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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR COMMON-LAW WRIT OF CERTIORARI
TO THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2026-001614

In re: Application of Duke Energy Progress, LLC to Have the
Terms of the Electric Rate Stabilization Adjustment Apply to
the Company's Rates and Charges for Retail Electric Service.....Petitioner.

**PETITIONER'S RETURN OPPOSING MOTION TO DISMISS
AND REPLY IN FURTHER SUPPORT OF PETITION**

Pursuant to Rule 240(e)–(f), SCACR, Duke Energy Progress, LLC (DEP or the Company) submits this return opposing the Department of Consumer Affairs' (DCA) motion to dismiss and reply in further support of the Company's petition for the Court to issue a common-law writ of certiorari in its original jurisdiction to review the Public Service Commission of South Carolina's (the Commission) July 15, 2026 order. For the additional reasons below, the Court should deny DCA's motion, accept this matter for review, and vacate the Commission's order rejecting DEP's right to invoke the Rate Stabilization Adjustment (RSA) mechanism statutes for 2026.

To begin, all parties agree the General Assembly carefully created a specific and orderly process under the RSA statutes. *See* 2025 S.C. Act No. 41, at § 10 (codified as amended at S.C. Code Ann. §§ 58-27-2700 through -2810). According to DCA, the Company's concerns "can be addressed by the Commission under the statutory processes found in the eRSA without prejudice to DEP or other parties." DCA Mot. to Dismiss at 1. DCA, however, ignores the procedural quandary in which the Company finds itself because the Commission did not follow that process

and erroneously construed the applicable statutes. As a result, the remainder of the process is inapplicable, and any evidentiary hearing would be futile.

In its order, the Commission ruled the Company could not rely on 2025 cost data, and based on this finding, rejected the rate adjustment for 2026. App’x at p. 14. Because the Commission arbitrarily postponed the data review process until 2027 and no rates were approved in the Initial Order, the Commission could not “set forth any changes that are required to the rates approved in the Initial Order.” S.C. Code Ann. § 58-27-2790(A)(1). With nothing to review, proceeding to an evidentiary hearing would be an exercise in futility. *See, e.g., Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) (“A commonly recognized exception to the requirement of exhaustion of administrative remedies exists when a party demonstrates that pursuit of administrative remedies would be a vain or futile act.”).

That is especially so where, as here, the Commission applied its one-year-delay rule to “all utilities” going forward. App’x at p. 12; *cf. Cox v. S.C. Educ. Lottery Comm’n*, 441 S.C. 209, 221, 893 S.E.2d 342, 348 (Ct. App. 2023) (a party shows “[f]utility” where the “administrative agency” takes “a hard and fast position that makes an adverse ruling a certainty” (quoting *Brown*, 389 S.C. at 54, 697 S.E.2d at 611)). DCA offers no reason to think the Commission would depart from its new hard-and-fast rule between now and the end of the year.

Yet DCA demands DEP proceed to an evidentiary hearing (with no evidence) anyway.¹ The Company should not have “to go to such extraordinary lengths to challenge the agency’s fiat.”

¹ DCA further claims to be weighing its options on whether to seek review of the initial order under the RSA procedures. *See* S.C. Code Ann. § 58-27-2780. That is a red herring, for DCA is not an “aggrieved party.” *Id.*; *see also Ralph v. McLaughlin*, 432 S.C. 640, 649, 856 S.E.2d 154, 158 (2021) (“the word aggrieved refer[s] to a substantial grievance, a denial of some personal or property right or the imposition on a party of a burden or obligation” (quoting *Cisson v. McWhorter*, 255 S.C. 174, 178, 177 S.E.2d 603, 605 (1970))).

Joseph v. S.C. Dep't of Labor, Licensing & Reg., 417 S.C. 436, 461, 790 S.E.2d 763, 776 (2016) (Kittredge, J., concurring). Under “the wisdom of the Founders’ division of power among three co-equal branches of government,” *id.*, this Court sits “to correct errors of law, particularly where” an agency “exceed[s] its authority.” *State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023); *see also* S.C. CONST. art. V, § 5 (“The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs.”); S.C. Code Ann. § 14-3-310 (same).

To be sure, “the General Assembly has designated the [Commission] as the ‘expert’ in regulating rates and services of public utilities in the state.” *Duke Energy Carolinas, LLC v. S.C. Office of Reg. Staff*, 434 S.C. 392, 406, 864 S.E.2d 873, 880 (2021). But as Commissioner Belser explained, “the Initial Order rests upon a flawed and misapplied interpretation of the statutory process established for the eRSA mechanism resulting in an error of law.” App’x at p. 17 (Belser, Comm’r, dissenting). And “[d]etermining the proper interpretation of a statute is a question of law” this “Court reviews . . . de novo.” *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008); *see also* S.C. Code Ann. § 1-23-380(b) (“[T]he court shall not defer to the agency’s interpretation of the statute or regulation and instead shall interpret the statute or regulation de novo.”). That is all the Company seeks here.²

Deciding this legal question now does not prejudice anyone. To the contrary, it would provide needed clarity, promote judicial economy, and prevent “material prejudice,” Rule 245, SACR, to the Company and others who had no chance to weigh in on this *sua sponte* ruling applied to all utilities. *Cf. Storm M. H. v. Charleston Cnty. Bd. of Trs.*, 400 S.C. 478, 487, 735 S.E.2d 492,

² To be clear, DEP does not ask the Court to rule on any rate adjustment. DEP agrees it remains “the Commission’s duty to review the eRSA filing and make this determination in light of the other eRSA requirements.” DCA Mot. to Dismiss Pet. at 8. Unfortunately, that has not yet occurred.

497 (2012) (addressing the merits and finding futility when a “decision was certain to be unfavorable,” “administrative remedies would have been inadequate given the immediacy” of the relevant “date and the potential delay of an administrative appeal,” and “resolution would promote judicial economy”); *McIntyre v. Sec. Comm’r of S.C.*, 425 S.C. 439, 451, 823 S.E.2d 193, 199 (Ct. App. 2018) (finding “[a]s a result of this haphazard process, the risk Appellants would be erroneously deprived of their property was substantial”);

Here, the Court faces three different positions from three different administrative agencies. *Cf. Trump v. Slaughter*, 146 S. Ct. 2283, ___, 225 L. Ed. 2d 664, 678 (2026) (“‘[A] plurality in the executive,’ Hamilton argued, ‘tends to conceal faults and destroy responsibility.’” (alteration in original) (quoting Alexander Hamilton, *The Federalist* No. 70, at 427)).

ORS, the agency charged with representing the public interest for all customer classes, S.C. Code Ann. § 58-4-10(B)(1), reviewed DEP’s financial data, settled with the Company as to its prudently incurred costs, and believes the Stipulation follows “state law and regulatory policy.” ORS Ltr. Resp. to DEP Pet. for Recons. at 1, Docket No. 2026-78-E (S.C. Pub. Serv. Comm’n Aug. 4, 2026). DCA, which advocates for residential customers, opposes the Company’s RSA election on a host of grounds the Commission rejected. *See* DCA Mot. to Dismiss Pet. at 3, 7. The Commission, which is the “expert” charged by the General Assembly with regulating public utilities, allowed the Company to elect under the RSA but adopted an extratextual requirement that it must wait a year to receive a rate adjustment. *See* App’x at p. 13.

In doing so, the Commission deprived the Company of a substantial property right based on a requirement found nowhere in the statute. *See* S.C. Code Ann. § 58-27-2700 (stating “[a] public utility providing retail electric service, *in its discretion and at any time*, may elect to have the terms of this article apply to its rates and charges for retail electric service, on a prospective

basis, by filing a notice of the election with the commission” (emphasis added)); *cf.* S.C. CONST. art. I, § 22 (“nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all instances the right to judicial review”). No party has adopted or defended the Commission’s position—not even DCA.

DCA ignores that the Commission’s order departs from and revises the statutory RSA process enacted by the General Assembly. *Cf. Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006) (stating even if “troubled by [a] result,” courts are “not at liberty to rewrite the statutes, and any amendment must come from the [General Assembly]”); *see also Responsible Econ. Dev. v. S.C. Dep’t of Health & Envtl. Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007) (“As a creature of statutes, regulatory bodies . . . have only the authority granted” by the General Assembly, and “[a]ny action . . . outside of [their] statutory and regulatory authority is null and void.”). It was “arbitrary and so affected fundamental fairness that to deem it harmless would only add insult to the injury to the rule of law.” *McIntyre*, 425 S.C. at 452, 823 S.E.2d at 199. Following that reimagined RSA process cannot be the cure.

Given the “absence of other effective relief,” *Rowe v. City of West Columbia*, 334 S.C. 400, 407–08, 513 S.E.2d 379, 383 (Ct. App. 1999), under the “exceptional circumstances” presented here, the Court’s prompt resolution of this issue “best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.” *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471–72, 674 S.E.2d 154, 160–61 (2009).

The Court should therefore deny DCA’s motion to dismiss, issue a common-law writ of certiorari, vacate the Commission’s order, and remand with instructions to consider the merits of DEP’s application and its pending stipulation with ORS under the plain and unambiguous terms of the RSA statutes.

Respectfully submitted,

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