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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, 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.

MOTION TO DISMISS APPEAL
AND SUPPORTING MEMORANDUM

Respondent Dominion Energy of South Carolina, Inc. ("DESC"), f/k/a South Carolina Electric & Gas Company ("SCE&G"), pursuant to Rule 240 of the South Carolina Appellate Court Rules ("SCACR"), hereby moves this Court for an order dismissing the above-captioned appeal on the grounds that it is moot, does not involve an existing case or controversy between the parties due to an absence of standing on the part of Appellants, and presents arguments which are unpreserved. In support thereof, DESC/SCE&G would respectfully show the following:

1. This matter is pending before the Court for decision on consolidated appeals filed by the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy ("SCCCL/SACE") and by the South Carolina Solar Business Alliance, LLC ("SCSBA") from orders of the Public Service Commission of South Carolina ("Commission"). These orders approved avoided cost rates which SCE&G would be required to pay to a qualifying facility ("QF"), as defined by the Federal Public Utilities Regulatory Policy Act of 1978 ("PURPA") 16 U.S.C.A. §796, that sought to enter into a power purchase agreement ("PPA") with SCE&G for the sale of electricity under applicable provisions of PURPA. R. Vol.I at 141-165. As the Court is aware from the parties' briefing and oral arguments, the lack of an avoided capacity payment component for the avoided cost rate approved in the Commission's orders on appeal was an issue before the Commission and on appeal in this Court. *See,* e.g., Brief of Appellant SCSBA at 21, Brief of Appellant SCCL-SACE at 31, and Brief of Respondent DESC/SCE&G at 24.

2. Immediately prior to the commencement of the oral argument held in this matter on September 26, 2019, the Court instructed counsel for the parties to address two issues which had not been briefed, to wit: (1) standing and (2) the practical effect a decision by the Court would have on any actual controversy that then existed regarding DESC's/SCE&G's avoided cost rates. During oral argument, the Court inquired of counsel as to whether a justiciable controversy existed

in the absence of any QF at that time having sought to enter into a PPA with DESC/SCE&G at the avoided cost rate approved by the Commission in the orders on appeal. In responding to the Court's inquiry, counsel for DESC/SCE&G stated that if no QF subsequently sought to enter into a PPA under the avoided cost rate approved by the Commission orders on appeal, and a different avoided cost rate was adopted in a future proceeding before the Commission under the South Carolina Energy Freedom Act, S.C. Code Ann. §§58-41-5, et seq. ("Act 62"), this would render the instant appeals moot and DESC/SCE&G would so inform the Court.

3. As required by Act 62, on May 30, 2019, the Commission opened its Docket No. 2019-184-E for the purpose of establishing, *inter alia*, DESC's/SCE&G's avoided cost which constitutes the rate it must pay to certain smaller QFs and the permissible avoided cost methodology that DESC/SCE&G could employ in determining the rate it would pay other, larger QFs for electricity purchased under a PPA. *See* S.C. Code Ann. §58-41-10(14) and §58-41-20, subsections (A), (B)(1), (C), (D), and (F)(1).[1] On December 9, 2019, the Commission issued its Order No. 2019-847 establishing DESC's/SCE&G's permissible avoided cost rate and

[1] Pertinent to this Motion, these subsections respectively (i) define a "small power producer" as a QF (§58-41-10(14)), (ii) required that the Commission establish its Docket No. 2019-184-E to determine, *inter alia*, the proper avoided cost methodology for DESC/SCE&G (§58-41-20(A)), (iii) provide that the price that DESC/SEC&G must pay certain smaller QFs for their energy and capacity sold under PURPA shall be determined in that proceeding (§58-41-20(B)(1)), (iv) created a specific procedure by which other QFs exceeding a certain output threshold may challenge the avoided cost rate offered to them in PPAs if it is inconsistent with the avoided cost methodologies approved by the Commission in Docket No. 2019-184-E or future proceedings under the Act (§58-41-20(C)), (v) confirmed the right of a QF to sell its output to an electrical utility such as DESC/SCE&G at the avoided cost rate determined by the Commission (§58-4-20(D)), and (vi) obligated DESC/SCE&G to offer to enter into PPAs with QF's at the avoided cost determined by the Commission (§58-41-20(F)(1)). Unlike the proceeding involved in the instant appeal, and as required by S.C. Code Ann. §58-41-20(A)(1), the Commission's determination of DESC/SCE&G's avoided cost in Docket No. 2019-184-E was made separately from those in which the company's annual fuel cost adjustment was determined under S.C. Code Ann. §58-27-865.

methodology for these purposes, a copy of which is attached hereto and incorporated herein by reference as Motion Exhibit A pursuant to Rule 240(c)(3), SCACR. On March 24, 2020, the Commission issued its Order No. 2020-244 granting in part and denying in part petitions for rehearing and reconsideration of Order No. 2019-847. A copy of Order No. 2020-244 is attached hereto and incorporated herein by reference as Motion Exhibit B pursuant to Rule 240(c)(3), SCACR. Appellants SCCCL/SACE and SCSBA intervened and were recognized by the Commission as parties of record in the proceedings in Docket No. 2019-184-E. *See* Mot. Ex. A at 6. The avoided cost rate and methodology subsequently approved by the Commission in Docket No. 2019-184-E provides QFs greater compensation for their electricity than that approved in the orders on appeal, in part because the Commission has now required that a capacity payment component be included therein. *See* Mot. Ex. A at 21-22, 31-36, Mot. Ex. B at 10-11, Mot. Ex. C at ¶ 5.

4. The time period within which a party in Commission Docket No. 2019-184-E may appeal Commission Order Nos. 2019-847 and 2020-244 has now run and no such appeal has been filed. *See* S.C. Code Ann. §58-27-2310, §14-8-200(b)(2), and Rule 203(d)(2)(B), SCACR. These orders are therefore final insofar as they pertain to currently available prices DESC/SCE&G must pay for electricity it purchases from a QF under PURPA.[2]

[2] It is noteworthy that, under S.C. Code Ann. §58-41-20(A), the avoided cost methodology established by the Commission in Docket No. 2019-184-E may control the rate DESC/SCE&G is required to pay to a QF for purchases of electricity under PURPA for a period of time as long as twenty-four months. ("Within six months after the effective date of this chapter, and at least once every twenty-four months thereafter, the commission shall approve each electrical utility's …avoided cost methodologies.") As this avoided cost rate changes periodically, the terms for the sale of electricity by QFs to electrical utilities such as DESC/SCE&G under new PPAs will also change.

5. During the oral argument in this case, the Court's questions and responses of counsel were in part premised upon an understanding that neither of the Appellants and no QF had sought to utilize the avoided cost rate established in the orders on appeal due to the capacity component of the avoided cost rate being set at zero. This understanding was correct as to Appellants (none of which is a QF)[3] and as to larger QFs eligible to sell electricity under the PR-2 rate approved by the Commission in its orders on appeal. *See* Affidavit of Daniel F. Kassis, Vice President of Customer Service and Renewables for DESC/SCE&G, a copy of which is attached hereto and incorporated herein by reference as Mot. Ex. C in accordance with Rule 240(c)(3), SCACR, ¶ 4.[4] However, this understanding was incorrect as to smaller QFs (those with generating capacity not greater than 100 kilowatts) entitled to be compensated for electricity sold to DESC/SCE&G under the PR-1 rate established in the Commission's orders on appeal. *Id.* ¶5. In fact, DESC/SCE&G had approximately forty (40) QFs from which it purchased electricity at the PR-1 rate during the period it was in effect (May 2018-April 2019); importantly, however, these QFs **collectively** would have realized additional revenue of approximately $600 over a twelve-month period if the capacity credit payable under the 2017 avoided cost rate proposed by Appellants had been adopted by the Commission. *Id* . DESC/SCE&G submits that the instant appeal is clearly mooted by the Commission's un-appealed orders in Docket No. 2019-184-E with respect to the PR-2 rate and arguably mooted by these orders as to the PR-1 rate as well.

6. "'A case is moot where a judgment rendered by the Court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of

[3] *See* Brief of Appellant SCCCL/SACE at 2-3, n.1, and Brief of Appellant SCSBA at 13.

[4] And, in fact, the PR-2 Rate was terminated by the Commission in its order in the subsequent proceedings under the Act. *See* Mot. Ex. A at 90.

effectual relief impossible for the Court.'" *Wachesaw Plantation East Community Services, Ass'n, Inc. v Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015). "'[M]oot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties.'" *Id.* "'Appellate court[s] will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.'" *Id.* [Internal citations omitted.]

7. Because the Commission's orders establishing a new avoided cost rate and methodology for DESC/SCE&G under S.C. Code Ann. §58-41-20 are final, the PR-2 avoided cost rate established in the orders on appeal are neither at issue with, nor any longer available to any QF. The instant appeal is therefore now moot as to the PR-2 rate because of the occurrence of an intervening event resulting from the Commission's discharge of its duties under the Act. *Wachesaw, supra*.

8. This appeal is also arguably mooted with respect to the PR-1 rate established in the Commission's orders. Notwithstanding that the PR-1 rate is not a utility rate charged to customers but a rate paid by a utility, because this appeal nonetheless involves obligations of a public utility it would be appropriate for this Court to consider the "practical legal effect" contemplated by *Wachesaw, supra*, in view of its jurisprudence in cases involving appeals from orders of the Commission. This Court has held that "'[r]atemaking is not an exact science, but a legislative function involving many questions of judgment and discretion.'" *Parker v. South Carolina Public Service Commission*, 280 S.C. 310, 312, 313 S.E.2d 290, 291 (1984). Similarly, this Court has observed with respect to the allowance of expenses in a utility's rates, only "reasonable certainty" and not "absolute precision" is required to determine whether a known and measurable change in expenses has occurred. *See Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 291, 422 S.E.2d 110, 115 (1992). And, in the context of considering allowable elements of a

utility's rate base, this Court has rejected appeals challenging Commission determinations where the result of employing two alternative methodologies "is substantially the same." *See Porter v. South Carolina Public Service Commission*, 328 S.C. 222, 233, 493 S.E.2d 92, 98 (1997) (rejecting Consumer Advocate's challenge to Commission order which involved a "difference represent[ing] .06% of the total rate base"). Any potential additional payment which could be due to QFs which had been paid under the PR-1 rate would have generated approximately $600 in additional aggregate revenues for these QFs, or an average of approximately $15.00 for an entire year, or approximately $1.25 per month. *See* Mot. Ex. C ¶ 5. Viewed through the prism of this Court's precedents governing review of Commission orders in ratemaking matters, any issue with respect to the PR-1 rate in this appeal is at most *de minimis*, *cf. Parker*, *supra*, and does not practically affect these smaller QFs.

9. Although this Court has recognized that "[i]n the civil context, there are three general exceptions to the mootness doctrine,"[5] none of them apply here for the following reasons:

(a) The first exception is inapplicable as a matter of law because (i) the procedures and requirements established by the General Assembly in the Act for Commission proceedings determining avoided costs and the rights and obligations of electric utilities and QFs are now significantly different than those employed in the case on appeal and in fact put a burden of persuasion on any QF that wishes to challenge an avoided cost rate offered by DESC/SCE&G (*see supra* note 1 and accompanying discussion) and (ii) orders of the

[5] "First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Wachesaw*, 414 S.C. at 359, 778 S.E.2d at 900 (internal citations omitted).

Commission in future proceedings involving avoided cost rates and methodologies under the Act are always subject to review by this Court. *See* S.C. Code Ann. §58-27-2310;

(b) The second of these exceptions cannot apply as the Commission's implementation of the Act so as to establish new avoided cost rates under which QFs may sell electricity to DESC/SCE&G and methodologies that may be used to determine the avoided cost rate it may include in future PPAs (which rate is higher than the avoided cost rate approved in the orders on appeal) necessarily means that no "imperative and manifest urgency" exists with respect to the previously approved avoided cost rate, and

(c) The third of these exceptions is inapplicable as the Commission has now determined DESC/SCE&G's avoided cost rates and methodologies in accordance with the Act and has included therein both energy and capacity payments which yield a higher avoided cost and thus a higher price which may be charged by QFs. *See* Mot. Ex. A at 21-22, 31-36, Mot. Ex. B at 10-11, Mot. Ex. C ¶ 7. Accordingly, there is no means by which the portion of the Commission's orders on appeal may impact Appellants (who are not QFs) or their members now or in the future.

10. DESC/SCE&G further submit that the instant appeal should be dismissed on the grounds that Appellants lack standing to challenge the PR-1 rate. The answers of counsel to the Court's two questions announced prior to the oral argument recognized that the concepts of mootness and standing are related, which is consistent with this Court's precedents. *See, e.g.*, *Jackson v. State*, 331 S.C. 486, 490, n.2, 489 S.E.2d 915, 917 (1997) ("it is well established that the mootness doctrine is a corollary of the principles embodied in the justiciability concepts of standing and ripeness"). (Internal citation omitted.) *See also James v. Anne's, Inc.*, 390 S.C.188, 193, 701 S.E.2d 730, 732 (2010) ("Justiciability encompasses several doctrines, including

ripeness, mootness, and standing.") This Court has observed that mootness is conceptually "the doctrine of standing set in a time frame," *Jackson, supra*, and that unripe appeals differ from moot appeals in that the latter involves "intervening events render[ing] a case non-justiciable." *See Curtis v. State*, 345 S.C 557, 567, 549 S.E.2d 591, 596 (2001).

11. With respect to the PR-1 rate, the Appellants lack standing as none of them are QFs who were entitled to sell electricity to DESC/SCE&G at that rate. For its part, SCSBA described itself as an entity whose existence and purpose is advocating on behalf of solar energy related businesses, including "solar energy developers, engineering procurement and construction contractors, professional service firms, equipment distributors, and equipment manufacturers"(*see* R. Vol. I at 223-225) and essentially ignored the PR-1 rate before the Commission, asserting only that non-solar QFs should be entitled to "the benefit of standard rates" under the PR-2 tariff, recognizing that "the PR-1 standard offer tariff, which is not solar-only, is limited to very small generators (100 kW or less)" (*see* R. Vol. IV at 1361, ll. 8-10) and limiting its challenge to the DESC/SCE&G proposal to the reduction of "the capacity rate on **the PR-2 tariff** to zero." R. Vol. IV at 1406, ll.1-6 (emphasis supplied). For their part, SCCCL and SACE described themselves as "the Conservation Groups" (R. Vol. I at 227-229) and, while they did challenge the winter reserve margin proposed by DESC/SCE&G as it pertained to the development of the PR-1 rate, their challenge to the impact on capacity payments was focused primarily on solar generators. *See* R. Vol. III at 1013, l. 2- 1014, l.3, R. Vol. III at 1014, ll. 19-21.[6] As suggested by the Court's

[6] Although the Conservation Groups' evidentiary presentation also challenged the Rider to Retail Rates for generator customers entitled to credits against their electric bills as part of the Net Energy Metering for Renewable Energy Facilities based upon their contention that avoided generation capacity cost of greater than zero should be adopted by the Commission, R. Vol. III at 1014, ll. 4-9, that is of no moment here. This is so because this tariff provides to generator customers a credit at the DESC/SCE&G **retail** rate, not its avoided cost rate, for electricity

questions at oral argument, Appellants are therefore not aggrieved by the Commission's orders and therefore have no standing under Rule 201, SCACR. And the fact that Appellants were permitted to intervene as parties of record before the Commission does not confer standing for purposes of this appeal. *See* S.C. Code Regs. 103-804.H (2012) ("[a]dmission as an intervenor shall not be construed as recognition by the Commission that such intervenor might be aggrieved by any order of the Commission in such proceeding"). Absent standing, no justiciable controversy exists with respect to the PR-1 rate.[7]

12. Finally, with respect to the propriety of the Commission's establishment of the PR-1 rate, DESC/SCE&G submit that this issue is not preserved for appeal even assuming it is not mooted and Appellants do possess standing. Although this issue was specifically raised in the

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generated by these customers up to the total amount of retail billings and allows only an energy (as opposed to capacity) credit for electricity that is generated in excess of retail billings on an annual basis. *See* Mot. Ex. C ¶ 6, R. Vol. IV at 1552 – 1555. None of the Appellants here have asserted in their briefs that the customer generator retail tariff should include a capacity and energy factor for excess electricity.

[7] The suggestion by SCCCL/SACE at oral argument that it possesses associational standing to pursue this appeal is wrong given that neither it, nor its members, are QFs. *See Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (holding that "an organization has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right"). *See also Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 753 S.E.2d 846 (2014) (holding that plaintiffs – including SCCCL – lacked standing to pursue nuisance claims where they alleged only "generalized grievances" which did not constitute the particularized injury necessary to confer standing on their various organizations). For its part, SCSBA asserted to the Commission in the underlying proceeding that its "alleged right or interest" supporting its intervention (*see* S.C. Code Regs 103-825A.(3)(a) (2012)) arose from the fact that its organization includes members that "conduct **solar-energy related business** in South Carolina," R. Vol. 1 at 224 (emphasis supplied). There is no evidence of record that any SCSBA members were QFs selling electricity to DESC/SCE&G. In fact, no member of SCSBA even testified before the Commission as it limited its evidentiary presentation to testimony of an outside, expert witness. *See* R. Vol. III, at 1272 – Vol. IV at 1482. That none of the Appellants possess the requisite stake to support a finding of standing in this matter is further confirmed by the fact that the statements of the case in their briefs omit a description of "the amount involved on appeal" as required by Rule 208(b)(1)(C), SCACR.

petition for rehearing of the Conservation Groups to the Commission, *see* R. Vol. II at 522, they did not address it specifically in their briefs to this Court. *Cf. Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003) ("[s]ince [appellant] failed to argue this issue in the body of its brief, the issue is deemed abandoned"). By contrast, even though SCSBA did include a request that the PR-1 rate be invalidated in the concluding paragraphs of its briefs to this Court, it did not raise the issue of the PR-1 rate in its petition for rehearing to the Commission (*see* R. Vol. I at 467-473) as required by S.C. Code Ann. §58-5-330. ("No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified"). *Cf. Hunt v. Avondale Mills, Inc*., 385 S.C. 616, 618, 686 S.E.2d 190, 191 (2009) (holding that S.C. Code Ann. §§ 58-5-330 and -340 "clearly provide a mechanism by which [parties] could have and should have" raised to the Commission issues improperly sought to be litigated in the circuit court).

WHEREFORE, having fully set forth its motion, DESC/SCE&G moves the Court to issue an order dismissing the instant appeal.

Respectfully submitted,

K. Chad Burgess, Esquire
Matthew Gissendanner, Esquire
Mail Code C222
220 Operation Way
Cayce, SC 29033-3701
Telephone: 803-217-8141
Facsimile: 803-217-7931
kenneth.burgess@dominionenergy.com
matthew.gissendanner@dominionenergy.com

_s/ John M. S. Hoefer__
Mitchell Willoughby, Esquire
John M.S. Hoefer, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
PO Box 8416
Columbia, SC 29202-8416
Telephone: (803) 252-3300
Facsimile: (803) 256-8062
mwilloughby@willoughbyhoefer.com
jhoefer@willoughbyhoefer.com

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

Columbia, South Carolina
May 14, 2020