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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2017-32-E

3109 Hwy. 25 S. L.L.C. d/b/a
25 Drive-In and Tommy McCutcheon, Respondent,

v.

Duke Energy Carolinas, LLC, Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. WAS THE COMMISSION'S DECISION TO ORDER THAT RESPONDENT BE PLACED BACK ON THE GREENWOOD RATE AN ERROR OF LAW, WHERE THE COMMISSION MADE A DETERMINATION THAT THE ELECTRICITY DEMAND OF RESPONDENT'S BUSINESS REQUIRED A NEW CONNECTION SO THAT DUKE ENERGY CAROLINAS LLC COULD SAFELY PROVIDE ELECTRIC SERVICE TO RESPONDENT'S BUSINESS?

2. WAS THERE SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE COMMISSION'S DECISION, WHERE THE ONLY EVIDENCE PRESENTED SHOWED THAT THE INCREASED DEMAND FROM RESPONDENT'S BUSINESS REQUIRED AN UPGRADE IN FACILITIES CONSTITUTING A NEW CONNECTION FOR THE SERVICE PROVIDED TO RESPONDENT BY DUKE ENERGY CAROLINAS, LLC?

STATEMENT OF THE CASE

On January 27, 2017, 3109 Hwy. 25 S., L.L.C. d/b/a 25 Drive-In and Tommy McCutcheon ("Respondent") filed a complaint with the Public Service Commission of South Carolina ("Commission") seeking to have Duke Energy Carolinas, LLC ("DEC") return the electric service account for Respondent's business from the standard DEC rate to the previous rate, known as the "Greenwood Rate," effective June 18, 2015. On November 8, 2017, the Commission issued an order permitting Respondent to return to the previous rate, effective January 1, 2018, unless and until Respondent's peak electricity usage exceeds the capacity of the previously installed facilities. On February 13, 2018, the Commission issued an order denying rehearing. On March 15, 2018, DEC served the Notice of Appeal on Respondent.

STATEMENT OF FACTS

This case arose in the summer of 2015 when the electric service lines to Respondent's business overheated, melted and burned on two different occasions. After the second incident, DEC replaced and upgraded the service lines to the business, thereby establishing a "new connection" for Respondent's business. Under Act 1293 of 1966, 1966 Acts 3294 ("the Act" or "Act 1293") and this Court's opinion in *Payne v. Duke Power Co.*, 304 S.C. 447, 405 S.E.2d 399 (1991), as a result of the new connection, established by DEC to fulfill its obligations to provide safe and reliable electric service, Respondent no longer qualified for the "Greenwood Rate." Accordingly, DEC transferred Respondent's business to its standard rate approved by the Commission.

Respondent operates a drive-in movie theater in Greenwood, South Carolina located on Highway 25 South, and which is served by DEC. The drive-in first opened in the 1940s and was purchased by Respondent in 2008. (ROA __; Order No. 2017-774, p. 2.) The drive-in property had been served by DEC under the Greenwood Rate prior to Respondent's purchase, and the Greenwood Rate was allowed to continue after Respondent purchased the property. (ROA __; Order No. 2017-774, p. 2.) Prior to Respondent's purchase of the drive-in, it had not operated in 25 years. (ROA __; Order No. 2017-774, p. 2.) At the time of the purchase, the movie theatre featured one outdoor movie screen. Respondent installed an additional movie screen in 2008, and another screen in 2016. (ROA __; Order No. 2017-774, p. 2.) (ROA ___; Tr. Vol. 1, pp. 53-54.) Over the years, Respondent has also added projection equipment, cooking equipment, a refrigerator, and other items. (ROA __; Order No. 2017-774, p. 2.) (ROA __; Tr. Vol. 1, p. 54.) Following Respondent's purchase of the business in 2008, annual electricity usage increased

from an average of 4,927 KWh between the years 2000 and 2007 to an average of 48,186 KWh between the years 2009 and 2016. (ROA __; Lunsford Test., Ex. A.)

One Saturday evening, on May 30, 2015 at approximately 10:00 p.m., while the drive-in was showing a movie and serving its customers, it experienced a power outage which was accompanied by sparking, a melted electric service line, and a melted fuse in the pole-mounted transformer serving the drive-in. (ROA __; Order No. 2017-774, p. 3) (ROA __; Fowler Test., pp. 3, 4, Ex. A, Ex. C) (ROA __; Lunsford Test., pp. 4, 7). DEC repaired its electric facilities and restored power to the drive-in. (ROA __; Order No. 2017-774, p. 3) (ROA __; Fowler Test., p. 3). Again, on June 13, 2015, another Saturday night two weeks later, at approximately 9:40 p.m. the drive-in experienced another outage with sparking, a melted electric service line, a melted transformer fuse, and smoke damage. (ROA __; Order No. 2017-774, p. 3) (ROA __; Fowler Test., pp. 3, 4). According to DEC records, a report was phoned in that the electric service line serving Respondent's business was on fire, and that the fire department had been contacted. (ROA __; Fowler Test., p. 4, Ex. B).

DEC technicians determined that the outages and associated melted lines and fuses were caused by thermal overload resulting from an increased electricity demand from Respondent's business. (ROA __; Order No. 2017-774, p. 3) (ROA __; Fowler Test., p. 4). Although the original service line providing power to Respondent's business was rated for only 185 amperes, actual demand of the theater was later calculated to be 225 amperes, or about 122% of the rating of the line. (ROA __; Order No. 2017-774, pp. 3-4) (ROA __; Lunsford Test., pp. 4-5). Given the safety concern associated with the risk of fire, DEC advised Respondent on June 17, 2015, and Respondent signed a letter acknowledging, that the electric facilities would need to be upgraded, and that such upgrade would result in Respondent being transferred from the

Greenwood Rate to the standard DEC rate. (ROA __; Fowler Test., pp. 4-5) (ROA __; Lane Test., p. 3, Exhibit A). On June 18, 2015, DEC upgraded the facilities serving Respondent's business by replacing the single run of 2/0-3 aluminum triplex wire serving Respondent's business with a dual run of 4/0-3 aluminum triplex wire and replacing the 25 KVA transformer with a 50 KVA transformer. (ROA __; Fowler Test., p. 5). The new facilities were capable of handling a significantly greater load from Respondent's business. (ROA __; Order No. 2017-774, p. 5). Following the upgrade of the facilities and subsequent reconnection of Respondent's business, DEC transferred Respondent from the Greenwood Rate to the applicable DEC rate. (ROA __; Order No. 2017-774, p. 4). That transfer occurred on June 18, 2015. The Complaint was filed on January 27, 2017, approximately eighteen months later.

The Greenwood Rate, which is at the center of the dispute in this proceeding, is a product of Act 1293. The Act was adopted in 1966 to approve a contract negotiated between the Greenwood County Electric Power Commission ("GEPC") and DEC's predecessor, Duke Power Company ("Duke Power"), by which Duke Power acquired the facilities of GEPC. The Act included the following provision regarding the rates to be charged to customers who were being transferred:

> The rates to be charged for electric power for all connections which exist *at the consummation of the sale* shall be the lower of the rates charged by the Greenwood County Electric Power Commission and Duke Power Company and the same shall not be grounds for any claim alleging discrimination. The rates to be charged for electric power for connections *after the date of the sale* shall be the applicable rates of Duke Power Company. As used herein the word "connections" shall be deemed to mean the physical connection of a resident or business establishment and shall have no reference to the person or business firm occupying the premises so connected, and the benefit of the lower rate shall continue although the person or firm occupying such premises may change from time to time.

(ROA __; Act No. 1293, 1966 S.C. Acts 3294 (emphasis added) (Act 1293).

The rate charged for all existing connections became known as the "Greenwood Rate." The Commission issued Order No. E-976 a few months following the enactment of Act 1293. In that order, the Commission directed, with regard to customers eligible for the Greenwood Rate, that "whenever a customer is disconnected for any reason, the proper Duke rate shall be applied when the customer is reconnected." (ROA __; Order No. E-976, Docket No. 13,277 (issued July 13, 1966). Based on Act 1293, Order No. E-976, and related precedent, when a customer's electricity demand requires that the facilities serving that customer be upgraded, DEC performs the upgrade and establishes a new connection with the customer, and thereafter transfers the customer from the legacy Greenwood Rate to the standard DEC rate.

This matter came before the Commission on the Complaint of Respondent and his business on January 27, 2017, claiming that DEC wrongly removed Respondent's business from the Greenwood Rate. After hearings on this matter on April 5, 2017 and April 19, 2017, the Commission issued Order No. 2017-774 on December 21, 2017. That order determined that the transformer fuse had melted, which was indicative of excess current flow, and which would result in a thermal overload. (ROA __; Order No. 2017-774, p. 3). The order also determined that DEC was required to upgrade the facilities in order to safely provide service to Respondent. (ROA __; Order No. 2017-774, p. 5). However, instead of recognizing the upgraded electric facilities as a new connection, thereby disqualifying Respondent from the Greenwood Rate, Order No. 2017-774 required DEC to place Respondent back on the Greenwood Rate, effective January 1, 2018, unless and until the demand of Respondent's business exceeds the capacity of the facilities that were replaced in June 2015. (ROA __; Order No. 2017-774, pp. 5-6). DEC requested rehearing of this decision, and the Commission issued an order denying rehearing on February 13, 2018 ("Order Denying Rehearing").

ARGUMENTS

1. BECAUSE THE COMMISSION DETERMINED THAT THE DEMAND OF RESPONDENT'S BUSINESS EXCEEDED THE CAPACITY OF THE FACILITIES IN PLACE TO SERVE RESPONDENT, DEC'S ACTIONS IN REPLACING AND UPGRADING THE FACILITIES CONSTITUTED A "NEW CONNECTION" AND THE COMMISSION'S DECISION TO RETURN RESPONDENT TO THE GREENWOOD RATE WAS AN ERROR OF LAW.

In Order No. 2017-774 the Commission determined that the demand of Respondent's business exceeded the capacity of the previously-installed electric facilities and threatened DEC's ability to safely provide electricity. (ROA __; Order No. 2017-774, pp. 4-5). DEC responded appropriately and upgraded the facilities serving Respondent. This upgrade was a "new connection" under Act 1293, and, accordingly, it was an error of law for the Commission to order DEC to transfer Respondent to the Greenwood Rate.

Standard of Review

This appeal from orders of the Commission is governed by the Administrative Procedures Act, S.C. Code Ann. §1-23-310 *et seq.* The arguments advanced in this section of this brief address errors of law committed by the Commission. The standard of review is found in S.C. Code Ann. §1-23-380 which allows reversal of the Commission where substantial rights of DEC have been prejudiced because the Commission's decision is affected by an error of law.

A. Pursuant to Act 1293 and Related Precedent, DEC Properly Transferred Respondent from the Greenwood Rate Upon Respondent's Need for a New Connection

Act 1293 established that the rates to be charged for electric power for "connections" made after the sale of GEPC to Duke Power in 1966 would be the applicable rates of Duke Power (now DEC). (ROA __; Act 1293 § 4(3)). Act 1293 defines "connections" as "the physical connection of a resident or business establishment." (ROA __; Act 1293 § 4(3)). In 1966, following the enactment of Act 1293 the Commission issued Order No. E-976 to address

the manner in which it interpreted the "new connection" provisions in Act 1293. In that order, the Commission directed that "whenever a customer is disconnected for any reason, the proper Duke rate shall be applied when the customer is reconnected." (ROA __; Order No. E-976, Docket No. 13,277 (issued July 13, 1966). This order has not been modified.

There are different scenarios in which DEC will treat—and courts have recognized—a reconnection as a "new connection," including where "the customer's electrical needs changed, requiring changes in the equipment Duke had to provide to serve the premises," (ROA __; *Payne v. Duke Power Co.*, No. 85-CP-24-381, at 18 (8th Cir. Mar. 22, 1990), *aff'd*, 304 S.C. 447, 405 S.E.2d 399 (1991)) or where "a location's electric demand increased to the point Duke deem[s] it a 'new connection.'" *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 87, 326 S.E.2d 395, 399 (1985).

The leading case on the Greenwood Rate is *Payne v. Duke Power Co., supra. Payne* was a class action suit filed in the Court of Common Pleas for Greenwood County on the question of whether Duke Power had violated Act 1293 by "systematically transferring the members of the Plaintiff Class to the Duke Power Company rate schedule." The Circuit Court order in *Payne* is instructive in understanding and interpreting Act 1293.[1] (ROA __; *Payne v. Duke Power Co.*, No. 85-CP-24-381 (8th Cir. Mar. 22, 1990), *aff'd*, 304 S.C. 447, 405 S.E.2d 399 (1991). The trial court in that case had the benefit of testimony of the legal counsel at the Commission who drafted Order No. E-976, as well as the testimony of four successive General Counsels of the Commission. (ROA __; *id.* at 24). The Court explained that one of the reasons a customer would be transferred from the Greenwood Rate to the standard Duke rate is "when the

[1] In *City of Orangeburg v. Moss*, 262 S.C. 299, 204 S.E.2d 377 (1974) this Court held that orders of the Circuit Court and the Public Service Commission were persuasive but not binding authority. DEC submits that the *Payne* circuit court order is especially persuasive in this matter, both because it was affirmed by this Court and because it addresses the precise question presented by this case.

customer's electrical needs changed, requiring changes in the equipment Duke had to provide to serve the premises. This was a 'new' connection, and under the terms of Act 1293 and PSC Order No. E-976, the standard Duke rate was thereafter applicable to the location." (ROA __; *id.* at 18.) The Court explained that transfers from the Greenwood Rate to the standard DEC rate

> took place because the language of Act 1293 referred specifically to the connection as it existed on the date of the sale. Any subsequently changed connections requiring increased investment in the service facilities by Duke was a "new" connection and the Act required that it be placed on the applicable Duke rate schedule. . . . The old Greenwood County rate schedules available to "old" connections were closed on July 1, 1966. A change in connections is, in effect, a "new connection," no longer eligible for the old Greenwood County rate.

(ROA __; *id.*) This Court affirmed the trial court's order, reiterating the language of Act 1293 that "[t]he rates to be charged . . . for connections *after* the date of the sale shall be the applicable rates of Duke Power Company." (ROA __; *Payne v. Duke Power Co.*, 304 S.C. 447, at 452, 405 S.E.2d at 402 (emphasis original).)

The facts of this case present the same situation the Court described in *Payne* that constitute a "new connection" and thus a proper transfer from the Greenwood Rate to the Duke Power rate. The record in the instant case demonstrates, and Order No. 2017-774 acknowledges, that: (1) the customer's demand exceeded the rating of the service line and (2) upgrade of the electric facilities was necessary to ensure continued safe and reliable electric service. (ROA __; Order No. 2017-774, p. 5). Accordingly, and pursuant to the instruction affirmed by this Court in *Payne*, once the upgrade was completed, a new connection was established with the customer such that transfer of Respondent from the Greenwood Rate was required by Act 1293. Once the new connection was placed into service, Respondent, as a matter of law, no longer qualified for the Greenwood Rate. As a result, the Commission's order transferring Respondent back to the Greenwood Rate is an error of law.

B. Act 1293 and Related Precedent Prohibit Retransfer to the Greenwood Rate.

The Commission's order retransferring Respondent to the Greenwood Rate is contrary to the statutory directive of Act 1293 and is an arbitrary and capricious departure from the Commission's precedent, which has been recognized by this Court, prohibiting retransfers to the Greenwood Rate. Indeed, in its Order Denying Rehearing, the Commission acknowledged that "Act 1293 does not provide an opportunity to re-qualify for the Greenwood Rate." (ROA __; Order No. 2018-101, p. 3. (citing *Payne v. Duke Power Co.*, 304 S.C. 447, 405 S.E.2d 399 (1991)) (Order Denying Rehearing).) Further, this Court in *Payne* recognized that the "PSC, the agency charged with administering Act 1293, has, without exception, construed it as establishing a closed rate schedule, that is, one precluding retransfer of customers." *Payne,* 304 S.C. at 451-52, 405 S.E.2d at 401. Nevertheless, Order No. 2017-774 required that Respondent be returned to the Greenwood Rate effective "the first billing cycle after January 1, 2018."

In permitting Respondent an opportunity to re-qualify for the Greenwood Rate after a "new connection" was required in order to continue service, Order No. 2017-774 has the effect of rewriting the provisions of Act 1293 by which the General Assembly established the criteria for customers' eligibility for the Greenwood Rate. This aspect of the holding of Order No. 2017-774 is in conflict with the holding in *Duke Power Co. v. S.C. Pub. Serv. Comm'n* that Act 1293 deprived the Commission of jurisdiction to disturb the terms set by the General Assembly, and it is an error of law for Order No. 2017-774 to alter the terms of Act 1293.

C. The Commission's Application of Equity Was Erroneous

Order No. 2017-774 erroneously directs DEC to retransfer Respondent to the Greenwood Rate in an effort to balance equities between DEC, which "[took] action to safely provide power in what was an unsafe situation," and Respondent, who "[took] measures to ensure compliance with the [Greenwood] Rate." (ROA __; Order No. 2017-774, p. 5). As explained above, the Commission's effort to balance equities by retransferring Respondent to the Greenwood rate directly conflicts with the provisions of Act 1293. Accordingly, the retransfer is unlawful and beyond the authority of the Commission. The Commission "is a body of limited jurisdiction and has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted." *Black River Electric Cooperative v. Public Service Commission*, 238 S.C. 282, 120 S.E.2d 6 (1961). *See also*, *Beard-Laney v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948) ("The power to make rules does not of course extend to the enlargement of statutory powers, nor to the liberalization of the policy of the law beyond the provisions of the governing statutes.").

The result required by Act 1293 and recognized by the jurisprudence of the Commission and this Court, was that a customer would remain on the Greenwood Rate unless and until a new connection was established, after which the customer would be transferred to the standard DEC rate. As discussed *supra*, Act 1293 dictates that the rates to be charged for new connections established after the 1966 sale of GEPC to Duke Power are the standard Duke Power rates and the Commission does not have the authority to override the statutory requirements by citing to "equity." In light of these facts, the Commission may not fashion a new remedy contrary to that provided for in Act 1293. Instead, its equitable powers must yield to the law, which requires a one-way transfer of Respondent to the standard DEC rate.

2. THERE IS NO SUBSTANTIAL EVIDENCE SUPPORTING THE CONCLUSION OF ORDER NO. 2017-774 THAT RESPONDENT WAS ELIGIBLE FOR THE GREENWOOD RATE.

Standard of Review

The argument is this section of the brief is governed by the "substantial evidence rule" as found in S.C. Code Ann. § 1-23-380(5)(e) (2015). The substantial evidence rule has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hamm v. Pub. Serv. Comm'n of S.C.*, 310 S.C. 13, 16-17, 425 S.E.2d 28, 30 (1992) (citations omitted).

A. The Only Finding Supported by Substantial Evidence Was that the Upgraded Facilities Serving Respondent Constituted a New Connection Disqualifying Respondent from the Greenwood Rate.

The record in this case demonstrates that energy demand from Respondent's business overloaded the thermal capacity of the DEC facilities, which necessitated the upgrade of the facilities in order to ensure safe and reliable service. The upgrade constituted a "new connection," as that term is used in Act 1293. No other conclusion finds any support in the record. Respondent provided no credible alternative theory as to the failure of the electric service line. Respondent called as an expert witness electrician Robert Calhoun, but Mr. Calhoun provided no credible testimony to suggest that the cause of the failure was anything other than the load exceeding the capacity of the service line: "[i]n my looking at this, I think the cause of the failure was the cable. And I can't say nothing about the connections, but I would say that I think the cable had deteriorated." (ROA __; Tr. Vol. 1, p. 83). DEC's witness Joel Lunsford testified that thermal overload resulting from excessive customer demand will melt a fuse and service line, as in this case, (ROA __; Tr. Vol. 2, p. 180):

> There's two ways that fuse opens up. There's one by fault, and you can tell when a fuse opens up by fault; it is very much fragmented and almost destroyed. What

> Mr. Gonzalez saw, and I can collaborate that, it was actually melted out, which is a forensics telltale sign that it was an overload and not a fault. So that just helps verify the situation that we think that the cable, the service, was overloaded.

(ROA __; Tr. Vol. 2, p. 241.) (ROA __; Lunsford Supp. Test., p. 2.) (ROA __; Tr. Vol. 1, p. 140 ("[S]ometimes [the fuse] completely blows, as in a fault situation. And then sometimes it melts out, as in a load situation."). Likewise, the Commission concluded that "[t]he record shows that the fuse on the primary side of the pole-mounted transformer melted. This is indicative of excess current flow, which would result in a thermal overload." (ROA __; Order No. 2017-774, p. 3.) There was, therefore, no basis to conclude that the thermal outages were caused by anything other than Respondent's electricity demand exceeding the capacity of the DEC facilities.

The only way for Order No. 2017-774 to lawfully conclude that Respondent was eligible for the Greenwood Rate would be for the Commission to have made a finding that the outages, to which DEC responded by providing upgraded facilities, were caused by something other than the excessive electricity demand of Respondent's business. Order No. 2017-774 makes no such finding, and the record supports no such finding. On the contrary, the record evidence demonstrates that the customer's electricity demand resulted in a thermal overload of the DEC facilities, and an upgrade of the facilities and a subsequent new connection were necessary to, in the words of Order No. 2017-774, "ensure the safe, reliable delivery of power to [DEC's] customers." (ROA __; Order No. 2017-774, p. 5.)

CONCLUSION

This case is controlled by the provisions of Act 1293. Respondent's business experienced two dangerous outages involving melting service lines and electrical fires. DEC determined that its facilities serving Respondent were overloaded and needed to be upgraded. After a hearing on Respondent's complaint, the Commission determined that DEC had taken action "to safely provide power in what was an unsafe situation." (ROA __; Order No. 2017-774, p. 5). The upgraded service was a new connection under Act 1293 and Respondent was required as a matter of law to be transferred to the DEC rate. For these reasons, DEC requests that this Court issue an order reversing Order Nos. 2017-744 and 2018-101 and remanding this action to the Commission with instructions that it issue an order requiring the transfer of Respondent to the DEC rate.

Respectfully submitted,

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vs.

Duke Energy Carolinas, LLC .....Appellant.

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a Paralegal with the law firm of Sowell Gray Robinson Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on behalf of Duke Energy Carolinas, LLC** in the foregoing matter by placing copies of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated this 16th day of May, 2018.

Toni C. Hawkins