No. COA 20-867

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX. REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION, Appellees, v. FRIESIAN HOLDINGS, LLC, Petitioner; NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, Intervenor; and NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE, Intervenor, Appellants, v. DUKE ENERGY PROGRESS, LLC and NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, Intervenors.	**From the North Carolina Utilities Commission**

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APPELLANTS' BRIEF

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No. COA 20-867

NORTH CAROLINA COURT OF APPEALS

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STATE OF NORTH CAROLINA EX. REL. UTILITIES COMMISSION; PUBLIC STAFF – NORTH CAROLINA UTILITIES COMMISSION,

Appellees,

v.

FRIESIAN HOLDINGS, LLC, Petitioner; NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, Intervenor; and NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE, Intervenor,

Appellants,

v.

DUKE ENERGY PROGRESS, LLC and NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION,

Intervenors.

From the North Carolina Utilities Commission
DOCKET NO. EMP-105, SUB 0

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APPELLANTS' BRIEF

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ISSUES PRESENTED

I. Did the North Carolina Utilities Commission err in determining that Friesian Holdings, LLC failed to provide a sufficient showing of need under the requirements Rule R8-63 when it denied Friesian's Certificate of Public Convenience and Necessity application?

II. Did the North Carolina Utilities Commission err in concluding that the benefits of the electric grid network upgrades triggered by the Friesian Project are too uncertain and speculative to be given substantial weight in the Certificate of Public Convenience and Necessity application?

III. Did the North Carolina Utilities Commission err in taking Federal Energy Regulatory Commission jurisdictional interconnection costs into account when determining whether to grant a State-jurisdictional Certificate of Public Convenience and Necessity application?

IV. Did the North Carolina Utilities Commission err in requiring levelized cost of transmission analysis for determining the reasonableness of network upgrade costs for a merchant plant facility when evaluating the Certificate of Public Convenience and Necessity application?

STATEMENT OF THE CASE

Friesian Holdings, LLC ("Friesian") submitted an application for a Certificate of Public Convenience and Necessity ("CPCN") for a 70-megawatt alternating current ("MW_{AC}") solar photovoltaic ("PV") facility on 15 May 2019 to the North Carolina Utility Commission ("NCUC" or "the Commission"). (R p 5). On 31 May 2019, North Carolina – Public Staff of the Utilities Commission[1] ("Public Staff") noted Friesian's CPCN application was complete. (R pp 37-38). NCUC issued an order on 13 June 2019 scheduling hearings, requiring filing of testimony, establishing procedural guidelines, and requiring public notice. (R pp 41-44). North Carolina Electric Membership Corporation, Inc. ("NCEMC") (R pp 47-51), Duke Energy Progress, LLC ("DEP") (R pp 57-60), North Carolina Sustainable Energy Association ("NCSEA") (R pp 64-68), and North Carolina Clean Energy Business Alliance[2] ("CCEBA") (NCSEA and CCEBA, collectively, "Appellants") (R pp 80-84) filed petitions to intervene, which the NCUC granted. (R pp 52, 75, 87-88).

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[1] The Public Staff of the Utilities Commission is an independent agency not subject to the supervision, direction, or control of the NCUC. The Public Staff represents the interests of the using and consuming public.

[2] Subsequent to the notice of appeal, North Carolina Clean Energy Business Alliance changed its name to Carolinas Clean Energy Business Association ("CCEBA"). Throughout this brief the party will be referred to as "CCEBA". This name change was documented with the North Carolina Secretary of State on 19 January 2021 through the filing of Amended Articles of Incorporation, available at https://www.sosnc.gov/online_services/search/by_title/_Business_Registration, Document ID C202101202839

On 5 August 2019, the NCUC suspended the expert witness hearing to allow for the filing of pre-hearing briefs and reply briefs in response to three legal issues:

> (1) The appropriate standard of review for the Commission to apply in determining the public convenience and necessity for a certificate to construct a merchant generating facility pursuant to N.C.[G.S.] § 62-110.1 and Commission Rule R8-63; (2) Whether the Commission has authority under state and federal law to consider as part of its review of the Application the costs associated with the approximately $227 million dollars in transmission network upgrades and interconnection facilities necessary to accommodate the FERC jurisdictional interconnection of the merchant generating facility, and the resulting impact of those network costs on retail rates in North Carolina; and (3) Whether the allocation of costs associated with interconnecting the Friesian project and any resulting additional capacity made available that is then utilized by State-jurisdictional interconnection projects is consistent with the Commission's guidance provided in the Commission's June 14, 2019, Order Approving Revised Interconnection Standard and Requiring Reports and Testimony, issued in Docket No. E-100, Sub 101, in which the Commission directed the utilities as follows: "to the greatest extent possible, to continue to seek to recover from Interconnection Customers all expenses . . . associated with supporting the generator interconnection process under the NC Interconnection Standard."

(R pp 76-79).

The NCUC canceled the public hearing due to lack of written consumer complaints. (R pp 85-86). Oral arguments were held on 21 October 2019 in which the parties presented their legal arguments to determine whether the NCUC had authority to consider costs associated with the Federal Energy

Regulatory Commission ("FERC")-jurisdictional transmission network upgrades and interconnection facilities when evaluating a CPCN for a merchant generating facility under N.C. Gen. Stat. § 62-110.1 and Commission Rule R8-63. (R pp 89-90).

The NCUC determined that these costs could be considered when reviewing a CPCN application and ordered another hearing to allow the parties to submit additional testimony and exhibits. (R pp 91-93). The expert witness hearing was held on 18 December 2019. (R p 92). On 11 June 2020, the Commission entered the final Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Plant ("Order Denying CPCN") after taking the network upgrade costs into consideration and concluding Friesian's solar PV facility was not in the public interest. (R pp 110-42). On 10 August 2020, following an extension of time, Friesian, NCSEA, and CCEBA filed notices of appeal and exceptions. (R pp 146-68).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The Commission's order denying the Friesian CPCN Application is a final order and appeal is therefore proper to the North Carolina Court of Appeals pursuant to N.C. Gen. Stat. § 7A-29 and N.C. Gen. Stat. § 62-90.

STATEMENT OF FACTS

Friesian applied for the CPCN to construct a 70-MW_{AC} solar PV facility in Scotland County, North Carolina (the "Facility"), which would interconnect to the electric transmission grid owned by DEP. (R pp 5-7). On 14 June 2019, NCEMC and Friesian entered into a Power Purchase Agreement ("PPA") for Friesian to sell the full output of the Facility to NCEMC. (R p 10). Further, pursuant to the PPA, Friesian will sell the power and renewable energy credits ("RECs") generated by the Facility to NCEMC to assist in meeting its electricity needs and, also, further NCEMC's carbon goals via investment in clean energy generation through the Facility. (R pp 28, 53-56; Doc.Ex.(II) pp 522-72 (sealed)).

While the Facility will be constructed in DEP's electric service territory, the power from the Facility will be wheeled[3] on a wholesale basis from DEP to NCEMC. (R p 115; Doc.Ex.(III) p 1032). On 6 June 2019, Friesian and DEP executed the FERC Large Generator Interconnection Agreement ("LGIA") to interconnect the Facility to DEP's grid, which is a FERC-approved federal contract required for this type of wholesale facility. (R p 28; Doc.Ex.(III) p 779; T(II) p 105; T(III) p 122). The LGIA defines the

[3] The U.S. Energy Information Administration defines wheeling as "[t]he movement of electricity from one system to another over transmission facilities of interconnecting systems. Wheeling service contracts can be established between two or more systems." Available at https://www.eia.gov/tools/glossary/index.php?id=w.

parties' obligations with regard to construction of the facilities required to interconnect the Facility ("Interconnection Facilities"), along with the necessary upgrades to DEP's transmission system to accommodate the interconnection ("Network Upgrades"). (Doc.Ex.(III) pp 771-849).

The Facility is estimated to cost $100 million with an expected life of twenty years. (R p 8). The Network Upgrades required to support the Facility are estimated to cost $223.5 million and the Interconnection Facilities are estimated to cost $4 million. (R p 123). Under the LGIA between DEP and Friesian, Friesian will pay these costs, but upon commercial operation of the Facility, DEP will reimburse Friesian for the network upgrade costs plus interest pursuant to Duke's FERC-approved Open Access Transmission Tariff ("OATT"). (R p 123). 70 percent of these costs would be recovered through DEP's retail customers and the remaining 30 percent would be recovered through wholesale customers. (R p 123).

Public Staff took the position that a levelized cost of transmission ("LCOT") analysis should be used to evaluate the reasonableness of the Network Upgrade costs. (R p 124). Public Staff witnesses Lawrence and Metz testified that the LCOT for Friesian was $62.94/Megawatt hour ("MWh") while the LCOT of other solar projects in other regions averaged $1.56/MWh, $3.22/MWh, and $2.21/MWh. (R p 124). DEP's aging transmission grid in southeast North Carolina is at capacity and no more generation can be added

without upgrading the transmission system. (R pp 99-100; Doc.Ex.(III) pp 29, 30, 33-34). Between 1,561 and 3,898 MW of proposed solar resources are also in line to be interconnected to DEP's system—in the "interconnection queue"—but cannot be interconnected unless the Network Upgrades are constructed. (R p 100; T(II) pp 29, 31, 37, 56). DEP confirmed that the Network Upgrades would at least partially facilitate the interconnection of about 1,561 MW of additional solar generation and other generation resources. (R pp 99-100). Friesian witness Wilson testified that Public Staff's calculation of the LCOT was flawed because it did not take into account all the generating facilities behind Friesian in the interconnection queue that would also be able to interconnect due to the Network Upgrades, which would have brought Friesian's LCOT within the range listed above. (R p 124).

DEP has planned a 1,235-MW natural gas project that would also rely on the Network Upgrades. (T(II) pp 66, 70-71, 75, 86). If the Facility and Network Upgrades are not constructed, DEP's natural gas project cannot be added to the system without construction of upgrades that are virtually identical to the Network Upgrades. (T(II) p 88). If DEP had to construct the upgrades for the natural gas facility, the cost would not be subject to FERC

crediting policy[4] and instead be paid for entirely by the North Carolina ratepayers. (T(III) pp 214-15).

On 18 July 2019, NCEMC filed its Initial Comments detailing NCEMC's position as a generation and transmission cooperative that purchases wholesale power from third-parties and resells it to the benefit of its membership distribution cooperative utilities. (R p 53). NCEMC also asserted that it assists its member distribution cooperative utilities with their compliance obligations under the North Carolina Renewable Energy and Energy Efficiency Portfolio Standard ("REPS") and that historically this assistance often included purchasing renewable energy certificates from utility-scale solar facilities. (R pp 53-54). NCEMC developed the "A Brighter Energy Future" program, which entails supplying power that is affordable, reliable, and safe, and also increasingly low carbon. (R p 54). NCEMC stated that execution of the terms of the PPA for the Facility will simultaneously advance NCEMC's pursuit of increasingly low carbon energy and further NCEMC's ability to achieve REPS compliance. (R p 54).

On 6 December 2019, Steven DeMay, North Carolina President of the Duke Energy utilities, including DEP, submitted a letter to the Commission in favor of the Facility and CPCN application and, in particular, supported

[4] As detailed more fully below, FERC Order No. 2003 set forth a crediting policy ("Crediting Policy") detailing how to allocate grid network upgrade costs between parties.

the Network Upgrades. (R pp 96-97). Mr. DeMay summarized the benefits of the Network Upgrades by stating that they would allow for the interconnection of substantial renewable resources in the southeastern portion of DEP's service territory, would help to avoid substantial delays in interconnecting other new generation projects, or "queue paralysis," and would minimize certain short-term challenges associated with the Duke Utilities' plans to reform their interconnection process. (R p 97).

Also on 6 December 2019, DEP filed a letter outlining several benefits associated with the Network Upgrades and Interconnection Facility ("DEP Upgrades Letter").[5] (R p 98). First, DEP stated the upgrades would allow more than 1,000 MW of additional solar resources to interconnect in North Carolina, which would help DEP comply with its own carbon dioxide ("CO_2") goals and Executive Order 80's[6] greenhouse gas emission reduction goals. (R pp 99-100). Second, DEP stated the upgrades would avoid interconnection queue paralysis. (R p 100). Third, DEP stated that if the Network Upgrades were not constructed at that time, then there would be a "further substantial delay in the interconnection of any additional generating facilities." (R p 100).

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[5] Maggie Clark the Senior Manager of State Affairs for Solar Energy Industries Association ("SEIA"), James McDougald the Economic Development Director for the Town of Maxton, Ray Britt the Chairman of the Bladen County Board of Commissioners, Bob Davis the Chair of the Scotland County Board of Commissioners, and Helen Livingston a resident of Scotland County all submitted letters of recommendation to the NCUC to approve Friesian's CPCN. (R p 94-95, 103-108).

[6] N.C. Exec. Order No. 80, 33 N.C. Reg. 11 at 1103 (Oct. 29, 2018).

The NCUC denied the CPCN on 11 June 2020 after taking the Network Upgrade costs into consideration and concluding Friesian's solar PV facility was not in the public interest. (R pp 110-142). The Commission concluded that the Facility would require Network Upgrades that DEP estimated would cost $223.5 million, and while this cost would be reimbursed pursuant to the FERC Crediting Policy, it would be unreasonable to impose such a significant portion of costs on DEP's retail customers in North Carolina. (R pp 117, 123, 131-32). **[BEGIN CONFIDENTIAL]** The Commission found that the Facility had speculative use beyond the explicit term of the 11-year PPA **[END CONFIDENTIAL]** and, relatedly, found persuasive the Public Staff's argument that the capacity need identified in DEP's Integrated Resource Plan does not support a determination of need for the Facility. (Doc.Ex.(II) 686 (sealed)).

ARGUMENT

I. STANDARD OF REVIEW

When reviewing a final Commission order on appeal, the North Carolina Court of Appeals "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 62-94(b). The Court may affirm, reverse, remand, declare the same null and void, or modify a decision. *Id.* The Court may reverse or modify

> if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are: (1) In violation of constitutional provisions, or (2) In excess of statutory authority or jurisdiction of the Commission, or (3) Made upon unlawful proceedings, or (4) Affected by other errors of law, or (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b)(1)-(6). The Court will uphold the order of the Commission unless the Court finds error based on one of those six enumerated grounds listed above. *State ex rel. Utils. Comm'n v. Empire Power Co.*, 112 N.C. App. 265, 270, 435 S.E.2d 553, 555 (1993).

"For the Commission's order to be arbitrary and capricious, it must lack fair and careful consideration or fail to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 131, 738 S.E.2d 187, 195 (2013). "An order 'which indicates that the Commission accorded only minimal consideration to competent evidence constitutes error at law and is correctable on appeal.'" *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 511, 334 S.E.2d 772, 773 (1985). "The Commission's conclusions of law, on the other hand, are reviewed de novo." *State ex rel. Utils. Comm'n v. Stein*, 851 S.E.2d 237, 256 (N.C. 2020).

II. FRIESIAN ADEQUATELY MADE A SHOWING OF NEED AND THE COMMISSION INAPPROPRIATELY EXPANDED THE REQUIREMENTS OF COMMISSION RULE R8-63

The Commission acted arbitrarily and capriciously in denying the Friesian CPCN. The Commission found the Friesian CPCN application failed to show the requisite need for a merchant generating facility and, in doing so, relied upon the Public Staff's arguments with regard to the DEP Integrated Resource Plan and did not place adequate weight on the underlying PPA which evidenced the requisite "showing of need[.]" Furthermore, the Commission weighed the speculative evidence of the Public Staff regarding the latter years of the Facility's usable life heavily, but did not find persuasive evidence in the record regarding Duke's corporate clean energy goals, North Carolina's Clean Energy Plan and Executive Order 80[7], and the cascading effect of the Network Upgrades.

A. Requirements for Showing of Need

The underlying statutory directive implementing the CPCN framework states, in pertinent part: "no public utility or other person shall begin the construction of any steam, water, or other facility for the generation of

[7] North Carolina's Clean Energy Plan and Governor Cooper's Executive Order 80 were explained and briefed in the underlying docket. See (Doc.Ex.(III) pp 976-978; Doc.Ex.(III) pp 1015-1017). The Clean Energy Plan and Executive Order 80 were also discussed during direct and cross-examination testimony, see (T(II) pp 54-59, 106-108, 156; (T(III) pp 14-19, 26, 133-139, 148-150).

electricity to be directly or indirectly used for the furnishing of public utility service, even though the facility be for furnishing the service already being rendered, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction." N.C. Gen. Stat. § 62-110.1. As noted in the Order Denying CPCN: "[i]n considering whether to approve a facility proposed under this statute the Commission must focus upon an element of public need for the facility and emphasize a policy that favors the orderly expansion of electric generating capacity that both creates a reliable and economical power supply and prevents the costly overbuilding of generation resources." Order Denying CPCN (R pp 116-17), <u>citing</u> *State ex rel. Utils. Comm'n v. Empire Power*, 112 N.C. App. 265, 279-80, 435 S.E.2d 553, 561 (1994); *State ex rel. Utils. Comm'n v. High Rock Lake Ass'n,* 37 N.C. App. 138, 140-41, 245 S.E.2d 787, 790, disc. rev. denied, 295 N.C. 646, 248 S.E.2d 257 (1978). "This act, codified as G.S. 62-110.1(c)-(f), directs the Utilities Commission to consider the present and future needs for power in the area, the extent, size, mix and location of the utility's plants, arrangements for pooling or purchasing power, and the construction costs of the project before granting a certificate of public convenience and necessity for a new facility." *High Rock*, 37 N.C. App. at 140-141.

Rule R8-63 of the Commission's consolidated rules, which outlines the requirements for a merchant plant to apply for and the Commission to review a CPCN application, states, in pertinent part[8]:

> APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR MERCHANT PLANT; PROGRESS REPORTS
> […]
> (b) Application. The application shall contain the exhibits listed below, which shall contain the information hereinafter required, with each exhibit and item labeled as set out below. Any additional information may be included at the end of the application.
> […]
> (3) Exhibit 3 [to the CPCN application] shall provide a description of the need for the facility in the state and/or region, with supporting documentation.

B. Analysis of NCUC Determination of Showing of Need

The NCUC erred by concluding that the application for the Facility failed to make a sufficient showing of need as required by Commission Rule R8-63(b)(3). As set forth below, the Commission pushed the scale in an unprecedented way to deny the Friesian CPCN application. The Commission made the following findings of fact regarding Friesian's showing of need:

> 4. While the Facility would be located in DEP service territory, the output from the Facility would be wheeled by DEP to NCEMC pursuant to a power purchase agreement (PPA) between Friesian and NCEMC for the sale of the

[8] Rule R8-63 has a lengthy list of requirements for an applicant. However, in the instant case, the only portion of the application under R8-63 that is at issue is the showing of need outlined above in subsection (3).

> output and renewable energy certificates (RECs) generated by the Facility. Friesian fails to sufficiently establish that the Facility's output is necessary to meet any of NCEMC's Renewable Energy and Energy Efficiency Portfolio Standard (REPS) compliance requirements to be given substantial weight in support of the Application.
>
> 5. Friesian fails to support the beneficial economic impacts that it asserts would flow to Scotland County with either sufficient detail or specific attribution to the Facility to be given substantial weight in support of the Application.
>
> 6. In its determination of need the Commission may consider factors other than Friesian's plan for the output of the Facility, including the long-term energy and capacity needs in the State and region, as well as system reliability concerns.
>
> 7. It is undisputed that the energy and capacity provided by the Facility are not otherwise needed to support any immediate or future load growth in the DEP East Balancing Area or the southeastern region of the State.
>
> 8. The placement of additional uncontrolled solar generating capacity in a region of the DEP system that currently contains significant existing solar generation may increase and exacerbate system operational issues already being faced by DEP's system operators and would provide minimal contribution to meeting winter peak load conditions.

(R p 115).

a. <u>The Friesian PPA Was Sufficient to Show Need</u>

As an initial matter, the executed Friesian PPA should be sufficient for the finding of need for a merchant facility under N.C. Gen. Stat. § 162-110.1 and Commission Rule R8-63. In 1992, "the Commission dismissed a

certificate application for a merchant plant, station that as a minimum filing requirement 'an IPP proposing to sell its electricity to a North Carolina utility must first obtain and allege as part of its certificate application either a contract or a written commitment from the utility.'" *In the Matter of Investigation of Certification Requirements for New Generating Capacity in North Carolina*, *Order Adopting Rule*, NCUC Docket No. E-100, Sub 85 (21 May 2001), p. 7. However, the Commission subsequently abandoned the requirement that merchant facilities have PPAs in place in order to obtain a CPCN, stating:

> It is the Commission's intent to facilitate, and not to frustrate, merchant plant development. Given the present statutory framework, the Commission is not in a position to abandon any showing of need or to create a presumption of need. However, the Commission believes that a flexible standard for the showing of need is appropriate.

Id. at 6. Thus, Friesian satisfied the showing of need pursuant to a stricter rule that was abandoned by the Commission.

The Commission has made this finding in the past. In *In the Matter of Application of Southern Power Company, d/b/a Southern Power Company-North Carolina, for a Certificate of Public Convenience and Necessity to Construct a Dual-Fueled Electric Generating Facility in Cleveland County, North Carolina*, the Commission explicitly found that responses to requests for procurement and summaries of supply contracts were sufficient to support

a showing of need for a merchant facility CPCN application. *Order Granting Certificate*, NCUC Docket No. EMP-13, Sub 1 (31 August 2009). Specifically, the Commission stated: "Southern Power has provided evidence of a public need by showing that it has entered into arrangements with wholesale customers for the purchase of the output of three of the four CTs to be constructed during the first phase." *Id*. at 6.

In fact, in at least one merchant facility application review, the mere *negotiation* for merchant facility output was found sufficient to show need. In *In the Matter of Application of NTE Carolinas, LLC for a Certificate of Public Convenience and Necessity to Construct a Natural Gas-Fired Merchant Power Plant in Cleveland County, North Carolina*, the Commission granted a merchant facility a certificate of public necessity and convenience and stated in its evidence and conclusions for the showing of need that the merchant facility "is currently negotiating power sale agreements with interested wholesale customers in the region for the output of the facility." *Order Granting Certificate*, NCUC Docket No. EMP-76, Sub 0 (28 October 2014), p. 7. While this was not the sole showing of need in that docket, it was the final proviso before granting the certificate and, of course, it represented negotiations and not an executed PPA. *Id*.

b. The Commission relies on "flexibility" in determining that Friesian did not meet an impossible "showing of need" standard

The Commission arbitrarily decided that the clear benefits of the Network Upgrades that would result from the Facility are not a meaningful factor in establishing need, and, instead, relied upon the "flexibility" component of the review of a showing of need to arbitrarily limit and weigh the factors in a manner inconsistent with the intent of the underlying statute and rule. Set forth below, the Commission set forth this "flexibility" position clearly in the Order:

> And the required demonstration of need may also differ depending on whether the CPCN is sought for a generating facility by a regulated utility, a small power producer seeking to sell its output to the utility as a qualifying facility (QF), or a merchant generating facility[…] To this end, the flexibility of the CPCN standard necessarily includes analyzing the need for the merchant generating facility to be placed not just within the State but a certain region, as well as evaluating whether the applicant has accurately assessed and met wholesale market needs.

(R p 120) (footnote omitted).

The Commission cites to the Public Staff's argument that while the transmission grid in the area of the Facility is constrained, meaning it has limited ability to accommodate new generating resources, "being constrained [is] not necessarily disadvantageous" as these constrained areas can happen throughout a utility grid. (R p 118). Further, still quoting the Public Staff, the

Commission included in the Order that North American Electric Reliability Corporation ("NERC") standards require "transmission planners to evaluate risk in order to target critical areas in the electrical grid for investments." (R p 118). This argument is non-sensical in the context of a CPCN application. The "showing of need" does not require a showing that underlying Network Upgrades, which unequivocally will *improve* the grid that is constrained, to have been examined by transmission planners to evaluate risk prior to Commission approval.

However, the Commission seizes on this Public Staff position, stating that Friesian: "has identified no reliability or service quality concerns necessitating the Facility. To the contrary, Friesian Witness Bednar acknowledged that DEP states that the continued addition of solar generation in the DEP East Balancing Area would instead exacerbate existing reliability challenges and increase the potential for NERC compliance issues." (R p 122). The Commission here is comparing apples and oranges. While NERC standards require transmission planners to evaluate where *grid* upgrades are needed, those standards do not apply to new *generation* resources. Following this logically, the Commission would never grant a CPCN as no method of generation is without flaw in either reliability or service quality concerns.

The Commission's position on the lack of net benefits of the Friesian facility is ably countered by the DEP Upgrades Letter, which shows the clear benefits to the grid that the Network Upgrades would provide including, but not limited to, allowing for a series of new solar projects to interconnect. While the Public Staff took the position that DEP had "not previously identified the transmission lines in question as needing upgrades due to reliability issues in any of the reports issued by the NC Transmission Planning Collaborative," the DEP Upgrades Letter clearly shows that DEP has contemplated the benefits of the Network Upgrades on a global scale. (R p 118). Further, what the Commission neglects to analyze in the Order is that the Network Upgrades will likely be built anyway at a steeper cost to the ratepayers. DEP has planned a 1,235-MW natural gas project that would also rely on the Friesian Network Upgrades. (T(II) pp 66, 70-71, 75, 86). DEP's natural gas project cannot be added to the system without construction of upgrades that are virtually identical to the Network Upgrades. (T(II) p 88). Further, if DEP constructed these necessary upgrades for its planned natural gas facility, the cost would be rate-based and paid for entirely by the North Carolina retail ratepayers rather than split via the Crediting Policy. (T(III) pp 214-15).

c. The Commission arbitrarily and capriciously ignored NCEMC's need for the output of the Facility

The Applicant and NCEMC introduced evidence that the output of the Friesian project would meet NCEMC's needs for clean renewable energy and capacity. (T(II) pp 40-41). No party disputed this evidence. As discussed above, Friesian also provided RECs that would count towards NCEMC's REPS compliance obligations.

In its Order, the Commission disregarded this evidence about NCEMC's need for energy or capacity from the Facility. Instead, it focused exclusively on *Duke's* lack of need for new generation resources, as expressed in DEP's Integrated Resource Plan ("IRP"), and on its conclusion that NCEMC (according to the Commission) does not need additional RECs to meet its compliance obligations under the REPS program. (R pp 121-22). In short, the Commission simply ignored the fact that NCEMC had decided that a PPA with Friesian was an appropriate way to satisfy its members' needs for energy and capacity.

Duke's resource needs (or lack thereof) are simply irrelevant given that Friesian had no plans to sell its output to Duke. And the sale of RECs, while a benefit, is far less important than the power produced by the facility. Why did the Commission consider these two relatively unimportant factors, and ignore the critical fact that NCEMC thought there was a need for the Project?

One possible reason is that while the Commission has jurisdiction over Duke's resource planning and NCEMC's REPS compliance, it does not have jurisdiction over NCEMC's resource planning and procurement decisions.

The Commission has jurisdiction over NCEMC's REPS program compliance pursuant to N.C. Gen. Stat. § 62-133.8(c). In addition, the Commission has the power to require Duke and other investor-owned utilities in North Carolina to develop and file for Commission approval IRPs that detail their expected resource needs and plans for meeting them over the next fifteen years. *See* Commission Rule R8-60; N.C. Gen. Stat. § 62-110.1(c); N.C. Gen. Stat. § 62-2(3a). The Commission does not, however, have the authority to review NCEMC's IRPs or otherwise second-guess its resource planning decisions. In fact, N.C. Gen. Stat. § 62-110.1 was amended in 2013 to specifically exempt electric membership corporations from the Commission's jurisdiction over resource planning. N.C. Sess. Laws 2013-187 (removing electric membership corporations from the scope of "public utilities" subject to N.C. Gen. Stat. § 62-110.1(c)).

Rather than acknowledge this limitation on its jurisdiction, the Commission simply ignored evidence that NCEMC had clearly decided for itself that it had a need for the output of the Project to satisfy its customers' needs. Put another way, the Commission tacitly concluded that NCEMC did

not have a need for the output of the Project. In so doing, it exceeded its statutory authority and acted arbitrarily and capriciously.

d. NCEMC's "A Brighter Energy Future" Goal

Finding of Fact #4 further reveals the scales being tipped against Friesian and its off-taker NCEMC. In its verified Petition to Intervene, NCEMC describes itself thusly:

> A generation and transmission cooperative responsible for the power supply of its 26 member distribution cooperatives throughout the State of North Carolina. NCEMC purchases power and energy pursuant to wholesale contracts from Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Dominion Energy North Carolina and others, including facilities similar to Friesian, to supply its members. These members, in turn, supply power to their members, the end-use retail consumers. NCEMC also owns and operates electric generation resources, some of which are fueled by natural gas purchased from entities subject to Commission jurisdiction. As Friesian's counterparty on the Project PPA, no other party can adequately represent NCEMC's interests and NCEMC's participation would be in the public interest.

(R p 47).

In its 18 July 2019 *Initial Comments* ("NCEMC Initial Comments"), NCEMC, via its Government and Regulatory Affairs Counsel, broadly laid out the benefits that its membership would receive from the Friesian project: "[o]nce constructed, the Project - specifically, the parties' execution of the Project PPA - will simultaneously advance NCEMC's pursuit of [Brighter

Energy Future program] and further its ability to achieve REPS compliance." (R p 54).

Despite this unequivocal statement of NCEMC needs being met via the Friesian Facility, the Commission still found that NCEMC's evidence on the record did not "sufficiently establish" that the Friesian Facility would help to meet NCEMC renewable energy needs. (R p 115). Bizarrely, the Commission disregarded the NCEMC Initial Comments when weighing the showing of need. When listing what evidence it considered when making Finding of Fact #4, the Commission omitted the NCEMC Initial Comments. (R p 117). The Commission noted that neither Friesian witness "provided any corroborating evidence that the RECs that would be procured by NCEMC from Friesian are necessary for this purpose or that NCEMC has an actual need for RECs," but ignored the NCEMC Initial Comments which state almost exactly that. When finally referencing the NCEMC Initial Comments, the Commission referenced them as "unsworn comments" despite them being signed by their attorney and subject to the same North Carolina Rule 11 standard[9] as any pleading. (R p 121). The Commission further stated that the NCEMC Initial Comments are not specific enough: "merely a restatement of NCEMC's three

[9] "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." N.C. Gen. Stat. § 1A-1, Rule 11.

business objectives. It does not set out a specific, or even a general, strategy for attaining 'A Brighter Energy Future,' it contains no programs, policies, goals, objectives, or metrics, and it does not speak at all to NCEMC's targets for REPS compliance." (R p 121). Finally, the Commission stated that it reviewed "NCEMC's most recent, verified NC REPS Compliance Plan" and that the Friesian Facility is neither contemplated in that plan nor necessary to accomplish the immediate REPS needs outlined therein. (R p 121).

The Commission's position is unsupported by competent, material, and substantial evidence when considering the record on a whole. NCEMC plainly stated that the Facility would allow them to pursue their internal goals, such as "Better Energy Together," and also procure RECs necessary to continue to fulfill state renewable energy goals. Rather than weighing this statement on behalf of the off-taking entity from the Facility in deciding on the global "showing of need" metric required under Rule R8-63, the Commission plants doubt about the sincerity or truthfulness of NCEMC's Initial Comments. Further, nothing in R8-63 or N.C. Gen. Stat. § 62-110.1 requires an off-taker from a merchant facility to provide any proof of any such underlying needs being met, let alone a cooperative association of unregulated cooperative utilities providing verified evidence of energy goals that are being met by the prospective facility with which they have contracted.

e. The Friesian PPA, the DEP IRP, and Beyond.

[BEGIN CONFIDENTIAL] The PPA between Friesian and NCEMC has a term of 11 years and the lifespan of the Facility is 20 years. (Doc.Ex.(II) p 692 (sealed)). This discrepancy in terms of lifespan and PPA caused the Commission to weigh the DEP IRP to determine whether the facility will "serve load growth in the State, and specifically the southeastern region, since the energy and capacity from the Facility, and its associated RECs production, would be available well beyond the terms of the current PPA." (Doc.Ex.(II) p 692 (sealed)). Appellants acknowledge that there is a discrepancy between the PPA term and the lifespan of the Facility, and, therefore, it would be appropriate to examine the Facility's use beyond the 11-year PPA. However, the Commission places too much evidentiary weight on speculative post-PPA Facility use and the DEP IRP filings. The 11-year PPA term does not provide the full picture: the PPA term length does not change the underlying Network Upgrades which will provide regional benefits with an upgraded grid and the related cascading effects outlined herein, nor does the 11-year PPA term mean that the Facility will not provide usefulness as a merchant facility beyond this 11-year term or be required to be absorbed by DEP as a generating facility. **[END CONFIDENTIAL]**

The Public Staff's argument about DEP's IRP, which "persuaded" the Commission, should not have been considered as evidence as to whether a

showing of need has been made. While Appellants disagree with the expansive approach the Commission has taken to identifying the showing of need, even assuming such an expansive approach is allowable under Rule R8-63, the DEP IRP argument is illogical and does not go to the ultimate showing of need. The Order restates the Public Staff testimony:

> one cannot assume that any generation resource can be added to, and complement, the existing system just because reserve margins fall below a particular threshold[…]Rather, the IRP involves a capacity expansion model that solves for multiple system constraints and scenarios ultimately to determine the generation resources needed to meet load projections over the planning period. As Public Staff witness Metz and Lawrence testified, and as Friesian witness Askey acknowledged on cross-examination, the DEP system is winter peaking and winter planning at this time, and while DEP's IRP demonstrates a need for additional capacity to meet winter peak loads, the addition of uncontrolled, intermittent solar generation will provide minimal contribution to winter morning peak loads and limited value to grid operators. (R p 122).

After this recitation, the Commission states that it is persuaded that the "capacity need identified in DEP's IRP does not support a determination of need for the Facility." (R p 122).

The entire Commission analysis with regard to the DEP IRP is, at best, highly speculative and in no way should weigh on the showing of need analysis necessary under R8-63. First, the PPA has a term of **[BEGIN CONFIDENTIAL]** 11 years **[END CONFIDENTIAL]**, which is more than half the useful life expected of the Facility. Any decision on a showing of need

should therefore be weighted accordingly. Second, as mentioned above, none of this analysis takes into account the Network Upgrades and what those Network Upgrades will mean to DEP's potential generation mix in the future. The Network Upgrades may allow for other generation, such as the projected natural gas turbine, to come online. Third, DEP only recently became a "winter peak" utility and assuming that electric demand will peak in the same manner in **[BEGIN CONFIDENTIAL]** 11 years **[END CONFIDENTIAL]** as it does now is unwarranted. Finally, the DEP IRP relied upon by the Public Staff, which contains the planning portfolio for the DEP utility over a 15-year planning window, was not accepted beyond 2020:

> The Commission finds and concludes that DEC's and DEP's 2018 IRPs are adequate to be used for planning purposes during the remainder of 2019 and in 2020, subject to DEC's and DEP's 2019 IRP Updates. However, the Commission declines to accept all of the underlying assumptions upon which DEC's and DEP's IRPs are based, the sufficiency or adequacy of the models employed, or the resource needs identified and scheduled in them beyond 2020.

Order Accepting Integrated Resource Plans and REPS Compliance Plans, Scheduling Oral Argument, and Requiring Additional Analyses, NCUC Docket No. E-100, Sub 157 (27 August 2019), p. 86. The IRP proceedings in North Carolina are highly complex and include dozens of issues and thousands of modeling inputs to lead to an approved planning scenario, so Appellants acknowledge that the Public Staff's underlying point regarding

incorporating intermittent generation resources into the DEP portfolio might not solve future DEP generation issues. However, it cannot go unnoticed that this speculative review of "showing of need" discarded the Facility's off-taker providing comments to the Commission stating the need for the Facility, but still relied upon an IRP that was specifically refused for the time period where this Facility might affect DEP's generation portfolio. The Commission's inconsistency in applying its evidentiary standards to demonstrate a "showing of need" is clear. While the Commission discarded off-taker NCEMC's statement that the Facility was needed as "speculative," it nevertheless relied upon DEP's IRP, where DEP is not the off-taker and which the Commission had *already refused to accept* for the very time period during which this Facility might affect DEP's generation portfolio.

There are much less speculative considerations that the Commission should have weighed more heavily in reviewing the CPCN application. DEP's interconnection queue shows that there is 3,898 MW of proposed solar generation in this constrained area. (T(II) p 29). 1,561 MW of the planned solar is directly interdependent on the Friesian upgrades. (T(II) p 31). DEP estimates that at least 1,000 MW of new solar generation could be added to the grid with the Network Upgrades. (T(III) pp 60-61).

C. The Commission's Expansion of Commission Rule R8-63 Requires Notice-and-Comment Rulemaking

Prior to the Order Denying CPCN, the NCUC had not required such an expansive and global review of a CPCN application prior to approval. Specifically, an LCOT analysis of a CPCN applicant's potential network upgrade costs had not previously been considered. The NCUC erred by *requiring* an analysis of the network upgrade costs by way of the LCOT without undergoing notice-and-comment rulemaking.

The NCUC is exempt from the North Carolina Administrative Procedure Act. N.C. Gen. Stat. § 150B-1(c)(3). However, the NCUC is "still an administrative agency of the state government, and general tenets of administrative law are applicable to its operation." *State ex rel. Utils. Comm'n v. Nantahala Power and Light Co.*, 326 N.C. 190, 199-200 (1990). Thus, the NCUC should have gone through notice-and-comment rulemaking before requiring an analysis of Network Upgrade costs by way of LCOT when reviewing the Friesian CPCN Application. This is further true considering the LCOT is not required by either N.C. Gen. Stat. § 162-110.1 or Commission Rule R8-63.

Appellants note that while formal notice-and-comment rulemaking has not always applied to certain policies of the NCUC, it should apply to the more formal requirements for an application of a CPCN. The Commission

has, on occasion, allowed for *ad hoc* rule making, but in cases distinguishable from this case and where the parties had advance notice. See, *State ex rel. Utils. Comm'n v. Public Staff – North Carolina Utils. Comm'n*, 123 N.C. App. 623, 473 S.E.2d 661 (1996). For instance, in *State ex rel. Utils. Comm'n v. Public Staff – North Carolina Utils. Comm'n*, the offending policy at issue had been announced in an earlier docket. *Id.* at 624, 473 S.E.2d at 662. That situation is notably different than this one. Here, for the first time, the NCUC required an LCOT analysis. Further, the Friesian case involves an additive change, at the burden of the applicant, to the rule regarding a CPCN application. Of course, there are already requirements for a CPCN outlined in N.C. Gen. Stat. § 162-110.1 and Commission Rule R8-63, but neither require the use of LCOT to review network upgrade costs. This is a leap in requirement, beyond the typical boilerplate CPCN application tenets and the above-detailed requisite showing of need. The Commission applied it without notice and arbitrarily on the Friesian CPCN review. The NCUC should have gone through formal notice-and-comment rulemaking before adding a new requirement to the CPCN process, and for these reasons acted arbitrarily and capriciously.

III. THE NCUC SHOULD NOT HAVE CONSIDERED NETWORK UPGRADE COSTS WHEN CONSIDERING THE FRIESIAN CPCN APPLICATION

The North Carolina Utilities Commission inappropriately took into consideration the relative costs of the Network Upgrades when determining whether to approve the Friesian CPCN Application. This exceeds the jurisdiction of the NCUC.

A. Federal Preemption, Interstate Commerce, and FERC Order No. 2003

a. FERC Jurisdiction

"While the North Carolina Public Utilities Act grants NCUC jurisdiction over intrastate sales and interstate retail sales of electric energy, as well as over the quality and reliability of local electric service, the Federal Power Act granted the Federal Power Commission (FPC), FERC's predecessor, exclusive jurisdiction over the transmission and wholesale sale of electric energy in interstate commerce." *State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 522-23, 614 S.E.2d 281, 286 (2005) (*citing* 16 U.S.C.S. § 824). "A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 106 S. Ct. 2349, 2357 (1986). The applicable portion of the Federal Power Act is unequivocal in federal

jurisdiction over electric energy that is transmitted from a state at any point: "[f]or the purpose of this Part [16 USCS §§ 824 et seq.], electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof[.]" 16 U.S.C.S. § 824. "Decades ago, state or local utilities controlled their own power plants, transmission lines, and delivery systems, operating as vertically integrated monopolies in confined geographic areas. That is no longer so. Independent power plants now abound, and almost all electricity flows not through 'the local power networks of the past,' but instead through an interconnected 'grid' of near-nationwide scope." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 768 (2016). Outside of Hawaii, Alaska, and most of Texas, "electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. FERC*, 535 U.S. 1, 7, 122 S. Ct. 1012, 1018 (2002).

b. Network Upgrades, Crediting Policy, and FERC Order No. 2003

The Network Upgrades outlined in the Friesian case are a result of the "Crediting Policy" which was enacted under FERC Order 2003. FERC's Crediting Policy is a critical tool adopted by FERC to combat undue discrimination in access to the transmission grid. The Federal Power Act ("FPA") states in pertinent part: "All rates and charges made, demanded, or

received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." 16 U.S.C.S. § 824d.

FERC Order No. 2003 established standard procedures and pro forma agreements for interconnection of generators to the transmission grid and was amended by FERC Order No. 2003-a. Standardization of Generator Interconnection Agreements & Procedures, 2003 FERC LEXIS 1551, 104 F.E.R.C. P61,103 (F.E.R.C. July 24, 2003). ("Order No. 2003"); Standardization of Generator Interconnection Agreements & Procedures, 2004 FERC LEXIS 449, 106 F.E.R.C. P61,220 (F.E.R.C. March 5, 2004) ("Order No. 2003-A"). FERC found that uniform interconnection procedures would limit opportunities for transmission providers to favor their own generation, facilitate new generation, and encourage "needed investment in generator and transmission infrastructure." Order No. 2003, ¶ 12. The Crediting Policy was thought to provide a "pricing framework" to incentivize the building of transmission. Order No. 2003, ¶ 703.

The Crediting Policy would ensure that interconnection customers' interconnections are treated comparably to the interconnections that a non-independent transmission provider, such as a regulated utility like DEP,

completes. Order No. 2003, ¶ 694. FERC concluded that non-independent transmission owners have the incentive to use their control of the interconnection process (including their ability to assign the costs of network upgrades to particular interconnection customers) to impede access to the grid. Order No. 2003, ¶ 696. The Crediting Policy alleviates this concern by allocating the costs of upgrades among users of the grid, who would all benefit from the expansion of the transmission system. *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 475 F.3d 1277, 1285 (D.C. Cir. 2007). The Crediting Policy was enacted to enhance competition and promote construction of new generation, and the FERC intended for this new generation to come in areas where there have been barriers to entry. Order No. 2003, ¶ 694.

FERC observed that "state siting authorities may have little interest in siting a transmission facility that benefits mainly a particular Interconnection Customer or customers in another state if doing so would require the retail sales customers on the constructing public utility's system to pay for the new facilities." *Id.* ¶ 678. FERC concluded that the Crediting Policy would limit these opportunities for "undue discrimination" by giving interconnection customers greater control over siting. *Id.* FERC also specifically rejected the arguments that the Crediting Policy would encourage inefficient siting decisions and lead to subsidization of new generation projects. *Id.* ¶¶ 683-90. FERC further explained the necessity for the

Crediting Policy in Order No. 2003-A, in which it modified certain aspects of the policy, stating that by requiring an up-front payment for upgrades from the interconnection customer and placing the interconnection customer initially at risk for the full cost of the network upgrades, the Crediting Policy "provides the Interconnection Customer with a strong incentive to make efficient siting decisions." Order No. 2003-A, ¶ 613.

B. The Commission Inappropriately Considered FERC-Jurisdictional Costs in Denying the Friesian CPCN

The Facility would be located in DEP territory and then wheel energy to NCEMC pursuant to the terms of the PPA. (R p 115). DEP is "an electric utility organized, existing and operating under the laws of the State of North Carolina for the purposes of generating, transmitting, and distributing electric power in its assigned service territory in North and South Carolina." (R p 58). The wheeling of these electrons through transmission lines in the multistate DEP territory is inherently interstate. "Unlike the other electricity components -- and with the exception of transmission in Alaska, Hawaii, and parts of Texas -- transmission is inherently interstate." *New York v. FERC*, 535 U.S. 1, 31, 122 S. Ct. 1012, 1030 (2002) (Thomas, dissenting). Therefore, the Friesian facility is subject to FERC jurisdiction with regard to the sale of its wholesale energy. Accordingly, the Network Upgrades were prepared under the guide of FERC Order No. 2003 (and subsequent orders and case

law) which implemented the Crediting Policy. As set forth above, the Crediting Policy was enacted by FERC with clear understanding that it needed to balance the weight of protecting rate payers through "just and fair rates" which cascade down from wholesale to retail customers while also allowing for a historically discriminatory transmission interconnection process. The FERC has vetted processes to review FERC jurisdictional contract terms including Network Upgrades and the Crediting Policy, and, to the extent there is an objection, it would be appropriate to bring that to the FERC and not the NCUC.

The very concerns that the Public Staff and the Appellants have voiced – ratepayer concerns, interconnection issues, allocation of costs – were considered and implemented FERC Order No. 2003 and subsequent related orders. Despite these considerations in federal policy and also the clear FERC jurisdiction, the Commission determined it would sidestep FERC precedent and block the interconnection of the Facility by denying the CPCN. But the Commission has no authority to consider FERC jurisdictional costs, such as those determined via Crediting Policy, when weighing a CPCN application, so their order is arbitrary and capricious.

No such network upgrade costs are mentioned in Chapter 62 of the North Carolina General Statutes or Rule R8-63 as a factor in considering whether a CPCN application should be granted. Neither the NCUC nor any

party in the underlying case provided evidence that Network Upgrade costs have been previously considered by the Commission in deciding whether to grant a CPCN. Nothing in Commission Docket E-100, Sub 85 (implementing Rule R8-65) mentions considering Network Upgrade costs in electric generation facility costs. "[S]tates are barred from relying on mere formal distinctions in 'an attempt' to evade preemption and 'regulate matters within FERC's exclusive jurisdiction.'" *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

CONCLUSION

The Court should reverse the Commission's decision and remand with instructions to grant Friesian's Application and issue the CPCN.

This the 3rd day of March, 2021.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

This the 3rd day of March, 2021.

/s/ Benjamin W. Smith
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant Brief of the North Carolina Sustainable Energy Association and the North Carolina Clean Energy Business Alliance was served by depositing a copy with the United States Postal Service, first-class mail, postage prepaid, and addressed as follows:

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