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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. 2018-2-E
Appellate Case No. 2018-001165

South Carolina Coastal Conservation League
And Southern Alliance for Clean Energy, Appellant,

v.

South Carolina Public Service Commission,
Dominion Energy South Carolina, Inc., f/k/a/ South
Carolina Electric & Gas Company,
CMC Steel South Carolina, South Carolina
Energy Users Committee, South Carolina Solar
Business Alliance, LLC, Southern Current, LLC,
and South Carolina Office of Regulatory Staff, Respondents,

and,

South Carolina Solar Business Alliance, LLC, Appellant,

v.

South Carolina Coastal Conservation League and South
Alliance for Clean Energy, South Carolina Public Service
Commission, Dominion Energy South Carolina, Inc., f/k/a/ South
Carolina Electric & Gas Company, CMC Steel South Carolina,
South Carolina Energy Users Committee,
Southern Current, LLC, and
South Carolina Office of Regulatory Staff, of whom Dominion
Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas
Company, and South Carolina Office of Regulatory Staff, are Respondents

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**AMICUS CURIAE BRIEF OF THE
SOUTH CAROLINA OFFICE OF REGULATORY STAFF**

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STATEMENT OF INTEREST OF AMICUS CURIAE

The South Carolina Office of Regulatory Staff (“ORS”) files this *amicus* brief because ORS’s ability to effectively represent the public interest depends upon the fair and accurate application of the law by the Public Service Commission of South Carolina (“Commission”). On May 23, 2018, the Commission denied the Petition for Reconsideration filed by the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively referred to herein as “Appellants”). On June 21, the Appellants filed a Notice of Appeal with this Court. On June 26, 2018, the South Carolina Electric & Gas Company (“SCE&G”) filed a Motion to Dismiss the Appellants’ appeal and in the alternative to hold the appeal in abeyance until the Commission issues its final order ruling on the Appellants’ Petition for Rehearing and/or Reconsideration. South Carolina Act No. 258, which altered the statutory mission of the South Carolina Office of Regulatory Staff (“ORS”) became effective June 28, 2018.¹ On August 16, 2018, this Court denied SCE&G’s Motion to Dismiss and granted SCE&G’s request to hold the appeal in abeyance, with the right to amend the Notice of Appeal if necessary following the issuance of the Commission’s Order. On October 30, 2018, the Commission issued its Order denying the Appellants’ Petition for Rehearing or Reconsideration.

ORS is the South Carolina agency tasked with representing the public interest of South Carolina before the Commission. In representing the public interest, ORS must consider the concerns of the using and consuming public with respect to public utility services, regardless of the class of customer and preservation of continued investment in and maintenance of utility

¹ Prior to the effective date of South Carolina Act 258, ORS was tasked with balancing the concerns of the using and consuming public with respect to public utility services, economic development and job attraction and retention in South Carolina; and preservation of the financial integrity of the state’s public utilities. Subsequent to the effective date of South Carolina Act 258, ORS’s statutory obligation changed such that it no longer balances economic development and job attraction and retention in South Carolina and the preservation of the financial integrity of the state’s public utilities.

facilities so as to provide reliable and high-quality utility services. ORS is automatically a party to all matters before the Commission and, unless it chooses not to participate, is statutorily obligated to advocate for the public interest. ORS believes that in order to effectively represent the public interest and for a just result to be reached, the Commission must consistently apply the law in a fair and uniform standard. ORS's ability to effectively represent the public interest before the Commission and make informed decisions is based almost entirely upon its confidence that the Commission will not act arbitrarily and will fairly and uniformly apply the law.

INTRODUCTION

The Commission erred in its Order No. 2018-322(A) by improperly shifting the burden of proof onto ORS and intervenors. In that Order, the Commission found that because certain parties failed to produce a viable alternative, the Commission was bound to accept the proposal put forth by the Applicant. Appellants assert that the Commission erred by shifting the burden from the Applicant to other parties to calculate a viable rate. The record and the brief submitted by Appellants make clear that the Commission improperly applied the law when it shifted the burden from SCE&G onto ORS and intervenors in the fuel proceeding. The Commission's improper burden shifting upsets settled law and creates confusion in a setting where relative certainty is paramount. The ORS agrees with Appellants and would respectfully request this Court to compel the Commission to comply with established law and properly place the burden on SCE&G.

ARGUMENT²

I. The Commission Erred by Improperly Shifting the Burden of Proof from the Applicant Utility onto ORS and the Intervenors.

The issue addressed in this brief and before this Court is whether the Commission improperly shifted a burden from the utility onto ORS and interveners. The Commission's acceptance of SCE&G's avoided capacity rate because it concluded the ORS and interveners failed to present a viable alternative, constitutes an improper burden shift and an error of law.

A. THE COMMISSION FAILED TO PROPERLY APPLY THE LAW WHEN IT SHIFTED THE BURDEN OFF OF SCE&G AND ONTO ORS AND INTERVENORS BY REQUIRING THE PROVISION OF AN ALTERNATIVE AVOIDED CAPACITY COST

Utilities appearing before the Commission are entitled to a presumption that their expenditures are reasonable and incurred in good faith. Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff, 393, S.C. 96, 109, 708 S.E.2d 755, 762 (2011). The presumption of reasonableness has generally been applied to expenditures; however, the general principle is founded on the presumption that, absent a showing otherwise, good faith attends all actions of a utility. Interstate Commerce Comm'n v. Chicago Great Western Ry. Co., 209 U.S. 108, 119-120, 28 S. Ct. 493, 497 (1908). However, this Court has stated that this presumption is not dispositive, and the presumption in the utility's favor is nevertheless subject to scrutiny and a challenge. (Id.)

The utilities' presumption of reasonableness may be overcome upon a production by a contesting party that demonstrates a "tenable basis for raising the specter of imprudence." Hamm v. South Carolina Public Service Comm'n, 309 S.C. 282, 286, 422 S.E.2d 110, 112 (1992). If an investigation initiated by the ORS, the Commission, a contesting party, or even

² This brief relies upon the facts as presented by Appellants.

testimony of a non-party witness, raises the specter of imprudence and overcomes the presumption of reasonableness, then the utility is obligated to *further* [emphasis added] substantiate its claimed expenditures. (Id. at pp. 109-111, 762-763).

Finally, the Commission must “fully document its findings of fact and base its decision on reliable, probative, and substantial evidence on the whole record.” Porter v. South Carolina Public Service Comm’n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998).

Therefore, while the law dictates that utilities’ proposals submitted to the Commission have a presumption of good faith, those proposals may nevertheless be challenged and upon reasonable challenge, must be further substantiated by the utility without additional burden placed upon the party contesting the utility proposal.

At the Commission hearing in this proceeding, ORS witness Horii contested SCE&G’s proposed PR-2 capacity value and recommended that the PR-2 capacity value be set at 19.5% of the avoided cost per kW from a 100 MW change to SCE&G’s base resource plan. (R. p.1221, ll. 3 - 17). Because of the lack of an avoided capacity cost calculation and data provided by SCE&G in this Docket, witness Horii was unable to produce an independent estimate of avoided capacity costs for a 100 MW change in supply. (R. p. 1222, ll. 1 - 6). According to witness Horii, SCE&G’s new manner of calculating the avoided capacity costs represented a “substantial change from the methodology and inputs used by SCE&G to calculate prior PR-1 and PR-2 rates...” (R. p. 1197, ll. 1 - 11). Therefore, he recommended that SCE&G be required to provide an estimate of long-run avoided capacity cost and the calculation for the long-run avoided capacity costs. (R. p. 1222, ll. 6-8). As explained by witness Horii in testimony, SCE&G based its assertion of zero avoided capacity cost for solar projects on its premise that SCE&G is constrained by winter capacity needs, and unaided by summer

capacity reductions. (R. p. 1197, ll. 4 -7). Witness Horii testified that this was a substantial change from the methodology and inputs used by SCE&G to calculate prior PR-1 and PR-2 rates and relied upon assumptions and studies conducted in the 2018 Integrated Resource Plan that were not fully reviewed, vetted and/or approved by the Commission. (Id. at ll. 7 - 11). Additionally, Appellants' witnesses Johnson and Glick concurred with witness Horii in stating that the Company's proposed avoided capacity cost of zero was inappropriate. (R. p. 1367, ll. 10 - 16 and R. p. 1022, ll. 3 - 14).

In view of the substantial evidence on the whole record it is clear that both ORS and Appellants presented a reasonable and well-founded challenge to SCE&G's proposed avoided capacity valuation that was before the Commission.

The Commission's Order states that because there is no "viable alternative proposal being presented by any other party," SCE&G's avoided capacity cost proposal of zero is reasonable. (R. p. 152, ll. 4 -6).³ "The Commission ... reiterate[d] that no other party presented an alternative estimate of SCE&G's avoided capacity costs." (R. p. 153). In its Directive, issued April 25, 2018, the Commission stated, "[t]he other parties took great pains to explain how they believe SCE&G inappropriately derived its factor, but the parties failed to present an alternative for us to consider." (R. p. 204 - 205).

SCE&G's proposed change to avoided capacity cost was a significant and dramatic⁴ departure from past practice, and ORS and Appellants' witnesses provided reasonable and sufficient evidentiary challenges to SCE&G's proposed avoided capacity value thereby raising

³ Notwithstanding the above, as mentioned in testimony, ORS did provide a viable alternative method to determining an appropriate avoided capacity cost. The record gives the Commission a viable alternative such that SCE&G could have provided the calculations and resulting accurate avoided capacity cost.

⁴ According to ORS witness Horii, SCE&G "implemented a dramatic change in approach by not providing any avoided capacity cost calculations in this proceeding." (R. p. 1208, l. 6 -7).

the “specter of imprudence” and overcoming the presumption of reasonableness. Yet once SCE&G was challenged regarding its avoided capacity cost rate, rather than present its calculations proving why the avoided capacity cost was zero, it simply made conclusory statements.⁵ SCE&G had the burden to prove why a zero capacity value was appropriate regardless of whether ORS or the intervenors had presented “viable” alternatives. Despite the reasonable challenge made by ORS, the Commission held that absent an additional proposal by ORS or intervenors, the Commission must take the proposal set forth by SCE&G.

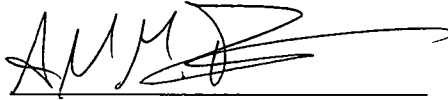
The Commission’s Order improperly failed to consider evidence presented by ORS and imposed a new requirement upon ORS and the intervenors: to not only make reasonable challenges to utility proposals but also to provide alternatives. Therefore, the Commission’s Order erred when it allowed SCE&G to retain its initial presumption of reasonableness and shifted the burden onto ORS by requiring ORS to provide an alternative to SCE&G’s unsubstantiated position.

CONCLUSION

The ORS respectfully joins in the request of the Appellants and asks this Court to remand this case back to the Commission with instructions that the Commission comply with settled law and keep the ultimate burden of proof on the utility.

⁵ Commission Orders must rely upon adequate factual basis for its findings and opinion testimony. Parker v. South Carolina Public Service Comm’n, 281 S.C. 215, 314 S.E.2d 597 (1984); *See Also*, Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671 (1978), where this Court determined that opinion testimony was of no probative value where there was no evidentiary showing of fact upon which the opinion was predicated.

Respectfully submitted,



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