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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appellate Case No. 2014-001514

FEB 24 2016

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

**APPELLANTS' PETITION FOR REHEARING**

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Clean Energy*

Pursuant to Rule 221(a), SCACR, the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, “Appellants”) respectfully petition for rehearing and reconsideration of this Court’s February 10, 2016 Per Curiam Opinion affirming the decision of the Public Service Commission of South Carolina (“PSC” or “Commission”) to issue a Certificate of Environmental Compatibility and Public Convenience and Necessity (“Certificate”) granted to Respondents Duke Energy Carolinas, LLC (“Duke”) and the North Carolina Electric Membership Corporation (“NCEMC”) for the proposed Lee natural gas combined cycle (“NGCC”) power plant in Anderson County, South Carolina.

### **INTRODUCTION**

Under the Utility Facility Siting and Environmental Protection Act, (the “Act”), the Commission “may not” grant a certificate for the construction or operation of a major utility facility “unless” it finds and determines that “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). The Commission can grant or deny the application “as filed,” or grant it upon “such terms, conditions or modifications” of “construction, operation or maintenance” as it may deem appropriate. *Id.* § 58-33-160(1).

In this case, the Commission failed to execute its statutory charge. It was presented with a proposal for solar technology that would complement, not replace, the proposed gas plant – available technology that would save ratepayers money and lessen environmental impacts. In particular, the solar component proposed by Appellants would enable the “ramping down” of the gas plant’s operations to lower its consumption of

water from the Saluda River and its emission of air pollution. The proposal would also save money, since 80-90% of a natural gas plant's costs come from burning fuel. R. p. 316.

While it was undisputed that the ramping down of gas plant operations would reduce water consumption from the Saluda River and reduce air pollution emissions, the Commission nonetheless failed to address Appellants' solar proposal. Instead, it addressed and analyzed proposals that Appellants did *not* make. By way of analogy, if Duke's proposal was to build and operate what is in essence a 10-person capacity van, Appellants' proposal was to include a hybrid electric feature for that van whose costs would be recouped with the van's gas savings.

Rather than address Appellants' proposal, the Commission refused it on grounds that did not apply to the actual proposal before the Commission. On the one hand, it claimed that Appellants had proposed too much capacity – in essence, a 40-person bus. On the other hand, it claimed, inconsistently, that Appellants had proposed too little capacity – a two-person car. Because it used reasoning that was not applicable to the proposal before it, the Commission never gave Appellants' proposal any consideration at all. In failing to do so, it arbitrarily and capriciously failed its clear statutory duty to consider all “alternatives” and “available technology” to reduce a major energy facility's environmental impacts. S.C. Code Ann. § 58-33-160(1)(c).

This Court's decision affirming the Commission contains two central errors that warrant reconsideration.

- 1. The Commission Arbitrarily and Capriciously Failed to Actually Consider Appellants' Solar Proposal.**

This Court's Opinion posits that the Commission's recitation of Appellants' proposal meant that it "considered" it. *In re Duke Energy Carolinas, LLC*, No. 2014-1514, 2016 WL 526516, at \*2 (Ct. App. Feb. 10, 2016). The only evidence beyond a one-line recitation of Appellants' solar proposal, however, is the Opinion's agreement with the Commission that Appellants proposed "additional" generating capacity (expressed in megawatts, or MW) beyond what is needed.

Rather than demonstrate that the Commission considered Appellants' proposal, this reasoning repeats the Commission's erroneous conflation of energy generating *capacity*, expressed in megawatts (MWs), and energy *generation*, expressed in megawatt-hours (MWhs). The record shows that Appellants never proposed "additional" MW capacity for its own sake. Instead, they proposed that Duke issue a request for proposals ("RFP") for either a solar facility or a contract to purchase solar power. Although expressed in terms of MWs, the point of the RFP was to evaluate bids from energy market participants who could deliver solar energy generation (MWhs) that would offset generation from the gas plant and allow it to ramp down operations and thereby burn less fuel. As with a hybrid vehicle, the point of the electric component (analogous to the proposed solar component in this case) is not to boost maximum horsepower, but to reduce operations of the paired fossil fuel engine, thus reducing gas use and saving money.

The Opinion correctly recognizes that this concept was put forth clearly before the Commission. *Id.* at \*2, n. 2. Indeed, when asked by a Commissioner whether the proposal was to tell Duke to "pursue generation capacity beyond its needs," R. p. 324, Appellants' witness explained that it was "not a capacity need" being addressed, and not

“anticipated to be a capacity increase,” but instead was a “companion piece to this plant” that “offset ... costs associated with running Lee” by “ramping down” a “percentage of the operations at the plant [and] replacing that with the solar,” R. pp. 324, 325.<sup>1</sup>

*In the end, there is simply no evidence in the record that the Commission actually considered Appellants’ proposal.* Instead, it fundamentally misapprehended Appellants’ proposal, and rejected it on mutually inconsistent grounds that do not apply to the proposal that was actually before the Commission.<sup>2</sup> While it is true that the Commission, and this Court, have in places accurately recited the proposal, such recitation cannot make up for the actual failure to consider or otherwise engage its actual merits. “Consideration” of Appellants’ proposal requires more than rote recitation or repetition of it. *See U.S. v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006) (“[m]eaningful consideration requires more than mere recitation that the factors have been considered”); *In re Criscione*, 173 Cal. App. 4th 60, 74-75, 92 Cal. Rptr. 3d 258, 268 (2009) (due

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<sup>1</sup> *See* R. p. 320 (proposal would “reduce the operating costs” of gas unit); R. p. 316 (solar as “alternative to operating the unit”); R. p. 320 (would “offset the operating costs” of gas plant); R. p. 320 (would “have operational characteristics to complement” gas plant and reduce costs of “owning and operating the unit”); R. p. 317 (goal to deliver energy “cost-effective relative to the long-term operating cost” of Lee unit).

<sup>2</sup> The Commission inconsistently attacked Appellants’ proposal as providing too little capacity and too much, demonstrating a fundamental misunderstanding of Appellants’ proposal. *Contrast* R. pp. 15-16 (Commission objecting to building gas plant with *less than 650 megawatts* [Appellants never proposed this]); R. p. 16 (objecting that “*capacity*” of solar facility was *below required need* [Appellants never proposed building only solar]) *with* R. p. 16 (“MWs generated from solar would be *in addition to* the 650 MW capacity requirements” [Appellants justified proposal with offsetting MWs, not new MW capacity]); R. p. 16 (“The *additional 375 MW* of solar *capacity*...are *not needed* at this time” [same]; R. p. 16 (objecting to having “*more capacity than is needed*” [same]). Appellants proposed a solar component of a sufficiently large magnitude (expressed in MW) so that its energy generation (expressed in MWs) would enable the gas plant to ramp down significantly and often – thus saving money and reducing impacts. That proposal was never considered by the Commission.

consideration requires more than “rote recitation” of the relevant factors with no analysis).

The complete failure to engage on evidence that it must statutorily consider renders the Commission’s decision arbitrary and capricious, and justifies remand. *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 270 S.C. 590, 602-604, 244 S.E.2d 278, 284-285 (1978), *holding modified by Parker v. S.C. Pub. Serv. Comm’n*, 280 S.C. 310, 313 S.E.2d 290 (1984).

The failure is made all the more egregious by the uncontested truth that Appellants’ proposal could reduce impacts to the environment and impacts to ratepayers. With regard to environmental impacts, for example, while the NGCC would emit nitrogen oxides (“NOx”), carbon monoxide, and volatile organic compounds, R. pp. 276, 277, operating the plant at lower power as enabled by a solar component would reduce emission of air pollution, including NOx, R. p. 286. While the plant would consume 10 cubic feet per second of water from the Saluda River, R. p. 278, or 4,488 gallons per minute, it is undisputed that operating the unit at lower output would reduce water use from the River, R. p. 285. And while the plant would emit significant amounts of carbon dioxide (“CO2”) pollution, R. p. 321, it is undisputed that Appellants’ proposal would yield “direct emissions reduction benefits” of carbon dioxide, R. p. 321.

From the standpoint of economics, the gas plant is estimated to cost ratepayers around \$673 million to build. R. pp. 286-287. But it will be far more expensive to run. Given that operating costs, mainly the natural gas burned as fuel, will constitute 80-90% of the Lee NGCC’s long-term cost, R. p. 316, the total lifetime operating costs (mainly fuel) could approach nearly \$3 billion. The solar proposal put forth by Appellants

offered substantial cost savings as well as risk hedging advantages.<sup>3</sup> Critically, under the solar RFP proposed by Appellants, Duke would *only* have to accept a bid for solar power if the bidder could meet or beat the price that it would cost to produce that power by running the gas plant. R. p. 299. Any cost savings would be passed on to customers, while there would be zero risk of increased costs. Again, the Commission did not engage on this crucial feature of Appellants' proposal.

Had the Commission engaged on Appellants' proposal, this record evidence – showing the proposal would lessen environmental impacts and lower ratepayer risk – would have been considered. Based on the Commission's written orders, it was not. Likewise, the Commission did not address record evidence showing that, operationally, the NGCC proposed by Duke is well-suited to pair with a solar complement.<sup>4</sup> The record shows no consideration of any of this because the Commission did not, in fact, consider Appellants' solar proposal, or how this "available technology" would lessen the proposed gas plant's environmental impact. That failure rendered its decision arbitrary and capricious and unlawful. *Morall v. Drug Enforcement Agency*, 412 F.3d 165, 178 (D.C. Cir. 2005) (agency acts arbitrarily and capriciously when it ignores relevant testimony); *Surgicore v. Office of Pers. Mgmt.*, No. 03-C-2451, 2006 WL 733548, at \*9 (N.D. Ill. Mar. 21, 2006) (agency acted "arbitrarily and capriciously" by ignoring information relevant to appeal); *Tolman v. Salt Lake Cty. Attorney*, 818 P.2d 23, 32 (Utah Ct. App.

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<sup>3</sup> See R. pp. 321, 317 (incremental capital costs of solar "more than compensated by the savings in operating costs" of NGCC); R. pp. 300, 316, 320 ("offset the operating costs" of Lee); R. pp. 305, 322 (hedge against higher gas prices), R. p. 301 (insulate ratepayers from the risk of increasing and volatile gas prices).

<sup>4</sup> The NGCC design proposed by Duke can ramp up and down quickly; does not lose efficiency when running at less than full power; and can operate on a system that includes intermittent power sources like solar. R. 285.

1991) (failure to actually consider and address contentions was agency abuse of discretion); *Buxton v. Indus. Comm'n of Utah*, 587 P.2d 121, 123 (Utah 1978) (holding “Commission is not vested with arbitrary powers; and it cannot simply ignore competent and credible evidence when there is nothing discrediting therein and there is no evidence to the contrary”); *City of Pittsburgh v. Pennsylvania Pub. Util. Comm'n*, 370 Pa. 305, 315-16, 88 A.2d 59, 64-65 (Pa. 1952) (ignoring undisputed competent evidence was “was not an exercise of judgment by the Commission but an arbitrary and unreasonable finding”).

The Opinion’s finding that the Commission gave any consideration to Appellants’ proposal beyond reciting it should be reconsidered, and the matter remanded to the Commission for consideration of Appellants’ proposal.

**2. The Statute Empowers the Commission to Condition and Modify Certifications to Save Ratepayers Money and Reduce Environmental Damage.**

As something of an alternate ground, the Opinion holds that the Commission had no choice but to reject Appellants’ proposal given a highly circumscribed ability to condition its certifications on “modifications.” See *In re Duke Energy*, 2016 WL 526516, at \*3. Citing a dictionary entry, the Opinion holds that the Commission is empowered to consider only a “small alteration, adjustment, or limitation” to a proposed major generating facility. See *id.* This deserves reconsideration for several reasons.

First, as the Supreme Court made clear in an earlier case involving this Commission, when a statutory term such as “modification” is undefined, a court may not “merely consider the language of the particular clause being construed,” but must

examine “the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.” *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*, 388 S.C. 486, 492-493, 697 S.E.2d 587, 590-591 (2010). That was not done here. Instead, the Opinion cites a limited dictionary sub-definition of “modification,” rather than the first definition set forth in the same dictionary, which is “the act of modifying,” with the term “modify” defined to mean “to change in form or character: ALTER.” Webster’s II New College Dictionary (Houghton Mifflin Co. ed., 2001). This basic meaning of modification – to change or alter – is found in other dictionaries as well<sup>5</sup> and better fits “the purpose of the whole statute and the policy of the law,” which the Opinion did not address.

That law requires that the Commission may *not* issue a Certificate “unless” the Commission “find[s] and determine[s]” that “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). As noted, in carrying out this duty, the Commission can grant or deny the application “as filed,” or grant it upon “such terms, conditions or modifications” of “construction, operation or maintenance” as the Commission “may deem appropriate.” *Id.* § 58-33-160(1). Further, the Siting Act explicitly requires additional public notice where the Commission conditions its certification upon the modification of the location

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<sup>5</sup> See, e.g., THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Fifth ed. 2015) (defining “modify” as “To change in form or character; alter.”) (available at <https://ahdictionary.com/word/search.html?q=modify>); MERRIAM-WEBSTER (defining “modification” as “the act or process of changing parts of something : the act or process of modifying something”) (available at <http://www.merriam-webster.com/dictionary/modification>).

of all or part of a proposed facility, *id.* § 58-33-160(2), and empowers the Commission to require after-the-fact modifications for emergency-approved facilities “if, after giving due consideration to the major utility facility, available technology and the economics involved, it finds such modification necessary in order to minimize the environmental impact,” *id.* § 58-33-110(6).

Taken together, these provisions embody a clear policy choice by the General Assembly to charge and empower the Commission with actively reviewing proposals for major energy production facilities in South Carolina; to approve them only if their environmental impacts are “justified” given available alternatives; and to impose terms, conditions, and modifications for such proposals to minimize environmental impacts. It was error to construe the term “modification” without considering the statutory context or the General Assembly’s intent in enacting it, and to adopt a constrained definition that undercuts the statutory scheme.

That scheme explicitly empowers the Commission to either (1) grant or deny the application “as filed,” or (2) grant it upon “such terms, conditions or modifications” of “construction, operation or maintenance” as the Commission “may deem appropriate” after a full public hearing. *Id.* §§ 58-33-160(1); 58-33-130(1). The General Assembly gave the Commission something well beyond a thumbs-up or thumbs-down power: it gave it the power to condition certifications on modifications that would reduce environmental impacts and save ratepayers money. The Commission’s power to condition the grant of a Certificate on a modification of the utility’s proposed facility is entirely consistent with the General Assembly’s broad grant of authority to the Commission:

The commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.

S.C. Code Ann. § 58-3-140(A). Empowering the Commission to modify a facility fits the general rule that administrative commissions have the power to modify approvals to carry out the goals of the underlying statute, *see U.S. v. State Water Res. Control Bd.*, 182 Cal. App. 3d 82, 130, 227 Cal. Rptr. 161, 188 (Cal. Ct. App. 1986) (finding Commission had implied power to modify permits to include water quality conditions), and that such modifications should be upheld where reasonable and based on evidence, *see In re Narragansett Elec. Co.*, 544 A.2d 121, 127 (R.I. 1988); *Cf. Mueller v. Mo. Hazardous Waste Mgmt. Comm'n*, 904 S.W.2d 552, 559 (Mo. Ct. App. 1995) (refusing to imply power to modify where Commission only had power to resolve appeals of permit issuances or denials).

The power to issue certifications with something more than “small” adjustments comports with the South Carolina Supreme Court’s view that the S.C. Public Service Commission “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.C. 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)). Here, the power to modify and condition certifications as to the construction, operation, and maintenance of a proposed facility is made explicit, with no textual limitation except the Commission acting as it “deem[s] appropriate.” S.C. Code Ann. § 58-33-160(1).

Engrafting judicially-created limitations on that power is inconsistent with the overall intent of the Certification review scheme and the power vested with the Commission. The proposed limitation is also at odds with, and improperly constrains, the Commission's explicit power to impose after-the-fact modifications for temporarily authorized facilities where the Commission "finds such modification necessary in order to minimize the environmental impact," *id.* § 58-33-110(6), and with its power to modify facilities to change their location and provide notice of such changes, *id.* § 58-33-160(2). *Cf. Saxony Lutheran High Sch., Inc. v. Mo. Dep't of Natural Res.*, 404 S.W.3d 902, 911 (Mo. Ct. App. 2013) (finding that presence of a provision for public notice supported view that Commission had power to modify and correct a noncompliant application).

Because the General Assembly gave the Commission the power to condition approvals upon "such terms, conditions or modifications" of "construction, operation or maintenance" as the Commission "may deem appropriate" to minimize environmental impacts, S.C. Code Ann. § 58-33-160(1), that language, and the policy choice it reflects, must be respected. Properly construed, the term "modification" – to alter or change – easily encompasses consideration of Appellants' proposal to include a solar component as an available technology to limit pollution and save ratepayers money. Appellants did not propose to physically alter the facility for which Duke sought a Certificate—a 750 MW combined-cycle natural gas plant. Instead, they proposed something much more modest: that Duke solicit bids from solar companies in the marketplace for solar power to complement the gas plant's operations by allowing Duke to ramp down the gas plant's operations to reduce ratepayer costs and environmental impacts. R. p. 300. Whether the Commission approves of that proposal remains to be seen. Appellants therefore request

that the Court remand this matter so that the Commission may actually consider their proposal.

The Opinion's reading of the term "modification" to preclude consideration of that proposal, based on a single dictionary entry with no reference to the statute, should be reconsidered.

### **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that their petition for rehearing and reconsideration be allowed, that the Court reverse the Commission's grant of a Certificate to Duke, and remand this matter to the Commission.

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Appellate Case No. 2014-001514

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APPEAL FROM THE PUBLIC SERVICE COMMISSION

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Docket No. 2013-392-E

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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

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**CERTIFICATE OF SERVICE**

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I certify that I have served Appellants South Carolina Coastal Conservation  
League and Southern Alliance for Clean Energy's Petition for Rehearing on all parties by  
depositing a copy in the United States Mail, postage prepaid, on February 23, 2016,  
addressed to their attorneys of record, as indicated below:

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February 23, 2016

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February 23, 2016

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**SC Court of Appeals**

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings  
The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

**Re: Joint Application of Duke Energy Carolinas  
Appellate Case No. 2014-001514**


Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy's Petition for Rehearing and Certificate of Service in the above-referenced matter. Also enclosed is a check in the amount of \$25.00 to cover the associated filing fee. Please return a file-stamped copy to our office in the enclosed self-addressed, stamped envelope.

By copy of this correspondence, I am serving the same upon all counsel of record. If you have any questions or if there is anything further I should provide, please do not hesitate to contact me at 843-720-5270 or bholman@selcsc.org.

Thank you kindly for your assistance with this matter.

Sincerely,

  
J. Blanding Holman IV

JBH/arp

cc: All Counsel of Record (via First Class Mail)