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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2026-001613

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

Duke Energy Progress, LLC .... Appellant.

APPELLANT'S RETURN OPPOSING MOTION TO DISMISS THE APPEAL

Pursuant to Rule 240(e), SCACR, Duke Energy Progress, LLC (DEP or the Company) submits this return opposing the Department of Consumer Affairs' (DCA) motion to dismiss the Company's notice of appeal from the Public Service Commission of South Carolina's (the Commission) July 15, 2026 order. For the reasons below, the Court should deny DCA's motion.

INTRODUCTION

In 2025, the General Assembly passed the South Carolina Energy Security Act. *See* 2025 S.C. Act No. 41. As part of that transformative legislation, it gave electric utilities the same ability to adjust rates through an RSA mechanism that natural gas utilities have used since 2005. *Compare id.* at § 10 (codified as amended at S.C. Code Ann. §§ 58-27-2700 through -2810), *with* 2005 S.C. Act No. 16 (codified as amended at S.C. Code Ann. §§ 58-5-400 through -480).

Under the RSA statutes, "[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." S.C. Code Ann. § 58-

27-2700 (emphasis added). Earlier this year, DEP became the first electric utility to file an application electing to have the RSA mechanism apply to the Company's rates and charges for retail electric service. Its March 13, 2026 filing should have triggered the streamlined and carefully structured ratemaking process under the RSA statutes. *See* S.C. Code Ann. § 58-27-2700.

Unfortunately, starting with its failure to issue a timely baseline order, the Commission did not follow that process. *See id.* ("Upon receipt of notice of the election, the commission shall proceed to make the findings and establish the ongoing procedures required for adjustments in base rates to be made under this article."); *cf. Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002) ("'shall' or 'must' indicates" an "intent to enact a mandatory requirement"). When presented with a stipulation between DEP and the Office of Regulatory Staff (ORS), App'x pp. 113–26, the Commission used its mistake to reject the Company's right to invoke the RSA mechanism in two separate votes.

The Commission first voted to reject the Company's RSA election for failure to file a June monitoring report. It issued a directive memorializing this vote on June 29, 2026, indicating a full order would follow. App'x p. 20. Given the impending July 15 statutory deadline for an initial order adjusting rates under the RSA mechanism, DEP asked the Commission to reconsider and vacate this ruling on an expedited basis. *See* App'x pp. 140–53; S.C. Code Ann. § 58-27-2760(5) ("On or before July 15 of each year, the commission shall issue an initial order setting forth any changes required in the utility's request to adjust rates[.]"). The Commission then scheduled a special business meeting to address this issue.

During the July 13, 2026 special business meeting, the Commission—noting its failure to timely issue a baseline order—voted to vacate its prior ruling but imposed a new extratextual requirement. The Commission found "[p]rospective rate adjustments must be based on an operating experience that occurred while the utility was operating pursuant to the eRSA, rather than the operational experience the utility may have had prior to electing to have the eRSA apply to its rates." App'x p. 13,[1] Order No. 2026-394 at 13, Docket No. 2026-78-E (S.C. Pub. Serv. Comm'n July 15, 2026). It held "[t]he operational data given from DEP for the calendar year ending December 31, 2025 predates DEP's election into the eRSA and does not warrant a rate adjustment based on that data." *Id.* at 16. And it said "all utilities would be subject to the same matching between the election of the eRSA and application of adjustments to their respective rates beginning in that calendar year" without giving the utilities a chance to be heard. *Id.* at 12.

Commissioner Belser dissented, explaining that "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." *Id.* at 17 (Belser, Comm'r, dissenting).

While DCA opposed DEP's application for a host of reasons, App'x pp. 91–112, no party advanced either ground on which the Commission rejected DEP's right to invoke the RSA mechanism. *But see United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020) ("our system is designed around the premise that parties represented by competent counsel know what is best for them and are responsible for advancing the facts and argument entitling them to relief").

At bottom, the Commission rejected the Company's statutory right to invoke the RSA mechanism for 2026 in a final order, even though it is styled as an initial order and references a review process. That review process, however, cannot correct the errors of law plaguing the order or change the result: the order was based on a flawed view of the statute, excluded the financial

[1] Because DCA's motion predated the briefing schedule, DEP has not yet prepared a record on appeal. The Company, however, prepared an appendix that was filed in the companion matter seeking a common-law writ of certiorari. For the sake of efficiency, any citations to the appendix reference the appendix filed with the Court in Appellate Case No. 2026-001614.

monitoring information, and cannot "set forth any changes that are required to the rates approved in the Initial Order," S.C. Code Ann. § 58-27-2790(A)(1), because it did not approve rates. So there's nothing to review in an evidentiary hearing by December 31. In its motion to dismiss, DCA leans heavily on the review process. But in doing so, it ignores the actual effect of the order.

The Commission misread and rewrote the law, ignored the party-presentation principle, acted arbitrarily and capriciously, and violated the Company's due process rights. Because the order affected substantial rights, effectively struck DEP's election for 2026, and erroneously postponed the statutory review process to 2027, DEP appealed. Recognizing the novelty of this situation both substantively and procedurally, the Company—in the alternative—petitioned for the Court to issue a common-law writ in its original jurisdiction to review the Commission's order.

Whether to grant a rate adjustment remains a decision for the Commission to make in the first instance. DEP is simply asking the Court to correct the Commission's errors of law—which no one has defended thus far—to get this case back on the statutory track carefully laid by the General Assembly. The Company leaves it to the Court to decide which vehicle is preferable.

For present purposes, though, the Court should deny DCA's motion to dismiss the appeal. If the Court prefers for the Commission to rule on DEP's pending petition for reconsideration, the Company has already indicated—in its filing letter—that it has no objection to a limited remand for that purpose. DEP was simply preserving its right to appeal given the procedural quagmire it was facing due to the Commission's actions. *Cf. Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) ("An appeal may be barred due to untimely service of the notice of appeal when a party—instead of serving a notice of appeal—files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment.").

ARGUMENT

I. The Commission's order is immediately appealable.

"[W]hether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005).

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:
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> . . .
>
> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action;
>
> (3) A final order affecting a substantial right made in any special proceeding or upon a summary application in any action after judgment . . . .

S.C. Code Ann. § 14-3-330(2)–(3). "An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right." *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012).

"By its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 538, 773 S.E.2d 144, 146 (2015). And this Court's "review of trial court orders is not constrained by how the order is styled." *Id.* at 539, 773 S.E.2d at 147. "[C]ourts have previously looked beyond the labels on motions and orders to discern their actual effect for purposes of appealability." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 303, 705 S.E.2d 475, 478 (Ct. App. 2011).

"An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479. "If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Mid-State Distribs. v. Century Imps.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993). Or "[i]f there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory." *Id.*

Here, the Commission's order already determined "the rights of the parties," *id.*, and "is immediately appealable under section 14-3-330 because it is based on a material misunderstanding of," *Morrow*, 412 S.C. 538, 773 S.E.2d at 146, the RSA statutes. By not allowing the Company to exercise its statutory right to elect "at any time in its discretion," S.C. Code Ann. § 58-27-2700, and enforcing an extratextual one-year delay, the "order removes a material issue from the case," "prevent[s] the issue from being litigated on the merits," *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479, prevents DEP "from being architect[] of [its] own complaint," and "deprive[s]" the Company "of bringing [its] case" at a time of its "own choosing," *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146, as required under section 58-27-2700.

Waiting until the end of the year would accomplish nothing legally or factually. For one, there's no reason to think the Commission will change its mind on the statutory question it decided for "all utilities." App'x p. 12. For another, even if it did, the Company could not be made whole because the Commission denied a rate adjustment for 2026. *See S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980) (observing "the firm principle that rate-making is prospective rather than retroactive"); *Duke Energy Carolinas, LLC v. S.C. Office of Reg. Staff*, 434 S.C. 392, 426, 864 S.E.2d 873, 891 (2021) ("ratemaking is a prospective process in which customers who currently use the system pay for its production, rather than requiring future ratepayers to pay for past use").

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 initial order "essentially invites DEP to further its arguments during the eRSA review process," and "DEP must accept that invitation." DCA Mot. to Dismiss at 7–8. But the Commission did not follow that process and erroneously construed the applicable statutes. Instead, it created a one-year-delay rule, postponing the rate review and adjustment process to 2027.

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." Order No. 2026-394 at 17 (Belser, Comm'r, dissenting). The Commission said the Company could not rely on 2025 data, and it therefore rejected the rate adjustment for 2026. App'x p. 14. Because 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). We are therefore outside the statutory process.

In short, the Commission deprived the Company of a substantial property right based on a requirement found nowhere in the statute. *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"); *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").

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. *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)). Yet DCA demands DEP proceed with an evidentiary hearing anyway. "Determining the proper interpretation of a statute is a question of law" for the Court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). That is all the Company seeks on appeal here.

Because the Commission's order deprived DEP of a substantial right and effectively struck the Company's application for a rate adjustment in 2026, it is immediately appealable under the unique circumstances of this case. The Court should therefore deny DCA's motion to dismiss.

II. Less drastic procedural routes exist.

Again, the Company filed its notice of appeal given the impending statutory deadline and to avoid arguments that the period for doing so was not tolled by a successive petition for reconsideration. *Cf. Elam*, 361 S.C. at 20, 602 S.E.2d at 778. By way of an update, on August 6, 2026, the Commission voted to dismiss the Company's pending petition for reconsideration in a business meeting. *See* Rule 205, SCACR (stating "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal"). If the Court prefers for the Commission to rule on that petition, the Court should remand for that limited purpose.

In all events, if the Court finds the order is not immediately appealable, it should 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.[2] Frankly, given the procedural hair on this case, that may

[2] *E.g.*, *State v. Price*, 441 S.C. 423, 433, 895 S.E.2d 633, 638 (2023) (this Court "may use a common-law writ of certiorari to correct errors of law, particularly where a trial court exceeded its authority"); *City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) ("A writ of certiorari is used to keep an inferior tribunal within the scope of its powers."); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 471–72, 674 S.E.2d 154, 160–61 (2009) (the writ is

be the most effective and efficient way to correct the Commission's errors of law. Still, out of an abundance of caution, DEP filed a notice of appeal because it was finally deprived of a substantial right and is entitled to a direct appeal in the event the Court is not inclined to grant the cert petition.

CONCLUSION

The Court should therefore deny DCA's motion to dismiss, set an expedited briefing schedule, and review the Commission's order in due course. Alternatively, if the Commission believes a ruling on DEP's petition for reconsideration pending at the Commission is necessary, the Court should remand for the Commission's expedited consideration of the petition.

Respectfully submitted,

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granted in "exceptional circumstances" where resolution "best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest"); *Rowe v. City of West Columbia*, 334 S.C. 400, 407–08, 513 S.E.2d 379, 383 (Ct. App. 1999) (the writ is "generally is used only in the absence of other effective relief").

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