

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

IN THE ORIGINAL JURISDICTION

ON COMMON LAW WRIT OF CERTIORARI
TO THE PUBLIC SERVICE COMMISSION

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.

Appellate Case No. 2026-001614

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ISSUES PRESENTED

- I. Did the Commission err in adding an extratextual requirement to the RSA statute to reject the Company's rate adjustment for 2026?
- II. Did the Commission act arbitrarily in departing—without explanation—from its precedent interpreting an identical RSA provision for natural gas utilities?
- III. Did the Commission violate the Company's administrative due process rights?

INTRODUCTION

As the Public Service Commission (the Commission) has “emphasized,” “ratemaking [is] a prospective process” that “use[s] the historical test year to set rates for estimated future costs within a reasonable degree of certainty, subject to any adjustments for known and measurable out-of-period changes in expenses, revenues, and investments.” *Duke Energy Carolinas, LLC v. S.C. Off. of Regul. Staff*, 434 S.C. 392, 429, 864 S.E.2d 873, 893 (2021).

“The historical test year recognizes that 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.” *Id.* at 426, 864 S.E.2d at 891. So “a utility must justify the prudence of its past-incurred expenses every time it comes in for a new ratemaking proceeding.” *Id.* at 431, 864 S.E.2d at 894. Ordinarily, an electric utility does so in base rate proceedings. *See* S.C. Code Ann. § 58-27-870.

In 2025, the General Assembly passed the Energy Security Act, giving electric utilities the ability to also adjust rates through a more streamlined rate stabilization mechanism that natural gas utilities have used since 2005. *Compare* 2025 S.C. Act No. 41, at § 10 (codified as amended at S.C. Code Ann. §§ 58-27-2700 through -2810), *with* 2005 S.C. Act No. 16, at § 1 (codified as amended at S.C. Code Ann. §§ 58-5-400 through -480).

Under the rate stabilization adjustment (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).

On March 13, 2026, Duke Energy Progress, LLC (DEP or the Company) became the first electric utility to elect to have the RSA mechanism apply to its rates and charges for retail electric service. App’x p. 22. DEP provided 12 months of historical cost data from 2025 for the Office of

Regulatory Staff (ORS) to audit, including the effect of the costs and revenues on DEP's return. All that feeds into rates set for the initial RSA. *See* S.C. Code Ann. § 58-27-2750. Once RSA is effective, the monitoring report process evaluates how the costs and revenues compare to the rates set in terms of the return achieved. *See* S.C. Code Ann. § 58-27-2730.

DEP's application should have triggered a carefully structured ratemaking process under the RSA statutes. Here's how it works:

Procedural Date	Procedural Milestone
At any time in the utility's discretion	A utility may file notice of an RSA election. S.C. Code Ann. § 58-27-2700.
Upon receipt of the notice of election	The Commission issues a baseline order, making findings and establishing ongoing procedures required for adjustments in base rates. <i>Id.</i>
No later than March 15	A utility files the annual monitoring report for the 12-month period ending December 31 with the Commission and serves it on ORS. S.C. Code Ann. §§ 58-27-2760(1) & -2730.
March 31	The Commission issues a notice of filing. S.C. Code Ann. § 58-27-2760(2).
May 15	Interested parties may petition to intervene. <i>Id.</i>
June 1	ORS files an audit report, and other parties may file verified written comments and submit evidence. S.C. Code Ann. § 58-27-2760(3).
June 15	The utility files verified written comments, submits evidence, and may request a non-evidentiary hearing. S.C. Code Ann. § 58-27-2760(4).
July 15	The Commission issues the initial order setting forth any changes required in the request to adjust rates. Absent an initial order, the rate adjustment request is deemed granted as filed. S.C. Code Ann. § 58-27-2760(5).
August 1	Any rate adjustment takes effect for bills rendered on or after the first billing cycle of August. S.C. Code Ann. § 58-27-2760(6).
Quarterly	The utility files monitoring reports for each 12-month period ending March 31, June 30, September 30, and December 31 of each year. S.C. Code Ann. § 58-27-2730.

After the Office of Regulatory Staff (ORS) thoroughly audited DEP's 2025 cost data, DEP settled with ORS as to its prudently incurred costs and filed a stipulation with the Commission.

App’x pp. 113–26. “Based upon [ORS’s] report and the findings of [its] audit” of the historical data, the Commission was to “order the utility to make the adjustments to tariff rates necessary to achieve the revenue levels indicated in [s]ection 58-27-2740.” S.C. Code Ann. § 58-27-2750.

On June 29, 2026, however, the Commission voted to “deny” the stipulation and reject the DEP’s RSA election for not filing a June monitoring report. App’x p. 20. Given the impending July 15 statutory deadline, *see* S.C. Code Ann. § 58-27-2760(5), DEP asked the Commission to reconsider and vacate its *sua sponte* ruling. *See* App’x pp. 140–53.

In a July 15, 2026 order, the Commission vacated its prior ruling but held (again *sua sponte*) that DEP could not rely on 2025 cost data. App’x p. 14. Instead, the Commission held DEP must wait until 2027 to adjust its rates based on 2026 data. *Id.* No party ever advanced this argument. Still, the Commission announced its new one-year-delay rule, used it to reject a rate adjustment for 2026, and applied it to “all utilities” going forward. App’x p. 12. No utility had a chance to weigh in on the new rule.

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.” App’x p. 17. Indeed, the Commission’s order arbitrarily departed—without explanation—from its longstanding interpretation of the nearly-identical RSA statutes gas utilities have used without incident for two decades. *E.g.*, Order No. 2005-567 at 4, Dkt. No. 2005-125-G (S.C. Pub. Serv. Comm’n Oct. 13, 2005) (directing Piedmont Natural Gas Company to implement new adjusted rates in the same year election was filed); Order No. 2005-619 at 7, Dkt. No. 2005-113-G (S.C. Pub. Serv. Comm’n Oct. 31, 2005) (same for South Carolina Electric & Gas Co.).

By erecting new procedural barriers to the RSA statutes, the Commission misread and rewrote the law, ignored the party-presentation principle, acted arbitrarily and capriciously, and

violated the Company’s administrative due process rights. Accordingly, this matter comes before the Court on a common-law writ of certiorari.

STATEMENT OF THE CASE

Earlier this year, DEP filed an application electing to have the RSA mechanism apply to its rates and charges for retail electric service. App’x p. 22. After reviewing DEP’s financial data, ORS settled with the Company. DEP and ORS filed their stipulation with the Commission, App’x pp. 113–26, and it noticed a special business meeting for June 29, 2026 to consider final disposition of the docket. Supp. App’x p. 319.

During its special business meeting, the Commission voted to “deny” the stipulation and reject DEP’s RSA election for failure to file a June monitoring report. Supp. App’x pp. 323–24. It issued a directive memorializing this vote on June 29, 2026. App’x p. 20. DEP asked the Commission to reconsider and vacate its ruling on an expedited basis. *See* App’x pp. 140–53. At a July 13, 2026 special business meeting, the Commission voted to vacate its prior ruling¹ but still reject the RSA election. Supp. App’x pp. 346–48.

In its order, 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. 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

¹ Commissioner Belser found “no procedural error by Duke in not filing the March 31 monitoring report by June 15th. If there was error in that report not being filed,” she thought “that lies squarely with this Commission for not having filed the baseline order as requested.” App’x p. 209:1–6. Chair Williams said “to the extent that the Commission may or may have not fumbled the ball with issuing the . . . base order, we can ensure that that won’t happen again.” App’x pp. 209:24–210:2.

matching between the election of the eRSA and application of adjustments to their respective rates beginning in that calendar year.” *Id.* at 12. Commissioner Belser dissented. *Id.* at 17.

DEP appealed. It also filed a petition for the Court to issue a common-law writ of certiorari in its original jurisdiction on an expedited basis. The Department of Consumer Affairs (DCA) moved to dismiss the appeal and the petition, and DEP filed returns opposing the motions. On September 15, 2026, the Court denied DCA’s motions to dismiss, granted DEP’s petition for a common-law writ of certiorari, and ordered expedited briefing. In light of its disposition of the petition, the Court dismissed the notice of appeal. DEP’s opening brief now follows.

STANDARD OF REVIEW

“A writ of certiorari is used to keep an inferior tribunal within the scope of its powers.” *City of Columbia v. S.C. Pub. Serv. Comm’n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963). “On certiorari,” the Court’s review “is confined to the correction of errors of law.” *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 472, 674 S.E.2d 154, 161 (2009).

ARGUMENT

I. The Commission erred in adding an extratextual requirement to the RSA statute.

“As a creature of statutes, regulatory bodies . . . have only the authority granted them by the” General Assembly, and “[a]ny action taken . . . outside of [their] statutory and regulatory authority is null and void.” *Responsible Econ. Dev. v. S.C. Dep’t of Health & Envtl. Control*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007). 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*, 434 S.C. at 406, 864 S.E.2d at 880. 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 p. 17.

“Determining the proper interpretation of a statute is a question of law” the 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* 2026 S.C. Act No. 251, at § 5 (“[T]he court shall not defer to the agency’s interpretation” and “shall interpret the statute . . . de novo.”). After all, this “Court has the final responsibility of construing the constitution and laws of this state.” *Mims Amusement Co. v. S.C. Law Enf’t Div.*, 366 S.C. 141, 149, 621 S.E.2d 344, 348 (2005).

“The primary rule of statutory construction is to ascertain the intent of the General Assembly.” *S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021). “Under the plain meaning rule,” courts have “no right to search for or impose another meaning or resort to subtle or forced construction to change the scope of a clear and unambiguous statute.” *Creswick v. Univ. of S.C.*, 434 S.C. 77, 81–82, 862 S.E.2d 706, 708 (2021) (per curiam). “[A] court cannot rewrite the statute and inject matters into it which are not in the [General Assembly’s] language.” *Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000).

In extending the RSA mechanism to electric utilities in Act 41, the General Assembly created one of the most procedurally precise statutory schemes in Title 58. *See* Table, *supra*, at 2; S.C. Code Ann. §§ 58-27-2700 & -2760(3)–(6). But the General Assembly wasn’t starting from a blank canvas. In 2005, it had enacted the Natural Gas Rate Stabilization Act. *See* 2005 S.C. Act No. 16, at § 1 (codified as amended at S.C. Code Ann. §§ 58-5-400 through -480).

So the General Assembly, in passing Act 41, had the benefit of the Commission’s application of the gas RSA mechanism over the last 20 years. *E.g.*, Order No. 2005-567 at 4; Order No. 2005-619 at 7; *cf. State v. McKnight*, 352 S.C. 635, 648, 576 S.E.2d 168, 175 (2003) (“There is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.”);

Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 215, 423 S.E.2d 101, 104 (1992) (citing with approval *Grove City College v. Bell*, 465 U.S. 555 (1984), where the U.S. Supreme Court said reenacting a statute with knowledge of administrative interpretation of it is strong indication of legislative approval of that interpretation).

Under the RSA election statute at issue, “[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” and serving a copy on ORS. S.C. Code Ann. § 58-27-2700 (emphasis added). The companion gas RSA election statute is no different. *See* S.C. Code Ann. § 58-5-410 (stating “[a] public utility providing natural gas distribution service, *in its discretion and at anytime*, may elect to have the terms of this article apply to its rates and charges for gas distribution service, on a prospective basis, by filing a notice of the election” (emphasis added)). Aside from occurring during different months and accounting for particulars unique to electric operations,² the RSA process is the same in all relevant respects for electric and gas utilities.

For the first time in two decades, however, the Commission found the phrase “on a prospective basis” applied not only to rate adjustments under the RSA but also—contrary to established ratemaking principles—the operational data underpinning them. *See* App’x pp. 13–14. And the Commission applied this new rule only to electric utilities. *Contra* Order Nos. 2005-567 & 2005-619 (issuing initial orders adjusting rates the same year as RSA election was filed under identical statute for gas utilities). As Commissioner Belser noted, that is not how RSA works. App’x p. 17.

² Compare S.C. Code Ann. § 58-5-455(1)–(6), with S.C. Code Ann. § 58-27-2760(1)–(6) (listing the same milestones at the same pace but in different months); *see also* S.C. Code Ann. § 58-27-2770 (outlining 250 MW ceiling for plant-in-service investments unique to electric utilities).

Nowhere do the statutes require a utility to wait a year after electing RSA before receiving a rate adjustment. Quite the contrary: they say a utility may file an election “in its discretion at any time,” S.C. Code Ann. § 58-27-2700, and the rate review and adjustment procedures follow. By reading “on a prospective basis” in isolation, the Commission deprived “in its discretion and at any time” of all meaning. *See Duke Energy Corp. v. S.C. Dep’t of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (a court “should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose”).

If the General Assembly intended a one-year delay for rate adjustments after the RSA election, it would have had no reason to establish a July 15 deadline, a deemed-granted remedy if the Commission does not act, an August rate implementation date, or a December 31 deadline for a final order—all in the same year an RSA election is filed. *See* S.C. Code Ann. §§ 58-27-2760(5)–(6) & -2790(B); *cf. Senate ex rel. Leatherman v. McMaster*, 425 S.C. 315, 322, 821 S.E.2d 908, 911–12 (2018) (statutes “must be read as a whole[,] and sections which are part of the same general statutory law must be construed together and each one given effect” (quoting *CFRE, LLC. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011))); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (“The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.”).

Yet the Commission’s order renders these provisions useless and creates a conflict where none exists.³ *Cf. Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) (“statutes dealing with the same subject matter are in *pari materia* and must be construed together,

³ Why, for example, would the statute require a utility to file a year’s worth of historical data for ORS to audit with the notice of election if it can only use prospective data for a rate adjustment? More to the point, if only prospective data were allowed, how would a utility even know whether it needed to file a notice of election under the RSA?

if possible, to produce a single, harmonious result”). An RSA election is designed to smooth out rate changes between rate cases by providing a streamlined process for annual adjustments. It makes no sense to deprive ratepayers and the utility of a year of reaping those benefits when “the utility must file an application for a general rate proceeding every five years after [the RSA] election.” S.C. Code Ann. § 58-27-2700.

Read in its proper context, “on a prospective basis,” *id.*, simply reinforces “the firm principle that rate-making is prospective rather than retroactive.” *S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n*, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980). The term “prospective” modifies, and comes directly after, the phrase “rates and charges for retail electric service.” S.C. Code Ann. § 58-27-2700; *cf. Luce v. Lexington Cnty. Health Servs. Dist., Inc.*, 446 S.C. 319, 325, 919 S.E.2d 558, 562 (2025) (“The meaning of words may be known by the company they keep.”). In other words, it applies to the rate adjustment resulting from the RSA process, not the “operational data” used. App’x p. 13. Those words aren’t in the statute.

While the Commission sought to distinguish data used in rate cases versus RSA mechanism cases in a conclusory sentence, App’x p. 14, the statute draws no such distinction. In fact, “[i]n carrying out the procedures established” under the RSA mechanism, the General Assembly said “the commission shall rely upon and utilize the approved rates, charges, revenues, expenses, capital structure, returns, and other matters established in the public utility’s most recent general rate proceeding pursuant to Section 58-27-860.” S.C. Code Ann. § 58-27-2700.

As the Court has observed, “[t]he historical test year recognizes that 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.” *Duke Energy Carolinas, LLC*, 434 S.C. at 426, 864 S.E.2d at 891. That is how ratemaking works, regardless of whether it arises under the

RSA mechanism or in a base rate case, and that is the only point the General Assembly sought to reinforce by using “on a prospective basis” in section 58-27-2700.

Still, on the Commission’s reading, RSA cases will take over sixteen months—between the March 15 election and August 1 the next year—before rates can take effect, even though more complex base rate cases take only six months. *See* S.C. Code Ann. 58-27-870(B); *cf. Florence Cnty. Democratic Party v. Florence Cnty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (courts “will not construe a statute in a way which leads to an absurd result or renders it meaningless”). Requiring DEP to wait until 2027 to adjust rates based on costs already audited only postpones recovery, increases financing costs, and ultimately will require customers to bear more carrying costs. *Cf. Duke Energy Carolinas, LLC*, 434 S.C. at 429, 864 S.E.2d at 893 (“[T]he purpose of . . . using a test year and making appropriate adjustments is to match—as closely as possible—the utility’s revenue to the costs it will incur after the rates are implemented.” (quoting Order No. 2019-323 at 15, Dkt. No. 2018-319-E (S.C. Pub. Serv. Comm’n May 21, 2019))).

That is anathema to the General Assembly’s policy objectives and the streamlined RSA process it created. *See* S.C. Code Ann. § 58-27-2760(1)–(6); *Hinton v. S.C. Dep’t of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333, 592 S.E.2d 335, 338 (Ct. App. 2004) (“Courts should consider not merely the language of the particular clause being construed, but the word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.”); *cf.* 2005 S.C. Act No. 16 (natural gas RSA is “a more streamlined and predictable ratemaking mechanism”).

In short, the Commission erred as a matter of law and exceeded its authority by engrafting a new requirement in the RSA statutes that the General Assembly did not bless. The Court should therefore vacate the Commission’s order and remand with instructions for it to consider DEP’s application and stipulation with ORS under the unambiguous terms of the RSA statutes.

II. *The Commission's decision was arbitrary and capricious.*

The Court “may reverse” the Commission if its decision is “arbitrary or capricious.” *In re Blue Granite Water Co.*, 434 S.C. 180, 187, 862 S.E.2d 887, 891 (2021) (quoting S.C. Code Ann. § 1-23-380(5)(f)). A decision “is arbitrary ‘if it is without a rational basis, is based . . . not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards.’” *Daufuskie Island Util. Co. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019) (quoting *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184–85, 332 S.E.2d 539, 541 (Ct. App. 1985)).

Here, the Commission acted arbitrarily by engaging in conclusory analysis to create new procedural requirements *sua sponte* and departing from settled precedent without explanation. Although DCA opposed DEP’s application, App’x pp. 91–112, no party advanced either ground on which the Commission rejected DEP’s right to invoke the RSA mechanism.

“[O]ur 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.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375–76 (2020). The Commission could have benefited from briefing on these issues but instead tied this case into procedural knots with *sua sponte* rulings. *Cf. Margolin v. Nat’l Ass’n of Immigr. Judges*, 146 S. Ct. 1285, 1288 (2026) (summarily reversing for “violating th[e] party presentation principle” as courts “rely on the parties to ‘frame the issues for decision’ and decide ‘only the questions presented’” (quoting *Sineneng-Smith*, 590 U.S. at 375–76)).⁴

⁴ Like judges, commissioners are subject to and “bound by the Code of Judicial Conduct.” S.C. Code Ann. § 58-3-30(B) (citing Rule 501, SCACR).

What is more, in adopting a novel procedural hurdle, the Commission failed to supply a basis for treating RSA proceedings differently. According to the Commission, “[w]hile a historical test year may be used in a general rate case, the use of such a test year is impermissible in the election and use of the eRSA, wherein the first year of data available will coincide with the end of the first calendar year in which the election was made.” App’x p. 14.⁵

As best DEP can tell, the Commission’s ruling was tied to the RSA statute’s use of the term “prospective.” App’x p. 13. But rate adjustments of all stripes “must be prospective in nature.” App’x p. 13; *see also S.C. Elec. & Gas Co.*, 275 S.C. at 491, 272 S.E.2d at 795 (“rate-making is prospective rather than retroactive”). “The relationship between costs, investment, and revenue in the historic test year is generally a constant and reliable factor upon which a regulatory agency can make calculations which formulate the basis for fair and reasonable rates to be charged.” *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 270 S.C. 590, 602, 244 S.E.2d 278, 284 (1978).

The Commission never explained what made RSA cases—which involve a rate adjustment based on historic data just like base rate cases—any different to justify a departure from ratemaking principles. It simply declared the outcome. *Cf. Daufuskie Island Util. Co.*, 427 S.C. at 464, 832 S.E.2d at 575 (quoting *Deese*, 286 S.C. at 184–85, 332 S.E.2d at 541)). One cannot divine that distinction from the RSA statute. *See* S.C. Code Ann. § 58-27-2700; *cf. Porter v. S.C. Pub. Serv. Comm’n*, 333 S.C. 12, 26, 507 S.E.2d 328, 335 (1998) (“It is within PSC’s discretion to adopt the rate-setting method it believes is appropriate, provided that method complies with the statutes.”);

⁵ It then faulted DEP for not filing an election last year. *Id.* (“In this instance, DEP elected to become subject to the eRSA in 2026. It could have elected to do so in 2025 but did not.”). That was not required either. *See* S.C. Code Ann. § 58-27-2700 (“A public utility *may* combine an election under this article with the filing of a rate proceeding pursuant to Section 58-27-860.” (emphasis added)); *Robertson v. State*, 276 S.C. 356, 358, 278 S.E.2d 770, 771 (1981) (“Ordinarily, ‘may’ signifies permission and generally means the action spoken of is optional or discretionary.”).

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]”).

Further, the Commission did not acknowledge or wrestle with its longstanding approach to the identically worded gas RSA statute. *Compare* S.C. Code Ann. § 58-27-2700, *with* S.C. Code Ann. § 58-5-410. In the last two decades, the Commission never invoked this one-year-delay rule. To the contrary, the Commission issued initial orders adjusting rates the same year as the utility filed the RSA election. *E.g.*, Order Nos. 2005-567 & 2005-619. While the Commission “is generally not bound by the principle of *stare decisis*,” “it cannot act arbitrarily in failing to follow established precedent.” *330 Concord St. Neighb. Ass’n v. Campsen*, 309 S.C. 514, 517, 424 S.E.2d 538, 540 (Ct. App. 1992).

III. The Commission violated the Company’s administrative due process rights.

As “the West Committee recognized,” “agency decisions often ‘are more significant than laws enacted by the General Assembly or decisions made by the courts.’” *McIntyre v. Sec. Comm’r of S.C.*, 425 S.C. 439, 446, 823 S.E.2d 193, 196 (Ct. App. 2018) (quoting FINAL REPORT OF THE COMMITTEE TO MAKE A STUDY OF THE SOUTH CAROLINA CONSTITUTION OF 1895, at 21 (1969)).

“In recognition of the increasing number of governmental powers delegated to administrative agencies,” *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997), article I, section 22 was added to our constitution to provide “an additional guarantee of important due process rights,” *Garris v. Governing Bd. of Reins. Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998). The administrative due process provision promises the following:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; 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 such instances the right to judicial review.

S.C. CONST. art. I, § 22.

The “fundamental requirements” of due process are “notice, an opportunity to be heard in a meaningful way, and judicial review.” *Robert K. v. City of Camden Plan. Comm’n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). Generally, a party must show “substantial prejudice . . . to establish a due process claim.” *Tall Tower, Inc. v. S.C. Procurement Review Panel*, 294 S.C. 225, 233, 363 S.E.2d 683, 687 (1987). “A ‘harmless error’ analysis, however, is impossible and unnecessary to undertake where the structure of the proceeding under review was fundamentally unsound.” *McIntyre*, 425 S.C. at 451, 823 S.E.2d at 199.

Here, the Commission raised two alternate theories on its own to deny the Company its lawful right to invoke the RSA mechanism. In doing so, the Commission deprived the Company of a substantial property right based on a rule found nowhere in the RSA statute. *See* S.C. Code Ann. § 58-27-2700; *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”). Worse, the Commission held its one-year-delay rule applies to “all utilities.” App’x p. 12.

Even if the Commission could “fill up the details,” *S.C. State Hwy. Dep’t v. Harbin*, 226 S.C. 585, 594, 86 S.E.2d 466, 470 (1955), on the prescriptive and self-executing RSA statutes, no utility had “notice” of or “an opportunity to be heard” in a meaningful way on the new rule. S.C. CONST. art. I, § 22; *see also* S.C. Code Ann. § 1-23-320(E) (“Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.”). Nor did the General Assembly. *Cf. Joseph v. S.C. Dep’t of Lab., Licensing & Regul.*, 417 S.C. 436, 455 n.3, 790 S.E.2d 763, 773 n.3 (2016) (stating “the Board’s attempt to use its 2011 position statement to

regulate the practice of physical therapy without submitting it to the General Assembly as a proposed agency regulation following the requirements of the . . . Administrative Procedures Act” violated article I, section 22).

This case had been going on for months. No party raised a concern with the timing of the operational data in filings, during the procedural conference, or at oral argument. ORS, the agency charged with “review[ing] the monitoring report . . . to determine compliance with” the RSA statutes, certainly didn’t. S.C. Code Ann. § 58-27-2750. “Based upon [ORS’s] report and the findings of [its] audit,” the Commission was to “order the utility to make the adjustments to tariff rates necessary to achieve the revenue levels indicated in [s]ection 58-27-2740.” *Id.* Yet when it came time to do so, the Commission hatched two novel interpretations to reject DEP’s ability to adjust rates. DEP first learned of this new one-year-delay rule when it ruled *sua sponte* on a petition for reconsideration.⁶ “It is hard to imagine how the opportunity to be heard can be meaningful if one does not know what to say.” *McIntyre*, 425 S.C. at 450, 823 S.E.2d at 198.

And while the Commission hand-waved “a path of review” of its ruling, App’x p. 15 (citing S.C. Code Ann. § 58-27-2780), that was “little more than a parchment promise,” *Allen v. Milligan*, 599 U.S. 1, 10 (2023), for the Commission rejected the rate adjustment solely on legal grounds. In other words, it has no evidence to review in an “evidentiary hearing.” S.C. Code Ann. § 58-27-2780. The Commission cannot insulate its decision from judicial review by invoking an evidentiary hearing that would not change the outcome under its reimagined RSA process. *Cf.*

⁶ At oral argument, one commissioner expressed confusion—through questioning—on the timing of the data and the RSA election. Supp. App’x pp. 266:15–272:13. But no one else shared similar concerns. In fact, when asked whether DEP was “prohibited from filing,” DCA said it was “not necessarily disputing that.” Supp. App’x pp. 281:24–282:1. DEP heard nothing more about this concern until the Commission used it to deny a rate adjustment in its ruling on reconsideration of a prior order. While “due process is flexible,” DEP has a right “to be heard in a meaningful way.” *Robert K.*, 376 S.C. at 171–72, 656 S.E.2d at 350. The Commission contravened that right here.

Joseph, 417 S.C. at 459, 790 S.E.2d at 775 (Kittredge, J., concurring) (noting “the dangers posed by an unchecked administrative state”).

Under these circumstances, the Commission finally rejected DEP’s RSA rate adjustment for 2026 on legal grounds. Its decision 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.

CONCLUSION

For these reasons, the Court should vacate the Commission’s order and remand with instructions to consider the merits of DEP’s settlement with ORS under the RSA statutes as written by the General Assembly.

Respectfully submitted,

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