

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 27 2019

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

SC SUPREME COURT

Appellate Case No. 2018-001165

Public Service Commission Docket No. 2018-2-E

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy,.....Appellants,

v.

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, Southern Alliance for Clean
Energy, 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.

**RETURN OF RESPONDENT DOMINION ENERGY SOUTH CAROLINA, INC. F/K/A
SOUTH CAROLINA ELECTRIC & GAS COMPANY IN OPPOSITION TO MOTION
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF THE SOUTH CAROLINA
OFFICE OF REGULATORY STAFF**

Respondent Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company (“SCE&G”),¹ pursuant to Rule 240(e), SCACR, hereby makes its return in opposition to the June 17, 2019, “Motion for Leave to File *Amicus Curiae* Brief” (“Motion”) filed by the South Carolina Office of Regulatory Staff (“ORS”). The underlying appeal is from orders issued by the Public Service Commission of South Carolina (“PSC”) in a contested case proceeding involving an annual review of the fuel purchasing practices and policies of SCE&G. *See* S.C. Code Ann. § 58-27-865 (2015).

The bases for SCE&G’s opposition to the Motion are as follows:

1. As an administrative agency, ORS only has such powers as have been conferred upon it by law and may act only within the authority granted to it. ORS does not have the statutory authority to participate in an appellate matter arising out of a PSC proceeding as an *amicus curiae*, but can only serve as a party appellant or respondent in an appeal from a PSC proceeding in which it participated as a party of record.
2. The Motion is an improper attempt on the part of ORS to use the role of an *amicus curiae* to circumvent the provisions of S.C. Code Ann. § 1-23-380 (Supp. 2018), which provides that a party to a contested case proceeding may seek judicial review only after exhausting all administrative remedies available within the agency and by serving and filing a notice of appeal as provided in Rule 203(b)(6) and (d)(2), SCACR.
3. The Motion also improperly attempts to circumvent the requirements of S.C. Code Ann. § 58-27-2310 (2015), which provides that “[a] party in interest dissatisfied with

¹ Subsequent to the parties’ submission of their initial briefs in this appeal, Respondent SCE&G changed its legal name to “Dominion Energy South Carolina, Inc.” which has resulted in an amendment of the caption as reflected in the letter from the Clerk of Court dated June 13, 2019. However, because its legal name had not been changed during the relevant proceedings before the PSC or at the time initial briefs were filed, Respondent will continue to refer to itself as “SCE&G” in the instant memorandum for purposes of clarity and to minimize any confusion.

an order of the [PSC] may appeal to the Supreme Court ... as provided by statute and the South Carolina Appellate Court Rules.”

4. ORS has not presented sufficient grounds demonstrating that its proposed *amicus curiae* brief is warranted or would assist the Court in its consideration of the issues presented in this appeal. To the contrary, ORS merely duplicates and restates the facts and issues previously asserted in the briefs filed by the Appellants in this matter.

Accordingly, SCE&G submits that ORS’s Motion should be denied.

Alternatively, if the Court is inclined to grant the Motion and to consider ORS’s proposed *amicus curiae* brief, SCE&G requests that the Court require ORS to appear before the Court and present argument at the oral arguments on the merits of this appeal as a party appellant.

As required by Rule 240(e) and Rule 240(c)(2), SCACR, SCE&G submits the accompanying memorandum in support of its return.

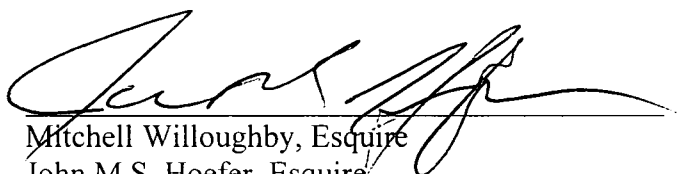
CONCLUSION

For the reasons discussed above and in the accompanying memorandum, ORS’s Motion for Leave to File *Amicus Curiae* Brief should be denied. In the alternative and if the Motion is granted, it should be conditioned on a requirement that ORS appear and participate in oral arguments on the issues presented in the appeal of this matter as a party appellant.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

K. Chad Burgess, Esquire
Matthew Gissendanner, Esquire
Mail Code C222
220 Operation Way
Cayce, SC 29033-3701
Phone: (803) 217-8141 (KCB)
(803) 217-5359 (MWG)
Fax: (803) 217-7931
chad.burgess@scana.com
matthew.gissendanner@scana.com



Mitchell Willoughby, Esquire
John M.S. Hoefler, Esquire
Benjamin P. Mustian, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
PO Box 8416
Columbia, SC 29202-8416
Phone: (803) 252-3300
Fax: (803) 256-8062
mwilloughby@willoughbyhoefler.com
jhoefler@willoughbyhoefler.com
bmustian@willoughbyhoefler.com

*Attorneys for Respondent Dominion Energy South
Carolina, Inc. f/k/a South Carolina Electric & Gas
Company*

Columbia, South Carolina
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and

South Carolina Solar Business Alliance, LLC, Appellant,

v.

South Carolina Coastal Conservation League, Southern Alliance for Clean
Energy, Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric &
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Committee, Southern Current, LLC, and South Carolina Office of
Regulatory Staff,

Of whom, Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric &
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**MEMORANDUM OF RESPONDENT DOMINION ENERGY SOUTH CAROLINA, INC.
F/K/A SOUTH CAROLINA ELECTRIC & GAS COMPANY IN SUPPORT OF RETURN
IN OPPOSITION TO MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF
THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF**

Respondent Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company (“SCE&G”),¹ pursuant to Rules 240(e) and 240(c)(2), SCACR, submits the within memorandum in support of its return in opposition to the “Motion for Leave to File *Amicus Curiae* Brief” (“Motion”) filed June 17, 2019, by the South Carolina Office of Regulatory Staff (“ORS”). The underlying appeal is from orders issued by the Public Service Commission of South Carolina (“PSC”). In compliance with Rule 240(c)(3), SCACR, all documents referenced in the within memorandum are contained in the Record on Appeal, which was filed in the above-captioned matter on May 22, 2019.

SUMMARY OF ARGUMENT

ORS was a party of record in the proceeding below and elected not to initiate an appeal from the orders issued by the PSC giving rise to the instant appeal. Therefore, the Court should not allow ORS, which lacks any statutory authority to serve in the role of an *amicus curiae*, to be recognized as an *amicus curiae* and thereby avoid the effect of its decision not to appeal the PSC’s rulings – particularly where it only makes the same arguments already presented to the Court by Appellants.

BACKGROUND

This matter is an appeal from orders issued by the PSC in a contested case proceeding involving an annual review of the fuel purchasing practices and policies of SCE&G. *See* S.C. Code Ann. § 58-27-865 (2015). The PSC was required to consider the need to adjust the factors involved in SCE&G’s recovery of the costs of fuel related to the generation and sale of electricity, including any costs associated with purchasing power from non-utility power producers pursuant to the Public Utility Regulatory Policies Act, 16 U.S.C.A. §§ 796, *et seq.* *See* S.C. Code Ann. § 58-27-

¹See Return at 2, n.1 regarding the continued reference of Respondent as “SCE&G.”

865 (2015). Timely petitions to intervene were filed by Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, the “Conservation Groups”), Appellant South Carolina Solar Business Alliance (“Solar Alliance”), the South Carolina Energy Users Committee (“Energy Users”), Southern Current, LLC, and CMC Steel South Carolina. ORS also was automatically made a party of record in the proceeding by operation of S.C. Code Ann. § 58-4-10(B) (2015) and actively participated in the PSC proceeding by litigating its position through the presentation of witnesses and engaging in cross-examination.

The PSC conducted an evidentiary hearing on April 10-11, 2018, and issued its Order No. 2018-322(A) on May 2, 2018. On May 10, 2018, the Conservation Groups, the Solar Alliance, and Energy Users filed timely petitions for rehearing or reconsideration of Order No. 2018-322(A). On May 11, 2018, ORS also filed a timely petition for rehearing or reconsideration of Order No. 2018-322(A). On May 23, 2018, the PSC issued a directive (“Directive”) granting the Energy Users’ petition and denying the other petitions for reconsideration, including the petition filed by ORS. On October 30, 2018, the PSC issued Order No. 2018-708, its final order on the petitions for reconsideration, memorializing the action approved in the Directive. On November 28, 2018, the Conservation Groups filed an Amended Notice of Appeal in Appellate Case No. 2018-1165 seeking review of Order No. 2018-322(A), the Directive, and Order No. 2018-708. On November 28, 2018, the Solar Alliance also filed a Notice of Appeal in Appellate Case No. 2018-2117 seeking appellate review of Order No. 2018-322(A), the Directive, and Order No. 2018-708.² Neither ORS nor any of the remaining parties filed notices of appeal from the PSC’s decisions. Pertinent to this Motion, ORS was named as a party respondent in the Notices of Appeal filed by the Conservation

² On January 31, 2019, the Court issued an order consolidating Appellate Case Nos. 2018-1165 and 2018-2117. By way of a letter dated June 13, 2019, and based on this Court’s Order, the Clerk of Court administratively closed Appellate Case No. 2018-2117 and directed that all further filings be made in Appellate Case No. 2018-1165.

Groups and the Solar Alliance, but did not notify the Court of its intent not to participate as a Respondent. *Cf.* Letter of Respondent Energy Users, dated April 3, 2019 (notifying the Court that it did not intend to file a brief in this matter). Nor did ORS file a brief as a party respondent. *Cf.* Rule 208(a)(4), SCACR.

ISSUES/ARGUMENTS

Of course, the determination of whether to grant leave to file a brief as an *amicus curiae* under Rule 213, SCACR, is within this Court's discretion. However, SCE&G respectfully submits that the Court should decline ORS's request that the Court exercise its discretion in favor of ORS because ORS does not possess the legal authority to act as an *amicus curiae*. Moreover, ORS cannot be an *amicus curiae* because ORS was a party to the proceeding before the PSC and by its own inactions forever extinguished its appellate rights in this case. Accordingly, SCE&G submits that ORS's Motion must be denied.

I. ORS's Statutory Authority Does Not Permit it to Participate as an *Amicus Curiae*

In its Motion and proposed *amicus curiae* brief ("Proposed *Amicus Curiae* Brief") ORS correctly notes that the PSC denied the petition for reconsideration filed by the Conservation Groups. Proposed *Amicus Curiae* Brief, p. 3. However, ORS failed to inform the Court that it, too, filed a petition for reconsideration which also was denied by the PSC. *See* ORS Pet. for Reh'g and/or Recons., May 11, 2018 ("ORS Pet. for Reh'g"), R. pp. 540-51; Order No. 2018-708, pp. 1, 6, R. pp. 189, 194. As a party to the proceedings below, ORS therefore was entitled to seek judicial review of the PSC's decisions "by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered." S.C. Code Ann. § 1-23-380 (Supp. 2018). Furthermore, as "[a] party in interest" to these proceedings, it had the right to

appeal “to the Supreme Court ... as provided by statute and the South Carolina Appellate Court Rules” if it was dissatisfied with” the PSC’s decisions. S.C. Code Ann. § 58-27-2310 (2015). *See also* S.C. Code Ann. § 58-4-80 (“The executive director representing [ORS] has the same rights of appeal from [PSC] orders or decisions as other parties to [PSC] proceedings.”). Even so, ORS decided not to seek appellate review of the PSC’s decisions, which it could have done by filing a timely notice of appeal with this Court. *See* S.C. Code Ann. §§ 58-27-2310, 58-4-90 (“Except as required by Section 58-4-50, decisions relating to whether, when, or how to initiate, continue, participate, or intervene in proceedings pursuant to Section 58-4-50 are in the sole discretion of the executive director....”).

As an administrative agency, ORS “has only such powers as have been conferred by law and must act within the authority granted for that purpose.” *Bazzle v. Huff*, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995). Pursuant to S.C. Code Ann. § 58-4-50(A)(4), ORS has the “duty and responsibility” to “represent the public interest in [PSC] proceedings.” It is further authorized to “provide legal representation of the public interest before state courts” under S.C. Code Ann. § 58-5-40(A)(8). However, nothing in S.C. Code Ann. § 58-4-50 vests ORS with the authority to serve as a neutral “friend of the court” by seeking to file an *amicus curiae* brief in an appeal in which it had the power – but chose not – to participate. If ORS believed that the PSC had unfairly and inaccurately applied the law to the detriment of the public interest, then it not only had the ability to appeal the PSC decision by filing a timely notice of appeal, but also had the obligation to do so based upon its statutory “duty and responsibility” to represent the public interest. The fact that ORS did not appeal the decisions of the PSC demonstrates that, in representing the public interest, ORS concluded it was appropriate to acquiesce in the final decision of the PSC (*see* S.C. Code Ann. § 58-4-90). *Cf. Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997)

(“Failure to challenge the ruling ‘is an abandonment of the issue and precludes consideration on appeal.’”) *quoting Biales v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993). Notwithstanding the efforts of the Conservation Groups and the Solar Alliance, ORS abandoned the issues it now seeks to argue when it failed to appeal, and now seeks to advance the Proposed *Amicus Curiae* Brief in a manner which exceeds its statutory authority.

Because the legislature has not conferred such authority on ORS, the relief sought in the Motion requires an exercise of powers that ORS does not possess as a matter of law and it should be denied on that basis alone. Even assuming ORS did possess such powers, there are ample other reasons why the Motion should be denied.

II. The Motion is an Improper Attempt to Circumvent S.C. Code Ann. §§ 1-23-380 and 58-27-2310

By participating in the PSC proceeding as a party, ORS cannot now be an *amicus curiae*, which, by definition, is “someone *who is not a party to a lawsuit* but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.” BLACK’S LAW DICTIONARY 106 (11th ed. 2019) (emphasis added). ORS cannot satisfy any element of this definition inasmuch as it had a clear ability to seek appellate review of the PSC decisions if it believed such an action was necessary in order for it to “effectively represent the public interest and for a just result to be reached,” Motion at 3, but chose not to do so. Now, however, and over seven months after the PSC denied its Petition for Rehearing in the proceedings below and after the submission of final briefs and the record on appeal, ORS seeks leave of this Court to file an *amicus curiae* brief in which it advocates the reversal of the PSC decisions. For this reason, SCE&G submits that the Motion is an improper effort to have the Court entertain an appeal on the part of ORS under the guise of an *amicus curiae* when it failed to properly seek appellate review of the PSC’s decisions.

ORS' true intent to assume the role of an appellant, both out of time and without being required to abide by the briefing and other requirements required of a party to an appeal, is made clear by the positions advanced in its proposed *amicus curiae* brief. For example, ORS argues that "[t]he Commission erred in its Order No. 2018-322(A) by improperly shifting the burden of proof onto ORS and intervenors." Proposed *Amicus Curiae* Brief, p. 4. *See also* Proposed *Amicus Curiae* Brief, p. 9 ("the [PSC'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."). This is exactly what it argued to the PSC when it petitioned for rehearing or reconsideration of Order No. 2018-322(A) below. *See* ORS Pet. for Reh'g, p. 7, R. p. 548 ("The Commission erred when it placed the burden on ORS and the intervenors to provide an alternative to SCE&G's proposed avoided capacity cost."). ORS also attempts to further advance its position as a party below that it "presented a reasonable and well-founded challenge to SCE&G's proposed avoided capacity valuation that was before the [PSC]." Proposed *Amicus Curiae* Brief, p. 8; *see also* ORS Pet. for Reh'g, p. 10, R. p. 549 ("While SCE&G's proposals are entitled to a presumption of reasonableness, ORS challenged the value of SCE&G's avoided capacity cost.").

By advancing the same position as it did as a party to the proceedings below, ORS therefore cannot properly serve in the role of an *amicus curiae*, which is to act as a "'friend of the court' as distinguished from an advocate before the court." *Alexander v. Hall*, 64 F.R.D. 152 (D.S.C. 1974); *see also* 3B C.J.S. *Amicus Curiae* § 1 ("[a]n amicus is one who, not as party but just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken rather than one who gives a highly partisan account of the facts"). To the contrary, the Motion demonstrates that ORS is seeking to act as an advocate and

“friend of the appellants” by expressly arguing that the Commission erred in declining to adopt the position ORS advanced below and seeks to have this Court reverse the Commission on that basis. As a party to the proceedings below and as a named Respondent to this appeal, ORS is hardly a “stranger” to the underlying litigation and cannot provide neutral assistance or objectively discuss the issues in this appeal as an *amicus curiae*. Accordingly, the Motion should be denied.

III. ORS has not Presented Sufficient Grounds Demonstrating that an *Amicus Curiae* Brief is Warranted or Would Assist the Court and its Proposed Brief Merely Duplicates and Restates Appellants’ Briefs

The Motion also should be denied on the basis that ORS’s proposed *amicus curiae* brief is merely repetitious and duplicative of the Appellants’ briefs filed by the Conservation Groups and the Solar Alliance and does not tell the Court anything it does not already know by virtue of the briefs filed by the Appellants and Respondents in this matter. As recognized by other courts:

An *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (**though not enough affected to entitle the *amicus* to intervene and become a party in the present case**), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied.

Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997) (citations omitted) (emphasis added). *See also Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (“[T]he criterion for deciding whether to permit the filing of an [*amicus curiae*] brief should be the same [for any would-be *amici*]: whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.”).

Here, ORS does not seek to add anything new to this Court’s understanding of this issue or discuss anything of legal significance that has not already been addressed by Appellants and

Respondents. *See Ryan*, 125 F.3d at 1064 (“In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, . . . judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties’ briefs do not give us all the help [they] need for deciding the appeal.”); *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) (“The policy of this court is, therefore, not to grant rote permission to file an *amicus curiae* brief [and] never to grant permission to file an *amicus curiae* brief that essentially merely duplicates the brief of one of the parties. . . .”). Instead and as discussed above, ORS’ Motion is advanced for the purpose of bolstering positions already advanced by appellants and circumvents the South Carolina Appellate Court Rules in the effort. For these additional reasons, ORS’s Motion should be denied.

IV. In the Alternative and if the Court grants the Motion, ORS should be required to Appear at the Oral Argument to Consider the Merits of this Appeal and Argue its Position as an Appellant

If the Court is inclined to grant the Motion and to consider ORS’s proposed *amicus curiae* brief, SCE&G alternatively requests that the Court require ORS to appear before the Court and present its argument at the oral argument on the merits of this appeal as an appellant.

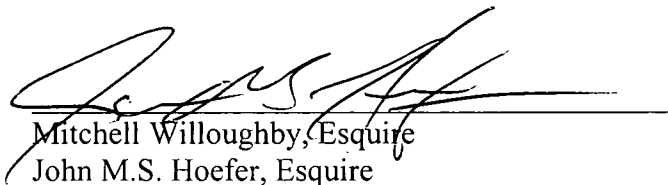
CONCLUSION

For the reasons discussed above, the Motion should be denied. Alternatively, if the Court grants the Motion, SCE&G requests that ORS be required to appear and participate in oral arguments on the issues presented in the appeal of this matter as a party appellant.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

K. Chad Burgess, Esquire
Matthew Gissendanner, Esquire
Mail Code C222
220 Operation Way
Cayce, SC 29033-3701
Phone: (803) 217-8141 (KCB)
(803) 217-5359 (MWG)
Fax: (803) 217-7931
chad.burgess@scana.com
matthew.gissendanner@scana.com



Mitchell Willoughby, Esquire
John M.S. Hoefler, Esquire
Benjamin P. Mustian, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
PO Box 8416
Columbia, SC 29202-8416
Phone: (803) 252-3300
Fax: (803) 256-8062
mwilloughby@willoughbyhoefler.com
jhoefler@willoughbyhoefler.com
bmustian@willoughbyhoefler.com

*Attorneys for Respondent Dominion Energy South
Carolina, Inc. f/k/a South Carolina Electric & Gas
Company*

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Of whom, Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric &
Gas Company and South Carolina Office of Regulatory Staff are..... Respondents.

PROOF OF SERVICE

This is to certify that I, Cathy G. Caldwell, a Legal Assistant with the law firm Willoughby
& Hoefler, P.A., have caused to be served this day one (1) copy of Respondent Dominion Energy

South Carolina, Inc. f/k/a South Carolina Electric & Gas Company's **Return in Opposition to Motion for Leave to File *Amicus Curiae* Brief of the South Carolina Office of Regulatory Staff** and the accompanying **Memorandum in Support** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

J. Blanding Holman, IV, Esquire
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403
*(Counsel for South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy)*


Alexander G. Shissias, Esquire
The Shissias Law Firm, LLC
1727 Hampton Street
Columbia, SC 29201
(Counsel for CMC Steel South Carolina)

Benjamin L. Snowden, Esquire
Kilpatrick Townsend & Stockton, LLP
4208 Six Forks Road, Suite 1400
Raleigh, NC 27609
(Counsel for South Carolina Solar Business Alliance, LLC)

Richard L. Whitt, Esquire
Timothy F. Rogers, Esquire
Austin and Rogers, P.A.
Post Office Box 11716
Columbia, SC 29211
*(Counsel for South Carolina Solar Business Alliance, LLC and
Southern Current, LLC)*

Scott A. Elliott, Esquire
Elliott & Elliott, P.A.
1508 Lady Street
Columbia, SC 29201
(Counsel for South Carolina Energy Users Committee)

Andrew M. Bateman, Esquire
Jenny R. Pittman, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
(Counsel for South Carolina Office of Regulatory Staff)


Cathy G. Caldwell

Columbia, South Carolina
This 27th day of June, 2019.