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THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

S.C. SUPREME COURT

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APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Docket Number 2017-32-E

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

Respondent,

v.

Duke Energy Carolinas, LLC,

Appellant.

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INITIAL BRIEF OF RESPONDENT

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## **STATEMENT OF ISSUES ON APPEAL**

1. THE COMMISSION'S DECISION DIRECTING APPELLANT TO ALLOW RESPONDENT TO CONTINUE ON THE GREENWOOD RATE WAS NOT AN ERROR OF LAW. THE COMMISSION FOUND THAT APPELLANT FAILED TO PROVE THAT THERE HAD BEEN A "CHANGE IN THE CHARACTER" OF RESPONDENT'S CONNECTION WITHIN THE MEANING OF ACT 1293 AND PRECEDENT INTERPRETING THE ACT.
  
2. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S CONCLUSION IN ORDERS NO. 2017-774 AND 18-101 THAT RESPONDENT SHOULD BE PLACED ON THE GREENWOOD RATE.

## STATEMENT OF THE CASE

On January 27, 2017, 3109 Highway S., LLC d/b/a 25 Drive-In and Tommy McCutcheon (“Respondent”) filed a complaint with the Public Service Commission (“Commission” or “PSC”) seeking administrative review of the action of Duke Energy Carolinas, LLC (“DEC” or “Appellant”) removing Respondent from the “Greenwood Rate,” as defined *infra*, and placing Respondent on the standard DEC electrical rate. On November 8, 2017, the Commission issued an order finding that Respondent should be allowed to continue on the Greenwood Rate, subject to certain limitations that it imposed. On February 13, 2018, the Commission denied DEC’s request for rehearing. This appeal followed.

## STATEMENT OF FACTS

This case arose in the summer of 2015 when Duke Energy Carolinas (“DEC”) terminated electric service to the Highway 25 S. Drive-In. DEC refused to restore electrical service to the facility unless Respondent agreed to sign a letter drafted by DEC agents whereby Respondent requested DEC “upgrade and restore my electric service” and acknowledged that “...the ‘old Greenwood County rate would no longer apply.’”<sup>1</sup> (ROA \_\_\_ Tr. Vol.1, Tommy McCutcheon Test. p. 21 l. 25 – p. 22 l. 12; Ex. 1.); (ROA \_\_\_; Vol 2 Lane Test. p. 211 l. 19 – p. 214 l. 25; Ex. 7) For the purposes of this brief, “Greenwood Rate” means charges authorized by the Commission in Order No. E-976, as shown on Schedule A, Schedule B-L, and Schedule E L attached to Order No. E-976 for customers transferred to Duke Power Company from Greenwood County, so long as charges under these rates are lower than charges under approved Duke Power Company rates. For the purposes of this brief, “Duke Rate” means the charges for electric current authorized in the most recently adopted Commission electric rate order for DEC customers not qualified for the Greenwood Rate.

The Highway 25 S. Drive-In was opened in the 1940’s. (ROA \_\_\_; Vol. 1, Tommy McCutcheon Pre-filed Test. p. 28 para 3) The Drive-In uses a four hundred (400) ampere breaker system. (ROA \_\_\_; Vol. 1, Calhoun Pre-filed Test. Tr. p. 86 para 5) (ROA \_\_\_; Tr. Vol. 2 Lunsford Test. p. 257 l. 1-12) When the Respondent purchased the Drive-In in 2008 the prior owner had one screen and projector. (ROA \_\_\_; Tr. Vol.1 Tommy McCutcheon Test. p. 32 l. 12-17) In 2015 Respondent testified power consumption dropped after he replaced the facility’s xenon projectors with energy efficient single phase digital projectors running on smaller 40-amp breakers that used

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<sup>1</sup> During the hearing Appellant’s counsel withdrew any contention that the agreement precluded the Commission from hearing the case or that Respondent’s signature on the Agreement bound it to accept the Duke Rate. (ROA \_\_\_; Tr. Vol.2 pp. 278 l. 22-279 l. 21)

less power.<sup>2</sup> (ROA \_\_\_; Vol. 1 Tommy McCutcheon Pre-filed Test. p. 29 at para 9); (ROA \_\_\_; Vol. 1 McCutcheon Test. p. 42 l. 5-9); (ROA \_\_\_; Vol. 1 McCutcheon Test p. 43 l. 1-11) The Drive-In also had food service appliances such as fryers, grills, hotdog machines, refrigerators and freezers. During his ownership Respondent replaced most of these appliances with newer ones. (ROA \_\_\_; Tr. Vol.1 Tommy McCutcheon Test p. 46 l. 19 -23); (ROA \_\_\_; Tr. Vol.1 Tommy McCutcheon Test p. 52 l. 17- p. 53 l. 12)

From 2008 to 2016 Respondent's annual electric usage averaged 48,186 Kilowatt Hours (KWH). (ROA \_\_\_; Lunsford Test, Ex. 8a) In 2015, when this case arose the Drive-In used 40,960 KWH. (ROA \_\_\_; Lunsford Test, Ex. 8a). The Respondent did not modify the existing wiring to increase the facility's ability to consume power. The facility has always had a 400-ampere capacity system on the Respondent's side of the power meter. (ROA \_\_\_; Vol. 1 Tommy McCutcheon Test. p. 25 l. 12-15); (ROA \_\_\_; Tr. Vol. 2 Lunsford Test. p. 257 l. 9-12) The Drive-In's electrical system connected with DEC's wires at a "weatherhead" where DEC spliced a 2/0<sup>3</sup> wire to the Drive-In's wires for delivery of electric current. (ROA \_\_\_; Vol. 2 Fowler Test. p. 175 l. 14 – p. 176 l. 3); (ROA \_\_\_; Lunsford Ex. 8b) During the 1940's Greenwood County Electric Power Commission ("GCEPC") supplied power to the Drive-In via a 15 Kilovolt-ampere (KVA) transformer and a 2/0 wire running to the facility's weatherhead and electric meter. When DEC purchased GCEPC's facilities under Act 1293 of 1966, 1966 Acts 3293 ("the Act" or "Act 1293") DEC continued supplying power to the Drive-In using the same 2/0 wire and 15 KVA transformer. The 15 KVA transformer failed on March 9, 2009 and on or about May 31, 2009 DEC replaced it

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<sup>2</sup> Respondent added a second screen in 2013. (ROA \_\_\_; Tr. Vol. 1, Tommy McCutcheon Test. p.45. l. 7-8). Respondent added a third screen in 2016 after DEC put Respondent on the Duke Rate. (ROA \_\_\_; Tr. Vol. 1, Tommy McCutcheon Test. p.45. l. 19-20) For that reason, the addition of the third screen is not relevant to this case.

<sup>3</sup> The term 2/0 wire refers to the wire gauge or diameter. 2/0 is sometimes stated as "Two aught" in the transcript. See, e.g., (ROA \_\_\_; Tr. Vol. 1 Fowler Test., p. 143.) 4/0 wire is heavier than 2/0 wire. (ROA \_\_\_; Tr. Vol. 1, Calhoun Test., p. 98 l. 21- p. 99 l. 8) Thinner wire has lesser electrical load bearing capacity and cannot carry as much amperage as thicker wire. (ROA \_\_\_; Tr. Vol. 2, Lunsford Test., p. 274 l. 12-18),

with a 25 KVA transformer. (ROA \_\_; Fowler Test. p. 153, Ex. 5 outage reports 4-17-09, 5-30-09, 5-31-09). DEC increased the capacity of the transformer to accommodate all electrical loads of accounts served by the transformer, namely two houses and the Drive-In. (ROA \_\_; Vol. 1, Fowler Test., p. 153) While DEC changed the 15 KVA transformer to a new 25 KVA transformer in 2009, DEC continued to use the same 2/0 wire for the Drive-In's connection. (ROA \_\_; Hearing Ex. 5 outage reports 4-17-09, 5-30-09, 5-31-09)

Respondent had no electrical outages from May 31, 2009, until the evening of May 30, 2015. (ROA \_\_; Hearing Ex. 5 outage report 5-31-15) The DEC repair technician wrote in the outage report for May 30, 2015, "repaired burnt up connection at weatherhead." (ROA \_\_; Ex. 5 outage reports 5-30-15) DEC's repair technicians restored power by cutting out the melted wire and replacing it with new wire. (ROA \_\_; Vol. 1 Gonzalez Test. p. 182. 18 – 21) When one replaces melted wire with another wire by squeezing and clapping one end of a wire to the other this process is called splicing. (ROA \_\_; Volume 1, Fowler Test., pp 135-136). DEC's repair technician testified that on May 30, 2015, the outage might have been repaired with thinner 1/0 wire because 2/0 wire is no longer available. (ROA \_\_; Vol. 1 Gonzalez Test. p. 183 l. 9 – 13) 1/0 wire only has a capacity of 150 sustained amperes, which is less than the 185-ampere sustained capacity of 2/0 wire. (ROA \_\_; Vol.2, Lunsford Test., p. 274 l. 12-18)

On June 13, 2015, the Drive-In had a second outage. DEC's repair technicians wrote in the outage report, "reworked SVC going through CTS with 4.0." (ROA \_\_; Hearing Ex. 5 outage report 6-13-15). DEC's technicians restored power at the Drive-In by cutting out the portion of melted wire and splicing three to four feet of 4/0 wire to the remaining 2/0 wire to replace the melted section. (ROA \_\_; Vol. 1 Gonzalez Test. p. 183 l. 25 – p. 184 l. 7). All outages at the Drive-

In were caused by melting of DEC's wire, not the Drive-In's wire. (ROA \_\_\_; Vol. 1., Fowler Test., p. 139)

On June 17, 2015, DEC terminated service to the Drive-In by physically severing its service wire at the transformer. (ROA: \_\_\_; Vol. 1, Tommy McCutcheon Pre-filed Testimony p 30. Item 17) (ROA \_\_\_; Tr. Vol.1, Fowler Test., p. 211 l. 5-18) DEC staff told Respondent that it would not restore electrical service to the Drive-In unless Respondent signed a letter agreeing to allow DEC to "upgrade" and remove Respondent from the Greenwood Rate. (ROA \_\_\_; Vol. 2 Lane Test. 197 l. 1 – 25) (Vol. 2 Lane Test, p. 211 l. 5 – 213 l. 6) On June 18, 2015, DEC installed what the company called an "upgrade" consisting of replacement of the 25 KVA transformer with a 50 KVA transformer (ROA \_\_\_ Vol. 2 Lunsford Supp. Test., p. 254 l. 24-25) and replacing the 2/0 wire running from the transformer to the weatherhead with 4/0 wires. (ROA \_\_\_; Vol. 2 Lunsford Test. p. 259 l. 9 – 17) DEC estimated the new wires increased the sustained maximum amperage from 185 amperes to 340 amperes. (ROA \_\_\_; Vol. 2 Lunsford Test., p. 259 l. 9-17)

DEC did not have an electric meter attached to the Drive-In capable of measuring instantaneous electric demand or "load" when it sized the wire used during the June 18, 2015, repair. (ROA \_\_\_; Order No. 2017-774, p 4). DEC's witness opined that on May 30, 2015, and June 13, 2015, DEC's wire was overloaded with amperage in excess of 185 sustained amps and opined that the Drive-In was pulling 225 amps (ROA \_\_\_; Vol. 1 Lunsford Test., p 239 l. 1-8) (ROA \_\_\_; Order No. 2017-774, p.4). Again, as the Commission recognized in its Order, DEC did not have equipment installed measuring instantaneous demand until some time after it had conducted its service drop changes. DEC's witness was speculating on what the demand load must have been on May 30, 2015, and June 13, 2015. (ROA \_\_\_; Vol. 2., Lunsford Pre-filed Test., p. 247 l. 8.- 248 p. l. 4)

DEC's Rates and Regulatory Department has Service Rules addressing the types of service changes that disqualify customers from the Greenwood Rate. (ROA \_\_\_; Vol. 2, Lunsford Test., p. 268 l. 14- p. 270 l. 4) The Service Rules<sup>4</sup> were not available to the public or filed with the PSC, and in fact were not made available to the Commission until after the hearing. (ROA \_\_\_; Vol. 2, Lunsford Test., p. 268 l. 14 – p. 273 l. 14)

This matter came before the Commission on the Complaint of Respondent and his business on January 27, 2017, claiming that DEC wrongfully removed Respondent's business from the Greenwood Rate. *Inter alia*, Respondent requested that the Commission find that DEC engaged in the practice of charging Respondent rates different from those in the applicable rate schedule in violation of S.C. Code Ann. § 58-27-830 and applying new service regulations without first filing those regulations with the Commission in violation of S.C. Code Ann. § 58-27-820. (ROA \_\_\_; See Complainant/Petitioner's Proposed Order at 13) After hearings on the matter on April 5, 2017, and April 17, 2017, the Commission Issued Order No. 2017 - 774 on December 21, 2017. The 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 it is critical for utilities to ensure safe and reliable power to their customers and the problem of melting wires was appropriately resolved. (ROA \_\_\_; Order No. 2017-774, p. 5) However, the Commission found it significant that the Respondent had taken measures to remain eligible for the Rate.<sup>5</sup>

The Order did not find the changed service drop was a "new connection" justifying Respondent's removal from the Greenwood Rate. (Order No. 2017-774, p. 5). The Order directed

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<sup>4</sup> Counsel for Appellant referred to these documents as "written guidelines." (ROA \_\_\_, Vol. 2, p. 272 l. 23-25)

<sup>5</sup> See Order 2017-774, pp. 4-5 (Respondent purchased energy efficient and single-phase replacement equipment and took measures to ensure compliance with the Rate)

DEC to restore Respondent to the Greenwood Rate so long as Respondent's use of electricity remained within the original limitations of the equipment serving the premises. (ROA \_\_\_; Order No. 2017-774, p. 6) The Commission did not address Respondent's allegation of applying new service regulations without first filing those regulations with the Commission in violation of S.C. Code Ann. §58-27-820. DEC requested rehearing of the Commission's decision and the Commission issued an Order denying rehearing on February 13, 2018.

## ARGUMENTS

1. THE COMMISSION'S DECISION DIRECTING APPELLANT TO ALLOW RESPONDENT TO CONTINUE ON THE GREENWOOD RATE WAS NOT AN ERROR OF LAW. THE COMMISSION FOUND THAT APPELLANT FAILED TO PROVE THAT THERE HAD BEEN A "CHANGE IN THE CHARACTER" OF RESPONDENT'S CONNECTION WITHIN THE MEANING OF ACT 1293 AND PRECEDENT INTERPRETING THE ACT.

In case 2017-32-E, the Commission was required to rule on the question of whether DEC had proven that Respondent's use of its facility constituted a "new connection" within the meaning of Act 1293. The Commission found that DEC had not presented sufficient proof as to whether Respondent's use of its facility constituted a "new connection," and properly ordered Appellant to restore Respondent to the Greenwood Rate.

### Standard of Review

Under S.C. Code Ann. § 1-23-380, the Court may reverse orders of the Commission where it finds that the rights of an appellant have been prejudiced because of errors of law.

- A. The Commission properly interpreted Act 1293 and Precedent in finding that DEC failed to prove that Respondent's use of its facility constituted a "new connection."*

Under Act 1293, the rates to be charged for connections made *after* the sale of GEPC to Duke in 1966 would be Duke (now DEC) rates. Connections in existence at the time of the sale remained on the "old" Greenwood Rate. (ROA \_\_\_\_; Act 1293 § 4(3)). As Appellant notes, in PSC Order E-976, Docket No. 13,277 (July 13, 1966) the Commission found that when a customer is disconnected, the customer must be put on the Duke Rate upon reconnection. However, what neither the Act nor Order E-976 discussed was the circumstances (other than disconnection) under which a connection could change from an existing to a "new connection" for the purposes of the

rate. The only precedent on the matter is the Supreme Court's ruling in *Payne v. Duke Power Co.*, 304 S.C. 447, 405 S.E.2d 399 (1991).

Appellant cites *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 87, 326 S.E.2d 395, 399 (1985) for the proposition that in cases where a location's electric demand increases Duke is legally allowed to deem it a new connection. It is important to note that in *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, the Court was not adjudicating the propriety of Duke's policy; the Court simply cited that this was Duke's practice. Specifically, the Court states:

Duke, as a result, billed its Greenwood County customers under a dual rate structure for 15 years. It has transferred Greenwood rate customers to its system-wide rates whenever (1) bills under system-wide rates for a location became less than the Greenwood rates; (2) a location required a new physical connection; and (3) a location's electric demand increased to the point Duke deemed it a "new connection."

*Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. at 87, 326 S.E.2d at 399. What is of interest here is that nowhere in the Order does the Court rule on whether Duke's practice in (3) *infra* was proper. DEC is improperly suggesting that this Court somehow reviewed and "recognized"<sup>6</sup> this practice as proper.

Second, Appellant improperly cites to the circuit court's order in *Payne* as persuasive authority, in violation of Rule 268, SCACR.<sup>7</sup> In an attempt to circumvent this requirement, Appellant cites to a case that predates Rule 268, SCACR, *City of Orangeburg v. Moss*, 262 S.C. 299, 204 S.E. 2d 377 (*per curium*) (1974). In *Moss*, the significant fact noted was that the Supreme Court had previously refused to grant certiorari on a particular issue that the circuit court had ruled

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<sup>6</sup> Initial Brief of Appellant p. 8.

<sup>7</sup> Appellant also included a copy of the circuit court's Order as part of the Record on Appeal, which is appropriate, as it was submitted for consideration by the Commission. However, it should not be cited as legal authority, persuasive or otherwise.

on in a prior case involving the same subject matter, instead disposing of that prior case on standing grounds without ruling on a jurisdictional issue. In so doing, the Court in *Moss* implied that the circuit court had properly dealt with the issue in earlier litigation. The same cannot be said in the case of *Payne*, where the Supreme Court specifically considered the question of connection. In *Payne*, the circuit court decision comprises 43 pages and lists a multitude of situations where a customer's connection becomes a "new" connection.<sup>8</sup> However, the Supreme Court issued a mere four-page order, finding:

With reference to customers in subclasses (b)<sup>9</sup> and (c)<sup>10</sup>, we agree with the trial court that a change in either the character of the connection...e.g. that a change in either the character of the connection (e.g. from single to three phase) or use of the premises (e.g. from residential to commercial) constitutes a new connection effectuating a transfer to Duke rates.

*Payne v. Duke Power Co.*, 304 S.C. 451, 452, 405 S.E.2d 399, 401-402 (S.C., 1991) In the list of changes that the circuit court in *Payne* called a change in the "character" of the connection constituting a "new" connection, the circuit court never mentioned a change from single to three phase as a change in the "character" of the connection. Instead, the Supreme Court arrived at that conclusion independently. The Supreme Court only found that a change in the "character" of the connection constitutes a "new" connection and declined to fully define the universe of situations where a change in "character" of a connection could be said to have occurred and allowed the PSC to exercise the powers retained after the legislature fixed the Greenwood Rates in Act 1293.<sup>11</sup> In

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<sup>8</sup> This 28-year old circuit court case is not persuasive authority under Rule 268, SCACR.

<sup>9</sup> Customers transferred as a result of a change in the "character of the connection." *Payne v. Duke Power Co.*, 304 S.C. at 451, 405 S.E.2d at 401.

<sup>10</sup> Customers transferred as a result of a change in the use of the premises from commercial to residential. *Id.*

<sup>11</sup> In *Duke Power v. Public Service Commission*, *supra*, this Court held that Act 1293 divested PSC of jurisdiction to raise the old Greenwood rates. However, PSC is not prohibited from exercising its regulatory authority in a manner consistent with the Act. *Payne v. Duke Power Co.*, 304 S.C. at 401 n.6 405 S.E.2d at 402 n.6.

the case before the Court, the Public Service Commission also declined to further define the phrase “change in the character” of a connection in its Order (ROA \_\_\_ ; Order No, 2017-774).

However, what is clear is that neither the Supreme Court in *Payne*, nor the Commission in this case have ever held that an “upgrade” (whatever that means) to a customer’s system automatically constitutes a change in the “character of the connection.” Appellant uses the words “upgrade” or “upgraded” some sixteen times in its brief, and the record below is absolutely riddled with the term. However, what is missing is any authority for the proposition that an “upgrade” in the form of new equipment (in this case, a larger transformer and a thicker service wire) constitutes a change in the “character” of the connection in this case. Further, the Commission found it significant that Respondent took pains to keep its power usage within the limits of the system installed (ROA \_\_\_; Order No, 2017-774, p. 4) and that it was impossible for Appellant to produce credible evidence as to the amperage demand on the nights of the outages, as the equipment from which it derived its estimates were only installed after DEC installed the new power supply. (ROA \_\_\_; Order No, 2017-774, p.4) In its Order, the Commission simply found an inadequacy of information available to make a determination as to whether such a change in character occurred or whether changes were necessitated due solely to the actions of the Complainant. (ROA \_\_\_; Order No, 2017-774, p. 4) The Commission simply treated this case as a failure of proof on the part of DEC.

*B. The Commission did not commit legal error in restoring Respondent to the Greenwood Rate*

Appellant mischaracterizes the Commission's action as "retransferring"<sup>12</sup> Respondent to the Greenwood Rate or allowing Respondent to "requalify"<sup>13</sup> for the Rate in apparent violation of Act 1293 and the Supreme Court's holding in *Payne*. Appellant's argument is inapposite. The Commission found that following Appellant's physical disconnection of Respondent's power supply, Appellant had improperly placed Respondent on the Duke Rate as a condition of restoration of service. The Commission merely required Appellant to correct its error. Appellant is suggesting that after changing a customer from the Greenwood Rate to the Duke Rate for any reason (even an improper or unlawful reason) the Commission lacks the authority to order Appellant to right such a wrong. This would lead to an absurd result and would deprive the Commission of any meaningful authority to review consumer complaint cases under S.C. Code Ann. § 58-27-830.

*C. The Commission did not erroneously apply equity in granting Respondent relief*

Appellant mischaracterizes the Commission's action as an improper exercise of equitable relief. As a threshold matter, the Commission undoubtedly has the authority to issue injunctive relief in some instances. Where the Commission has determined that a rate charged by an electrical utility is unjust, unreasonable, or in any way in violation of any provision of law, the Commission may determine the proper rate and fix that proper rate by order. The General Assembly has explicitly conferred upon the Commission the authority to act in these circumstances. S.C. Code Ann. § 58-27-850.

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<sup>12</sup> Initial Brief of Appellant p. 10.

<sup>13</sup> *Id.*

Whether or not an action is equitable or legal in nature is based on the nature of the relief sought. In a case where a party seeks damages, the relief sought is legal. *Compare O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (action for breach of restrictive covenants was at law where Plaintiff sought damages) *with Taylor v. Lindsey*, 332 S.C. 1, 3, n. 2, 498 S.E.2d 862, 864, n. 2 (1998) (action to enforce restrictive covenants by injunction is in equity). Broadly speaking, whenever the Commission issues an order requiring a party to take action or to refrain from taking action, the nature of the relief ordered is injunctive, and therefore equitable in nature.

The Commission is a creature of statute. This Court has held that statutorily created agencies possess only those powers which are "...specifically delineated." *City of Columbia v. Bd. of Health and Env'tl Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) However, "[b]y necessity however, a regulatory body possesses not only the powers expressly conferred on it but also those which must be inferred or implied to effectively carry out the duties for which it is charged. *Id.* See also *Carolina Water Service, Inc. v. S.C. Public Service Comm'n*, 272 S.C. 81, 248 S.E.2d 924 (1978); *City of Rock Hill v. S.C. Dep't of Health and Env'tl Control*, 394 S.E.2d 327, 302 S.C. 161 (1990).

A leading case discussing when an administrative tribunal is asked to exceed its explicit or implied statutory authority is *S.C. Dep't of Consumer Affairs v. Foreclosure Specialists, Inc.*, 390 S.C. 182, 700 S.E.2d 468 (Ct. App. 2010). In *Foreclosure Specialists* the Court of Appeals discussed the limited statutory authority of the Administrative Law Court. The case was brought by the Department of Consumer Affairs under the Consumer Credit Counseling Act. The Department had requested that the ALC find that the Respondent had violated the statute, that Respondent be ordered to cease and desist from further unlicensed credit counseling, that Respondent pay a fine, and that Respondent refund fees collected from customers. The

Administrative Law Court held that it lacked the statutory authority to order refunds as the enabling statute required such an action to be filed in circuit court, and the Court of Appeals agreed.

In contrast, here the Public Service Commission was not asked to, and did not exercise any power beyond that explicitly granted to it or necessarily implied to it by its enacting legislation to effectuate its jurisdiction. It cannot be denied that the Commission has the jurisdiction to review customer complaint cases under S.C. Code Ann. § 58-27-830, determine when the actions of a regulated utility are improper or unauthorized, and in such cases determine the proper rate and fix that proper rate by order pursuant to S.C. Code Ann. § 58-27-850. In issuing its Order the Commission decided the case on legal principles, not on equitable principles such as estoppel, laches, or unclean hands.<sup>14</sup>

The Commission has the authority to order that actions improperly or unlawfully undertaken be corrected. Without such authority, the Commission would lack the ability to provide meaningful review, and its jurisdiction over such cases would be rendered a nullity. Statutes should be construed to give force and effect to all their provisions. *Nucor Steel v. South Carolina Pub. Serv. Comm'n*, 310 S.C. 539, 426 S.E.2d 319 (1992). In this case, the Commission simply found that Appellant had improperly removed Respondent from the Greenwood Rate, having acted without proper justification. In ordering Respondent restored to the Rate, the Commission acted squarely within the ambit of its authority.

2. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE TO SUPPORT THE COMMISSION'S CONCLUSION IN ORDERS NO. 2017-774 AND 2018-101 THAT RESPONDENT SHOULD BE PLACED ON THE GREENWOOD RATE.

### **Standard of Review**

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<sup>14</sup> While it accuses the Commission of deciding the case on equitable principles, Appellant fails to specify which equitable principle(s) the Commission allegedly relied upon in issuing its Orders.

The argument in this section of the brief is governed by the “substantial evidence rule” as found in S.C. Code Ann. § 1-23-380(6)(e) (2015). The substantial evidence rule provides that a decision will not be set aside simply because reasonable minds may differ on the conclusion reached by the tribunal below. *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). The fact that the record, when considered as a whole, presents the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1995). In applying the substantial evidence rule, the factual findings of the administrative agency are presumed to be correct. *Rodney v. Michelin Tire Co.*, 320 S.C. 515, 518, 466 S.E.2d 357, 359 (1996).

A. *The record in this case contains sufficient facts to allow the Commission to make findings of fact upon which to support its decision.*

The record in this case testimony that a new 2/0 wire begins to fail at a load in excess of 185 sustained amperes. Appellant’s expert<sup>15</sup> and Respondent’s expert<sup>16</sup> testified about causes for the electrical outages of May 30, 2015, and June 13, 2015. While testimony supported the conclusion that the outages were caused by melted wires, (ROA \_\_; Tr. Vol. 2 Lunsford Test., p. 238 l. 5-17) (ROA \_\_; Vol. 1 Gonzalez Test, p. 180 l. 17-24) (ROA: \_\_ : Tr. Vol. 1, Calhoun Test., p. 183 l. 180-20) (ROA; \_\_\_ Tr. Vol. 1, Fowler Test. p. 110 \_\_\_ l. 4-10\_\_\_) (ROA; \_\_\_ Tr. Vol. 1, Fowler Test. p. 112 l. 11-18) (ROA \_\_; Tr. Vol. 2, Lunsford Test., p. 238\_\_ l. 5-17\_\_\_) , the testimony differed on the melting point of the wire in place on May 30, 2015, and the repaired

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<sup>15</sup> Joel M. Lunsford, General Manager for Upstate South Carolina.

<sup>16</sup> James A. Calhoun, 37 ½ year lineman and retired Head of Electric Division, Greenwood CPW [referred to by Appellant as an “electrician.” (Initial Brief of Appellant p. 12.)]

wire that failed on June 13, 2015. (ROA \_\_; Vol. 1, Calhoun Test., p. 108 l. 8-12) (ROA \_\_; Vol. 1, Fowler Test., p. 137-138) (ROA \_\_; Vol. 2, Lunsford Test., p. 276) In contrast to Appellant's assertion that Respondent "provided no credible alternative theory as to the failure of the electric service line" (Initial Brief of Appellant p. 12) the record contains at least three reasons DEC's wire could have overheated and melted at an amperage level of less than 185 sustained amperes.<sup>17</sup>

- (a) The 2/0 wire installed had deteriorated (ROA \_\_; Tr. Vol. 1, Calhoun Test., p 83 l. 17-20). (ROA \_\_; Tr. Vol. 1, Fowler Test., p. 138)
- (b) In repairing DEC's service drop on May 30, 2015, the melted portion of the damaged wire was replaced by splicing a new piece of wire into the deteriorated service drop, affecting the load bearing capacity of the entire wire. (ROA \_\_; Tr. Vol. 1, Fowler Test., p. 112 l. 2 – 10) (ROA \_\_; Tr. Vol. 1, Calhoun Test., p. 105 l. 2 – 12) (ROA \_\_; Tr. Vol. 1, Fowler Test., pp. 136, 138) (ROA \_\_; Tr. Vol. 2, Gonzalez Test., p. 187 l. 2-8)
- (c) In repairing DEC's service drop on May 30, 2015, the new wire spliced in could have been a thinner 1/0 wire as 2/0 wire is no longer available. This thinner wire has a lower sustained amperage rating, and this would also have affected the load bearing capacity of the entire wire. (ROA \_\_; Tr. Vol. 1, Gonzalez Test., p 183 l. 9-13)

The Commission specifically noted in Order No. 2017-774 "...Duke Energy's installed equipment did not meter the load being carried over the service line, but merely the amount of energy that has had been used in kilowatt-hours, which is not necessarily indicative of peak load." (ROA \_\_; Order No. 2017-774, p. 4) "The load information, though, was not available at the time

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<sup>17</sup> Circumstantial evidence and inferences drawn therefrom may be relied on to support a finding of fact of an administrative agency. *Waters v. S.C. Land Resources Conservation Comm'n*, 321 S.C. 219, 224 467 S.E.2d 913, 917 (1995).

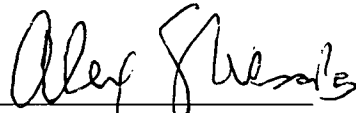
of the outages.” (ROA \_\_\_, *Id.*) The Commission noted that DEC’s conclusions on load were based on readings taken from new equipment that was installed after the second outage. In Order 2018-101 the Commission “...found an inadequacy of information available to make a determination as to whether such a change in character occurred.” (ROA \_\_\_, Order No 2018-101, p.3) Based on the absence of evidence the Commission carried out its role as finder of fact, deciding the case on the evidence presented, which it had the duty to believe or disbelieve. *Hilton Head Plantation Utilities, Inc. v. Public Service Comm'n of S.C.*, 312 S.C. 448, 451, 441 S.E.2d 321, 323 (1993). The Court should not substitute its judgment for that of the Commission. *Id.*

Appellant’s substantial evidence argument is based on the presupposition that whenever a DEC maintained connection fails and is subsequently changed as part of the repair process, this automatically constitutes a “change in the character of the connection” and therefore a “new connection” for the purposes of availability of the Greenwood Rate. As discussed *supra*, this is a legal conclusion at the heart of the dispute in this case. The Commission declined to further refine the concept of “change in the character of a connection” and instead held that Appellant failed to prove facts sufficient to determine whether a change in character had occurred. As a result, it disposed of the case on that basis.

## CONCLUSION

Appellant misconstrues the provisions of Act 1293 and relevant authority and has improperly merged the concept of an “upgrade” or other change to an electrical connection with a “change in the character of the connection” which must occur before an existing connection can be said to become a “new connection” for the purposes of availability of the Greenwood Rate. The Commission concluded that Appellant had failed to produce facts sufficient for it to conclude that Respondent’s connection should be deemed a “new connection” for the purposes of the rate, and properly held that Respondent should be allowed to proceed on the Greenwood Rate. Respondent requests that the Court uphold the decision of the Commission.

Respectfully Submitted,



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ATTORNEYS FOR RESPONDENT

Columbia, South Carolina  
July 5, 2018

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA

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Docket Number 2017-32-E

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

Respondent,

v.

Duke Energy Carolinas, LLC,

Appellant.

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PROOF OF SERVICE

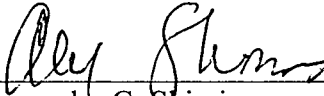
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This is to certify that I, Alexander G. Shissias, have this day caused to be served upon the person(s) named below the *Respondent AGS* **Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal on behalf of 3109 Hwy. 25 S., L.L.C. d/b/a/ 25 Drive-in and Tommy McCutcheon** in the foregoing matter by placing a copy of same in the United States Mail, postage prepaid, in an envelope addressed as follows:

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Dated this 5<sup>th</sup> day of July, 2018

  
Alexander G. Shissias