

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION
DOCKET NO. EMP-105, SUB 0**

In the Matter of:)	
Application of Friesian Holdings, LLC for a)	JOINT NOTICE OF APPEAL
Certificate of Public Convenience and)	OF THE NORTH
Necessity)	CAROLINA SUSTAINABLE
)	ENERGY ASSOCIATION
)	AND THE NORTH
)	CAROLINA CLEAN
)	ENERGY BUSINESS
)	ALLIANCE

**JOINT NOTICE OF APPEAL OF THE NORTH CAROLINA SUSTAINABLE
ENERGY ASSOCIATION AND THE NORTH CAROLINA CLEAN ENERGY
BUSINESS ALLIANCE**

NOW COME the North Carolina Sustainable Energy Association (“NCSEA”) and the North Carolina Clean Energy Business Alliance (“NCCEBA”) (NCSEA and NCCEBA collectively herein the “Appellants”) by and through the undersigned counsel, pursuant to N.C. Gen. Stat. § 7A-29(b), § 62-90 *et al.*, and Rule 18 of the North Carolina Rules of Appellate Procedure, and hereby give Notice of Appeal to the North Carolina Court of Appeals from the 11 June 2020 Order Denying Certificate of Public Convenience and Necessity for Merchant Generating Facility (herein the “Order”) issued by the North Carolina Utilities Commission (the “Commission”) in this proceeding.

N.C. Gen. Stat. § 62-90(a) states that, “[a]ny party to a proceeding before the Commission may appeal from any final order or decision of the Commission [...] if the party aggrieved by such decision or order shall file with the Commission notice of appeal and exceptions which shall set forth specifically the ground or grounds on which the aggrieved party considers said decisions or order to be unlawful, unjust, unreasonable or unwarranted, and including errors alleged to have been committed by the Commission.”

Accordingly, the Appellants identify the following exceptions and the grounds on which they consider the Order to be unlawful, unjust, unreasonable, or unwarranted because the Commission: acted in excess of its statutory authority; made errors of law; made findings and conclusions unsupported by competent, material and substantial evidence in view of the entire record as submitted; and/or made determinations that are arbitrary and capricious.

EXCEPTION NO. 1

The Order's Findings of Fact Nos. 10-11 and the corresponding Evidence and Conclusions for Findings of Fact Nos. 9-12 are unlawful, unjust, unreasonable, or unwarranted. These Findings and Evidence and Conclusions are affected by errors of law, are arbitrary and capricious, and are contrary to state law.

N.C. Gen. Stat. § 62-23 requires that "the Commission shall assume the initiative in performing its duties and responsibilities in securing to the people of the State an efficient and economic system of public utilities in the same manner as commissions and administrative boards generally." Included in this set of duties and responsibility is Rule R8-63 which outlines the procedures for a merchant plant to apply for a certificate of public convenience and necessity. Friesian Holdings, LLC ("Friesian") followed all requirements contained within Rule R8-63, including providing all necessary documentation outlined by Rule R8-63. Nonetheless, the Commission required Friesian to provide information beyond the scope of Rule R8-63 and then denied Friesian's application on the basis of *that* information. This requirement exceeds Rule R8-63 and such an amendment to that rule must be made in a rulemaking docket where interested parties have notice and opportunity to comment.

EXCEPTION NO. 2

The Order’s Findings of Fact Nos. 4 and 6-8 and the underlying Evidence and Conclusions are unlawful, unjust, unreasonable, or unwarranted. These Findings and Evidence and Conclusions are affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious.

A contract for the sale of electricity to an off-taker, especially an off-taker owned and governed by its municipal members, is a sufficient showing of need to trigger Commission approval for a certificate of public convenience and necessity for a new merchant generating facility. Despite the existence of such a contract, and despite a lack of evidence in the record disputing the underlying need, the Commission denied Friesian’s application. Furthermore, the Commission’s erroneous determination that the stated “need” was not sufficient was based on a completely different utility’s lack of “need” for Friesian’s electricity. For these reasons, the Order is affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious.

EXCEPTION NO. 3

The Order’s Findings of Facts Nos. 13 and 16 and the underlying Evidence and Conclusions supporting are unlawful, unjust, unreasonable, and unwarranted. These Findings and Evidence and Conclusions are affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious.

The Commission’s conclusion that the benefits of the electric grid network upgrades triggered by the Friesian Project and subsequent relief of congestion on the transmission grid, which will allow the interconnection of subsequent, interdependent solar facilities in queue, are too uncertain and speculative to be given substantial weight in the

application is inconsistent with the Commission’s findings and conclusions made elsewhere and, therefore, an arbitrary and capricious application of the law unsupported by evidence in the record. The Commission should have considered the impact of the network upgrades to North Carolina’s electric system, including the subsequent, interdependent solar facilities in the queue that would be able to interconnect, and erred in failing to do so.

EXCEPTION NO. 4

The Order’s Findings of Facts Nos. 15 and 16 and the underlying Evidence and Conclusions supporting are unlawful, unjust, unreasonable, and unwarranted. These Findings and Evidence and Conclusions are affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious.

The Commission found that: “[u]ntil such time as compliance with Executive Order 80 and the policy recommendations in the Clean Energy Plan are fully investigated and considered in the context of Duke’s integrated resource planning (IRP) process, any benefits associated with the construction of the facility and the network upgrades are not sufficiently known and measurable to be given substantial weight in support of the Application.” This misstates the current posture of state energy goals. The Clean Energy Plan is already policy of the State; the Commission need not wait until the DEQ stakeholder processes finish to begin implementing it. The failure to consider this and give it “substantial weight” is arbitrary, capricious, fails against the weight of the evidence in the record, and is an error of law.

EXCEPTION NO. 5

The Order, including its supporting Evidence and Conclusions, is unlawful, unjust, unreasonable, and unwarranted. The Order is affected by errors of law, unsupported by

substantial evidence, and arbitrary and capricious. The Commission has consistently granted certificates of public convenience and necessity to merchant generating facilities who have demonstrated less of a showing of need than Friesian. The Commission's Order denying the Friesian certificate is arbitrary, capricious, and without basis in facts in evidence or law.

EXCEPTION NO. 6

The Order, including its supporting Evidence and Conclusions, is unlawful, unjust, unreasonable, and unwarranted. The Order is affected by errors of law, unsupported by substantial evidence, and arbitrary and capricious.

The Commission erred in taking Federal Energy Regulatory Commission ("FERC")-jurisdictional interconnection costs into account when determining whether to grant a State-jurisdictional certificate of convenience and public necessity. The Commission exceeded its jurisdiction in considering these costs, which are plainly within the jurisdiction of FERC. Therefore, the Commission erred as a matter of law.

EXCEPTION NO. 7

The Order's Evidence and Conclusions for Findings of Fact 12 and 13 and the underlying Findings of Fact 12 and 13 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The competent, material, and substantial evidence in the record shows that it is inappropriate to consider the levelized cost of transmission ("LCOT"), which compares the cost of required network upgrades to the amount of energy that will be delivered by the new generating facility(ies) directly utilizing the electric grid network upgrades, as the exclusive method for determining the

reasonableness of network upgrade costs for a merchant plant facility. Calculating the LCOT for the network upgrades in no way fully quantifies the benefits of the network upgrades to the public or to the State of North Carolina. The network upgrades are needed to resolve a major transmission constraint in southeastern North Carolina, and those network upgrades are the lowest cost solution to the transmission constraint in southeastern North Carolina. Comparing all the benefits of the network upgrades to the cost of the Upgrades is a far better way to evaluate whether the Upgrades are in the public interest than a LCOT analysis.

Furthermore, even if LCOT were an appropriate metric for assessing the public benefits of network upgrades, the Commission applied this metric unreasonably in its Order. Specifically, the Commission erred in calculating a LCOT based only on energy generated by the Friesian facility, without including the output of more than 1,000 megawatts of planned solar facilities that depend on and would utilize the network upgrades. The Commission's finding -- that the potential for the Friesian upgrades to lead to the construction of these planned facilities is too speculative to be considered -- is unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

CONCLUSION

For the reasons stated above, the Commission's Order is in excess of the Commission's statutory authority; affected by errors of law; unsupported by competent, material and substantial evidence in view of the entire record as submitted; and arbitrary or capricious.

Respectfully submitted, this the 10th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that all persons on the docket service list have been served true and accurate copies of the foregoing Joint Notice of Appeal 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 10th day of August, 2020.

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