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**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT
APPEAL FROM THE PUBLIC SERVICE COMMISSION

Docket No. 2013-392-E
Appellate Case No. 2016-000839

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: 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 752 MW Combined Generating Plant Near Anderson, SC.

**AMICUS BRIEF OF SOUTH CAROLINA SMALL BUSINESS
CHAMBER OF COMMERCE**

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INTRODUCTION

This case presents novel questions of first impression concerning one of South Carolina's most important statutes protecting small-businesses and consumers, the Utility Facility Siting and Environmental Protection Act, S.C. Code Ann. § 58-33-10 *et seq.* ("the Act").

The Act is a central pillar of the "regulatory compact" in South Carolina, whereby privately owned utility companies were given exclusive electrical service territories in return for extensive oversight by the Public Service Commission ("PSC") to protect customers. One of these protections is a requirement that the PSC determine whether impacts of the facility are justified, considering the state of available technology and the nature and economics of various alternatives. S.C. Code Ann. § 58-33-160(1)(c). In this case the Public Service Commission failed to follow this legal requirement of the Act, instead relying entirely on a determination that the facility meets the need requirement. The Court of Appeals upheld that failure. Unless corrected, the errors below would severely weaken the PSC's ability to reduce the costs and impacts of large power plants and would unnecessarily and unduly burden the citizens and businesses of this state who are the ratepayers.

This case is particularly concerning for two reasons. The first is the precedent that would be set should the South Carolina Court of Appeals decision stand. The second is the loss of statutorily granted power currently held by an agency charged with protecting the environment and consumers from unwise actions by power companies who are not otherwise held accountable by traditional market forces.

The South Carolina Small Business Chamber of Commerce

The South Carolina Small Business Chamber of Commerce ("SCSBCC") is a statewide advocacy organization formed in 2000 to represent the interests of small businesses. It is

recognized as the primary organization working on behalf of small businesses on all matters regarding electricity/gas rates and related issues such as net metering that are regulated by the PSC.

Since 2002, the SCSBCC or its president, Frank Knapp Jr., have successfully intervened in eight PSC hearings on petitions filed by either South Carolina Electric & Gas or Duke Power to increase electricity or gas rates. In addition, Mr. Knapp was an intervenor in the PSC's 2014 hearing on net metering policy and has intervened in SCE&G's 2016 petition to the PSC for approval of additional construction costs for its nuclear plants.

The SCSBCC represents its members who are ratepayers and who will be directly impacted by the outcome of this litigation.

ARGUMENT

Summary of Argument

This case arises over a decision by the PSC to grant two certificates allowing Duke Energy to construct a new gas fire power plant. The proposed plant would be rated for 750 megawatts with an initial cost of 600 billion to build the facility, not including operating costs. Because of the cost and generation capacity of the plant, Duke will not be able to construct or operate the facility until it is certified by the PSC. S.C. Code Ann. §58-33-10 *et. seq.*

Under the Act, the PSC cannot approve a major power plant “unless” it makes six specific determinations, enumerated below. In this case, the PSC focused on one determination – whether the facility will meet a capacity “need” – to the exclusion of its duty to determine whether the facility’s impacts are justified considering the “economics of various alternatives.”

Id. § 58-33-160(1)(a), (c). As a result, the Commission failed to consider a solar energy component that was proposed to lower the Lee Gas Plant’s impacts and costs to ratepayers.

The Kentucky Court of Appeals recently reviewed a similar case. It called a utility commission’s failure to undertake a required consumer-protection determination in approving an expensive power plant for which residents and businesses must pay “a complete abdication” of the commission’s statutory responsibility, justifying reversal. Kentucky Industrial Utility Customers v. Kentucky Public Service Commission et al., 2016 WL 3886312 (Ky Ct. App. July 15, 2016).

In this case, the PSC also construed the Act to limit it from making more than minor modifications. But the statute explicitly authorizes the Commission to make any modifications it “may deem appropriate,” regardless of whether such modifications are minor. *Id.* § 58-33-160(1). The interpretation adopted below improperly handcuffs the agency in carrying out its consumer-protection, cost-saving mission, and is plainly inconsistent with statutory language and intent.

Taken together, the PSC and Court of Appeals rulings thwart the regime enacted by the General Assembly to protect South Carolina consumers and its natural resources. Because this case is of state-wide significance and presents important, novel issues of statutory construction, the Petition for Certiorari should be granted.

A. This Case Presents Novel, Significant Questions of Law That Justify Review

The regulation of utilities is one of the most important exercises of State police power. Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm’n, 461 U.S. 375, 377, 103 S.Ct. 1905, 1908–09, 76 L.Ed.2d 1 (1983). Where a state General Assembly delegates broad regulatory and supervisory powers to the Commission and a utility is granted monopoly status – as in South

Carolina – the “*quid pro quo* for its monopoly status, a public service utility is subject to vigilant and continuous regulation.” Arizona Pub. Serv. Co. v. Arizona Corp. Comm'n, 155 Ariz. 263, 746 P.2d 4 (Ct.App. 1987), rev'd in part on other grounds, 157 Ariz. 532, 760 P.2d 532 (1988).

A central aim of such oversight is to prevent imprudent expenditures by monopolies entitled to ratepayer-backed returns. Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm'n, 578 So. 2d 71, 85 n.6 (La. 1991) (“If a competitive enterprise tried to impose on its customers costs from imprudent actions, the customers could take their business to a more efficient provider. A utility's ratepayers have no such choice.”) (quoting In Re Long Island Lighting Co., 71 P.U.R. 4th 262, 1985 WL 258217 (N.Y.Pub.Serv.Comm'n 1985)). Commissions also have a duty to promote conservation and alternative fuels, which can reduce ratepayer costs. See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 571 (1980) (finding that state commissions “have the authority—and indeed the duty—to take appropriate action to further” the goal of “conservation, as well as the development of alternative energy sources”).

South Carolina has implemented the regulatory compact by giving the Public Service Commission broad authority over investor-owned utility rates and expenditures. A central statute to that end is the Utility Facility Siting and Environmental Protection Act, S.C. Code Ann. § 58-33-10 *et seq.*, which prohibits the PSC from approving a major power plant “unless” it makes six enumerated findings and determinations. Specifically, the Commission is empowered to issue a certification for a new major electrical generating facility “as filed or granting it upon such terms, conditions or modification” as the “Commission may deem appropriate,” but “may not” do so “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 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 facility will conform to applicable State and local laws, subject to exceptions not relevant here.
- (f) That the public convenience and necessity require construction of the facility.

S.C. Code Ann. § 58-33-160 (1).

The General Assembly explicitly required these enumerated required findings and determinations to protect South Carolina ratepayers and its natural resources from avoidable damage caused when a utility's preferred plan for a major generating facility goes unreviewed. The Respondents concede that the PSC must make specific findings on each of these six criteria. (Resp. Brief, p. 9). Further, the General Assembly specified that the PSC cannot issue a certificate "unless" it makes findings and determinations on each specific point. The statute thus sets a presumption against new major facilities *unless*, after active and searching review by the PSC on the public's behalf, the various criteria are satisfied.

In the present case, the PSC focused on one of the enumerated criteria – that the facility will meet a capacity "need" – to the neglect of others. Specifically, it failed to make the required finding and determination that the proposed Duke Lee Gas Plant's impacts are "justified" considering "the state of available technology" and the "economics of various alternatives." *Id.* § 58-33-160(1)(a), (c). The alternative put forth by the Citizen Groups in this case was justified as a means to reduce the Lee Gas Plant's environmental impacts and also to decrease its economic costs to ratepayers. Although there is good reason to believe, had that condition been adopted by the PSC and Requests for Proposals been issued by Duke, qualifying bids for a cost-effective component of solar energy would have been received, Amicus Small Business Chamber cannot say with certainty that this would be the case. But that is not the point. The

point is that the PSC, by failing to determine this alternative's ability to reduce impacts and costs, abdicated its statutory role in the regulatory compact.

The decision below also erroneously limits the PSC's ability to modify power plant proposals. The PSC found, and the Court of Appeals affirmed, that it cannot issue modifications like the one Petitioners request when certifying a new generation facility. In this ruling, the Court of Appeals leaves the PSC with the limited ability to impose *de minimis* modifications on new large generation facilities. This is a contradiction of the statutory language. The statute authorizes the Commission to make modifications it "may deem appropriate," and specifically authorizes re-noticing of proposals that are modified. S.C. Code Ann. § 58-33-160(1), (2). The appearance of the modification provision in the emergency order section supports this point. In that provision, PSC may permit the construction of a new facility in exigent circumstances. S.C. Code Ann. §58-33-110(6). However, after construction, the PSC may order modifications if it finds them necessary to minimize environmental impacts. *Id.* This language indicates that the PSC may require much more than *de minimis* modifications. In fact, it is not difficult to envision a plan quite similar to Petitioner's being implemented to reduce the impacts of a plant built under an emergency order.

The interpretation adopted below – limiting the PSC's power to make only minor modifications because more major ones would present notice problems – could not be farther afield of the statutory language. The narrow reading of the modification power by the Court of Appeals would leave the PSC unable to carry out its duties under the emergency provision, and indeed the entire statute. This Court's review is needed to restore the proper legal scope of the PSC's modification authority and remove the improper handcuffs that were imposed on its cost-saving mission.

To be clear, advocating the plain language application of the statute – and honoring the inquiries it requires and the powers it confers – is not taking sides of one energy generation technology or another. Advocating the plain language application of the statute means vindicating the South Carolina consumers whom the General Assembly intended to protect by requiring all feasible options be considered to promote innovation and correct the market distortions inherent in a regulated monopoly. See Nat'l Rural Telecom Ass'n v. F.C.C., 988 F.2d 174, 178 (D.C. Cir. 1993) (noting well-known “inefficiencies inherent in rate-of-return regulation. First, the resulting cost incentives are perverse. Because a firm can pass any cost along to ratepayers (unless it is identified as imprudent), its incentive to innovate is less sharp than if it were unregulated. There is even a temptation toward “gold-plat[ing]”—using equipment or services that are not justifiable in purely economic terms, especially when their use improves the lot of management (elegant offices, company jets, etc.)”).

The PSC’s application of the Act, endorsed by the Court of Appeals, presents an important issue of first impression that will shape PSC review of multi-billion dollar energy facilities going forward. The stakes are high for the South Carolina ratepayers who must pay the bills for those facilities. The legal errors are clear, and because they go the very heart of the Act, critical. This case firmly meets the criteria for discretionary review. SCACR 242(b).

B. The Kentucky Court of Appeals Recently Reversed A Similarly-Flawed Power Plant Approval

On July 15, 2016, the Kentucky Court of Appeals reversed the Kentucky Public Service Commission’s approval of a power plant proposal, finding the Commission elevated one factor of its analysis and failed to consider “other factors such as the reasonableness of the costs in the comparison with alternatives.” Kentucky Industrial Utility Customers v. Kentucky Public

Service Commission et al., 2016 WL 3886312 (Ky Ct. App. July 15, 2016). The Commission in that case supported a power-purchase agreement for energy from a biomass plant because the Kentucky legislature had indicated a preference for biomass resources in a separate statute. While the Court found that the Commission was entitled to consider such policies, it held that the Commission's organic statute "*mandates* that the Commission consider" whether the costs are just and reasonable, such that the Commission's failure to undertake that analysis was "a complete abdication of its statutory responsibility" justifying reversal. *Id.* at 30.

Here, a proposal was put forth to lower the costs of a proposed energy facility whose construction and operation costs will easily top \$1 billion – to be paid by South Carolina ratepayers. As with Kentucky Commission, the South Carolina PSC was charged by statute with examining whether the facility's impacts is justified and its costs are "reasonable in the comparison with alternatives." See S.C. Code Ann. § 58-33-160 (1) (PSC may not issue certificate "unless" it finds facility's impact "justified, considering the state of available technology and the nature and economics of the various alternatives" and that facility "will serve the interests of system economy []"). Focusing on one factor – whether a facility will meet a capacity "need" – to the exclusion of other, explicitly-required considerations was legal error, and requires the same result reached in Kentucky.

C. Policy Considerations Warrant Granting a Writ of Certiorari

As an entity working to protect the interests of small businesses, the SCSBCC is also concerned about the potential policy and precedential outcomes of this case. First, allowing the Court of Appeals decision to stand would severely limit the PSC's ability to protect consumers and the environment in two ways. It would allow a utility company to "justify" a new large

generation facility on need alone, and it would prevent the PSC from mediating disputes and protecting consumers by modifying plans for new large generation facilities.

The statute requiring the PSC to certify new facilities is explicit in what must be considered, and for good reason. A mere need-based analysis is insufficient to protect consumers and the environment from a state granted monopoly that is not subject to the normal free market forces that might otherwise check unwise expansion. The General Assembly recognized this, and included more than a need-based analysis. Rather, they required a utility justify a project in light of alternatives which could mitigate cost and environmental impacts. S.C. Code Ann. §58-33-110(1). Upholding the PSC and Court of Appeals decisions in this case would allow companies who are not subject to free market checks to “justify” any project based simply on need. As a policy matter such a ruling would be disastrous to consumers and the environment as those companies receive a rubber stamp “justification” for new facilities, whose costs will be borne by the ratepayers, under the holding of this case.

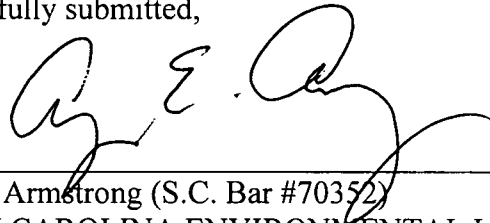
Finally, allowing the PSC to include only small modifications could have legal ramifications both for the Utility Facility Siting and Environmental Protection Act, and numerous other statutes authorizing agency review. Similar modification language appears throughout our code of laws and is a key piece of agency oversight.¹ Without the power to modify submitted projects, agencies would be left with only two decisions; rejection or acceptance. Modification is a tool of compromise, and therefore should be left intact and robust.

¹ For example, in the Coastal Zone Management Act, the Department of Health and Environmental Control is required to “examine, modify, approve or deny applications for permits for activities covered by the provisions of this chapter.” S.C. Code Ann. §48-39-50(G). For an example outside of the environmental context, see DHEC’s ability to modify architectural and size details when issuing a certificate of need for new hospitals. S.C. Code Ann. §44-7-230(A).

CONCLUSION

The South Carolina Small Business Chamber of Commerce respectfully joins the Petitioners' request for Supreme Court review of two legal errors made by the Court of Appeals. This case contains two errors of law which were vital to the outcome of the PSC's certification. However, this case also has more far reaching implications. Allowing an exemption from the justification analysis and prohibiting anything more than minor project modifications by the PSC will leave the Utility Facility Siting and Environmental Protection Act almost completely unenforceable. Finally, interpreting a statutory grant of the power to modify a proposed project to mean only minor modifications will have far reaching implications for agencies who rely on that power, as well as the citizens they protect.

Respectfully submitted,



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