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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2013-392-E
Appellate Case No. 2014-001514

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 750 MW Combined Generating Plant Near Anderson, SC

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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COUNTERSTATEMENT OF ISSUES PRESENTED

I. DID THE PUBLIC SERVICE COMMISSION ERR IN GRANTING THE CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC CONVENIENCE AND NECESSITY?

II. ARE THE PUBLIC SERVICE COMMISSION'S FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF THE CASE

This case is under the purview of the South Carolina Utility Facility Siting and Environmental Protection Act ("the Siting Act"), S.C. Code Ann. § 58-33-10 *et. seq.* (1976 and Supp. 2014). The South Carolina Coastal Conservation League ("CCL") and Southern Alliance for Clean Energy ("SACE") (collectively "the Appellants") appeal two orders issued by the Public Service Commission of South Carolina (the "Commission") in Docket No. 2013-392-E which granted Duke Energy Carolinas, LLC ("Duke Energy") and the North Carolina Electric Membership Corporation ("NCEMC") (collectively "the Applicants") a Certificate of Environmental Compatibility and Public Convenience and Necessity ("CECPCN") pursuant to the Siting Act. The CECPCN grants Duke Energy and NCEMC permission to construct and operate a 750 megawatt ("MW") combined cycle natural gas-fired generating plant near Anderson, South Carolina (the "Lee Unit," "Lee NGCC Unit," or "LCCP"). These orders, Order No. 2014-408 and Order No. 2014-546 ("the Orders"), were issued on May 2, 2014 and July 30, 2014, respectively.

The South Carolina Office of Regulatory Staff ("ORS") is a required party to the CECPCN proceeding ("CECPCN proceeding" or "certification proceeding") pursuant to S.C. Code Ann. §§ 58-4-10(B) (Supp. 2014) and 58-33-140(1)(b) (Supp. 2014). In addition, S.C. Code Ann. § 58-33-140(1)(b) requires other parties to the CECPCN proceeding; however, those parties did not have counsel file a Notice of Appearance and did not participate in discovery or the hearing. The Applicants, Appellants and ORS were the only active parties in the matter.

On January 3, 2014, ORS and the Applicants filed a Settlement Agreement wherein ORS endorsed the Application of Duke and NCEMC. The Appellants declined the opportunity to join the Settlement Agreement.

On January 7, 2014, the Commission convened a formal hearing on the Application. On May 2, 2014, the Commission issued Order No. 2014-408 granting the CECPCN and approving the Settlement Agreement. On May 15, 2014, the Appellants filed a Petition for Rehearing stating the CECPCN was not granted in compliance with the Siting Act. The Commission denied the Petition for Rehearing in Order No. 2014-546 dated July 30, 2014. This appeal of the Commission's orders ensued with ORS receiving the Notice of Appeal on July 7, 2014.

STATEMENT OF FACTS

On October 24, 2013, the Applicants filed an Application requesting a CECPCN pursuant to the Siting Act to build a 750 MW combined cycle natural gas-fired generating plant near Anderson, South Carolina. S.C. Code Ann. § 58-33-10 *et. seq.* (1976 and Supp. 2014). The Siting Act requires a CECPCN from the Commission prior to the construction of a major utility facility. S.C. Code Ann. § 58-33-110(1) (1976). A major utility facility is defined as (1) an electric generating plant and associated facilities designed for, or capable of, operation at a capacity of more than 75 MW or (2) an electric transmission line and associated facilities of a designed operating voltage of 125 kilovolts or more. S.C. Code Ann. § 58-33-20(2)(a) and (b) (1976 and Supp. 2014).

The Commission has exclusive jurisdiction to rule on Siting Act CECPCN applications. S.C. Code Ann. § 58-33-110(1) (1976). Before granting a CECPCN for the construction, operation and maintenance of a major utility facility, the Commission is

required to make six statutorily-mandated findings pursuant to S.C. Code Ann. § 58-33-160(1) (1976). Those findings concern:

A. The basis of the need for the facility. S.C. Code Ann. § 58-33-160(1)(a);

B. The nature of the probable environmental impact of the facility. S.C. Code Ann. § 58-33-160(1)(b);

C. Whether the impact of the facility upon the environment 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(1)(c);

D. Whether the facilities will serve the interests of system economy and reliability. S.C. Code Ann. § 58-33-160(1)(d);

E. Whether there is reasonable assurance that the proposed facility will conform to applicable state and local laws and regulations issued thereunder, including any allowable variance provisions therein, except that the Commission may refuse to apply any local law or local regulation that is unreasonably restrictive. S.C. Code Ann. § 58-33-160(1)(e); and

F. Whether public convenience and necessity require the construction of the facility. S.C. Code Ann. § 58-33-160(1)(f).

Commission rules and regulation require all parties to pre-file written testimony prior to the hearing. S.C. Code Ann. § 58-3-140(D) and 10 S.C. Code Ann. Regs. 103-845.C. (2012). The Applicants included pre-filed written direct testimony with their Application in lieu of waiting to file their testimony on a later Commission-determined due date.

ORS is a required party to the CECPCN proceeding pursuant to S.C. Code Ann. §§ 58-4-10(B) (Supp. 2014) and 58-33-140(1)(b) (Supp. 2014). ORS is mandated to "represent the public interest of South Carolina before the commission." S.C. Code Ann. § 58-4-10(B) (Supp. 2014). The "public interest" is defined in S.C. Code Ann § 58-4-10(B) as a balancing of the:

> (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
> (2) economic development and job attraction and retention in South Carolina; and
> (3) preservation of the financial integrity of the state's public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.

In addition to the Applicants and ORS, S.C. Code Ann. § 58-33-140(1) (Supp. 2014) of the Siting Act names the following parties to the CECPCN proceeding: (1) the South Carolina Department of Health and Environmental Control ("DHEC"), (2) the South Carolina Department of Natural Resources ("DNR"), (3) the South Carolina Department of Parks, Recreation and Tourism ("PRT"), (4) the chief executive officer of each municipality, and the head of each state and local government agency, charged with the duty of protecting the environment or of planning land use, in the area in the county in which any portion of the facility is set to be located if it has filed a notice of intervention as a party within thirty days after the date it was served with a copy of the Application, and (5) any domestic nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health, or other biological values, to preserve historical sites, to promote consumer interest, to represent commercial and industrial groups, or to promote the orderly development of the

area in which the facility is to be located. Accordingly, the Application along with the testimony included with it was served on (1) ORS, (2) DHEC, (3) DNR, (4) PRT, (5) South Carolina Department of Commerce, (6) South Carolina Department of Archives & History, (7) South Carolina Department of Transportation, (8) South Carolina Institute of Archaeology & Anthropology, (9) South Carolina Department of Forestry Commission, (10) the Mayor of the Town of Williamston, (11) the Mayor of the Town of West Pelzer, (12) the Mayor of the Town of Pelzer, (13) the Mayor of the City of Belton, (14) the Mayor of the City of Greenville, (15) the Chairman of the Anderson County Council, (16) Anderson County Planning & Community Development, (17) Anderson County Parks, Recreation & Tourism, (18) Williamston Town Administrator, (19) Belton City Administrator, (20) Greenville City Manager, (21) Pelzer Town Administrator, (22) West Pelzer Town Clerk, and (23) Anderson Town Administrator. (R. p. 48-49.) Among the 23 entities or persons that received service of the Application and the Applicants' pre-filed written direct testimony, only ORS filed a Notice of Appearance and participated in discovery and the hearing. The end result was that only ORS, Appellants, and the Applicants participated in the CECPCN proceeding.

Notice of the Application was published in five newspapers: (1) The Williamston Journal, (2) Anderson Independent Mail, (3) Belton News-Chronicle, (4) The Greenville News, and (5) Anderson Observer. An affidavit was filed with the Commission from each newspaper affirming the notice was published. (R. p. 50-56.)

On the Commission-issued due dates during December 2013, ORS and the Appellants filed their respective written direct testimony, the Applicants filed written rebuttal testimony in response to the Appellants' direct testimony, and lastly, the

Appellants filed surrebuttal written testimony in response to the Applicants' rebuttal testimony. ORS's witness, Senior Research Analyst Gene Soult, has over 30 years of experience related to all aspects of nuclear, hydro, and fossil generation. (R. p. 331, lines 19-22.) Mr. Soult testified about ORS's review of the Application, its supporting testimony, and responses to ORS discovery. (R. p. 331, line 23 – p. 332, line 16.) Mr. Soult concluded the requirements of the Siting Act were met, and this position was affirmed by ORS joining the Settlement Agreement supporting the Application. (R. p.333, lines 18-21 and R. p. 20-27.)

Appellants' witnesses, SCCCL Energy and Climate Director Hamilton Davis and SACE Director of Research John Wilson, made three recommendations to the Commission in their direct pre-filed written testimony. (R. p. 305, lines 9-21.) First, they recommended the Commission condition any certification of the Lee Unit on an in service date of 2018 rather than 2017 as proposed in the Application. *Id.* Second, they recommended that the Commission ensure exhaustion of cost-effective opportunities to defer or avoid the additional Lee Unit through lower-cost, lower-risk resources. *Id.* Third, they recommended the Commission direct Duke Energy to solicit developer interest in a 375 MW solar facility located at or near the Lee Unit site at a cost consistent with the cost to operate the Lee Unit. *Id.* The third recommendation was restated in their written testimony as, "We recommend that the Commission, as a condition of any certification of the proposed Lee NGCC Unit, require the Company to develop or procure, through an RFP [request for proposal] process initiated in 2014, an additional 375 MW of solar capacity at or near the Lee site.... [W]e further recommend that the Commission require that the best proposals that meet Duke Energy's minimum terms be

accepted up to 375 MW of solar capacity." (R. p. 322, lines 6-12.) It is the Appellants' third recommendation that is the crux of this appeal.

On January 3, 2014, ORS and the Applicants filed a Settlement Agreement wherein ORS endorsed the Application of Duke and NCEMC. (R. p. 20-27.) The Appellants declined the opportunity to join the Settlement Agreement.

On January 7, 2014, the Commission convened a formal hearing on the Application. On May 2, 2014, the Commission issued Order No. 2014-408 granting the CECPCN and approving the Settlement Agreement. On May 15, 2014, the Appellants filed a Petition for Rehearing stating the CECPCN was not granted in compliance with the Siting Act. The Commission denied the Petition for Rehearing in Order No. 2014-546 dated July 30, 2014. This appeal of the Commission's orders ensued.

STANDARD OF REVIEW

"This Court employs a deferential standard of review when reviewing a PSC decision and will affirm that decision when substantial evidence supports it." *S.C. Energy Users Comm. v. Pub. Serv. Comm'n of S.C.*, 388 S.C. 486, 490, 697 S.E.2d 587, 589-90 (2010) (citing *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2014)). This standard of review, as established in the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380, provides that this Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2014); *Long Cove Home Owners' Ass'n, Inc. v. Beaufort Cnty. Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857, 860 (1997). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or

decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e),(f) (Supp. 2014). Under this "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. *See Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 603-4, 550 S.E.2d 287, 292-3 (2001). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Waters v. S.C. Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996) (citing *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n,* 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). "[T]he burden is on Appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters*, 321 S.C. at 226, 467 S.E.2d at 917.

On matters of statutory construction, "[t]his Court, although not bound by the decision, will ordinarily defer to the opinion of a state agency as to the interpretation of a statute it is charged with the duty of enforcing." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 362, 669 S.E.2d 899, 906 (2008). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling

reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (citing *Dunton v. S.C. Bd. of Examiners in Optometry,* 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Thus, because the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole. *S.C. Energy Users Comm.*, 388 S.C. at 491, 697 S.E.2d at 590 (citing *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. at 558, 541 S.E.2d at 252 (2001)); *see also* S.C. Code Ann. § 1-23-380(A)(6).

ARGUMENT

I. THE COMMISSION DID NOT ERR IN ITS DECISION APPLYING THE SITING ACT AND ITS DECISION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellants argue the Commission (a) misunderstood and misapplied Appellants' position; (b) did not appropriately consider the environmental impact; and (c) erroneously concluded that it could not alter the Application. (Brief p. 10-17.) (R. p.97-101.)

A. The Commission did not misunderstand or misapply Appellants' position

Appellants assert their position has been misunderstood and misapplied. (Brief p. 10-12.) (R. p. 97-101.) ORS disagrees. The position asserted in Appellants' Petition for Reconsideration before the Commission and in Appellants' Brief before this Court has been modified from the position presented during the hearing.

In pre-filed testimony, Appellants recommended the Commission direct Duke Energy to solicit developer interest in a 375 MW solar facility located at or near the Lee

Unit site at a cost consistent with the cost to operate the Lee Unit. (R. p. 305, lines 19-21.) The above recommendation was repeated in Appellant's written direct testimony as, "We recommend that the Commission, as a condition of any certification of the proposed Lee NGCC Unit, require the Company to develop or procure, through an RFP process initiated in 2014, an additional 375 MW of solar capacity at or near the Lee site.... [W]e further recommend that the Commission require that the best proposals that meet Duke Energy's minimum terms be accepted up to 375 MW of solar capacity." (R. p. 322, lines 6-12.) At the hearing, Appellants testified that the solar capacity was not anticipated to be a capacity increase, but complementary capacity which could be used to offset the costs of operating the Lee Unit. (R. p. 324, lines 10-14.)

When reviewing Appellants' testimony as a whole, ORS understood Appellants' recommendation as one causing an additional 375 MW above and beyond the 750 MW Lee Unit. The recommended solar facility and its capacity, whether complementary or not, is additional capacity. Although ORS supported the certificate for the 750 MW Lee Unit, ORS was unwilling to support additional unneeded capacity. The Commission declined Appellants 375 MW solar recommendation setting forth the following reasons:

- Applicants demonstrated a need for a specified level of capacity in conjunction with energy production (also known as generation).[1] (R. p. 15-16.)

[1] The U.S. Energy Information Administration defines "capacity" and "generation" as follows:
"Capacity" is the maximum electric output a generator can produce under specific conditions. Nameplate capacity is determined by the generator's manufacturer and indicates the maximum output a generator can produce without exceeding design thermal limits.
"Generation" is the amount of electricity a generator produces over a specific period of time. For example, a generator with 1 megawatt ("mW") capacity that operates at that capacity consistently for one hour will produce 1 megawatthour ("mWh") of electricity. If it operates at only half that capacity for one hour, it will produce 0.5 mWh of electricity. Many generators do not operate at their full capacity all the time; they may

- A need was shown for the full 750 MWs that would be produced by the Lee Unit to meet base or intermediate load requirements at an expected capacity factor[2] between 50% to 75% for a period of 20 to 30 years.[3] *Id.*
- Solar energy has a much lower operating capacity factor due to its limited availability and reliability, making it not an optimal resource for base or intermediate load. *Id.* Any MWs generated from solar would be in addition to the Applicant-needed capacity requirements and capital investment would be needed to build a solar facility. (R. p. 16.)
- Based upon Duke Energy's Integrated Resource Plan which shows future planning for electricity needs, the additional 375 MW of solar capacity sought by the Appellants is not needed at this time. *Id.*

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vary their output according to conditions at the power plant, fuel costs, and/or as instructed from the electric power grid operator.
http://www.eia.gov/tools/faqs/faq.cfm?id=101&t=3

[2] The U.S. Energy Information Administration defines "capacity factor" as a measure of how often an electric generator runs for a specific period of time. It indicates how much electricity a generator actually produces relative to the maximum it could produce at continuous full power operation during the same period. For example, if a one megawatt generator produced 5,000 megawatthours the entire year, its capacity factor would be 0.57 or 57% (5,000 megawatthours / 8,760 megawatthours at full capacity for the entire year) of the total amount of electricity the generator could have produced if it operated at full capacity the entire year. Generators with relatively low fuel costs are usually operated to supply base load power and typically have average annual capacity factors of 0.70 or more. Conversely, generators with lower capacity factors might indicate average operation during peak demand periods and/or high fuel costs, or operation based on the availability of a variable energy source, such as hydro, solar, and wind energy.
http://www.eia.gov/tools/faqs/faq.cfm?id=187&t=3

[3] Applicant witness Hager testified:

> As CCL and SACE witnesses note, the largest solar facility in the world is under construction in Arizona and will provide 290 MWs of capacity. It is unclear why CCL and SACE believe the Anderson, South Carolina, area is a likely spot for an even larger facility. In addition, a 375 MW solar facility would be a poor substitute for the Lee CC Project. It would only provide approximately 150 MWs of summer peak equivalent capacity compared to the 750 MW Lee Project and can only provide about 10% of the energy that the Lee Project is capable of providing. . . . The 375 MW facility proposed by CCL and SACE would require approximately 2,625 acres of land. By contrast the footprint of the 750 MW Lee CC Project is estimated to be approximately 20 acres. (R. p. 207, lines 9-21.)

- It is not good practice to grant permission to build or secure more capacity than is needed as this could ultimately result in customers paying more than necessary for electric service. *Id.*
- Duke Energy could voluntarily submit an RFP to consider solar generation without the Commission requiring it to do so. (R. p. 17.)

The Commission's reasoning in Order No. 2014-408 shows that it had the same understanding of Appellants' recommendation as ORS.

After Commission Order No. 2014-408 was issued denying Appellants' recommendation, Appellants petitioned the Commission for a rehearing with the premise, among other things, that the Commission misapprehended the nature and intent of the solar recommendation, and because of the misunderstanding, the Commission's order is unsupported by substantial evidence. (R. p. 99.) In 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. (R. p. 89.) Appellants also state in their Petition for Rehearing that their recommendation is that (1) solar be used as a fuel substitute when available in order to offset the operating costs of the gas plant which mainly come from fuel[4] and (2) Duke Energy be required to issue a RFP for solar capacity that, as delivered, would displace production at the gas plant and reduce fuel burned there. (R. p.97-98.) Appellants' Petition further clarifies their position to state that customers should be "held harmless." (R. p. 98.)

[4] Applicants' Brief, which ORS supports, states why this recommendation is inconsistent with the requirements of S.C. Code Section 58-27-865(F).

The position presented to the Commission during the hearing process does not reflect what Appellants now claim to be their position. An issue raised for the first time in a party's petition for rehearing to the Commission is not preserved for judicial review. *See Kiawah Property Owners Group v. Public Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004). Here, Appellants' position that ratepayers are to be held harmless and the solar capacity is not to be in addition to the 750 MW is not plainly stated until its Petition for Rehearing.

The Appellants' failure to clearly state its position during the proceeding before the Commission is being couched in its Petition for Rehearing and Brief as a Commission misunderstanding of Appellants' position. It appears the Appellants are using the Petition for Rehearing and appellate process to re-characterize its arguments and position to get multiple bites at the apple.

When appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citing *Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 454, 211 S.E.2d 243, 244 (1975)). This "prevents a party from keeping an ace card up his sleeve – intentionally or by chance – in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id.* Had Appellants' testimony plainly stated what Appellants now contend is their position – that is for ratepayers to be held harmless and that the solar capacity is not to be in addition to the 750 MW – then Commission Order No. 2014-408 and ORS testimony would have specifically addressed the concerns now being raised.[5] It

[5] "In *Irving v. Mazda Motor Corp.*, 136 F.3d 764 (11th Cir. 1998), [the court] expressed [its] concern that 'too often our colleagues on the district courts complain that the appellate cases about which they read were

is not the Commission's role to decode parties' positions or infer relief. Appellants should not be given another bite at the apple. Lastly, even if this Court agrees with Appellants that ORS and the Commission misunderstood Appellants' position, the Commission's decision to deny the solar recommendation is nevertheless supported by substantial evidence and should not be overturned.

B. The Commission appropriately considered the environmental impact pursuant to S.C. Code Ann. § 58-33-160(1)(b) and (c)

Appellants argue the Commission did not consider the environmental impact as required by S.C. Code Ann. § 58-33-160(1)(b) and (c) (1976). S.C. Code Ann. § 58-33-160(1) (1976) states:

> (1) The Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such terms, conditions or modifications of the construction, operation or maintenance of the major utility facility as the Commission may deem appropriate; such conditions shall be as determined by the applicable State agency having jurisdiction or authority under statutes, rules, regulations or standards promulgated thereunder, and the conditions shall become a part of the certificate. The Commission may not grant a certificate for the construction, operation and maintenance of a major utility facility, either as proposed or as modified by the Commission, unless it shall find and determine:
>
> (a) The basis of the need for the facility.
>
> (b) The nature of the probable environmental impact.
>
> (c) That the impact of the facility upon the environment is justified, considering the state of available

---

not the cases argued before them. We cannot allow Plaintiff to argue a different case from the case she presented to the district court." *Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004).

> technology and the nature and economics of the various alternatives and other pertinent considerations.
>
> (d) That the facilities will serve the interests of system economy and reliability.
>
> (e) That there is reasonable assurance that the proposed facility will conform to applicable State and local laws and regulations issued thereunder, including any allowable variance provisions therein, except that the Commission may refuse to apply any local law or local regulation if it finds that, as applied to the proposed facility, such law or regulation is unreasonably restrictive in view of the existing technology, or of factors of cost or economics or of the needs of consumers whether located inside or outside of the directly affected government subdivisions.
>
> (f) That public convenience and necessity require the construction of the facility.

Appellants assert error in that the Commission summarized the favorable testimony of ORS and the Applicants, yet ignored conflicting testimony in the record showing that the Lee Unit would emit air pollutants and consume large amounts of water. (Brief p. 13.) ORS disagrees. As in *S.C. Energy Users Comm. v. S.C. Elec. & Gas*, 410 S.C. 348, 360, 764 S.E.2d 913, 919 (2014) the Commission parsed all of the evidence presented during the hearing and provided a detailed summary of all of the testimony on which it based its very technical findings. The Commission's Order addresses each finding required by S.C. Code Ann. § 58-33-160(1) and thoroughly discusses the environmental impact. (R. p. 12-18.) *See also* infra. p. 18 and footnote 6 of this Brief noting Applicants' Application is over five-hundred pages and includes numerous analyses related to water quality, air quality, cultural resources, aquatic life, botanical life and wildlife. Further, there is no Appellant testimony addressing water – concerns or otherwise. The Commission, however, inquired about water usage specifically in drought

conditions. (R. p. 290, lines 2-21.) Applicant witness Landseidel responded there is sufficient water flow from the Saluda River if there are drought conditions and with the retirement of two units currently using the water flow, the impact will be less than what it currently is. (R. p. 290, lines 5-14.)

The subject of pollutants was raised only in cross examination by the Appellants inquiring from Applicants' witness whether pollutants would be lower if the Lee Unit operated less. (R. p. 286, lines 1-18.) Appellants' testimony did not discuss pollutants, but discussed emissions in the context of a solar facility having lower emissions than the proposed plant. (R. p. 321, lines 24-26.) The Commission inquired about emissions. (R. p. 288, lines 11-14.) In response to Commission questioning, Landseidel testified there would be virtually no mercury emissions from the Lee Unit. (R. p. 288, lines 11-20.) Applicant witness Gillespy testified that the Lee Unit will add cost-effective, highly efficient natural gas generation to the company's system, adding to its flexibility and fuel diversity, and it will have state-of-the-art emission controls to reduce environmental impact on air and water. (R. p. 152, lines 1-5.) Gillespy further testified that because the Lee Project will be built at the existing Lee Steam Station, environmental impacts should be further reduced, as many existing resources necessary for construction are already in place. (R. p. 152, lines 5-9.)

ORS witness Soult testified as to each determination required by S.C. Code Ann. § 58-33-160(1). (R. p. 333, line 11- p.336, line 20.) With respect to the environmental impact, Soult testified, "The overall environmental impact of the changes to the Lee Steam Station, including the addition of the LCCP, is expected to be positive." (R. p. 335, lines 3-5.) With respect to the public convenience and necessity, Mr. Soult

concluded, "ORS's review of the information provided in the Joint Application indicates that the Company intends to build an efficient and reliable plant that will be economical and minimize the environmental impact, while strengthening the reliability of electric generation and the transmission grid." (R. p. 336, lines 15-20.)

The Supreme Court will not set aside an order of the Commission unless it is found by a convincing showing to be unsupported by evidence or to embody arbitrary or capricious action as a matter of law. *See S.C. Cable Television Ass'n v. Southern Bell Tel. & Tel. Co.*, 308 S.C. 216, 219, 417 S.E.2d 586, 588 (1992). The substantial evidence rule means that a court will not overturn a finding of fact by an administrative agency unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based. *See Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 322 (1992). The Commission did not ignore conflicting testimony, its order is based on substantial evidence, and there is no error.

In the environmental impact discussion in Appellants' Brief, Appellants discuss a 2002 Commission Order, Order No. 2002-120 in Docket No. 2001-411-E, wherein the Commission denied an Application filed by Greenville County Power, LLC for a CECPCN for a proposed combined cycle plant in Greenville County. In contrast to the present case where only ORS, the Applicants and Appellants participated, in the 2001 proceeding there were ten intervenors including eight *pro se* intervenors. In addition, statutory party DHEC participated and filed testimony. Here, DHEC did not participate in the proceeding effectively remaining silent on the Application.

Among the Commission's consideration in denying Greenville County Power, LLC's Application was the lack of certain environmental analyses. The Concurring Opinion with Commission Order No. 2002-120 states, "The lack of sound scientific and engineering analysis by the applicant regarding the synoptic, cumulative air and water impacts could not be ignored by this Commission." Order No. 2002-120, pg. 18. In the present case, Applicants' Application is over five-hundred pages and includes numerous analyses related to water quality, air quality, cultural resources, aquatic life, botanical life and wildlife. *See* Application Sections 2, 4, 6, Appendix A and D for analyses and Hearing Exhibit 4 for Applicants' Siting Study.[6] ORS witness Soult testified that the Application and supporting testimony contained the information required by the Siting Act for a CECPCN. (R. p. 333, lines 18-21.) Thus, the record contains substantial evidence to support the Commission's Orders.

C. The Commission did not err in declining to apply the Siting Act's modification clause

Appellants argue the Commission erred in declining to apply the Siting Act's modification clause. Appellants argue the Commission has latitude to make changes to an Application and point to S.C. Code Ann. § 58-33-160(1) which states in part:

> The Commission shall render a decision upon the record either granting or denying the application as filed, or granting it upon such *terms, conditions or modifications of the construction, operation or maintenance of the major utility facility as the Commission may deem appropriate*; such conditions shall be as determined by the applicable State agency having jurisdiction or authority under statutes,

[6] ORS's Designation of Matter requested that these portions of the Application be included. However, upon receiving the Record on Appeal and noting their absence, ORS considered the matter and chose not to pursue having the portions included.

> rules, regulations or standards promulgated thereunder, and the conditions shall become a part of the certificate. (Emphasis added.)

Among the reasons for denying the Appellants' recommendation for solar, the Commission stated in Order No. 2014-408:

> [A] solar generating facility cannot replace the needed MWs from the LCCP. We do not think it is good practice for this Commission to grant permission for the Company to build or secure more capacity than is needed as this could ultimately result in customers paying more than necessary for electric service. It is also 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. Lastly, it is also questionable whether this Commission can change the type of facility being requested by the Company. Here, SACE and SCCCL request that an RFP be required for the consideration of solar to be added to the LCCP. The Commission views this as requiring the Company to materially change its Application. (R. p. 16-17.)

The American Heritage College Dictionary defines "modification" as a small alteration, adjustment, or limitation. American Heritage College Dictionary p. 894 (4th ed. 2002). ORS disagrees that the statute offers the leeway endorsed by Appellants.

"The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (citing *Dunton v. S.C. Bd. of Examiners in Optometry,* 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636

S.E.2d 598, 606 (2006). The court should not consider the particular clause being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law. *S.C. Coastal Council v. South Carolina State Ethics Comm'n*, 306 S.C. 41, 44, 410 S.E.2d 245, 247 (1991). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Among the reasons the Commission concluded it would not be appropriate to accept Appellants' solar recommendation is that such an expansion of the Application is questionable under the limits of the Siting Act, given that the recommendation enlarges the scope of the Application without public notice. (R. p. 16-17.) *See also* S.C. Code Ann. §§ 1-23-320 (Supp. 2014) and 58-33-120 (Supp. 2014) (requiring notice). As the entity statutorily charged with representing the public interest before the Commission, ORS appreciates the Commission's concern for public notice. S.C. Code Ann. § 58-4-10(B) (Supp. 2014). The Commission's decision, which is supported by ORS, should receive deference.

CONCLUSION

The Commission did not misunderstand or misapply Appellants' position, appropriately considered the environmental impact, and did not err in declining to apply the Siting Act's modification clause. In addition, ORS has reviewed Applicants' Brief and supports it in its entirety. Commission Order Nos. 2014-408 and 2014-546 should be affirmed in their entirety.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2013-392-E
Appellate Case No. 2014-001514

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 750 MW Combined Generating Plant Near Anderson, SC

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent Office of Regulatory Staff complies with Rule 211(b), SCACR.

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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of **the Office of Regulatory Staff's Final Brief** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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