THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2014-001514

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Public Service Commission Dockets

State Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. Whether the Public Service Commission of South Carolina ("Commission") erred by failing to consider or require a solar component when issuing a Certificate of Environmental Compatibility and Public Convenience and Necessity for a proposed natural gas combined cycle power plant?

2. Whether the Commission erred in finding that the gas plant's environmental impact was justified, considering the state of available technology and the nature and economics of the various alternatives to reduce impacts and save ratepayers money?

STATEMENT OF THE CASE

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

On October 24, 2013, DEC and NCEMC filed a joint Application for a Certificate under the Utility Facility Siting and Environmental Protection Act, S.C. Code Ann. § 58-33-10, *et seq.* The application included a certification that DEC had served a copy of the application on those governmental officials and such other persons as S.C. Code Ann. § 58- 33-120(2) requires.

By letter dated November 1, 2013, the Clerk's Office of the Commission required DEC to publish a prepared Notice of Filing and Hearing which described the nature of the Application and advised all interested parties of the manner in which they might intervene or otherwise participate in the proceeding. DEC submitted an affidavit which demonstrated compliance with the Clerk's instructions. Statutory parties were the South Carolina Office of Regulatory Staff ("ORS"), the South Carolina Department of Health and Environmental Control ("DHEC"), the South Carolina Department of Natural Resources ("DNR") and the South Carolina Department of Parks, Recreation, and Tourism (the "Department"). Petitions to intervene were filed by the South Carolina Coastal Conservation League ("CCL") and Southern Alliance for Clean Energy ("SACE"); Invenergy Thermal Development, LLC ("Invenergy"); and the Electric

Cooperatives of South Carolina, Inc. and Central Electric Power Cooperative, Inc. (the "Co-ops"). The Co-ops filed a request to withdraw their petition to intervene, which was granted by the Commission on December 18, 2013. Also on December 18, 2013, the Commission denied Invenergy's petition to intervene upon objection by DEC and NCEMC. On January 2, 2014, Invenergy renewed its petition to intervene. A Settlement Agreement between DEC, NCEMC and ORS was filed on January 3, 2014.

On January 7, 2014, in accordance with Section 58-33-130 of the Siting Act and with the Commission's Rules of Practice and Procedure, the Commission commenced an evidentiary hearing on the Certificate application. On the oral motion of DEC, NCEMC and ORS, the Commission moved those parties' Settlement Agreement into the record. The Commission also denied Invenergy's renewed petition to intervene. The Commission then recessed the hearing.

The Commission reconvened the evidentiary hearing on February 4, 2014. DEC presented the testimony of Clark S. Gillespy, Janice D. Hager and Mark E. Landseidel. NCEMC presented the testimony of Michael W. Burnette, which was stipulated into the record. CCL and SACE presented the joint testimony of T. Hamilton Davis IV and John D. Wilson. ORS presented the testimony of Gene G. Soult. DHEC, DNR and the Department did not participate in the hearing.

On May 2, 2014, the Commission issued its Order Granting a Certificate of Environmental Compatibility and Public Convenience and Necessity to DEC and NCEMC for the Lee Gas Plant. Appellants filed a petition for rehearing on May 15, 2014. On June 4, 2014, the Commission voted to deny Appellants' petition and issued a written directive to that effect. Appellants filed a Notice of Appeal on July 3, 2014. The

Commission issued an Order Denying Petition for Rehearing and Reconsideration on July 30, 2014.

STATEMENT OF FACTS

The proposed Lee Gas Plant is a 750 MW natural gas-fired combined cycle electrical generating plant to be constructed at the site of DEC's existing Lee Steam Station in Anderson County, South Carolina. (Order No. 2014-408, p. 1; R. p. 004.) DEC is a limited liability company, organized under the laws of the State of North Carolina, which supplies retail electric service to approximately 2.4 million customers in its service area, including approximately 540,000 customers in South Carolina. NCEMC is a generation and transmission cooperative, a not-for-profit membership corporation under North Carolina, whose membership cooperatives use power supplied by NCEMC to provide retail electric service to their customers. (Order No. 2014-408, p. 6; R. p. 009.)

DEC declined to disclose publicly an estimated construction cost for the proposed Lee Gas Plant, which was filed under seal. (Tr. Vol. 2, p. 98, lines 23-24; R. p. 217, lines 23-24.) The construction cost of a similar combined cycle project recently completed at DEC's Dan River plant, however, was approximately $673 million. (Tr. Vol. 2, p. 167, line 21-p. 168, line 3; R. p. 286, line 21-p. 287, line 3.) The Lee Gas Plant is only the first of four to five natural gas combined-cycle ("NGCC") plants that DEC and fellow Duke Energy subsidiary Duke Energy Progress plan to construct over the next decade. (Tr. Vol. 2, p. 193, lines 1-4; R. p. 312, lines 1-4.) Together, construction of these plants will cost ratepayers billions of dollars.

Although expensive to build, NGCC plants are even more expensive to run. Operating costs, mainly the natural gas burned as fuel, would constitute 80-90 percent of

the Lee Gas Plant's long-term cost to ratepayers. (Tr. Vol. 2, p. 197, lines 7-9; R. p. 316, lines 7-9.) Approximately 30 percent of the operating costs of DEC's share of the unit will be allocated to South Carolina ratepayers. (Tr. Vol. 2, p. 42, line 21-p. 43, line 3; R. p. 161, line 21-p. 162, line 3.) Natural gas prices, while currently lower than in the past, have historically been subject to significant price volatility, and are also subject to supply disruptions from natural disasters. (Tr. Vol. 2, p. 117, lines 11-16; R. p. 236, lines 11-16.) If natural gas prices increase, South Carolina customers will pay more for electricity produced by the plant. (Tr. Vol. 2, p. 117, line 25-p. 118, line 4; R. p. 236, line 25-p. 237, line 4.)

The Siemens F Class technology proposed for the Lee Gas Plant has demonstrated operational flexibility including multiple starts, minimum load capability and minimum start times. (Tr. Vol. 2, p. 154, lines 1-3; R. p. 273, lines 1-3.) The technology and configuration selected by DEC provide significant capability to ramp the plant up and down quickly, as well as come to relatively low minimum loads. (Tr. Vol. 2, p. 163, lines 19-23; R. p. 282, lines 19-23.) DEC witness Landseidel testified that "the intermediate capability of the plant allows it to fluctuate as needed to meet the system needs," which could vary for reasons "including intermittent power sources," such as solar. (Tr. Vol. 2, p. 166, lines 5-8; R. p. 285, lines 5-8.) Mr. Landseidel testified that operating at lower output would not decrease the facility's useful life, since the plant is designed with the capability for cycling and operation at minimum loads, (Tr. Vol. 2, p. 165, lines 7-13; R. p. 284, lines 7-13).

Given the ability of a combined cycle plant to operate efficiently at variable levels, natural gas combined-cycle technology pairs well with solar generation, a

dependable and fuel-free but variable power source. To reduce the environmental impacts and offset the operating costs of the Lee Gas Plant, Appellants recommended that the Certificate for the project be conditioned on a requirement that DEC issue a request for proposals ("RFP") for cost-effective solar power. The RFP would be developed as follows. First, DEC would develop a benchmark price using the 30-year forecast of the variable costs for the Lee Gas Plant (mainly, natural gas). This is the 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. 318, lines 5-7.) Second, DEC would issue an RFP for up to 375 MW of firm solar power at the benchmark price. (Tr. Vol. 2, p. 203, lines 6-9; R. p. 322, lines 6-9.) Bids would only be accepted 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. 299, lines 20-24.)

By its terms, the solar condition proposed by CCL and SACE would not add costs for ratepayers. Moreover, the solar component would provide a significant hedge against gas price upside volatility; it would, as Mr. Davis testified, "save ratepayers money if solar costs go down and gas prices go up." (Tr. Vol. 2, p. 180, line 24-p. 181, line 1; R. p. 299, line 24-R. p. 300, line 1.) DEC witness Janice D. Hager agreed that instead of dispatching the natural gas plant, the Company could dispatch a type of generating facility that had lower fuel costs. (Tr. Vol. 2, p. 118, lines 9-12; R. p. 237, lines 9-12.) Solar, of course, has zero fuel costs. (Tr. Vol. 2, p. 118, lines 13-14; R. p. 237, lines 13-14.)

Solar's potential to offset part of the fuel costs of natural gas facilities and hedge against gas price increases has led to a growing trend of gas-solar pairings across the nation. Appellants submitted evidence regarding several solar projects that have been linked to natural gas generation, either co-located at the same site or as part of a resource portfolio. (Hrg. Ex. 7, Tr. Vol. 2, p. 221 [admitted]; R. pp. 340 [admitted], 617-19.) For example, Xcel Energy has proposed a wind/solar/gas proposal that would reduce operating costs by $246 million. (Hrg. Ex. 7, Tr. Vol. 2, p. 221 [admitted]; R. p. 340 [admitted], 618.) Florida Power & Light ("FPL") has a hybrid facility in which a 75 MW solar thermal power plant is directly connected to a 1,142 MW combined-cycle natural gas power plant at FPL's Martin Plant. *Id.* FPL has explained the Martin hybrid facility is a "fuel-substitute facility" that "displaces the use of fossil fuel," and is "not a facility that provides additional capacity and energy." *Id.* Similarly, in a competitive bidding process overseen by the Minnesota Public Utilities Commission, the Administrative Law Judge found that "[Xcel Energy's] solar project has no associated fuel costs, and, therefore, provides for a fixed and certain price for the life of the project." *Id.* Finally, Louisville Gas and Electric Company and Kentucky Utilities Company recently submitted a joint application to the Kentucky Public Service Commission for certificates of public convenience and necessity for the construction of both a natural gas combined cycle facility and a solar photovoltaic facility, having concluded after a request for proposals process that the gas-solar combination was the "least-cost reasonable alternative for meeting customer needs." (Hrg. Ex. 7, Tr. Vol. 2, p. 221 [admitted]; R. p. 340 [admitted], 619.)

The proposed Lee Gas Plant, while less polluting than the coal units it would replace, would still emit air pollutants such as nitrogen oxides and carbon dioxide. (Tr. Vol. 2, p. 39, lines 1-4; R. p. 158, lines 1-4.) The plant would also 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. 278, lines 11-13.) At the evidentiary hearing, DEC witness Landseidel conceded that operating the unit at a lower output would reduce water use (Tr. Vol. 2, p. 166, lines 20-23; R. p. 285, lines 20-23), as well as emissions of air pollutants (Tr. Vol. 2, p. 167, lines 12-18; R. p. 286, lines 12-18).

STANDARD OF REVIEW

I. THE COMMISSION'S REVIEW OF THE CERTIFICATE APPLICATION.

The Utility Facility Siting and Environmental Protection Act ("Siting Act"), S.C. Code Ann. § 58-33-10, *et seq.*, governs the siting of electric utility facilities in South Carolina. The statute requires the Commission to render a decision upon the record either granting or denying the application for a Certificate 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. S.C. Code Ann. § 58-33-160.

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," 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). The

Commission must also find that the facility "will serve the interests of system economy and reliability." *Id.* § 58-33-160(d).

II. THIS COURT'S REVIEW OF THE COMMISSION'S DECISION.

Under the Siting Act, any party may appeal from all or any portion of any final order or decision of the Commission. S.C. Code Ann. § 58-33-310. Such appeal is in accordance with S.C. Code Ann. § 1-23-380, the statute governing judicial review of a final decision in a contested case. That section provides that the appellate court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. *Id.* § 1-23-380(5). The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

South Carolina appellate courts employ a deferential standard of review when reviewing a decision of the Commission, and will affirm that decision when substantial evidence supports it. *Porter v. S. Carolina Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). The party challenging a Commission decision bears the burden

of convincingly proving that the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record. *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n of South Carolina*, 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996).

"This deferential standard of review does not mean, however, that 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). "The findings of fact of an administrative body 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). "Where 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). Although no particular format is required, "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. v. S. Carolina Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

ARGUMENT

Appellants respectfully submit that the Certificate was not granted in compliance with the Siting Act's requirement that the Commission only grant a certificate for a major utility facility, "as proposed or as modified by the Commission," where it determines the facility's "probable environmental impact" is "justified" considering "available technology and the nature and economics of the various alternatives and other pertinent

considerations." S.C. Code § 58-33-160(c). As described above, Appellants submitted evidence showing that a solar energy component would materially reduce the proposed gas facility's environmental impact and cost to customers. The Commission failed to actually consider or make statutorily required findings in light of this evidence. The Commission's rejection of Appellants' solar recommendation springs from three central errors, as discussed in the following sections.

I. BECAUSE THE COMMISSION FUNDAMENTALLY MISAPPREHENDED APPELLANTS' SOLAR RECOMMENDATION, ITS DECISION TO REJECT THAT RECOMMENDATION WAS CLEARLY ERRONEOUS.

First, the Commission misapprehended Appellants' solar recommendation itself, in several respects, and inaccurately characterized the proposal in its orders. Because the Commission fundamentally misunderstood Appellants' solar recommendation, it did not carry out its duty to determine that the gas facility's 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).

The Commission apparently understood Appellants to recommend that the Commission issue a Certificate for *less natural gas generating capacity* than that proposed by the applicants, and rejected that recommendation because "the [Lee Gas Plant] could not be built with lower than the Company-needed 650 MWs . . . ." (Order No. 2014-408, p. 13; R. p. 016). In addition, the Commission reasoned that "solar will not be capable of providing the intermediate to base load needs of the Lee Facility." (Order No. 2014-546, p. 4; R. p. 031.) Appellants did not propose that a certificate be issued for less than 650 MW, however, or suggest that their proposed solar component proposal would suffice to meet DEC's capacity need. Instead, they recommended that

DEC procure cost-effective solar generation that would offset the operating costs of the gas plant by reducing the amount of fuel burned. By way of illustration, if DEC obtained 300 MW of solar, on a sunny day it could use solar energy to displace the amount of energy that the natural gas plant would have to produce by burning natural gas. Because the RFP would guarantee that energy from solar generation would be no more expensive (if not less expensive) than the cost of energy from the Lee Gas Plant, this hybrid arrangement would present only benefits to ratepayers.

The Commission's conception of the solar component as adding capacity—i.e., that "any MWs generated from solar would be in addition to the 650 MW capacity requirements" (Order No. 2014-546, p. 3; R. p. 030)—and its view that Appellants merely sought to force construction of electrical generation capacity above and beyond the Lee Gas Plant's capacity (Order No. 2014-408, p. 13; R. p. 016), was thus error. Appellants presented evidence that requiring Duke to issue a RFP for solar power that, as delivered, would displace production at the Lee Gas Plant (megawatt hours, or MWh) and reduce fuel burned there. Much as the electrical component of a hybrid car operates in tandem with the gas motor, the solar component would complement gas production, not be in addition to it.

The Commission's misconception also led it to claim—with no evidentiary basis—that because "capital investment would be needed to build the solar facility," the proposal "could ultimately result in customers paying more than necessary for electric service." (Order No. 2014-408, p. 13; R. p. 016.) Again, these statements reflect a disregard for the key criterion in Appellants' recommendation: that DEC would only accept solar bids at a benchmark price at or below the operating costs of the gas unit, so

that customers would necessarily be held harmless or even benefit. Said another way, because bids would only be accepted if they were equal to or lower than a benchmark price based on the long-term operating costs of the gas facility, qualifying bids would, by definition, provide energy at or below the cost of producing the same energy from the Lee Gas Plant. By using solar electricity procured through the RFP, DEC could reduce production at the Lee Gas Plant, saving on fuel and other operating costs. Thus, the solar modification could at worst only save ratepayers money and provide a conservative hedge given gas price volatility.

South Carolina law requires the Commission 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.

II. THE COMMISSION ERRONEOUSLY FOUND THAT THE LEE GAS PLANT'S ENVIRONMENTAL IMPACT WAS JUSTIFIED.

Under the Siting Act, a Certificate for the Lee Gas Plant could only be issued, "as proposed or as modified by the Commission" where the Commission has determined, based on substantial evidence, that the facility's "probable environmental impact" is "justified" considering "available technology and the nature and economics of the various alternatives and other pertinent considerations." S.C. Code Ann. § 58-33-160(b)-(c). At a minimum, then, the Commission must make specific findings regarding the facility's

environmental impact and the ability of available alternatives to reduce this impact, which it did not do here.

The Commission was required by the Siting Act to find and determine "the nature of [the facility's] probable environmental impact." S.C. Code Ann. § 58-33-160(b). This it did not do. Instead, the Commission summarized the favorable testimony of the witnesses for DEC and the Office of Regulatory Staff, but wholly ignored conflicting testimony in the record showing that the Lee Gas Plant would emit air pollutants and also consume large amounts of water—environmental impacts that would be reduced by inclusion of a solar component that would reduce the facility's gas combustion, air pollutants and water consumption.

Beyond actually assessing probable environmental impacts, the Commission was also required to find and determine that the environmental impact of the plant "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(c). Notably, in 2002, the Commission denied a certificate for a similarly designed gas plant in the upstate after determining that it could not make a "finding that the impact of the facility upon the environment is justified." *In re Greenville County Power, LLC*, Docket No. 2001-411-E, Order No. 2002-120 (Denying Application for a Certificate of Environmental Compatibility and Public Convenience and Necessity) at 5 (April 1, 2002). In particular, despite the testimony of several company witnesses in that matter, the Commission found that given the absence of adequate air quality modeling, it could not assess the effect of the plant on air quality, as the law required. *Id.* The Commission also found that the combined cycle gas plant proposed in that case (and similar to the one

proposed in this case) would consume "large quantities of water" compared to another type of gas plant, a simple cycle peaking turbine. *In re Greenville County Power, LLC*, Docket No. 2001-411-E, Order No. 2002-377 (Denying Reconsideration) at 8 (May 17, 2002). In the absence of "detailed studies of the effects" of the plant's water consumption on the subject river's aquatic habitat and its environs, the Commission determined it could not "make the proper statutory findings as to the justifiability of the impacts of the plant on the environment." Order No. 2002-377 at 5; *id.* at 12 (without information on withdrawal's downstream impacts, Commission "could not make the required statutory finding" that impacts were justified). The Commission also held, correctly, that it is not bound by the findings of the Department of Health and Environmental Control ("DHEC"), since the Siting Act requires the Commission to make independent findings in issuing a Certificate. Order No. 2002-377 at 15.

As the Commission's order in the *Greenville County Power* docket makes clear, to fulfill its statutory obligation to determine that the Lee Gas Plant's environmental impact is "justified," the Commission must actually, and fully, consider the project's environmental impacts. It must also consider "alternatives" and options for "modif[ying]" the facility to reduce those impacts. Where, as here, alternative technology is available to reduce the project's environmental impact with no increased cost to ratepayers or effects on reliability, that impact is not "justified," as required by S.C. Code Ann. § 58-33-160(c). By reducing electricity generated from natural gas when the sun is shining, the solar component recommended by Appellants would reduce the gas plant's environmental impact almost by definition, since it is uncontested that solar

power produces no air pollution emissions and consumes no water from area streams or rivers.

At base, and as required by the Siting Act, Appellants' solar recommendation would reduce the facility's impact on the environment to a level "justified, considering the state of available technology and the nature and economics of the various alternatives and other pertinent considerations," while serving "the interests of system economy and reliability." S.C. Code Ann. § 58-33-160(c), (d). The Commission fundamentally misunderstood the solar modification proposed by Appellants. Without the proposed solar component, substantial evidence does not support a finding that the Lee Gas Plant's impact on 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(c).

III. THE COMMISSION ERRONEOUSLY CONCLUDED THAT IT LACKED AUTHORITY TO IMPOSE APPELLANTS' RECOMMENDED CONDITION ON ISSUANCE OF THE CERTIFICATE.

The Commission also apparently felt itself bound to reject Appellants' solar proposal because it would "materially change" DEC's application and change the "type of facility" being requested. (Order 2014-408 at 14; R. p. 017.) In its Order Denying Rehearing, the Commission explained that "requiring DEC or another entity to construct a major solar facility at or near the Lee Project site . . . would substantially alter DEC and NCEMC's Application." (Order No. 2014-546 at 5; R. p. 032.) This conclusion was erroneous, for two reasons.

First, Appellants did not seek to alter DEC's basic proposal, which is to construct a combined cycle gas plant. Appellants' proposal would not require any change in the Lee Gas Plant's design. Indeed, DEC's own experts testified that its planned facility can

ramp up and down quickly and operate at reduced loads without impacts on reliability or efficiency, making it well paired to intermittent resources like solar. (Tr. Vol. 2, p. 163, lines 19-23; R. p. 282, lines 19-23.) Rather than replace the facility that DEC proposed, the Appellants requested that the Certificate include a condition that would reduce gas consumption (and related pollution) to the extent that solar energy is available for the same cost or less.

The language of the Siting Act clearly authorizes the Commission to place conditions on the grant of a Certificate: "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*." S.C. Code Ann. § 58-33-160 (emphasis added). South Carolina case law on this point is sparse, but the general principle that public utilities commissions may attach reasonable terms or modifications to the grant of a certificate is widely recognized. "A public utilities commission has *great latitude to impose conditions* on its grant of a certificate of public convenience and necessity," although such conditions must be lawful and reasonable. 64 Am. Jur. 2d *Public Utilities* § 160 (2013) (emphasis added) (citing *Rheems Water Co. v. Penn. Public Utility Comm'n*, 620 A.2d 609 (Penn. 1993) and *Kansas Elec. Power Co-op, Inc. v. State Corp. Comm'n*, 683 P.2d 1235 (Kan. 1984)); 73B C.J.S. *Public Utilities* § 186 (2013) ("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.") (citing *Riverton Val. Elec.*

Ass'n v. Pacific Power & Light Co., 391 P.2d 489 (Wyo. 1964); *West Penn Rys. Co. v. Penn. Public Utility Comm'n*, 15 A.2d 539 (Penn. 1940); *Miss. Public Service Comm'n v. Miss. Power & Light Co.*, 593 So. 2d 997 (Miss. 1991)).

Requiring DEC to solicit bids for cost-effective solar to reduce the Lee Gas Plant's gas consumption, fuel costs and environmental impacts is fully within the Commission's authority to issue a Certificate approving a facility "as modified" by the Commission. Indeed, just as the Commission has the power to deny a Certificate for a gas power plant outright because of water consumption impacts and air pollution, as it did in *Greenville County Power*, cited above, it doubtless has the authority to include water-conserving and air pollution-reducing characteristics as a condition of granting a Certificate. Further, because solar generation has no fuel costs, requiring that DEC implement a solar component is a prudent hedge against natural gas price volatility. Because Appellants proposed that DEC only be required to accept bids that came in below the long-term operating costs of the Lee Gas Plant, their proposed condition could only save ratepayers money. Conditioning the grant of a Certificate on such a condition is thus consistent with the Commission's duty to only certify a facility—either as proposed or "as modified"—where it finds that the facility "will serve the interests of system economy and reliability." S.C. Code Ann. § 58-33-160(d).

CONCLUSION

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

Respectfully submitted this 12th day of March, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

I certify that the foregoing Final Brief of Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy complies with Rule 211(b), SCACR.

Gudrun Thompson

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CERTIFICATE OF SERVICE

I certify that I have served the Final Brief of Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy on all parties by depositing a copy in the United States Mail, postage prepaid, on March 12, 2015, addressed to their attorneys of record, as indicated below:

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