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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

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, ...Appellants,

v.

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Dominion Energy South Carolina 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 f/k/a South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff are..... Respondents.

RESPONSIVE BRIEF OF RESPONDENT DOMINION ENERGY SOUTH CAROLINA, INC. F/K/A SOUTH CAROLINA ELECTRIC & GAS COMPANY TO THE *AMICUS CURIAE* BRIEF OF THE SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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SUMMARY OF ARGUMENT

Although an *amicus curiae* is, literally, a "friend of the court," the South Carolina Office of Regulatory Staff's ("ORS") brief in this case improperly seeks reversal of the decisions rendered by the Public Service Commission of South Carolina ("PSC") in proceedings in which ORS was a party below. Further, ORS's brief adds nothing to aid the Court in its analysis of the issues raised by the Appellants in this matter and addressed in the briefs filed by Respondent Dominion Energy South Carolina Inc. f/k/a South Carolina Electric & Gas Company ("SCE&G").[1]

Rather, the only issue identified by ORS is its assertion that the Commission erred by improperly shifting the burden of proof from SCE&G onto ORS and the other parties of record – which assertion is based upon an unpreserved argument that seeks to take an existing legal standard regarding the presumptive reasonableness of utility expenses in utility rate relief proceedings and then impermissibly apply that standard to all actions of a utility. **This case is not about the prudency of an expense which a utility has already incurred which it sought to be included in allowable expenses for purposes of determining just and reasonable utility customer service rates. Instead, it is about what price a utility is required to pay to non-utility generators for electric energy and capacity.** As SCE&G has previously noted in its filings with this Court, the PSC correctly recognized that the Appellants and ORS, as proponents of alternative avoided costs that would increase SCE&G's costs to purchase electricity generated by future Qualifying Facilities (which costs would be passed on to customers in the form of higher rates),

[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 response for purposes of clarity and to minimize any confusion.

had the burden of persuasion to show their proposals would result in avoided costs that were just, reasonable, and appropriate. The record reflects that ORS and the Appellants failed to meet this burden because they offered only speculative and unreliable testimony that the PSC properly concluded was insufficient to support their proposals. And even assuming ORS and the Appellants did not bear a burden of persuasion, they failed to meet their burden to produce evidence of a tenable basis to raise the specter of imprudence regarding SCE&G's proposed avoided costs. Moreover, SCE&G substantiated its proposed avoided costs to overcome any such specter of imprudence. The PSC's decision to approve SCE&G's proposed avoided costs therefore should be affirmed.

ARGUMENT

I. ORS CANNOT PROVIDE MEANINGFUL ASSISTANCE TO THE COURT INASMUCH AS IT WAS A PARTY TO THE PROCEEDINGS BELOW AND MERELY REPEATS AND RESTATES ISSUES ALREADY ADVANCED BY APPELLANTS.

ORS is not simply an *amicus curiae* who is seeking to provide insight and assistance to the Court in its understanding of this case. Rather, ORS was a party of record to the proceedings below, petitioned the PSC to rehear and reconsider its orders, and therefore was entitled to seek judicial review of the PSC's decisions. *See* Order No. 2018-322(A), p. 3, R. p. 140; ORS Pet. for Reh'g and/or Recons. of Am. Order No. 2018-322(A), R. pp. 540-51; S.C. Code Ann. § 1-23-380 (Supp. 2018); S.C. Code Ann. § 58-27-2310 (2015); S.C. Code Ann. § 58-4-80 (2015). However, ORS did not seek judicial review. Instead, it elected to lie in wait.

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. *See* S.C. Code Ann. § 58-4-10(B) (Supp. 2018).[2] 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 (2015), 58-4-90 (2015). 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 (2015). *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). And this conclusion on the part of ORS was certainly appropriate given its obligation to observe the "legitimate financial interests of South Carolina businesses, *and* South Carolina utility ratepayers." *See Daufuskie Island Utility Company, Inc. v. S.C. Office of Regulatory Staff*, Op. No. 27905, (S.C. Sup. Ct. filed July 24, 2019) (Shearouse Adv. Sh. No. 30 at 66) (emphasis in original).[3]

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[2] In its *amicus curiae* brief, ORS included a "Statement of Interest of *Amicus Curiae*" in which it purports to explain ORS's interest in filing its brief in this matter. Although Rule 213, SCACR requires an applicant **in its motion for leave** to file an *amicus curiae* brief to identify its interest and to state the reasons why such a brief is desirable, including such a "statement of interest" in the *amicus curiae* brief itself is contrary to the rules of this Court. *See* Rule 213, SCACR (stating that an *amicus curiae* brief "shall be limited to argument of the issues on appeal as presented by the parties and shall comply with the requirements of Rules 208(b) and 211."); Rule 208(b), SCACR (requiring initial briefs to contain 1) a table of contents and cases, 2) a statement of issues on appeal, 3) a statement of the case, 4) the standard of review, 5) an argument, and 6) a conclusion); Rule 211, SCACR (requiring final briefs to be identical to the initial briefs except for updated references to the record on appeal and to correct any obvious typographical errors and misspellings). To the extent that the Court will consider ORS's "Statement of Interest of *Amicus Curiae*" to present and constitute arguments on the merits of this appeal, and out of an abundance of caution, SCE&G hereby incorporates by reference its Return in Opposition to Motion for Leave to File *Amicus Curiae* Brief of ORS and SCE&G's accompanying Memorandum in Support, which challenges the interests of ORS in this matter.

[3] As the Court is aware, petitions for reconsideration have been filed by ORS and others in that case.

By participating in the PSC proceeding as a party and declining to seek appellate review of these decisions, ORS's participation as an *amicus curiae* does not provide objective assistance to the Court in its consideration of the issues presented by Appellants. *See* BLACK'S LAW DICTIONARY 106 (11th ed. 2019) (defining *amicus curiae* as "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.") (emphasis added). To the contrary, ORS is acting 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 seeking to have this Court reverse the Commission on that basis. *See 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"). 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 its *amicus curiae* brief does not provide any neutral assistance or objectively discuss the issues in this appeal. And ORS does so at the expense of the legitimate financial interests of SCE&G's customers. *Daufuskie*, *supra*.

In addition, ORS's proposed *amicus curiae* brief is not helpful to this Court as it does not tell the Court anything it does not already know and does not seek to add anything new to this Court's understanding of the issues or discuss anything of legal significance that has not already been addressed by the Appellants and Respondents. Rather, it is merely repetitious and duplicative of the arguments presented in the Appellants' briefs and only seeks to bolster positions already

advanced by Appellants.[4] For these reasons, the Court should not afford any weight to the ORS *amicus curiae* brief.

II. THE PSC CORRECTLY DETERMINED THAT, AS AN ADVOCATE FOR HIGHER AVOIDED COSTS, ORS HAD A BURDEN OF PERSUASION TO DEMONSTRATE THAT ITS PROPOSED AVOIDED COSTS WERE JUST, REASONABLE, AND APPROPRIATE.

ORS recognizes that it cannot aid the Court's analysis of the issues in this case by a simplistic recitation of the Appellants' arguments (i.e., that the PSC improperly shifted a burden from SCE&G onto ORS and that the PSC erred by concluding ORS did not present a viable alternative) as these issues have already been identified and fully addressed in the briefs filed by Appellants and SCE&G in this matter.[5] Nor does ORS present any new facts in the record which bear on the issues in this appeal. Instead, ORS advances a new, unpreserved legal argument and standard for utility expenses which must be rejected by this Court as it is contrary to its holding in *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) ("*Hamm*").

Specifically, ORS cites *Interstate Commerce Comm'n v. Chicago Great Western Ry. Co.*, 209 U.S. 108 (1908) ("*Chicago Great Western*") in support of its argument that "all actions of a utility" are presumed to be reasonable. *See Amicus Curiae* Br. p. 5. Thus, ORS implies that *Hamm* is applicable not only to a utility's expenditures but also to **any** proposal advanced by a utility. Putting aside that this argument was not advanced by ORS or even the Appellants below, and this Court has never applied *Chicago Great Western* in any case – much less in the context of a utility

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[4] *Compare Amicus Curiae* Br. pp. 5-8 (ORS identifying the issue it seeks to address "is whether the [PSC] improperly shifted a burden from the utility onto ORS and interveners (*sic*)") *with* Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, the "Conservation Groups") Br. pp. 11-19 (arguing the PSC improperly shifted the burden of proof from the utility onto those parties challenging the proposed avoided costs) *and with* Appellant South Carolina Solar Business Alliance ("Solar Alliance") Br. pp. 17-20 (asserting the PSC improperly shifted the burden of proof to intervenors).

[5] *See* Resp't SCE&G Final Br. pp. 13-20.

rate making proceeding – it is inapposite here. The issue in *Chicago Great Western* was whether an increase in certain rates **charged** by a railroad carrier to customers was discriminatory. In finding that there was no unlawful discrimination, the United States Supreme Court recognized that the mere changing of a rate by a carrier does not result in a "presumption of wrong" and "the mere fact that a rate has been raised carries with it no presumption that it was not rightfully done." *Id.* at 119-20. Thus, while the Supreme Court recognized that all "human action"—not just carrier or utility action—has "those presumptions of good faith and integrity," a carrier proposing to change a rate "must, when properly called upon, be able to give good reason therefore." *Id.*

Unlike the facts in *Chicago Great Western*, here SCE&G was seeking to change an avoided cost amount it *paid* (i.e., the then-existing avoided costs) to Qualifying Facilities with ORS advocating that SCE&G should be required to pay Qualifying Facilities **more** for the power required to be purchased under PURPA and resulting in **higher** rates for customers.[6] *Cf.*, *Daufuskie*, *supra*. If anything, *Chicago Great Western* supports the conclusion that ORS had the same burden as SCE&G – to give a good reason for its proposal and thereby meet its burden to prove that its proposed avoided costs were reasonable. Regardless, *Hamm* does not stand for the proposition that **any** proposal advanced by a utility is presumed to be reasonable and that all any contesting party has to do is to raise a "tenable basis for raising the specter of imprudence" to overcome that presumption. To the contrary, *Hamm* applies to the reasonableness of a utility's **expenses** it seeks to recover through rates and is not applicable to the PSC's determination of prospective avoided costs, such as those at issue in the proceedings below.[7]

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[6] These avoided costs represent the amount future Qualifying Facilities will be paid for the electric energy and capacity they may supply and are based on reasonable and appropriate estimates of the incremental energy and capacity costs SCE&G will avoid in the future if it is required to make the purchases. *See* Resp't SCE&G Final Brief pp. 4-10.

[7] *See* Resp't SCE&G Final Br. pp. 13-16.

Accordingly, SCE&G's proposed avoided costs were not blanketed with the presumption of reasonableness contemplated by *Hamm*, and the Conservation Groups and the Solar Alliance can point to nothing in the PSC Orders concluding SCE&G was entitled to, or received, a presumption of reasonableness.[8] And for this same reason, ORS did not merely have "to demonstrate a tenable basis for raising the specter of imprudence" regarding SCE&G's proposal as it suggests is required by *Hamm* because there were no expenses presumed to be reasonable and, thus, no "specter of imprudence" to be raised.[9] Instead, each party, including ORS, that proposed a methodology to calculate SCE&G's avoided cost had the burden to persuade the PSC that their proposal would result in just, reasonable, and appropriate amounts to be paid to new Qualifying Facilities for the energy and capacity they may provide.[10] *See DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct.App.2017) ("In general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof"); *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 132-33, 530 S.E.2d 643, 651 (Ct.App.2000) *citing and quoting* 2 Am.Jur.2d Administrative Law § 360

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[8] In fact, the only mention of any presumption was the PSC's statement that the Solar Alliance contended "using the approved avoided capacity factor from the most recent fuel case should enjoy a presumption of reasonableness." [Order No. 2018-708 p. 4, R. p. 192.].

[9] In addition to mis-stating the scope of the presumption in *Hamm*, ORS also seeks to have this Court apply a different standard than that established in the Court's decision in that case. Instead of raising the "specter of imprudence" required to challenge a utility's past **expenditures** for purposes of determining future rates to be paid to a utility by its customers, ORS asserts that one need only make "a reasonable challenge" or "present[] a reasonable and well-founded challenge," *Amicus* Br. pp. 6, 7, and 8, in order to shift to the utility the burden of proving that a higher future charge sought to be received by a vendor which will be passed on to utility customers is not reasonable. Beyond the fact that this argument was not presented by any party below, this new standard proposed by ORS turns the regulatory paradigm on its head because it ignores the obligation of a utility to obtain goods and services at the lowest reasonable cost and the obligation of ORS to observe the legitimate financial interests of ratepayers.

[10] *See* Resp't SCE&G Final Br. pp. 16-20.

(1994) ("Generally the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding").

The PSC therefore did not impermissibly shift the burden of proof from SCE&G, but properly found that ORS had a burden to persuade the PSC that its alternative proposals would result in avoided costs that were just, reasonable, and appropriate. *See, e.g., S.C. Cable Television Ass'n v. S. Bell Tel. & Tel. Co.*, 308 S.C. 216, 221–22, 417 S.E.2d 586, 589 (1992) (holding "the PSC did not impermissibly shift the burden of proof" when it assigned little weight and credibility to expert witness testimony "based not only on [the witness'] failure to develop his own figures, but also on the conjectures and incomplete information which comprised [his] opinions."). However, there is no substantial evidence of record to support a finding that the proposals advanced by ORS would result in just, reasonable, and appropriate avoided costs that would not overcompensate future Qualifying Facilities and thereby cause higher customer rates.[11]

Instead, the record reflects that ORS's proposal was highly speculative, based upon outdated information, and merely concepts for deriving an avoided cost factor.[12] There also was no evidence to show that maintaining such avoided costs would be appropriate or that they would not result in SCE&G's customers having to pay for excessive avoided costs.[13] *See* 16 U.S.C.A. § 824a-3(b) (providing that avoided costs "shall be just and reasonable to the electric consumers of the electric utility and in the public interest"). Based on this record, the PSC properly found that SCE&G's proposal was reasonable under the changed circumstances, but also found ORS's alternative proposal was insufficient to warrant a requirement that SCE&G pay new Qualifying

[11] *Id.* at pp. 16-20, 25-29.

[12] *Id.* at pp. 27-29.

[13] *Id.* at pp. 25-29.

Facilities for capacity when the energy they supply will not allow SCE&G to avoid any future capacity costs.

The PSC therefore correctly concluded that the other parties "failed to meet their burden of persuasion to prove the reasonableness and viability of any alternative to SCE&G's proposal" because they did not offer any "probative evidence of a computed factor as opposed to a mere concept for deriving a factor." [Order 2018-708 p. 3, R. p. 191.] The Order should be affirmed.

III. ORS HAS NOT IDENTIFIED ANY EVIDENCE SUFFICIENT TO DEMONSTRATE SCE&G'S PROPOSAL WAS IMPRUDENT AND, EVEN SO, SCE&G FURTHER SUBSTANTIATED ITS PROPOSAL.

Even assuming *Hamm* applied, the PSC's decisions should still be affirmed on the alternative basis that, after SCE&G had made a prima facie case for its proposed avoided costs,[14] the burden of production shifted to the other parties to demonstrate SCE&G's proposed avoided costs were inappropriate. However, ORS has identified no portion of the record demonstrating that the evidence it presented raised a "tenable basis for raising the specter of imprudence."[15] Nevertheless, SCE&G further substantiated its claims and provided additional support to show its proposal was reasonable.[16] *See Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 110, 708 S.E.2d 755, 763 (2011) ("Thus, if an investigation initiated by ORS *or* by the PSC yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures.") (emphasis in original).

First, ORS states that its witness, Mr. Brian Horii, recommended that the avoided capacity value should be set at 19.5% of the avoided cost but presents no facts or argument demonstrating

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[14] *Id.* at pp. 21-25.

[15] *Id.* at pp. 29-34.

[16] *Id.* at pp. 34-37.

that such a proposal would be reasonable or result in appropriate avoided costs. *Amicus Curiae* Br. p. 6. To the contrary, the record reflects that Mr. Horii's proposal was based on SCE&G's solar analysis that found a 100 MW increment of new solar would reduce summer peak demand by about 19.5 MW. [Tr. Vol. 2, p. 591, ll. 15-23, R. p. 1221.] However, Mr. Horii did not present any analyses demonstrating the minimal amount of summer capacity supplied by these purchases of incremental solar generation would allow SCE&G to avoid any future capacity needs to reliably serve customers in the winter. In fact, he testified that he was unable to produce an independent estimate of avoided capacity costs for a 100 MW change in supply, but rather merely derived his proposed factor from SCE&G's previous avoided costs in 2017. [Tr. Vol. 2, p. 592, ll. 1-11, R. p. 1222.] *See* Order No. 2018-708, pp. 4-5, R. pp. 192-93 (stating that ORS and Appellants "would have the PSC extract a single element (the avoided capacity factor) out of a historical fuel factor and ignore the effects of the passage of time and all attendant changing circumstances").

Second, ORS complains that Mr. Horii was unable to produce an independent estimate of avoided capacity costs due to a lack of calculations or data. *Amicus Curiae* Br. p. 6. Although ORS does not explain how this lack of information demonstrates a tenable basis that SCE&G's proposal was imprudent, the PSC specifically noted it "did not receive any Motion to Compel nor any other indication of disputes in the discovery process, prior to the hearing." [Order No. 2018-322(A), p. 16, R. p. 153.]. The PSC also expressed its understanding that "all discovery issues were actually resolved prior to the hearing," noting that the parties "advised the [PSC] of an agreement ... that the company and the parties had resolved their differences" as a result of "a commitment from SCE&G to provide discovery responses prior to their due date and to agree to an extension of ... prefiled testimony deadlines" [Order No. 2018-708, p. 4, R. p. 192.] ORS therefore had the benefit of engaging in discovery, indicated to the PSC that no relief was needed to compel additional

discovery responses by SCE&G, and could have sought relief from the PSC if it was dissatisfied with the information provided. The fact that it failed to do so and did not obtain the information it believed it needed to analyze SCE&G's proposal does not now amount to a tenable basis to raise the specter of imprudence.

Third, SCE&G did not make a "substantial change" in its avoided cost methodology from prior proceedings. *See Amicus Curiae* Br. pp. 6-7. While ORS does not provide any explanation as to why a change in methodology supports its claim that it raised a specter of imprudence regarding SCE&G's proposed avoided costs, the record is clear that it is not the methodology that changed, but the circumstances. Specifically, the record reflects that, since the last proceeding before the PSC to determine SCE&G's avoided costs, SCE&G experienced a dramatic change in circumstances due to solar facilities having contracted to provide 875 MW of solar capacity to SCE&G's system.[17] [Tr. Vol. 1, p. 208, l. 7-15, R. p. 838; tr. Vol. 1, p. 231, ll. 14-21, R. p. 861; tr. Vol. 1, p. 285, l.11, R. p. 915; Order No. 2018-322(A) at pp. 8, 15, R. pp. 145, 152.] In addition, the record reflects that adding another 100 MW of solar generation (incremental to the 875 MW of solar capacity already under contract) would provide no additional capacity benefits during the winter period and only a small amount of capacity benefits in the summer period. [Hr'g. Ex. 5, JML-4 at 2, R. p. 1582.] SCE&G therefore concluded 100 MW of incremental solar capacity would not allow it to reduce or avoid any costs to add planned future capacity and estimated that its avoided capacity costs were zero. [Tr. Vol. 1, p. 212, ll. 1-9, R. p. 842.]

Fourth, ORS's claim that SCE&G improperly relied upon its 2018 Integrated Resource Plan in its modeling because it had not been approved by the Commission is also unavailing. *Amicus Curiae* Br. p. 7. The integrated resource plan filed by SCE&G was not required to be

[17] *Id.* at pp. 7, 24-25, 34-35

"approved" by the PSC as contended by ORS; instead, for purposes of this case, SCE&G was only required to file this resource planning document with the PSC to reflect its demand and energy forecasts for at least a 15-year period and to set forth a program for meeting the forecast in an economic and reliable manner. *See* S.C. Code Ann. §§ 58-37-10, -40 (2015).[18] Because SCE&G uses the resource plan in its latest Integrated Resource Plan to calculate its avoided costs, which methodology has been approved by the PSC, it therefore was appropriate for the PSC to look to the 2018 Integrated Resource Plan forecast to determine whether SCE&G's forecasted capacity needs were appropriate.[19]

Finally, even though ORS's proposals were speculative at best and did not present a sufficient basis upon which to raise a tenable specter of imprudence, the record reflects that SCE&G further substantiated its proposals through the rebuttal testimony of Dr. Joseph Lynch.[20] Specifically, Dr. Lynch testified that SCE&G's proposed avoided capacity cost value of zero should be expected based on the economic principle known as the "Law of Diminishing Marginal Returns." [Tr. Vol. 1, p. 232, ll. 1-16, R. p. 862.] He noted that, with 875 MW of solar under contract and as more and more solar comes onto the system, the usefulness of each successive addition decreases and therefore SCE&G is unable to avoid any additional future capacity needs, demonstrating the reasonableness to set the value at zero. [*Id.*] He also rebutted Mr. Horii's claims that SCE&G had not sufficiently demonstrated its winter capacity needs were greater than its

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[18] Going forward, integrated resource plans are required to be approved by the Commission. *See* Act No. 62, 2019 S.C. Acts __, §7. However, this does not aid ORS's analysis as the change in the law was not effective at the time this case was decided by the PSC. *Cf. Duke Power Co. v. S.C. Tax Com'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 ("[the] fact that the statute was subsequently amended is of no comfort to [the appellant]. The Commission correctly applied the law applicable at the time of the sale").

[19] *Id.* at pp. 32-34.

[20] *Id.* at pp. 34-37.

summer capacity needs noting that the seasonal peak demand forecasts and the seasonal reserve margins show SCE&G's incremental capacity need is higher in the winter than in the summer. [Tr. Vol. 1, p. 232, l. 17 – p. 233, l. 11, R. pp. 862-63.] He also presented evidence refuting Mr. Horii's claims regarding SCE&G's winter reserve margin, winter and summer peak forecasts, recommended use of a different methodology, and other similar criticisms. [Tr. Vol. 1, p. 233, l. 12 – p. 240, l. 5, R. pp. 863-70.] Further, Dr. Lynch identified an error in Mr. Horii's calculation of the maximum possible winter peak demand and, after correcting for that error, explained that the winter reserve margins estimated by SCE&G and ORS would be comparable and not statistically different. [Tr. Vol. 1, p. 240, l. 6 – p. 244, l. 6, R. pp. 870-74.]

In each instance, a close review of the record reflects that ORS has not identified any evidence that the PSC misapprehended or overlooked or that presented a tenable basis to raise the specter of imprudence or to meet their burden to prove the PSC's order "is clearly erroneous in view of the substantial evidence on the whole record." *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. at 136, 530 S.E.2d at 653. That which it does cite is based entirely upon speculation, surmise, and conjecture that does not reflect probative and reliable evidence upon which the PSC could have established just, reasonable, and appropriate avoided costs. *See Holland v. Ga. Hardwood Lumber Co.*, 214 S.C. 195, 205, 51 S.E.2d 744, 749 (1949). Furthermore, ORS opportunistically identifies discrete issues and portions of the record taken in isolation to suggest the PSC ignored evidence presented by ORS that allegedly demonstrated SCE&G's proposed avoided costs were imprudent. *See Amicus* Br. pp. 6-7. This is not evidence of a tenable basis raising the specter that SCE&G's proposed avoided costs were imprudent, but only demonstrates that ORS preferred that the avoided costs paid to future solar generating facilities be higher, which would have resulted in higher customer rates.

Even so, the record contains substantial evidence demonstrating that SCE&G rebutted the criticisms advanced by ORS and the other parties and presented detailed and credible analyses and information to support and further substantiate that its proposal would result in avoided costs that are just, reasonable, and appropriate. The record also reflects the speculative nature of the avoided costs and underlying methodologies recommended by ORS and of its criticisms of SCE&G's proposals. Thus, there is no reliable, probative, or substantial evidence in the record demonstrating that SCE&G's proposals were imprudent or that the other parties' recommendations would yield prospective avoided costs that were just, reasonable, and appropriate. The PSC therefore properly rejected ORS's claims in determining that SCE&G's proposed avoided capacity costs should be approved and those of the other parties should be rejected as mere concepts for deriving a factor that did not present viable alternatives for its consideration. *See* S.C. Code Ann. § 1-23-380(5) (Supp. 2018) ("The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.").

In light of this evidence of record and the other parties' failure to meet their evidentiary burdens, the PSC's decision to reject the alternative proposals and approve the recommendations of SCE&G therefore was not clearly erroneous and must be affirmed. *See Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (holding that "because the [PSC's] findings are presumptively correct, the party challenging a [PSC] order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record").

CONCLUSION

For the reasons explained above and in SCE&G's brief to this Court, Appellants' arguments and those of ORS should be rejected and the orders of the PSC affirmed.

Respectfully submitted,

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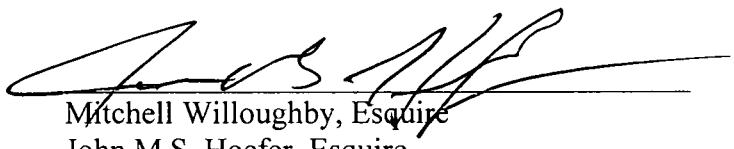

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Columbia, South Carolina
August 26, 2019

RECEIVED

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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

Appellate Case Nos. 2018-001165 and 2018-002117

Public Service Commission Docket No. 2018-2-E

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

v.

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, ...Appellants,

v.

South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, 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, South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff are ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Responsive Brief of Respondent Dominion Energy South Carolina, Inc. f/k/a South Carolina Electric & Gas Company to the *Amicus Curiae* Brief of the South Carolina Office of Regulatory Staff complies with Rule 211(b), SCACR.

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South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, Dominion Energy South Carolina 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 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 & Hoefer, 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 **Responsive Brief of Respondent to the *Amicus Curiae* Brief of the South Carolina Office of Regulatory Staff** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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This 26th day of August, 2019.