

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. E-100, SUB 176**

In the Matter of:)	
Petition to Revise Commission Rules R8-63)	NCSEA’S INITIAL
and R8-64)	COMMENTS

NCSEA’S INITIAL COMMENTS

NOW COMES the North Carolina Sustainable Energy Association (“NCSEA”), an intervenor in this docket, and offers the following initial comments in response to the North Carolina – Public Staff (“Public Staff”)’s Petition of the Public Staff to Amend Commission Rules R8-63 and R8-64 (“Petition”) filed in this docket on August 19, 2021.

I. BACKGROUND

1. The Friesian Appeal

As noted in its Motion to Stay Proceedings, the pending appeal to the North Carolina Court of Appeals of the final order in *In the Matter of: Application of Friesian Holdings, LLC for a Certificate of Public Convenience and Necessity*¹ (“Friesian”) will materially affect the proposed rulemaking in this proceeding. The *Friesian* appeal involves the merchant facility Certificate of Public Convenience and Necessity (“CPCN”) and the North Carolina Utilities Commission’s (“Commission”) denial of the *Friesian* CPCN application. NCSEA believes that the Commission’s denial in *Friesian* violated the jurisdictional limitations of the Commission and required a showing of need beyond the scope of the rule and beyond an acceptable standard for showing of “need” for a CPCN applicant.

¹ North Carolina Utilities Commission Docket No. EMP-105, Sub 0.

Here, Public Staff seeks to enact a new R8-63 merchant CPCN rule that seeks to circumvent Federal Energy Regulatory Commission (“FERC”) jurisdiction by taking questions tied to transmission costs for a merchant plant outside of the purview of the FERC and placing it instead with the Commission. NCSEA does not believe it necessary or efficient to restate the arguments made in the *Friesian* docket, but instead requests the Commission take judicial notice of Docket No. EMP-105, Sub 0 in considering NCSEA’s position and argument.

Because the appeal of the *Friesian* order may materially affect this rulemaking, NCSEA restates its position that it is inappropriate at this time to consider the rule changes suggested by the Public Staff that relate to consideration of those costs under FERC jurisdictional that are associated with transmission and network upgrades for a merchant facility CPCN.

2. House Bill 951

Recently passed state law will also materially affect the future of CPCN applications in North Carolina. House Bill 951² authorizes a carbon mandate, which will alter how generation is reviewed and approved in the state and will require the infrastructure buildout to sustain distributed generators, including, notably, solar. Approving new versions of R8-63 and R8-64 now, which strongly call into consideration costs associated with interconnecting distributed generation resources to the grid, ignores the pending carbon mandate which will be in place by the end of 2022 and places barriers to the installation of new merchant solar and solar tied to regulated utilities. The House Bill 951 implementation, including most notably the carbon mandate, will begin over the next

² S.L. 2021-165.

14 months. NCSEA does not believe it is efficient or constructive to change a rule now that will likely also require further rule changes within the next few years. The regulatory lag of multiple rulemakings related to the certification of new generators, including solar and wind projects, will put the state behind in trying to meet the requirements of House Bill 951 to reduce carbon emissions.

II. ANALYSIS OF PROPOSED RULES AND ARGUMENT

1. Proposed Changes to R8-63

i. NCSEA Supports Certain Proposed Changes to the Merchant CPCN Rule

Notwithstanding the arguments above regarding the inefficiency and lack of timeliness of this rulemaking proceeding, NCSEA does support certain provisions within the proposed revised rules. First, NCSEA supports the edit in R8-63(b)(2) to allow for a written description of a site where no street address is readily available. NCSEA believes this will create efficiency in this portion of the applying for the merchant CPCN.

NCSEA strongly supports the inclusion of information related to energy storage in the proposed rule. R8-63(b)(3)(iv) as proposed would provide certain information in the application for a merchant facility CPCN that would allow the state and stakeholders to have better transparency and understanding of the resources contained on the grid. It would put storage on the same plane as solar (and other merchant generation resources) regarding showing the system and, to some extent, its potential for the grid or, at the very least, its potential to assist any co-located resources. NCSEA would only seek further granularity about the cost of the storage system separate from the costs of the generation asset to which it is tied but believes this rule change is a good start.

Finally, NCSEA supports proposed deletion of R8-63(b)(11), which removes some administrative hurdles in granting a merchant facility CPCN. NCSEA thinks this change will improve efficiency in the process.

ii. NCSEA Opposes Certain Proposed Changes to the Merchant CPCN Rule

NCSEA opposes anything in proposed Rule R8-63 that encroaches on FERC jurisdiction and/or requires the applicant to rely heavily on third parties (including potential competitors) to commit acts or provide information to which the certificate applicant does not have direct access.

R8-63(b)(3)(iv), as proposed, would require certain information from a merchant plant applicant of which they do not have direct knowledge. Specifically, this subsection would require “[a] description of the transmission and distribution facilities to which the facility will interconnect, and a color map showing their general location. Include the utility feeder name or substation and the voltage level of the planned interconnection.” NCSEA believes this information, as related to the local utility and its grid, should not be required of the merchant plant applicant in a merchant plant CPCN application.

Further, NCSEA generally objects to Public Staff’s requested inclusion of certain details that are not relevant to the granting of certification of public necessity and need. This includes proposed subsections (ix), (x), (xi), (xiii), and (xiv) of R8-63(b)(3). These proposed changes all increase the requirements of the applicant, sometimes seeking information outside of their control or possession.

Further, proposed Rule R8-63(b)(5)(ii) through (vi) all require the utility to conduct lengthy studies before a CPCN can be granted. These study requirements fall outside the traditional parameters of CPCN review, and require work done from parties outside the

applicant. Additionally, these studies can take long periods of time to complete, and NCSEA fears that this will put too much of a burden on the applicant to repeatedly engage with outside entities, such as utilities, for work to be done for the CPCN.

The Public Staff further puts the burden of showing the regional need on the merchant plant CPCN applicant. In proposed R8-63(b)(6), the applicant is required to provide a description of the need for the proposed facility in the state or region with supporting documentation. NCSEA believes this requirement falls wildly outside the requirements of a CPCN application and requires a prohibitively onerous task upon application. Furthermore, NCSEA objects similarly to the requirements proposed in R8-63(b)(6)(ii) through (vi). These requirements include gathering information about statewide or regional need, the effect on the local utility outside the knowledge or control of the CPCN applicant, and otherwise beyond the scope of what NCSEA believes is an appropriate merchant facility CPCN rule.

The Public Staff has proposed a changed renewal process which includes, in proposed Rule R8-63(e), the requirement for the applicant to repeat steps included in proposed R8-63(b). NCSEA objects to the renewal process including steps insofar as they have already been objected herein. NCSEA believes a streamlined renewal process is desirable and does not believe the additional steps proposed for subsection (b) of the merchant CPCN rule will allow for this for the reasons outlined herein.

Finally, NCSEA objects to the proposed changes to R8-63(f) which, namely, require reporting of the changes in circumstances regarding network upgrades. As argued herein (and in other dockets including *Friesian*), merchant generator facilities which

trigger upgrades related to the transmission lines on the grid fall within the jurisdiction of FERC and not the Commission.

2. Proposed Changes to R8-64

i. NCSEA Supports Certain Changes to the CPRE/Qualifying Cogenerator/Small Power Producer CPCN Rule

NCSEA again supports the removal of the clearinghouse requirements set forth in proposed subsection R8-64(c) and supports the requirement to include energy storage information as set forth in proposed subsection R8-64(b)(3)(iv). NCSEA supports these for the same reasons as set forth in its analysis of the proposed changes to the merchant facility CPCN rule set forth above.

ii. NCSEA Opposes Certain Changes to the CPRE/Qualifying Cogenerator/Small Power Producer CPCN Rule

NCSEA's objections to the proposed changes to R8-64 are more limited than those proposed to R8-63, but they do overlap insofar as they fall outside what NCSEA believes is the appropriate scope of what this rule should be and what responsibilities that an applicant must take on.

NCSEA specifically objects to proposed R8-64(b)(6). The proposal greatly increases the requirements for large scale solar CPCN applicants. The current version of this rule is written in such a way to streamline applications for large scale solar projects, but this proposal greatly reduces efficiencies and requires further information, much of which may be outside the control or possession of the applicant.

NCSEA also objects to the revisions to proposed R8-64(b)(6)(iii)e. Requiring the CPCN applicant to file "all studies associated with the interconnection of the facility[]" violates the FERC's long-standing interpretation that the establishment of a legally

enforceable obligation (“LEO”) turns on “the QF’s commitment, and *not* the utility’s actions[.]”³ Given that one of the prongs for LEO formation in North Carolina is receiving a CPCN, this proposed revision would impermissibly dictate that the utility’s actions control the formation of a LEO for a small power producer.

NCSEA does not necessarily oppose but may need clarity regarding one provision in the proposed rule. Proposed R8-64(b)(3)(xiv) requires information about state mandates for clean energy, but NCSEA believes this needs to be refined, especially regarding what information the Public Staff is seeking about non-North Carolina clean energy mandates. NCSEA is also hesitant to put responsibility on the applicant to provide this information since these theoretical mandates put the responsibility on the utility, not the small power producers.

III. CONCLUSION

NCSEA supports limited changes to Rule R8-63 and R8-64 as set forth herein but believes that some of the proposed modifications of the Public Staff are inappropriate and should be denied. Further, NCSEA believes that, given the *Friesian* appeal and the implementation of House Bill 951, this rulemaking should be paused until a later time when it is more appropriate and ripe to prevent inefficiency and regulatory burden and lag.

Respectfully submitted, this the 2nd day of November, 2021.

/s/ Benjamin W. Smith
Benjamin W. Smith
Regulatory Counsel for NCSEA
N.C. State Bar No. 48344
4800 Six Forks Road, Suite 300
Raleigh, NC 27609
919-832-7601 Ext. 111
ben@energync.org

³ FLS Energy, Inc., 157 FERC ¶ 61211, 61730-31, (Dec. 15, 2016) (emphasis in original).

CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing document by hand delivery, first class mail deposited in the U.S. mail, postage pre-paid, or by email transmission with the party's consent.

This the 2nd day of November, 2021.

/s/ Benjamin W. Smith
Benjamin W. Smith
Regulatory Counsel for NCSEA
N.C. State Bar No. 48344
4800 Six Forks Road, Suite 300
Raleigh, NC 27609
919-832-7601 Ext. 111
ben@energync.org