THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Docket No. 2013-392-E

In The Matter of Joint Application of Duke Energy Carolinas, LLC and North Carolina Electric Membership Corporation for a Certificate of Environmental Compatibility and Public Convenience and Necessity for the Construction and Operation of a 750MW Combined Generating Plant Near Anderson, SC

Appellate Case No. 2014-001514

INITIAL REPLY BRIEF OF APPELLANTS SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND SOUTHERN ALLIANCE FOR CLEAN ENERGY

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INTRODUCTION

This appeal concerns the decision of the Public Service Commission of South Carolina (the "Commission") to grant a Certificate of Environmental Compatibility and Public Convenience and Necessity ("Certificate") for the construction and operation of a 750 megawatt ("MW") combined cycle natural gas-fired generating facility at Duke Energy Carolinas, LLC's ("DEC") existing Lee Steam Station near Anderson, South Carolina (the "Lee Gas Plant").

Appellants, the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy, have appealed the Certificate Order on two grounds, as set forth in their statement of issues on appeal and as discussed in their initial brief. First, when issuing the Certificate for the Lee Gas Plant, the Commission erred by failing to consider or require a solar component proposed by Appellants that would reduce the costs borne by customers, as well as air emissions and water use. Second, the Commission erred in finding that the Lee Gas Plant's environmental impact was justified, considering the state of available technology and the nature and economics of the various alternatives—specifically, Appellants' solar proposal—as required before granting a Certificate.

Respondents, DEC and its co-applicant the North Carolina Electric Membership Corporation ("NCEMC"), as well as the South Carolina Office of Regulatory Staff ("ORS"), which supported the Application, contend that the Commission did not err. Their basic contention is that the Commission was right to reject Appellants' proposal because that proposal sought to require DEC to construct more maximum energy generation capability (expressed as megawatts [MW] of "capacity") than is needed. But the record shows that Appellants' solar proposal, while expressed in terms of capacity,

was designed to yield a volume of electrical generation (expressed as megawatt-hours [MWhs] of "energy" or "power"), that could be used to complement and offset generation by the proposed natural gas facility. The Appellants did not propose to change the physical nature of the proposed combined cycle gas plant, or alter its maximum rated energy production capacity (750 MW). Instead, they proposed that the Commission condition the Certificate on the requirement that DEC issue a "request for proposals" ("RFP") for solar capacity up to a specified amount. According to Appellants' proposal, the MWhs generated by this solar capacity would offset MWhs that would otherwise need to be generated by the Lee Gas Plant to meet customer needs, and thus (by reducing the amount of gas burned) lessen that facility's environmental impact and reduce the cost to customers.

As discussed below, Respondents' arguments supporting the Commission's decision to reject Appellants' proposed solar condition do not remedy the legal error that occurred. At the end of the day, the Commission simply failed to actually consider a proposal put forth in the record that would reduce the Lee Gas Plant's environmental impact at no cost, and potentially some savings, to customers.

ARGUMENT

I. THE COMMISSION'S DECISION TO REJECT APPELLANTS' PROPOSED SOLAR CONDITION WAS ERRONEOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Because the Commission failed to consider the solar proposal actually put forth by Appellants, its rejection of the proposal was clearly erroneous in view of the record evidence.

Before issuing a Certificate, the Commission was required to "find and determine," among other things, that the Lee Gas Plant's environmental impact was "justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations." S.C. Code Ann. § 58-33-160. The Commission has the authority to grant a Certificate "upon such terms, conditions or modifications . . . as the Commission may deem appropriate." *Id.*

Appellants recommended that the Commission condition its grant of the Certificate on a requirement that DEC issue a request for proposals ("RFP") for solar power. In essence, this would be an operating condition, such that if (and only if) solar bids came in at a price at or below the cost of generating energy from the Lee Gas Plant, DEC would use the solar to reduce operation of the gas plant commensurately, thereby reducing its emission of air pollution and its consumption of water from the Saluda River.

It is uncontested that Appellants' proposal would indeed reduce those environmental impacts, yet the Commission rejected the proposed condition, in contravention of its authority to impose economically feasible conditions and modifications to reduce environmental impacts. The Commission committed clear error in failing to undertake any meaningful review of the option put forth by Appellants, and by endorsing the utility's proposal with no independent analysis whatsoever.

Both DEC/NCEMC and ORS attempt to bolster the Commission's decision, with each side attacking from a different (and somewhat contradictory) angle. DEC/NCEMC argue that the Commission understood Appellants' solar proposal and properly rejected it, whereas ORS argues that Appellants did not clearly state their proposal in testimony before the Commission and, in fact, modified it after the hearing in a petition filed with the Commission and in their initial brief to this Court. An examination of the Commission's findings and the record evidence reveals that both DEC/NCEMC and ORS are wrong.

1. The Commission either ignored or misunderstood evidence submitted by Appellants, and therefore its decision was arbitrary and clearly erroneous in view of the record evidence.

Appellants explained their proposed solar RFP condition in testimony pre-filed with the Commission as well as in testimony at the hearing. The proposal is as follows. First, using its 30-year forecast of fuel and other variable costs for the Lee Gas Plant, DEC would develop a "benchmark" price at which customers would be indifferent to whether the electricity was generated by the Lee Gas Plant or a solar facility (or facilities). (Tr. Vol. 2, p. 199, lines 5-7; R. p. __, lines __.) Second, DEC would issue an RFP for up to 375 MW of solar capacity at or near the Lee site. (Tr. Vol. 2, p. 203, lines 6-12; R. p. __, lines __.) While expressed as an RFP for "capacity," the aim of the RFP and of the Appellants' proposal generally was to elicit bids for projects that could actually deliver megawatt-hours of energy to be used in lieu of megawatt-hours of energy from the proposed Lee Gas Plant. The goal was not to change the size or capacity of the plant proposed by DEC/NCEMC (it would still have a maximum potential output of 750 MW), but to provide energy that could enable the Lee Gas Plant to "ramp down" and

reduce its production of electricity, and thus its consumption of gas and its pollution, when it could be offset by solar generation. (Tr. Vol. 2, p. 181, lines 2-12; R. p. __, lines __.)

Importantly, DEC would only accept bids from solar developers if they came in *below* the benchmark price; *i.e.*, by definition, at a price lower than the long-term cost of operating the Lee Gas Plant to produce the same amount of power. (Tr. Vol. 2, p. 180, lines 20-24; R. p. __, lines __.) DEC/NCEMC claim that "the Commission's orders show it did understand the Appellants' solar proposal and that the Commission rejected it for compelling reasons." DEC/NCEMC Br. p. 11. ORS also asserts that the Commission did not misunderstand or misapply Appellants' position. But the Commission's order itself belies this claim. Indeed, the very same statements cited and/or quoted by DEC/NCEMC on page 12 of its brief, and by ORS on pages 11-12 of its brief, set forth below in bold font, show that the Commission either did not understand or apprehend the actual proposal before it, and that its summary rejection of Appellant's proposal was groundless. Said another way, the grounds given by the Commission for rejecting Appellants' proposal simply do not apply to Appellants' proposal.

- **"Solar energy has a much lower operating capacity factor due to its limited availability, making it not an optimal source for base or intermediate load."** (Order No. 2014-408, pp. 12-13; R. p. ___.) This statement shows that the Commission fundamentally misapprehended Appellants' proposal. Appellants are well aware of the intermittent nature of solar—indeed, they cited a roughly 22% capacity factor for utility scale solar in the Southeast in testimony to the Commission (Tr. Vol. 2, p. 198, lines 13-15; R. p. __, lines __.) Appellants *did*

not, however, propose that solar be built *instead of* the Lee Gas Plant, *i.e.*, as a replacement intermediate or base load capacity resource. What Appellants proposed was using solar generation to *complement* production from the gas plant, so that available solar power could offset generation by the gas plant and consequently reduce its fuel costs and environmental impacts. (Tr. Vol. 2, p. 181, lines 2-12; R. p. __, lines __.)

- **"[T]he LCCP could not be built with lower than the [DEC] needed 650 MWs, since [DEC] has demonstrated a need for this additional capacity in the 2017-2018 time frame."** (Order No. 2014-408, p. 13; R. p. ___). Again, this shows the Commission was responding to something other than what Appellants proposed in the record. Appellants did not say that their solar component meant that DEC/NCEMC should build less natural gas capacity than that necessary to meet their claimed need.

- **"The reliability and operating capacity of the proposed solar facility is below the required need; therefore, it is not appropriate to meet the capacity needs of the proposed project."** Order No. 2014-408, p. 13; R. p. ___). Again, Appellants did not propose that DEC/NCEMC build less capacity than that necessary to meet their claimed need. Rather, Appellants proposed an RFP for solar capacity that would complement the Lee Gas Plant by producing energy that would enable reduction in generation from the gas plant (and thus reduction in its fuel and operating costs as well as environmental impacts). As Appellants' witness Hamilton Davis explained, the additional solar "is not a capacity need; it's an offset of costs associated with running Lee." (Tr. Vol. 2, p. 205, lines 5-7;

R. p. __, lines __.) Had the Appellants actually proposed to reduce the capacity of the Lee Gas Plant, there would be some indication of that in the record; for example, testimony opposing construction of the proposed 750 MW facility, or favoring construction of a smaller gas facility. But the record is devoid of any such recommendation.

- **"[A]ny MWs generated from solar would be in addition to the 650 MW capacity requirements."** (Order No. 2014-408, p. 13; R. p. __.) This statement reveals a central reason that that the Commission failed actually to consider the Appellants' proposal—it conflated the concepts of generating capacity (a facility's maximum output, expressed in megawatts, or "MW") and energy production (also known as generation, expressed in megawatt-hours, or "MWh").[1] The MWh of energy that would be produced pursuant to the solar RFP would reduce the need to generate MWh from the Lee Gas Plant. As explained by Appellants' witness Davis, the solar RFP condition would allow "ramping down . . . [a] percentage of the operations" at the gas plant and "replacing that with the solar." (Tr. Vol. 2, p. 205, line 23-p. 206, line 1; R. p. __, line __-p. __, line __.)

- **"Based upon Duke's Integrated Resource Plan [which shows future planning for electricity needs], the additional 375 MW of solar capacity sought by [Appellants] are not needed at this time."** (Order No. 2014-408, p. 13; R. p. __.) Again, this statement bespeaks a fundamental failure to actually consider the evidence and testimony that set forth the Appellants' proposal.

[1] Footnote 1 in ORS' brief sets out the definitions of "capacity" and "generation" on the U.S. Energy Information Administration web site.

While the proposed condition would *incidentally* provide some additional solar capacity, it was not proposed to meet the capacity need identified in DEC's IRP; rather, the thrust of the proposal is to provide energy (MWhs) to offset the need to generate energy from natural gas. As Witness Davis testified, "it's complementary capacity that would offset some of the operations of Lee and also potentially some of its costs." (Tr. Vol. 2, p. 205, lines 12-14; R. p. __, lines __.)

- **"We do not think it is good practice for this Commission to grant permission for the Company build or secure more capacity than is needed as this could ultimately result in customers paying more than necessary for electric service."** (Order No. 2014-408, p. 13; R. p. __.) While true as a general principle of public utility regulation, this statement ignores a crucial aspect of Appellants' proposal, which is that to meet the RFP's requirements, a qualifying solar bid would have to meet or beat a benchmark price set at the long-term operating cost of the Lee Gas Plant. The Appellants' proposal, if it resulted in DEC taking any solar MWh at all, would by definition result in MWh equal or lower in price to the MWh they would displace from the Lee plant. As explained by Appellants' witness John D. Wilson: "Because the cost of a solar power component would be delivered at or below the benchmark, the incremental capital costs of the solar facility would be more than compensated for by the savings in the operating costs." (Tr. Vol. 2, p. 181, lines 8-12; R. p. __, lines __.)

2. ORS's claim that Appellants modified their solar RFP proposal after initially presenting it to the Commission is belied by the record.

ORS contends that Appellants' solar RFP condition was properly rejected by the PSC and should be ignored by this Court because Appellants did not fairly present their position to the Commission during the hearing, and modified their position in their Petition for Rehearing or Reconsideration and in their initial brief to this Court. ORS suggests that Appellants deliberately kept "an ace up their sleeve" in order to get "another bite at the apple." ORS Br. p. 13-14. The Commission's failure to acknowledge and evaluate Appellants' proposal has nothing to do with any gamesmanship by Appellants, and ORS's claims otherwise do not bear scrutiny.

According to ORS, Appellants have modified their position in two respects. First, ORS states, "[i]n its Petition for Rehearing, the Appellants state that the 375 MW solar RFP is not to be above and beyond the 750 MW, but instead the proposal is for solar to offset plant operating costs, when cost-effective to do so." ORS Br. pp. 12-13. The statement cited (but not quoted) by ORS actually reads:

> [T]he Order misapprehends the nature and intent of [Appellants'] solar recommendation as ***simply*** a request to require solar capacity above and beyond the capacity of the gas plant, when the proposal in fact is for solar to offset plant operating costs, when cost-effective to do so.

(Petition for Rehearing, p. 2; R. p. __.) (emphasis added). As explained above, this is an entirely accurate characterization of Appellants' proposal to the Commission. Yet the Commission nevertheless misunderstood the Appellants to be requesting additional generating capacity (*i.e.*, maximum energy production capability) for its own sake, rather than as complementary capacity that would produce fuel-free energy and reduce the need for energy production at the gas plant. A petition for rehearing, filed to alert an

adjudicator that it misunderstood a party's position, is hardly untoward; it is routine, and exactly why such petitions are allowed. *See* S.C. Code Ann. Regs. § 103-825(4) ("[a] Petition for Rehearing or Reconsideration shall set forth clearly and concisely: . . . [t]he *alleged error or errors* in the Commission order . . . .") (emphasis added).

ORS also claims that Appellants failed to plainly state their position that ratepayers would be "held harmless" under their proposal until their Petition for Rehearing. The record belies this as well. Appellants were careful to explain this aspect of the proposal—a crucial one—as clearly as they could. As Appellants' witness Davis testified:

> [DEC] would establish a benchmark price where it would be cheaper to enter into this contract for this solar capacity than it would be to run the natural gas plant . . . If that is not a wash or a net benefit to ratepayers, then Duke wouldn't move forward with that proposal. It would be triggered if the costs were neutral to ratepayers or a reduction in costs to ratepayers, so there's no risk on the front end, or back end, of this as we have proposed it.

(Tr. Vol 2, p. 205, line 20-p. 206, line 6; R. p. __, line __-p. __, line __.)

To the extent the Respondents were confused by Appellants' testimony, their counsel had an opportunity to cross-examine Appellants' witnesses at the evidentiary hearing before the Commission. They declined to ask a single question. (Tr. Vol. 2, p. 204, lines 1-9; R. p. __, lines __.)

The Commission, for its part, also largely chose to forgo the opportunity to seek clarification from Appellants' witnesses. Only one Commissioner asked any questions, and he asked only two. (Tr. Vol. 2, p. 204, line 19-p. 206, line 6:, R. pp. ___.) After Appellants' witnesses had left the stand, one Commissioner directed a question about

Appellants' proposal to ORS witness Gene Soult, a Senior Research Analyst with over 30 years' experience in the electric utility industry, this exchange followed:

Q I wish I'd asked this question to the panel before, but you heard the testimony of Mr. Davis and Mr. Wilson.
A I did.
Q And when you were looking at this project, are there other projects that have been built similar to what they propose to do?
A Yes, ma'am -- other projects as what Wilson and them have described?
Q Uh-huh.
A Not to my knowledge, dealing with the solar and the combined-cycle project -- is that what you're asking?
Q Yes, I am.
A I do not know of one, ma'am.

Tr. Vol. 2 at 218-219, R. p. ___.[2] When counsel for Appellants offered to put Appellants' witnesses back on the stand to answer the question, the presiding Commissioner declined, but just after the hearing was adjourned the Hearing Officer granted leave to submit a late-filed exhibit with information responsive to the Commissioner's question. Appellants then submitted an exhibit summarizing several examples of solar projects that have been linked to natural gas generation in an effort to reduce fuel costs borne by customers, either co-located at the same site or as part of a utility resource portfolio. (Hrg. Ex. 7, Tr. Vol. 2; p. 221, R. p. ___.) Although the exhibit was received into evidence, these examples were not mentioned in the Commission's order.

3. Conclusion

A decision by the Commission warrants reversal by this Court if, among other things, it was "clearly erroneous in view of the reliable, probative, and substantial

[2] Line numbers are missing from this portion of the transcript.

evidence on the whole record." S.C. Code Ann. § 1-23-380(5)(e). Although this standard of review is deferential, it "does not mean . . . the Court will accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." *Porter v. S. Carolina Pub. Serv. Comm'n*, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998).

Appellants' solar proposal was concededly a concept that had not previously been proposed to the Commission by other parties. But substantial evidence in the record supported Appellants' proposal, and the Commission was required to explain its reasoning for rejecting Appellants' solar proposal. *Porter*, 333 S.C. at 21, 507 S.E.2d at 332. The Commission's explanations show that it fundamentally misunderstood Appellants' testimony in support of their solar recommendation. Because the Commission's characterization of Appellants' recommendation was unsupported by the evidence, its decision to reject that recommendation was clearly erroneous in view of the substantial evidence in the record.

B. The Commission has authority to modify or condition a Certificate, and erred in failing to exercise that authority.

The Commission concluded, erroneously, that it lacked the authority to attach Appellants' proposed solar condition to the Certificate. ORS argues that the Commission did not err in declining to apply the Siting Act's modification clause, which authorizes the Commission to grant a Certificate "upon such terms, conditions or modifications . . . as the Commission may deem appropriate." S.C. Code Ann. § 58-33-160. In support of this contention, ORS points to the Commission's statement in the Certificate Order that it was "questionable whether this Commission can change the type of facility being requested by the Company." (Order No. 2014-408, p. 14, R. pp. __.)

Appellants did not seek to alter the Lee Gas Plant itself, however. As discussed in detail in Section I.A., above, Appellants did not propose that the facility for which the Applicants sought a Certificate—a 750 MW combined-cycle natural gas plant—be physically altered. Instead, their proposed solar RFP would complement the gas plant by reducing its need to operate and consequently its fuel costs and environmental impacts. (Tr. Vol. 2, p. 181, lines 2-12; R. p. __, lines __.) Thus, Appellants' solar proposal was aimed at reducing the Lee Gas Plant's operational costs and environmental impacts, in light of the Siting Act's requirement that a Certificate only be granted where the Commission finds that the facility's environmental impact "is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations." S.C. Code Ann. § 58-33-160(b), (c).

It is a well-recognized principle of public utility regulation that a commission may attach reasonable terms or modifications to the grant of a certificate:

> A public utilities commission may, in the public interest, annex reasonable conditions or limitations to a certificate of convenience and necessity. Such conditions must be within the express or implied power of the commission conferred by statute, but the commission has discretion to impose equitable conditions.

73B C.J.S. *Public Utilities* § 186 (2013). Consistent with this principle, the Siting Act empowers the Commission either to grant or deny the application for a Certificate as filed, or to grant it "upon such terms, conditions or modifications of the construction, operation or maintenance of the major utility facility as the Commission may deem appropriate." S.C. Code Ann. § 58-33-160. Our Supreme Court has explained that an administrative body such as the Commission has broad authority in discharging its statutory duties:

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the Field which the regulations may cover. They may imply or express restricting limitations of public policy. And of course they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it.

Carolina Water Serv., Inc. v. S. Carolina Pub. Serv. Comm'n, 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978) (quoting *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948)) (holding Commission had implied authority to determine whether a water service fee was a tap fee or customer contribution in aid of construction for purposes of setting reasonable water service rate). The Siting Act thus confers wide latitude for the Commission to attach appropriate conditions to a Certificate, commensurate with its duty to examine economical alternatives that would minimize environmental harm. While that authority would indeed be broad enough to allow the Commission to insist on physical changes to a proposed facility, that is not what Appellants recommended. The Commission's failure to consider Appellants' proposed solar condition, citing a professed lack of authority, was clear legal error.

That error is not excused by Respondents' concerns about public notice requirements. They point to the Commission's concern that it is "questionable whether this would be permitted under the Siting Act given that such a grant of permission would be enlarging the scope of the Application without notice to the public." Order No. (Order No. 2014-408, pp. 13-14, R. p. __.) While Appellants certainly appreciate and support the need to provide proper notice to public, the concern here rests on a misstatement of Appellants' proposal, and the Commission's own procedures provide a clear path to

providing public notice of any solar facilities constructed or power purchased pursuant to the RFP proposed by Appellants.

Appellants only recommended that Commission condition its grant of a Certificate on DEC's issuance of the RFP. As discussed in detail in Section I.A., it is not a foregone conclusion that DEC would accept any solar bids submitted in response to its RFP, because it would only accept bids that could meet the benchmark price. The RFP process would unfold, and any solar facilities that DEC selected pursuant to the RFP would need to go through appropriate regulatory proceedings, including public notice if applicable. Moreover, the Siting Act does not preclude the Commission from requiring an applicant to re-notice an application that has been granted subject to conditions or modifications. S.C. Code Ann. § 58-33-160(2). The Siting Act thus provides established public notice procedures. If the Commission had determined that the solar RFP condition would require additional public notice, the Siting Act authorized it to require or condition its granting of the application on such further notice. The concern about public notice is simply a red herring.

II. THE COMMISSION'S FINDING THAT THE LEE GAS PLANT'S ENVIRONMENTAL IMPACT WAS JUSTIFIED WAS INSUFFICIENTLY DETAILED AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Before issuing a Certificate, the Commission was required to "find and determine," among other things, "the nature of [the facility's] probable environmental impact," and that this impact "is justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations." S.C. Code Ann. § 58-33-160(b), (c). As explained in Appellants' initial brief, the Commission failed to make specific, detailed findings regarding the facility's environmental impact and the ability of available alternatives to reduce this impact, in

contravention of the Siting Act's requirements. Instead, the Commission merely repeated in summary form the favorable testimony of DEC and ORS witnesses regarding the Lee Gas Plant's general environmental attributes, with no acknowledgment—let alone detailed discussion—of conflicting testimony in the record about the plant's air pollution emissions and water consumption. In addition, as discussed in detail in Section I.A., above, the Commission ignored or misunderstood much of Appellants' testimony regarding their solar proposal, and as a result, the Commission's findings regarding alternatives were not supported by substantial evidence.

Respondents counter that the Commission's findings regarding the environmental impact of the Lee Gas Plant were adequate and supported by substantial evidence, pointing to evidence that they claim supported the Commission's findings, emphasizing the page count of the Application and providing citations to testimony by the Lee Gas Plant's proponents regarding its asserted minimal environmental impacts. While ORS acknowledges the existence of testimony regarding negative environmental impacts, the Respondents can provide no citation to any discussion of this conflicting evidence by the Commission in its order—because there is none. The record, in fact, shows that the Commission ignored this conflicting evidence entirely.

ORS quibbles that the testimony about negative environmental impacts was elicited through cross-examination rather than presented by Appellants' witnesses.[3] In fact, the pre-filed direct testimony of DEC's own witness Mark E. Landseidel discussed pollution emissions from the Lee Gas Plant, including nitrogen oxides ("NOx"), carbon monoxide and volatile organic compounds. (Tr. Vol. 2 p. 157, line 20-p. 158, line 2; R. p.

[3] ORS states that "Appellants' testimony did not discuss pollutants, but discussed emissions in the context of a solar facility having lower emissions than the proposed plant." ORS Br., p. 16. This is pure semantics, as "pollutants" and "emissions" are different ways of saying the same thing.

__, lines __.) Mr. Landseidel also testified that the Lee Gas Plant would consume an estimated 10 cubic feet per second of water from the Saluda River, which is a drinking water source. (Tr. Vol. 2, p. 159, lines 11-13; R. p. __, lines __.) On cross-examination, Mr. Landseidel agreed that operating the unit at a lower output would reduce water use. (Tr. Vol. 2, p. 166, line 23; R. p. __, line __.) He also conceded that operations at lower power would reduce emission of air pollution such as NOx. (Tr. Vol. 2, p. 167, line 18; R. p. __, line __.) The Commission was made aware that the Lee Gas Plant will have some negative environmental effects, and was presented with a proposal to reduce them, yet its Certificate Order failed to acknowledge these environmental impacts, let alone discuss them in detail.

Respondents emphasize the deference to be accorded the Commission under the substantial evidence standard; however, that does not end the inquiry. The Commission's findings "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Commc'ns, Inc. v. S. Carolina Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). As is the case here, "[w]here material facts are in dispute, the administrative body must make specific, express findings of fact," *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S. Carolina*, 338 S.C. 92, 96, 525 S.E.2d 863, 865 (1999), and "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues," *Able Commc'ns, Inc.*, 290 S.C. at 411, 351 S.E.2d at 152.

Here, the Commission did not even acknowledge conflicting testimony. Instead, it merely summarized the proponents' favorable testimony regarding the proposed

facility's positive environmental attributes and made a general conclusion without even discussing testimony by the same witnesses acknowledging the negative impacts of the facility or attempting to resolve any factual differences about those impacts. The Commission's findings regarding the Lee Gas Plant's environmental impacts were one-sided, generalized, and patently insufficient. Its Certificate Order should be reversed, and the matter remanded for proper evaluation.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reject the arguments made by Respondents, reverse the Commission's grant of a Certificate to DEC and NCEMC, and remand this matter to the Commission.

Respectfully submitted this 22nd day of January, 2015.

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THE STATE OF SOUTH CAROLINA
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Appellate Case No. 2014-001514

CERTIFICATE OF SERVICE

I certify that I have served the Appellants' Initial Reply Brief on Appeal on all parties by depositing a copy of it in the United States Mail, postage prepaid, on January 22, 2015, addressed to their attorneys of record, as indicated below:

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January 22, 2015

VIA U.S. MAIL

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Re: In The Matter of Joint Application of Duke Energy Carolinas
Appellate Case No. 2014-001514

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Reply Brief of Appellants Southern Alliance for Clean Energy and the South Carolina Coastal Conservation League. Please file-stamp the copy and return it to me in the enclosed self-addressed, stamped envelope.

If I can answer any questions, please do not hesitate to let me know.

Sincerely,

J. Blanding Holman, IV
Attorney for Appellants

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Enclosures
cc: All Counsel of Record

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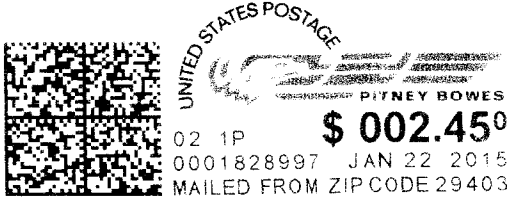
SC 29403-7204



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