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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appellate Case No. 2018-000475

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 REPLY BRIEF OF APPELLANT

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This is not a complicated case. Appellant Duke Energy Carolinas, LLC ("DEC") provides electricity to Respondent 3109 Hwy. 25 S., LLC, d/b/a 25 Drive-In ("Respondent"). In the summer of 2015 the electrical connection by which DEC served Respondent's business overloaded, melted and caught fire on two occasions. (ROA __; Order No. 2017-774, p. 3). After the second incident DEC replaced the connection with a new heavier cable and a transformer with a substantially higher capacity. (ROA __; Fowler Test., p. 5). The new facilities constituted a "new connection" as that term is used in Act 1293 of 1966 ("Act 1293"). Under the provisions of Act 1293, once a new connection was established between DEC and Respondent, Respondent was properly transferred from the Greenwood Rate to the appropriate DEC rate. The order of the Public Service Commission ("Commission") made the factual finding that DEC replaced and upgraded the connection in order to safely provide electricity to Respondent. Once that finding was made, Act 1293 required, as a matter of law, that Respondent be transferred from the Greenwood Rate to the DEC rate. The Commission committed an error of law by holding that Respondent must be transferred back to the Greenwood Rate.

This Reply will address two arguments made by Respondent and will show that: (1) it is proper for this Court to consider as persuasive authority the circuit court order ("Circuit Court Order") affirmed in the leading case of *Payne v. Duke Power Company*, 304 S.C. 447, 405 S.E.2d 399 (1991); and (2) the absence of a meter monitoring the demand of Respondent's business has no legal significance and is no basis for ruling against DEC.

A. The Circuit Court Order in *Payne* Is Appropriate Authority for This Court to Consider.

Respondent recognizes, as it must, that the *Payne* decision is binding precedent that directly addresses the application of Act 1293 to certain customers of DEC living in Greenwood County. Respondent's brief, p. 10. DEC agrees that *Payne* is the leading case addressing the issues in this case and believes that the Circuit Court Order affirmed in *Payne* is persuasive authority that directly addresses the issue in this case and demonstrates unequivocally that DEC acted properly in transferring Respondent from the Greenwood Rate to the DEC rate.

The *Payne* litigation began in 1980 as a class action filed in Greenwood County asserting claims by customers of DEC's predecessor, Duke Power Company ("Duke Power"), who were transferred from the Greenwood Rate to the Duke Power rate. (ROA __; *Payne* Circuit Court Order p. 1-2). The theory asserted in the *Payne* complaint was that Duke Power failed to comply with the requirements of Act 1293 in transferring customers from the Greenwood Rate. The transferred customers were grouped into three subclasses, one of which was a group of 600 class members who were transferred from the Greenwood Rate to the Duke rate because of a change in the customer's electrical needs. (ROA __; Circuit Court Order p. 18).

The class was certified in 1988 and the case was tried in 1989. (ROA __; Circuit Court Order p. 3). The Circuit Court Order was issued in 1990 and affirmed by this Court in 1991. DEC submitted a copy of the Circuit Court Order to the Commission at the hearing in this case (ROA __; Tr. Vol. 2, p. 285.) and argued to the Commission and to this Court that the Circuit Court Order should be relied on as persuasive authority, citing *City of Orangeburg v. Moss,* 262 S.C. 299, 204 S.E.2d 377 (1974). See Appellant's brief p. 8.

In its brief Respondent asserts that DEC's reliance on the Circuit Court Order as persuasive authority is improper, arguing both that *Moss* was overruled by Rule 268 SCACR and

that *Moss* is distinguishable. Respondent's brief pp. 10-11. Respondent's position is wrong on both counts. The purpose of Rule 268 SCACR is stated in its introduction: "[t]o provide guidance on citing South Carolina authority, the following forms of citation are given." The rule is a citation guide and does not purport to be an exhaustive listing of all sources of authority that may be cited in submissions to this Court. There is nothing in the rule to suggest that it was intended to overrule prior decisions like *Moss* in which lower court decisions were found to be persuasive authority.

Respondent's effort to distinguish *Moss* is similarly unpersuasive. Respondent attempts to distinguish *Moss* by arguing that, unlike the *Moss* case, this Court's opinion in *Payne* did not approve of or affirm the Circuit Court Order. Respondent's Brief, p. 11. Respondent's argument is based on a misreading of the *Payne* rulings in the circuit court and in this Court. Respondent overlooks the fact that *Payne* was an appeal from an order ruling on various issues involving a certified class action with three subclasses. In affirming the Circuit Court Order this Court expressly affirmed the rulings as to all three of the subclasses. *Payne*, *supra*, 304 S.C. at 451-452. For that reason, the *Payne* Circuit Court Order is stronger authority than the orders cited in *Moss* as persuasive.

The following is the description in the Circuit Court Order of its ruling on the subclass consisting of customers who, like Respondent, were transferred from the Greenwood Rate because of a change in their usage of electricity:

> ... there were two other reasons accounts were changed to the applicable Duke rates. The first was when the 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. Approximately 600 locations were transferred for this reason.
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> ***

> These conversions 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 connection 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.

ROA __; Circuit Court Order p. 18.

In affirming the Circuit Court Order this Court was necessarily ruling on the claims of a subclass of 600 customers who had been transferred from the Greenwood Rate to the applicable Duke rate because a change in the customer's usage caused Duke Power to make changes in the equipment used to provide service to that customer. Appellant submits that the *Payne* Circuit Court Order is far more persuasive authority than the orders considered by the Court in *Moss* because this Court in *Payne* had to approve of the cited language in order to affirm the lower court's ruling on the 600-person subclass.

It is understandable that Respondent objects to consideration of the Circuit Court Order in this case. The holding there is directly applicable to this case. The record is clear that Respondent's electricity usage increased as its business was successful. The increased usage caused two fires in the summer of 2015 and required that the facilities serving Respondent be upgraded. Under Act 1293, the new facilities constituted a new connection and Respondent was properly transferred from the Greenwood Rate to the DEC rate.

B. The Commission Made No Ruling That DEC Was Under an Obligation to Measure Respondent's Electricity Demand.

In Order No. 2017-774 the Commission mentioned that, prior to the two fires at Respondent's business, DEC did not have a meter in place that measured the peak usage or "demand" of the connection. (ROA __; Order No. 2017-774, p. 4). DEC witness Lunsford made the same observation in his testimony. (ROA __; Transcript Vol. II, p. 247). The Commission did not, and could not, have made any determination that DEC was under an

obligation to have a meter in place to measure demand. See ROA __; Order No. 2017-774, p. 6 (requiring for the first time that DEC install a meter to measure demand "in a manner consistent with the demand component measurement of Duke Energy Carolinas, LLC's commercial customers that are subscribed to a demand rate schedule.")

Notwithstanding the fact that the Commission made no finding or ruling regarding any obligation of DEC to have provided a demand meter, Respondent argues repeatedly that the absence of a demand meter in place in 2015 prevents DEC from establishing that transferring Respondent from the Greenwood Rate was proper. See Respondent's brief, pp. 6, 12, 17, and 18. The argument fails for three separate reasons. First, DEC was under no obligation to have a demand meter in place in 2015 and cannot be penalized for a failure to provide one. Second, the Commission did not find that DEC failed to explain why a new connection was required; instead, the Commission made the factual finding that the two potentially dangerous fires at Respondent's business were the result of thermal overload. (ROA __; Order No. 2017-774, p. 3-4.) Third, there is absolutely no basis in Act 1293 for requiring DEC to make a showing of the level of Respondent's peak demand in order to transfer the Respondent from the Greenwood Rate to the DEC rate. When the Commission found that DEC had acted properly in upgrading the facilities, Act 1293 required, as a matter of law, that Respondent be transferred to the DEC rate. After making that finding, the Commission was without the authority to order DEC to transfer Respondent back to the Greenwood Rate. *Duke Power Co. v. S.C. Public Service Commission*, 284 S.C. 81, 326 S.E.2d 395 (1985) (Act 1293 deprived the Commission of authority to disturb the sale terms set by the General Assembly).

CONCLUSION

The arguments advanced in Respondent's brief are not persuasive and fail to provide any basis for affirming the Commission's orders. Under Act 1293 it is not possible to reconcile the Commission's finding that DEC acted properly in upgrading the facilities serving Respondent, with its determination that, because Respondent made efforts to stay on the Greenwood Rate, it should be allowed to do so. Act 1293 required the transfer and the Commission's orders holding otherwise should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a Paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have this day caused to be served upon the person(s) named below the **Initial Reply Brief of Appellant 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 6th day of August, 2018.

Toni C. Hawkins