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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court  
Appellate Case No. 2016-000839

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APPEAL FROM THE PUBLIC SERVICE COMMISSION  
Docket No. 2013-392-E

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Ex Parte: South Carolina Coastal Conservation League, and Southern  
Alliance for Clean Energy, Petitioners,

v.

Duke Energy Carolinas, LLC, South Carolina Office of Regulatory Staff,  
North Carolina Electric Membership Corporation, South Carolina  
Department of Health and Environmental Control, and Invenergy Thermal  
Development, LLC, Respondents.

In Re: 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

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**REPLY OF SOUTH CAROLINA COASTAL CONSERVATION LEAGUE AND  
SOUTHERN ALLIANCE FOR CLEAN ENERGY IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

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J. Blanding Holman IV  
S.C. Bar No.: 72260  
Southern Environmental Law Center  
463 King Street, Suite B  
Charleston, SC 29403  
(843) 720-5270

Gudrun Thompson  
*Admitted Pro Hac Vice*  
Southern Environmental Law Center  
601 W. Rosemary Street, Suite 220  
Chapel Hill, NC 27516  
(919) 967-1450  
*Attorneys for Petitioners*

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## INTRODUCTION

The Petition presents two questions of clear first impression under South Carolina's major ratepayer and environmental protection statute, the Utility Facility Siting and Environmental Protection Act (the "Siting and Environmental Protection Act," "the Act"), S.C. Code Ann. § 58-33-10 *et seq.* The first is whether it was error to construe the Act – which prohibits approval of a major facility "unless" the Public Service Commission "finds and concludes" that the project's environmental impacts are "justified" considering the "nature and economics" of "various alternatives" – to require merely, and only, a finding that the utility's proposed facility will meet a capacity "need." As set forth in the Petition, because collapsing the statutorily distinct "justified" inquiry into the "need" inquiry renders the former inquiry a nullity, the Public Service Commission's reading, affirmed by the Court of Appeals, was clear, reversible legal error.

The second question presented is whether the Commission erred by construing its statutory charge to "modify" projects "as the Commission may deem appropriate" to allow only *de minimis* modifications. This holding too constitutes clear legal error, since it contravenes explicit legislative language that gives the Commission the power to propose more than *de minimis* modifications as it "may deem appropriate."

Respondents do not directly contest that these are questions of first impression, or that the Commission's approval of \$650 million natural gas facility – to be constructed at South Carolina ratepayer expense and draining water from a drinking water source river with limited flows – is a matter of significant public concern. Instead they try the "nothing to see here, move along" approach, attempting to obscure the Commission's misapprehension of its governing statute and its abdication of clear statutory duties in a fog of "substantial evidence."

The record, however, paints a starkly different picture. It shows a Commission interested only in the capacity “need” for Duke’s proposed facility, and being legally handcuffed from considering modifications beyond trivial details. Nothing in the record shows *any* evaluation of whether Duke’s proposal was justified in light of the conditional modification presented by Petitioners – a proposal that would save ratepayers money and reduce environmental impacts. Rather than a Commission carefully making findings and determinations concerning the proposed alternative, as the statute requires, the record shows a Commission abdicating its statutory duty. The Court of Appeals affirmed the abdication by construing the Act to sharply limit the Commission’s power to modify any proposal, notwithstanding unambiguous statutory language empowering the Commission to modify proposals as it “may deem appropriate.”

These clear errors of law have major ramifications for the State of South Carolina. The Act, by its terms, charges the Commission with exercising an active and healthy skepticism in reviewing large generation facilities proposed by regulated utilities; in return, those utilities are granted monopoly service territories and guaranteed rates of return from South Carolina citizens. The Act’s environmental protection and customer protection goals will never be realized if, rather than conducting the vigorous review required by law, the Commission continues under a more lethargic reading whereby very expensive facilities gain approval with no meaningful evaluation of options to decrease their economic and environmental costs.

The Court should grant certiorari and correct the significant erroneous interpretations of the Act adopted below. Doing so would not ensure that Petitioners’ solar condition is adopted by the Commission. But it would ensure that the condition’s ability to reduce the Lee Gas Plant’s costs and impacts are actually considered – as the General Assembly explicitly required.

## ARGUMENT

### **I. The Commission's Clear Legal Error in Ignoring the "Justified" Prong of S.C. Code 58-33-160 (1)(c) is Subject to *De Novo* Review**

In claiming the Commission's actions are supported by "substantial evidence," the Respondents simply adopt the erroneous legal framework used below as correct, rather than defending or explaining it.

But the Act could not be more clear. It requires that the Commission "shall not" issue a Certificate unless it finds that the impacts of the Lee Gas Plant on the environment are "justified, considering the state of available technology and the nature and economics of various alternatives and other pertinent considerations." S.C. Code Ann. § 58-33-160(1)(c) (1971). Faced with Petitioners' showing that the Commission failed to undertake the basic analytical step of evaluating whether the facility's environmental impacts are justified given solar technology that could reduce those impacts (and lower costs for customers), Respondents point to the Commission's having "explained why the resource need identified by the [Integrated Resource Plan] could not be met by a solar facility." Return of Duke Energy Carolinas, LLC, the North Carolina Electric Membership Corporation and the Office of Regulatory Staff to the Pet. for Cert. of South Carolina Coastal Conservation League and Southern Alliance for Clean Energy ("Return") at 10 (citing R. Vol. I, pp. 15-16).

But pointing to the Commission's finding regarding the "need" for the plant merely demonstrates that the Commission erred in collapsing the distinct "need" and "justified" inquiries that the statute explicitly compels. Collapsing those inquiries was clear legal error, compounded by the reality that the solar proposal would be a complementary component of the Gas Plant, not a replacement. As an analytical matter, the Commission's collapse of the "need" and "justified" prongs into the former reads the *second* analysis out of the statute, and that error

and “justified” prongs into the former reads the *second* analysis out of the statute, and that error is not corrected even if evidence supports the first one. Said another way, there can be no “substantial evidence” for a decision or analysis *that did not take place*.

Reading Siting and Environmental Protection Act only to address whether a capacity “need” has been stated removes the environmental justification requirement out of the statute entirely, and thus violates the “well-settled rule in South Carolina. . . that, where possible, all provisions of a statute must be given full force and effect.” *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm’n*, 310 S.C. 539, 545, 426 S.E.2d 319, 323 (S.C. 1992). This Court is empowered to review an erroneous statutory interpretation *de novo*, *Therrell v. Jerry’s Inc.*, 370 S.C. 22, 26 n. 3, 633 S.E.2d 893, 895 n. 3 (S.C. 2006), and it should reverse. *Carolina Water Serv., Inc., v. S.C. Pub. Serv. Comm’n*, 272 S.C. 81, 87-88, 249 S.E.2d 924, 927 (S.C. 1978) (where misapplication of legal factor “precludes meaningful judicial review of the Commission’s order,” Commission’s judgment must be reversed and remanded for further proceedings.); *see Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 447-48, 511 S.E.2d 48, 56 (S.C. 1998) (administrative body’s failure to undertake mandatory duty rendered proceeding inherently flawed and thus “not subject to harmless error analysis”); *see S.C. Code Ann. § 58-33-170* (1971) (requiring Commission to “issue an opinion stating its reasons for the action taken”).

Respondents’ attempted reliance on *Lark v. Bi-Lo Inc.*, 276 S.C. 130, 276 S.E.2d 304 (S.C. 1981) and *Friends of the Earth v. Publ. Serv. Comm’n*, 387 S.C. 360, 692 S.E.2d 910 (S.C. 2010), is misplaced. Where clear legal error occurs, the applicable standard of review is not substantial evidence; the Court reviews legal error *de novo*. *Therrell*, 370 S.C. at 26 n.3, 633 S.E.2d at 895 n. 3. Further, even if the Commission had actually engaged in an analysis of whether the Lee Gas Plant’s environmental impacts were “justified” in light of a solar

higher burden on the Commission than the Base Load Review Act (“BLRA”), which was at issue in *Friends of the Earth*. The BLRA directs that the Commission “shall issue” an order approving project development if the utility demonstrates, by a “preponderance of evidence,” that its decision to incur preconstruction costs is “prudent.” S.C. Code Ann. § 58-33-225(D) (2007). By contrast, the Siting and Environmental Protection Act *prohibits* the Commission from issuing a Certificate “unless” it “shall find and determine” several distinct things, including that the facility’s environmental impact is “justified, considering the state of available technology” and the “nature and economics of the various alternatives and other pertinent considerations.” S.C. Code Ann. § 58-33-160(1)(c). By only addressing the “need” factor under § 58-33-160(1)(a), and not engaging in the environmentally justified-given-alternatives analysis under § 58-33-160(1)(c), the Commission committed clear legal error in a far more prescriptive review process than was present in *Friends of the Earth*.

Respondents’ final argument is to pretend that the Petitioners asked the Commission to issue a stand-alone Certificate for the solar component proposal. *See* Return at 12-13. According to Respondents, the Commission’s decision was sound because it properly found that the proposed solar component would not, itself, meet the stated capacity need. As mentioned earlier, and as Respondents well know, the Petitioners did not apply for a stand-alone Certificate for a solar facility; they proposed to condition or modify the Lee Gas Plant to include a complementary solar component that would decrease the Gas Plant’s operating costs and environmental impacts. The combined solar-gas facility would indeed meet the stated capacity need, with incidental additional capacity to spare. The Respondents’ attempt to bring the discussion back to “need” just underlines their inability or unwillingness to defend the Commission’s failure to engage in the “justified” analysis required by statute.

In summary, the Return does not refute the basic reality that the Commission misconstrued the Siting and Environmental Protection Act to remove a major statutory requirement – that it “*may not*” issue a Certificate “*unless*” it shall “*find and determine*” that a major facility’s impacts are “*justified, considering the state of available technology and the economics of the various alternatives*” – out of the law. The record is bereft of any indication that the Commission actually undertook this legislatively assigned task. The Court should grant certiorari to correct a clear and serious legal error that, if left in place, flaunts plain legislative text and removes protections installed by the General Assembly for South Carolina ratepayers and the State’s natural resources.

## **II. Respondents’ Professed Concern About Notice is a Classic Red Herring**

Respondents’ assertion that the Commission correctly rejected Petitioners’ solar condition because it conflicted with the notice requirements of the Siting Act is a classic red herring. Notably, Respondents make no argument concerning the scope of the Commission’s “modification” power, or the Court of Appeals unfounded view that the power is limited to *de minimis* modifications. The only argument they make concerns statutory notice. This argument is unpersuasive for multiple reasons.

As an initial matter, the Respondents are incorrect to imply that the solar condition proposed by Petitioners would necessarily be at maximum scale and at a single location – the record shows that the proposal was for Duke to issue a request for proposals for solar power “up to” a certain megawatt size, R. p. 324, and, as Respondents elsewhere admit, the power could come from a series of smaller facilities rather than one. Return at 6. More to the point, the Commission considered *none of this*, due to its clear legal in focusing entirely on the “need” prong of the statute without consideration of whether the Lee Gas Plant’s degradation of water

and air quality – which were uncontested – were “justified” in light of a solar component that would indisputably reduce them.

Second, Respondents’ professed concerns about public notice are based on a mistaken reading of the Act, which provides not just for modifications of proposals but also for renewed notice where such modifications occur. Specifically, the Siting and Environmental Protection Act empower the Commission to grant a Certificate “upon such terms, conditions or modifications” of the facility “as the Commission may deem appropriate,” S.C. Code Ann. § 58-33-160 (1971), and authorizes the Commission to require an applicant to re-notice an application that has been granted subject to conditions or modifications. S.C. Code Ann. § 58-33-160(2) (1971) (“If the Commission determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the municipalities and persons residing therein affected by the modification shall have been given reasonable notice.”). If the Commission had determined that the solar condition would require additional public notice, the Siting Act authorizes it to require or condition its granting of the application on such further notice. Respondents’ concern about public notice is simply a non-issue.

Finally, the Respondents’ citation to Vermont case involving the siting of a solar facility proves perhaps more than they intended. The real import of *In re Rutland Renewable Energy*, No. 2015-230, 2016 WL 1729592, -- A.3d -- (Vt. April 29, 2016), is to reaffirm the proposition that, where alternatives to reduce the impacts of a utility’s generation proposal are put forth but are not adopted, a Commission’s *denial* of a Certificate will be *affirmed*. *Id.* Citing *In re Halnon*, 174 Vt. 514, 811 A.2d 161 (Vt. 2002). The case law cited by Respondents thus underlines the egregiousness of the error below: an alternative was put forth to reduce a

generation unit's environmental impacts, yet the Commission failed to consider that option's ability to reduce impacts despite a clear legislative mandate to do so. That was clear error, and it should be reversed.

### **III. Respondents' Invocation of Act 236 is Misplaced**

Respondents point to Act 236, enacted in 2014, as an additional reason why the Court should deny the Petition. Act 236 established a suite of policies and procedures related to distributed energy resources in South Carolina up to 10 megawatts - in other words, relatively small, dispersed facilities. While the Act does demonstrate tremendous public and legislative support for distributed resources like solar, Act 236 did not alter in any way the requirements of the Siting Act, or the Public Service Commission's obligation to adhere to those requirements when granting a certificate for a new major utility facility. Act 236 focuses on smaller solar facilities, does not foreclose the approval of renewable energy facilities in proceedings outside the Act's purview, and certainly did not foreclose the Commission's consideration of Petitioners' solar condition. The fact that Act 236 encourages the development of smaller solar facilities has no bearing on the questions of law presented in the Petition, and the Court should disregard Respondents' attempts to distract it from the real questions at issue in this case.<sup>1</sup>

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<sup>1</sup> One of the Petitioners' witnesses in this case, Hamilton Davis, was central to the drafting and passage of Act 236, making Respondents' citation of that enactment following their questioning of Mr. Davis's credentials, Return at 6, somewhat ironic. Petitioners' other witness, John Wilson, holds a Masters in Public Policy from Harvard University and is one of the most experienced solar energy policy experts in the nation. Their combined experience concerning the technical aspects of photovoltaic systems dwarfed that of witnesses put forth by Duke or ORS. Of course, Commission members asked Petitioners nothing about the solar component's ability to reduce the Lee Plant's impacts, but instead posed a total of two questions, both about capacity needs – more proof of the erroneous collapsing of the “justified” inquiry into the “need” inquiry. R. p. 323-4.

**CONCLUSION**

For the reasons stated herein, Petitioners ask the Court to grant the petition for a writ of certiorari.

Respectfully submitted this 23<sup>rd</sup> day of June, 2016,



J. Blanding Holman IV  
S.C. Bar No.: 72260  
Southern Environmental Law Center  
463 King Street, Suite B  
Charleston, SC 29403  
(843) 720-5270

Gudrun Thompson  
Admitted *pro hac vice*  
Southern Environmental Law Center  
601 W. Rosemary Street, Suite 220  
Chapel Hill, NC 27516  
(919) 929-9421  
*Attorneys for Petitioners*

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**CERTIFICATE OF SERVICE**

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

Jacquelyn S. Dickman  
Susan A. Lake  
SC DHEC  
2600 Bull Street  
Columbia, SC 29201  
(803) 898-3432  
*Attorneys for Respondent SC Dept. of  
Health & Environmental Control*

Len S. Anthony  
NC Electric Membership Corp.  
1701 N. Ocean Blvd.  
N. Myrtle Beach, SC 29582  
(919) 601-7871  
*Attorney for Respondent NC Electric  
Membership Corporation*

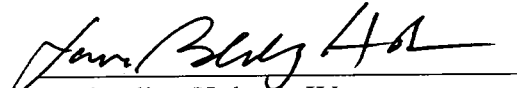
Shannon B. Hudson  
Jeffrey M. Nelson  
Florence P. Belser  
Nanette S. Edwards  
Office of Regulatory Staff  
1401 Main Street, Suite 900  
Columbia, SC 29201  
(803) 737-0800  
*Attorneys for Respondent SC Office of  
Regulatory Staff*

Richard L. Whitt  
Austin & Rogers, P.A.  
508 Hampton Street, Suite 300  
Columbia, SC 29201  
(803) 256-4000  
*Attorney for Respondent Invenergy  
Thermal Development, LLC*

Frank Rogers Ellerbe, III  
Robinson, McFadden & Moore, P.C.  
P.O. Box 944  
Columbia, SC 29202  
(803) 779-8900

Timika Shafeek-Horton  
Duke Energy Carolinas, LLC  
P.O. Box 1321 (DEC 45A)  
Charlotte, NC 28201  
(704) 382-6373  
*Attorneys for Respondent Duke Energy  
Carolinas, LLC*

June 23, 2016

  
J. Blanding Holman IV  
S.C. Bar No.: 72260  
Southern Environmental Law Center  
463 King Street, Suite B  
Charleston, SC 29403  
(843) 720-5270

Gudrun Thompson  
Admitted *pro hac vice*  
Southern Environmental Law Center  
601 W. Rosemary Street, Suite 220  
Chapel Hill, NC 27516  
(919) 929-9421  
*Attorneys for Petitioners*

ORIGIN ID: CHSA (843) 720-5270  
RACHEL PRUZIN  
SOUTHERN ENVIRONMENTAL LAW CENTER  
463 KING STREET  
SUITE B  
CHARLESTON, SC 29403  
UNITED STATES US

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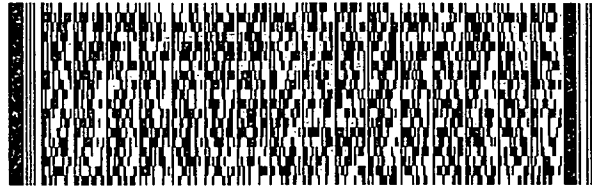
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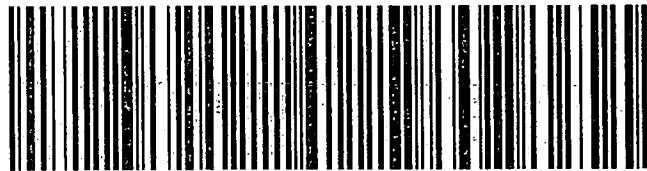
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