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

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 and 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, f/k/a South Carolina Electric & Gas Company and South Carolina Office of Regulatory Staff, are Respondents.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL

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Appellants South Carolina Solar Business Alliance ("SCSBA") and the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy ("Conservation Groups") hereby file this Memorandum in Opposition to the Motion to Dismiss Appeal filed by Respondent Dominion Energy of South Carolina, Inc. ("DESC"), f/k/a South Carolina Electric & Gas Company ("SCE&G") on May 14, 2020 ("DESC Mot."). Contrary to the contentions in the Motion to Dismiss, this appeal is not moot for several reasons, most notably because it involves a harm capable of repetition but evading appeal. The General Assembly's passage of the South Carolina Energy Freedom Act, though it did establish additional requirements for utility avoided cost rate calculations, left open the question (central to this appeal) of how the burden of proof should be allocated in avoided cost rate cases.

As to Standing, DESC has waived its arguments as to standing at this late stage of the proceeding. Even if DESC had not waived its right to challenge standing, Appellants have standing to pursue this appeal, just as they had standing and a right to intervene in the proceedings below. Accordingly, the Motion to Dismiss must be denied.

In opposition to the Motion, Appellants show the following:

This matter is pending before the Court for decision on consolidated appeals filed by Conservation Groups and 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 qualifying facilities ("QF"), as defined by the Federal Public Utility Regulatory Policies Act of 1978 ("PURPA") 16 U.S.C. § 824a-3, *et seq.*, pursuant to a power purchase agreement ("PPA") with SCE&G for the sale of electricity under applicable provisions of PURPA. R. Vol. I at 141-165. Those rates were codified in the PR-1 and PR-2 tariffs, which were available,

respectively, to QFs with nameplate capacities under 100 kilowatts ("kW") and between 100 kW and 80 megawatts ("MW").

I. Background

As stated in DESC's Motion to Dismiss, in 2019 the South Carolina General Assembly enacted the South Carolina Energy Freedom Act, S.C. Code Ann. §§58-41-5, et seq. ("Act 62," or "the Act"), a renewable energy bill that enacted significant changes to the law regulating utilities' calculation of the avoided cost rates paid to QFs under PURPA. Act 62 requires the Commission to convene docket proceedings (separate from the fuel proceedings conducted under S.C. Code Ann. § 58-27-865) to consider each utility's avoided cost rates.

Act 62 imposes a number of procedural and substantive requirements regarding the approval of utilities' avoided cost rates. The Act requires that avoided cost proceedings be conducted "as soon as possible" after the effective date of the Act, and at least every two years thereafter. S.C. Code Ann. § 58-41-20(A). Proceedings must include an opportunity for intervention, discovery, filed comments or testimony, and an evidentiary hearing. *Id.* § 58-41-20(A)(2)). The Act also requires that avoided cost rates "fully and accurately reflect the electrical utility's avoided costs" (*id.* § 58-41-20(B)(1); that the Commission shall treat small power producers on a fair and equal footing with electrical utility-owned resources (*id.* § 58-41-20(B)); and that any decisions by the Commission shall be just and reasonable to the ratepayers of the electrical utility, in the public interest, consistent with PURPA and the Federal Energy Regulatory Commission's implementing regulations and orders, and nondiscriminatory to small power producers; and shall strive to reduce the risk placed on the using and consuming public (*id.* § 58-41-20(A)). Evidencing the General Assembly's intent that utility avoided cost calculations be subject to greater scrutiny from the Commission, Act 62 also requires that "[e]ach electrical

utility's avoided cost filing must be reasonably transparent so that underlying assumptions, data, and results can be independently reviewed and verified by the parties and the commission." *Id.* § 58-41-20(J).

Notably absent from Act 62, however, is any discussion of how the burden of proof should be allocated in avoided cost proceedings.[1]

After passage of the Act, the Commission convened Docket No. 2019-184-E, to consider DESC's avoided cost rates. Appellants SCSBA and Conservation Groups intervened in that proceeding and challenged DESC's proposals. On December 9, 2019, the Commission issued Order No. 2019-847, which approved some aspects of DESC's proposed avoided cost calculations and disapproved others. Intervenors petitioned for reconsideration, which the Commission granted in part and denied in part in Order No. 2020-224, which was issued on March 24, 2020.

II. THE APPEAL IS NOT MOOT.

A. Appellants' challenge to the PR-2 rate is not mooted by Act 62 or by the Commission's more recent Avoided Cost Orders.

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489 S.E.2d 915 (1997). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing

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[1] The only discussion of burdens of proof in Ac 62 comes in Section 7 (codified in S.C. Code Ann. § 58-37-40(C)(4), which provides that the inclusion of new generating resources in an approved Integrated Resource Plan "shall not be determinative of the reasonableness or prudence of the acquisition or construction of any resource or the making of any expenditure," and that "The electrical utility shall retain the burden of proof to show that all of its investments and expenditures are reasonable and prudent when seeking cost recovery in rates." The fact that the Act discusses the burden of proof in that section, but not in reference to avoided cost, indicates that the General Assembly did not intend the Act to dictate the allocation of the burdens of proof in rate-making proceedings.

Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). DESC argues that, as to the 2018 PR-2 rate[2] (which is available to QFs with a capacity over 100 kW), this appeal is moot because: (1) no QFs decided to enter into power purchase agreements ("PPAs") with DESC at the those rates, and so a judgment by this Court as to the 2018 PR-2 rate would not have a financial impact on any party; and (2) the Commission's decision not to require DESC to make capacity payments to QFs in the 2018 PR-2 rate has been superseded by the Commission's Order on avoided cost calculations in Docket No. 2019-184-E, where the Commission ordered DESC to include capacity payments and also approved a rate that "provides QFs greater compensation for their electricity than that approved in the orders on appeal[.]" DESC Mot. at 2-6.

Appellants do not dispute DESC's claim that no QFs have sought to enter into PPAs with DESC based on the 2018 PR-2 rate. This comes as no surprise, given that the approved PR-2 rates significantly under-value solar generation (SCSBA Initial Br. at 16), and it is effectively impossible to finance the development of a solar facility under such low rates. But this does not mean that the appeal of the Commission's decision on the PR-2 rate is moot – it simply shows that the decision injured the Appellants. Further, as discussed below, because the prospect for injury is ongoing through repetition, this case is not moot.

In any event, the lack of any QFs with executed contracts under the 2018 PR-2 rates does not necessarily mean that a judgment from this Court would have no legal or practical effect. Under PURPA and implementing regulations of the Federal Energy Regulatory Commission ("FERC"), a QF has the right to sell its energy and capacity to a utility pursuant to either a long-

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[2] There are different vintages of the PR-2 rate schedule, corresponding to when the Commission approved the rates codified therein. At issue in this appeal is the PR-2 rate schedule approved in 2018 ("the 2018 PR-2 rate").

term contract or a "legally enforceable obligation" ("LEO"), with rates equal to the utility's avoided cost, calculated as of the date the LEO was established. 18 C.F.R. § 292.304(d)(2); *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631 (2010). A QF can establish an LEO even in the absence of a PPA. This means that if any QF established an LEO while the 2018 PR-2 rates are in effect, it would be entitled to sell to DESC at those rates. DESC's Motion to Dismiss and the affidavit do not address whether any QFs have established a Legally Enforceable Obligation to sell to DESC under the 2018 PR-2 rates.

B. Each of the general exceptions to the mootness doctrine recognized by this Court applies here.

Even if no QF executed a PPA or established an LEO under the 2018 PR-2 rates, the appeal would not be moot, because it falls under each of the exceptions to the mootness doctrine recognized by this Court. This Court has articulated these exceptions as follows:

> "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 Plantation East Community Services, Ass'n, Inc. v Alexander, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (quoting *Curtis v. State*, 345 S.C. 557, 568, 549 S.E.2d 591, 596 (2001) (internal citations omitted)). The first of these exceptions is most relevant here, although the second and third also apply.

1. The Commission's errors below are capable of repetition but evading review.

The Commission errors raised in this appeal are unquestionably "capable of repetition," because Act 62 requires the Commission to review and approve each utility's avoided cost rates at least every two years. S.C. Code Ann. § 58-41-20(A). And the very facts that Respondent points

to as demonstrating mootness show how the Commission's errors in the case below are likely to evade review. Specifically, the Commission's errors resulted in PR-2 rates that are unreasonably low. Because the 2018 PR-2 rates were unreasonably low and under-incentivized solar generation, no QFs were willing to enter into contracts under those rates. Because only QFs that enter into long-term PPAs with DESC are permitted to sell power at the approved avoided cost rates, there may be no QFs who will directly benefit from a successful appeal of the Commission's avoided cost ruling. The same dynamic would recur in future rate cases if the Commission were to again approve unreasonably low avoided cost rates. And with the biennial avoided cost rate updates now mandated by Act 62,[3] it is likely that future challenged rates will have expired by the time this Court can decide any appeal of the Commission's avoided cost decisions. Ironically, the worse the Commission's ratemaking errors (*i.e.*, the lower the avoided cost rates), the more likely it is that this harm will evade review.

DESC argues that this exception does not apply because (1) "the procedures and requirements" established under Act 62 for determining avoided cost rates "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; and (2) orders of the Commission in future proceedings involving avoided cost rates and methodologies under the Act are always subject to review by this Court. DESC Mot. at 7-8.

DESC is incorrect for several reasons. First, while Act 62 does establish additional substantive and procedural requirements for the determination of avoided cost rates, it does not address the key questions presented by this appeal. In particular, Act 62 does not address the following procedural issues raised by SCSBA: (1) whether the Commission may shift the burden

[3] Prior to Act 62, DESC updated its PR-2 rates on an annual or semiannual basis.

of proof from the utility to the Intervenors challenging the utility's proposed rate; (2) whether a Commission finding that intervenors have raised a "specter of imprudence" overcomes any presumption of reasonableness with respect to that proposal and placing the burden on the utility to prove its reasonableness; and (3) whether the Commission must make specific factual findings as to its application of the burden-shifting scheme. These are the key procedural questions raised in SCSBA's brief (SCSBA Br. at 1; Conservation Groups Br. at 11-13, 18-19, 23), the answers to which will inform all future avoided cost proceedings in this state.

Although Act 62 does establish certain procedural and substantive requirements for avoided cost proceedings, the Act is silent as to how burdens of proof are to be allocated in an avoided cost proceeding, and whether the burden-shifting scheme established in *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 422 S.E. 2d 110 (1992) (discussed at length in the parties' briefs) should apply. Nor do the Commission's Orders in Docket No. 2019-184-E suggest that the Commission has changed its approach to allocating the burden of proof in avoided cost cases.

DESC's claim that Act 62 "put[s] a burden of persuasion on any QF that wishes to challenge an avoided cost rate offered by DESC/SCE&G" (DESC Mot. at 7) is completely unfounded. The only thing Act 62 says about challenges to avoided cost rates is that "[i]n the event that a small power producer and an electrical utility are unable to mutually agree on an avoided cost rate, the small power producer shall have the right to have any disputed issues resolved by the commission in a formal complaint proceeding." (S.C. Code Ann. § 58-41-20(C)). The Act does not assign the burden of proof in such challenges, and certainly say nothing about how the burden should be allocated in proceedings to consider a *utility's* petition for approval of a standard avoided cost rate like the PR-2 rate.

Furthermore, although Appellants certainly read Act 62's requirements of greater fairness and transparency for utility avoided cost rates (*see, e.g.*, S.C. Code Ann. § 58-41-20(B), (J)) to require the Commission to make specific findings of fact sufficient to support each aspect of its decision, the language of the statute does not specify that. The sufficiency of the Commission's findings of fact is also central to this appeal (Conservation Groups Br. at 23-30), and a decision from the Court is needed to prevent a recurrence of the Commission's errors in this regard.

The substantive errors raised by Appellants are likewise capable of repetition but evading review. Although the Commission did hold in Order Nos. 2019-847 and 2020-244 that it was unreasonable for DESC not to assign a capacity value to solar QFs, the Commission's rulings did not address all of the substantive issues raised in Appellants' briefs;[4] and DESC again proposed a zero capacity value in the 2019 proceeding, evidencing the nature of this issue as one that is capable of repetition yet evading review given the recurring timeline of the avoided cost proceedings.[5]

2. The appeal raises questions "of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest."

Even if its ruling will have no practical effect, an appellate court may decide "questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. DESC argues that the Commission's approval of new avoided cost rates for DESC pursuant to Act 62 "necessarily means that no

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[4] For example, the Commission did not address whether DESC is required to optimize its resource plan as federal law demands (Conservation Groups' Br. at 27) and whether DESC's proposal to eliminate capacity payments discriminated against QFs.

[5] The fact that no party appealed the Commission's decision on avoided cost rates in Docket No. 2019-184-E does not mean that the procedural defects in the Commissions 2018 PR-2 order were cured. Appellants' decision not to appeal the order owe instead to the pendency of this appeal (which they hope will solve the recurring errors) and to the reality that non-profit associations with limited resources are simply unable to appeal each and every single order by the PSC that they believe includes erroneous holdings.

'imperative and manifest urgency' exists with respect to the previously approved avoided cost rate[.]" DESC Mot. at 8. This argument misses the point of the exception, which is to allow the establishment of a rule for future conduct.

"Future conduct" here means future avoided cost proceedings, which will be conducted every two years pursuant to Act 62. Central to this appeal are questions concerning the burden of proof in avoided cost rate setting proceedings, and in particular whether it is proper for the Commission to require parties challenging a proposed rate to prove the validity of an alternative rate in order to prevail. (SCSBA Br. at 9, 15; Conservation Groups Br. at 7-8, 12-13, 15-16.) As discussed, Act 62 provides no guidance on these issues.

The lack of clarity on this issue has significant consequences for the parties here, and will have similar consequences in the future. Both SCSBA and Conservation Groups intervened in DESC's avoided cost case under Act 62 (Docket No. 2019-184-E) and challenged DESC's avoided cost rates and other proposals. Based on the Commission's 2018 PR-2 Orders, SCSBA and Conservation Groups had to proceed in the Act 62 docket on the assumption that they would bear the burden not only of proving that DESC's proposed rates were unreasonable, but also of providing an alternative set of rates and proving that those rates complied with Act 62. In short, appellants were required to meet the same evidentiary burden as the utility, despite having only rudimentary access (even through discovery) to the utility's proprietary system modeling tools, system cost information, and dispatch information.[6] This had a tremendous impact on Appellants' litigation strategy, including but not limited to requiring Appellants to conduct extra discovery, and to dedicate significant additional legal and consultant resources to proving a complete

[6] The implications of requiring Appellants to prove an alternative avoided cost rate are discussed in Conservation Groups' Initial Brief at 7-8.

alternative to each DESC's proposals. It is therefore imperative that this Court provide guidance for future proceedings by answering the questions posed by the Appeal.

For largely the same reasons, the Commission's decision below may affect future events and have collateral consequences for the parties. *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596. DESC argues that "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," so that "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." DESC Mot. at 8. But as discussed, Appellants continue to participate on behalf of their members in avoided cost dockets before the Commission, and the decisions the Commission renders in those cases (not only for DESC but also for other utilities) will be informed by the decisions it made in the case below, and by a judgment from this Court on appeal. So even if the 2018 PR-2 rates have been superseded by the rates established in Docket No. 2019-184-E, a decision from this court even on procedural issues will affect future events and have collateral consequences for the parties.

C. The Appeal of the Commission's PR-1 Rate Decision is Not Moot.

DESC also claims that this appeal is "arguably" mooted with respect to the PR-1 rate established (using largely the same avoided cost calculation methodologies) in the Commission's Order because only about forty (40) customers contract to sell power to DESC under the PR-1 rate approved by the Commission, and those customers are not paid very much for that power. DESC Mot. at 5-8.

But DESC's argument on this issue is not really about mootness. Rather, DESC argues that the Court should excuse any errors with its PR-1 ratemaking because "'[r]atemaking is not an exact science,'" and because "only 'reasonable certainty' and not 'absolute precision'" is required in ratemaking. DESC Mot. at 6 (quoting *Parker v. South Carolina Public Service Commission*, 280 S.C. 310, 312, 313 S.E.2d 290, 291 (1984) and *Hamm v. South Carolina Public Service Commission*, 309 S.C. at 291, 422 S.E.2d at 115). DESC therefore claims that the appeal is moot as to the PR-1 rate because its impact on customers contracting under the PR-1 rate "is at most *de minimis*." DESC Mot. at 6.

But the cases cited by DESC for this proposition are ratemaking cases that do not address the mootness doctrine. DESC did not argue that defects in its PR-1 ratemaking should be excused because of their "*de minimis*" impact in its Initial or Final Brief in this matter. Accordingly, that argument has been waived and the Court should not consider Respondent's untimely attempt to assert it by motion. Rule 208(b)(2), SCACR.

Even if the argument had not been waived, the Court should reject DESC's attempt to conflate this "*de minimis* impact" argument from the ratemaking context with this court's mootness doctrine. To declare an appeal moot – as DESC asks – where the impact of the court's judgment would be real and quantifiable, even if it is relatively small compared to the utility's balance sheet, would radically expand this Court's mootness doctrine, which applies only "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 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) (emphasis added).

III. APPELLANTS HAVE STANDING AND DESC HAS NOT PRESERVED ITS STANDING ARGUMENT.

A. DESC's New Standing Argument Was Not Preserved for Review and Is Barred.

Before the present motion—filed six months *after* oral argument—DESC never raised the issue of standing to the Commission or in any brief to this Court. Under this Court's binding precedent, DESC's failure to raise the issue until now means it is not preserved for appellate review, and DESC's arguments are barred. *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732–33 (2010) ("[W]hen a party belatedly attempts to raise the issue of standing, our courts have applied error preservation principles and held that the matter was not preserved for review where the trial court was not given an opportunity to first rule on the issue."); *see Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (State's standing argument not preserved where it was not raised at the post-conviction relief hearing, but was raised in a motion for reconsideration); *Michael P. v. Greenville Cty. Dep't of Soc. Servs.*, 385 S.C. 407, 413 n.4, 684 S.E.2d 211, 214 n.4 (S.C. Ct. App. 2009) (appellants' arguments in support of standing were not preserved for consideration on appeal because they were not raised to and ruled upon by the family court); *but see A Fast Photo Express, Inc. v. First Nat'l Bank of Chi.*, 369 S.C. 80, 88, 630 S.E.2d 285, 289 (S.C. Ct. App. 2006) (finding standing properly preserved where it was both raised to and ruled upon by the master-in-equity).

DESC tries, but cannot, avoid its issue preservation problem by conflating standing and mootness. DESC Mot. 8–9 (citing footnote in *Jackson v. State*, 331 S.C. 486, 490 n.2, 489 S.E.2d 915, 917 n.2 (1997)). Mootness and standing are distinct doctrines of justiciability concerned with distinct points of time in litigation. Standing turns on whether a litigant "*had* the requisite stake in the outcome *when the suit was filed*," *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis added), whereas mootness ensures that the litigant's stake in the outcome continues

throughout the life of the suit, *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71–72 (2013). A court must perform separate analyses to determine whether a plaintiff has standing to bring an action at its outset and whether that action is mooted by intervening events. *See Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 69 (2d Cir. 2001) ("[E]ven as to claims that plaintiffs originally had standing to assert, the court must determine whether those claims remain live controversies or have become moot.").

This Court recognized the different frames of analysis for mootness and standing in *Sloan v. Friends of Hunley, Inc.*, holding that the plaintiff had standing to bring to a Freedom of Information Act claim against a nonprofit group even though the action was mooted by production of the requested documents. 369 S.C. 20, 25–29, 630 S.E.2d 474, 477–79 (2006). Nothing in *Jackson* suggests otherwise; in fact, *Jackson* expressly recognizes that standing and mootness are set in alternate "time frame[s]" and are thus distinct concepts. 331 S.C. at 490 n.2, 489 S.E.2d at 917 n.2 (quoting Monaghan, *Const. Adjudication*, 82 Yale L.J. 1363, 1384 (1973)).

Because DESC failed to raise the distinct issue of standing until now, its arguments on that point are not preserved for review and cannot form the basis of a motion to dismiss the appeal.

B. Appellants Have Standing.

Even if DESC's attacks on standing were somehow preserved for review, its arguments are meritless. Tellingly, DESC fails even to cite the proper framework for standing in South Carolina courts. "Standing may be acquired: (1) through the rubric of 'constitutional standing'; (2) under the 'public importance' exception; or (3) by statute." *Freemantle v. Preston*, 398 S.C. 186, 192,

728 S.E.2d 40, 43 (2012). The applicable test here is statutory standing, but Appellants' standing suffices under all tests.[7]

3. Statutory Standing

Whether statutory standing exists is an exercise in statutory interpretation. *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, No. 2018-000137, 2020 WL 811729, at *4 (S.C. Feb. 19, 2020) ("Statutory standing exists, as the name implies, when a statute confers a right to sue on a party, and determining whether a statute confers standing is an exercise in statutory interpretation.") (citation omitted), *pets. for reh'g filed* (April 27 and May 1, 2020). The statutory provisions for this proceeding issue are contained in Chapter 27 of Title 58, which governs Commission ratemaking procedure. *See* S.C. Code Ann. § 58-27-865 (ratemaking including fuel and avoided costs), § 58-27-2310 (review of Commission orders); DESC Initial Br. 2 (conceding case governed by S.C. Code Ann. § 58-27-865). The Commission was required to review and approve DESC's recovery of costs for fuel and other energy sources—including

[7] An organization has "associational standing" to bring suit on behalf of its members when "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Beaufort Realty Co., Inc. v. Beaufort Cty.*, 346 S.C. 298, 301 551 S.E.2d 588, 589 (Ct. App. 2001). As addressed below, each Appellant has members who would have standing to challenge the Commission's order individually. The interest Appellants seek to protect—promotion of clean energy resources in the state through accurate, fair avoided cost rates—clearly is germane to the purposes of these organizations. *See Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, No. 2018-000137, 2020 WL 811729, at *4 (S.C. Feb. 19, 2020) ("[T]he germaneness requirement is undemanding."); Exh. A at para. 11; Exh. B at para. 4; Exh. C at para. 12-19. Finally, the participation of individual members is unnecessary here because Appellants are seeking review of a Commission order setting avoided cost rates, not monetary damages on behalf of their members, and litigation of the merits does not require participation by individual members. *Pres. Soc'y of Charleston*, No. 2018-000137, 2020 WL 811729, at *4 (finding the third element satisfied where Petitioners did not seek "monetary damages on behalf of their members" but instead sought administrative review of a DHEC permitting process).

renewable power from qualifying facilities—for inclusion in the utility's "base rate." S.C. Code Ann. § 58-27-865(B); *see also* S.C. Code. Ann. § 58-39-140.

The statute directs that a "*party in interest* dissatisfied with an order of the commission may appeal to the Supreme Court or court of appeals as provided by statute and the South Carolina Appellate Court Rules." S.C. Code Ann. § 58-27-2310 (emphasis added). Those rules, in turn, provide that "[a]ppeals from a decision of the Public Service Commission setting public utility rates pursuant to Title 58 of the South Carolina Code of Laws shall be filed with the Clerk of the Supreme Court." Rule 203(d)(2)(A), SCACR. The question is thus whether Appellants qualified as parties "in interest" since they were indisputably—and without any objection from DESC—allowed to intervene as parties. *See* R. Vol. I at 222–26 (SCSBA petition to intervene); R. Vol. I at 227–30 (Conservation Groups' petition to intervene); R. Vol. I at 85 (Commission Order granting SCSBA petition to intervene); R. Vol I at 86 (Commission Order granting Conservation Groups' petition to intervene).

Appellants have numerous interests in this proceeding and in rectifying the Commission's errors below. As recited in the intervention petition of the Conservation Groups, and affirmed through affidavits attached as exhibits:

- Both organizations work on behalf of and represent members who are DESC ratepayers and seek to have the utility adopt more cost-competitive renewable energy. R. Vol. I at 228–29.
- Both organizations' members who are DESC customers have bills that are impacted by avoided cost determinations. R. Vol. I at 228–30.
- Both organizations advocate on behalf of their members to bring competitive renewable power to South Carolina, catalyzing, for example, two separate enactments by the General Assembly to facilitate such deployment. Exh. A at para. 9-10; Exh. B at para. 8.
- Both organizations have participated in many avoided cost and other renewable energy related proceedings. R. Vol. I at 229 ("The Conservation Groups have participated as intervenors in multiple Commission proceedings relating to the implementation of the South Carolina Distributed Energy Resource Act, including Docket Nos. 2014-246-E,

2015-53-E, 2015-54-E, 2015-55-E, 2015-203-E, 2015-204-E, 2015-205-E, and 2015-362-E.").

- Both organizations intervened and advocated in the Commission proceeding below for "accurate and fair valuation of avoided costs and the related tariffs" to "promote their members' interests as well as the broader public interest." R. Vol. I at 229–30.

Appellant Conservation Groups reiterated their interest in the proceeding and avoided cost determinations in their petition for reconsideration before the Commission, "to ensure accurate and fair valuation of avoided costs and the related tariffs proposed by [DESC]." R. Vol. II at 475–76 (describing the organizations and their members' interests in the proceeding, including to "promot[e] greater reliance on clean energy resources to meet the South's energy needs" and to engage on avoided cost determinations that "influence the future of renewable energy investment in South Carolina"). Conservation Groups also reiterated their interest in briefing before this Court. Conservation Groups' Final Brief pp. 2–3 n.1. Notably, at none of these points in time did Dominion challenge Appellants' standing until its pending motion to dismiss filed over six months after oral argument.

SCSBA similarly established their interest in the proceeding. As described in the petition to intervene before the Commission, SCSBA is a "Public Benefit Non-Profit Corporation" based in Charleston, South Carolina. R. Vol. I at 223. It is organized "for the purpose of promoting and advocating public policy positions supportive of solar power generation in South Carolina." R. Vol. I at 223. SCSBA's "more than sixty (60) Trade Members includes solar energy developers, engineering procurement and construction (EPC) contractors, professional service firms, equipment distributors and equipment manufacturers engaged in the business of solar energy generation in South Carolina and across the nation." R. Vol. I at 224. All the companies represented on SCSBA's board maintain offices in South Carolina. R. Vol. I at 224. SCSBA's members have "substantial business interest in SCE&G's assigned territory in South Carolina,"

and the Commission's avoided cost decisions are "important to Petitioner and its Trade Members from a financial standpoint." R. Vol. I at 225; *see also* Exh. C at para. 16-17.

Appellants Conservation Groups and SCSBA plainly had an "interest" in this proceeding, and were admitted as parties with no objection from DESC or anyone else. Appellants therefore had statutory standing to appeal when "dissatisfied with an order of the commission ... as provided by statute and the South Carolina Appellate Court Rules." S.C. Code Ann. § 58-27-2310. As set forth in Appellants' briefs, they are dissatisfied with the Commission's erroneous order because the Commission failed to follow this Court's directives to consider and actually analyze evidence on contested issues, and issued an order that fails to fully and accurately value the costs avoided by renewable energy generation. The end result both suppresses renewable generation deployment and improperly inflates the costs of DESC's distributed energy generation program for ratepayers. Exh. A at para. 10, 12. Finally, as previously discussed, the Appellants have intervened in many Commission avoided cost and related proceedings, and are directly impacted by who bears the burden of proof or persuasion in avoided cost proceedings. Exh. A at para. 13-14; Exh. B at para. 10; Exh.C at para. 20.

DESC acknowledges that the erroneous PR-1 rate in this case caused monetary harm, and its argument regarding the PR-2 rate essentially concedes harm as well by pointing out that no QFs proffered projects in the response to the erroneously low rate. DESC's view, that the absence of projects shows no standing, looks at the issue through the wrong end of the telescope. The lack of projects contracting under the 2018 PR-2 rate is a harm to the Appellants, caused by the erroneous rates set by the Commission in this case. The Appellants seek to remedy that harm and to prevent future injury by having the Commission go back and do its job by correctly allocating evidentiary burdens, engaging the issues before it, and rendering a decision that actually and explicitly resolves

core issues of contested fact and reduces its analysis to paper in sufficient detail that enables meaningful appellate review, as required by this Court's precedent.

4. Public Importance Standing

Because Appellants have statutory standing, the Court need not determine whether other types of standing apply. *See Pres. Soc'y*, 2020 WL 811729, at *4 ("The traditional concepts of constitutional standing are inapplicable when standing is conferred by statute.") (citing *Freemantle*, 398 S.C. at 194, 728 S.E.2d at 44). However, even assuming *arguendo* that statutory standing was not conferred, Appellants meet the requirements for public importance standing. Courts in South Carolina will find public importance standing where the issue involved is "of public importance," and, more importantly, where "future guidance on that issue is needed." *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 118–19, 804 S.E.2d 854, 859 (2017). "Unlike with constitutional standing, a party is not required to show he has suffered a concrete or particularized injury in order to obtain public importance standing." *Id.* at 118, 804 S.E.2d at 858. "Nor must he show he has an interest greater than other potential plaintiffs." *Id.* at 118, 804 S.E.2d at 858 (quotation marks and citation omitted).

As described by Conservation Groups in their petition to intervene, they sought to promote their members' interests as well as the broader "public interest." Because avoided cost determinations as presented in this proceeding have broad implications for the entire state and the solar industry going forward, Appellants easily meet the standard for public importance standing. It is undisputed that avoided cost rates, terms, and conditions influence whether or not qualifying solar energy facilities are deployed in DESC's territory. This is evidenced by the fact that not a single qualifying renewable energy has contracted with DESC under the most contentious tariff in

this proceeding, the PR-2 tariff, whereas prior rates did elicit such projects. DESC Mot. Exh. C at para. 4.

Further, relevant federal statutory and regulatory provisions acknowledge the public interest at stake in determining avoided cost rates. In addition to the state fuel cost and ratemaking statutes at issue in this proceeding, federal law is also being implemented. More specifically, under the Public Utility Regulatory Policies Act of 1978, avoided cost rates must be "non-discriminatory" against qualifying cogenerators or small power producers, "just and reasonable to the consumers of the electric utility," and "*in the public interest.*" 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(a)(1) (emphasis added).

Finally, this Court's guidance is ensure that the Commission continues to do its job in future proceedings. This Court has issued multiple decisions outlining the Commission's duty to address and analyze contested evidence, *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 317, 803 S.E.2d 280, 286 (2017) ("In reaching its decision, the Commission must consider all testimony and evidence presented to it."); to properly apply the burdens on the parties in setting rates, *Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff*, 392 S.C. 92, 109, 708 S.E.2d 755, 762 (2011) (the utility bears the burden "to demonstrate the reasonableness of its costs"); and to issue orders that provide a comprehensible written record for appellate review, *Porter v. S.C. Pub. Serv. Comm'n*, 33 S.C. 12, 21, 507 S.E.2d 328, 332 (1998) ("An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings.") (quotation marks and citation omitted). The decision on appeal here failed each and every one of those directives, and failed more fundamentally in putting the burden on intervenors to establish a rate when by law that burden rests with the utility. *Hamm*

v. S.C. Pub. Serv. Comm'n, 309 S.C. at 286, 422 S.E.2d at 112. This Court's review is needed to correct the Commission's failure to adhere to binding precedent and issue reasoned orders that properly allocate burdens and coherently address and resolve contested issues.

5. Constitutional Standing

The U.S. Supreme Court has articulated a three-part test for standing under Article III of the U.S. Constitution: (1) the plaintiff must have suffered an injury-in-fact that is concrete and particularized and actual or imminent; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *See Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dept. of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). Appellants satisfy all three elements.

In this case, SCSBA members were deprived of just and reasonable, non-discriminatory avoided cost rates, resulting in no projects contracting under the 2018 PR-2 rates. The Commission's ruling at issue on appeal was the direct cause of the artificially low avoided cost rates. A favorable decision from this Court would redress the injury because it would require the Commission to appropriately assess and value qualifying facility electricity generation, compensating affected PR-1 projects and correcting valuation for future projects that qualify for a PR-2 rate. DESC's motion concedes this as to PR-1, as the addition of a capacity value would result in $600 in additional payments for any qualifying facilities subject to the PR-1 rate. DESC Mot. 7. Even considering the Commission's recent ruling in Docket No. 2019-184-E, a favorable decision by this Court would prevent the Commission from committing the same errors in future proceedings that will occur at least every two years going forward, rendering them capable of repetition yet evading review.

Conservation Group members have been injured by the Commission's determination of artificially low avoided cost rates that have the effect of stifling clean energy competition that could ultimately lower their members' electricity bills. Even in the short-term, the avoided cost rate determination by the Commission had the result of inflating distributed energy resource ("DER") program costs. This is because net metering cost recovery under the DER programs involves subtracting avoided costs from DESC's retail rate of electricity. When the avoided cost rates are artificially reduced, it artificially increases the amount designated as net metering DER program costs, thus injuring Appellants because artificially high DER costs will inevitably lead to lower distributed energy deployment than would occur if ratepayers were not forced to pay an artificial subsidy to the utility.[8] The commission's determination at issue in this appeal directly caused these injuries. A favorable decision by this Court would prevent DESC from engaging in its predatory pricing that harms clean energy competition, and would directly impact and reduce the costs being recovered as DER program costs from DESC's customers, including members of Conservation Groups.

C. The PR-1 Rate Error Was Properly Preserved.

DESC contends that errors with the PR-1 rate were not properly preserved for appellate review (DESC Mot. at 10–11), even though the PR-1 rate was raised to and ruled upon by the Commission and then appealed to this Court and subsumed under the broader avoided cost rate issues. DESC's argument is without merit.

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[8] DESC's confused argument regarding net metering, DESC Br. 9 n.6, thus misses the mark. What DESC cannot deny is that the PSC, by setting an avoided rate lower than it should be, increases DER program costs for all ratepayers. While that may align with DESC's desire to suppress competition, it injures ratepayers and solar providers alike, further bolstering their standing. *See also* Exh. A at para. 10; Exh. B at para. 8.

For an issue to be properly preserved for appeal, it must have been "raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329 730 S.E.2d 282, 285 (2012); *see also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[I]t is axiomatic that an issue cannot be raised for the first time on appeal.").

In Appellants' briefing before this Court, they refer primarily to "avoided cost rates." DESC's "avoided cost rates" are ultimately conveyed to QFs and customers through tariffs, including the PR-1 and PR-2 tariffs, with additional implications for net metering tariffs and distributed energy resource program costs. As DESC concedes, Conservation Groups addressed avoided cost issues before the Commission, including those related to PR-1, PR-2, and net metering tariffs. *See* DESC Motion 10-11; *see also* R. Vol. I at 150–52, 161–62, 183 (describing raising of PR-1 avoided cost issues and ruling by Commission). This properly preserved the PR-1 issues for appeal as they were "raised to and ruled on" below. *Elam v. S.C. Dep't of Transp.*, 361 S.C. at 23, 602 S.E.2d at 779–80. Conservation Groups also fully briefed these issues before this Court, as the PR-1 determinations are subsumed under the overarching "avoided cost rate" issues, particularly the elimination of avoided capacity payments. *See* Conservation Groups' Final Br. & Final Reply Br. *passim* (referring to "avoided cost rates"); *see also* R. Vol I at 147 ("For solar QFs on PR-1, SCE&G used the same methodology to estimate avoided energy costs as it did for solar QFs on PR-2. The only difference is the time period over which the avoided energy costs are estimated. The short-run avoided energy costs in the PR-1 rate are calculated for the period May 2018 through April 2019. DESC/SCE&G Witness Lynch also testified that the avoided capacity

cost for solar QFs subject to the PR-1 rate is zero because, as with the PR-2 rate, incremental solar QFs do not affect the resource plan and therefore avoid no future resources or their cost.")[9] SCSBA explicitly included references to the PR-1 tariff in its briefing before this court. SCSBA Initial Br. at 25; SCSBA Initial Reply Br. at 11; SCSBA Final Br. at 25.[10] If the Appellants' requested relief is granted, the Commission decision would be vacated and remanded, and the Commission would reconsider its determinations as to the avoided cost rates, which are conveyed through the PR-1, PR-2, and net metering tariffs and related cost recovery.[11] Appellants have properly preserved these issues for appeal.

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[9] The Commission approved a zero capacity value for the PR-1 tariff as applied to both solar and non-solar QFs. Additionally, the burden shifting issue also relates explicitly to both the PR-1 and PR-2 tariffs. R. Vol. I at 152 ("The Commission finds that SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, in the absence of a viable alternative proposal being presented by any other party.").

[10] DESC's claim that SCSBA did not raise the PR-1 rate in its petition for rehearing to the Commission, Mot. 11, is wrong and irrelevant. "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733. Because the Commission expressly ruled on the PR-1 rate in the proceeding, R. Vol. I at 183, SCSBA was not required to raise the issue again in it petition for rehearing to preserve it for appeal. Even so, SCSBA addressed deficiencies in the Commission's approval of the avoided cost rates afflicting both the PR-1 and PR-2 tariffs (and net metering tariff) in its Petition for Rehearing or Reconsideration. R. Vol. I at 472. SCSBA also addressed in great detail the burden shifting issue that applied to both the PR-1 and PR-2 tariffs. R. Vol. I at 467–72; *see also* R. Vol. I at 152 ("The Commission finds that SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, in the absence of a viable alternative proposal being presented by any other party.").

[11] DESC's avoided cost rates also impact the quantification of distributed energy resource program costs and DESC's net energy metering tariff. These program costs include the difference between DESC's retail rate and a value that includes avoided cost rates, meaning that lower avoided cost rates result in higher distributed energy resource program costs recovered from ratepayers.

IV. CONCLUSION

Neither the passage of Act 62 nor the Public Service Commission's issuance of a more recent avoided cost order moots this appeal or lessens the importance of the legal questions presented herein. Without a judgment from this Court clarifying the procedures and standards the Commission must follow in deciding avoided cost cases, the errors in the decision below may be repeated but will continue to evade review, and parties will lack critical guidance on the burdens they must meet in litigating those cases. The appeal also should not be dismissed on standing grounds, both because DESC failed to preserve it and also because Appellants have statutory, constitutional, and public importance standing.

WHEREFORE Appellants respectfully request that the Court deny DESC's Motion to Dismiss.

Respectfully submitted this the 26th day of May 2020.

/s/Richard L. Whitt
Richard L. Whitt
S.C. Bar No. 62895
Whitt Law Firm, LLC
401 Western Lane, Suite E
Irmo, South Carolina, 29063
(803) 995-7719
Counsel for Petitioner, South Carolina Solar Business Alliance, Inc.

Benjamin L. Snowden
Kilpatrick Townsend & Stockton LLP
Suite 1400, 4208 Six Forks Road
Raleigh, North Carolina 27609
(919) 420-1700
bsnowden@kilpatricktownsend.com
Admitted *Pro Hac Vice*, by the Public Service Commission of South Carolina.

Attorneys for the South Carolina Solar Business Alliance, Inc.

/s/J. Blanding Holman, IV
J. Blanding Holman, IV
S.C. Bar No. 72260
Southern Environmental Law Center
463 King Street, Suite B
Charleston, S.C. 29403
(843) 720 5270
bholman@selcsc.org

Attorney for South Carolina Coastal Conservation League and Southern Alliance for Clean Energy