RECEIVED

Jun 02 2020

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.

REPLY IN SUPPORT OF
MOTION TO DISMISS APPEAL

Respondent Dominion Energy of South Carolina, Inc. ("DESC/SCE&G"), f/k/a South Carolina Electric & Gas Company ("SCE&G"), pursuant to Rule 240(f) of the South Carolina Appellate Court Rules ("SCACR"), hereby replies to the Memorandum in Opposition to Motion to Dismiss Appeal (the "Opposition") of Appellants South Carolina Coastal Conservation League ("SCCCL"), Southern Alliance for Clean Energy ("SACE"), and South Carolina Solar Business Alliance, LLC ("SCSBA") (collectively, "Appellants"), which was filed in response to DESC/SCE&G's May 14, 2020 motion for an order dismissing the above-captioned appeal on the grounds that it is moot and does not involve an existing case or controversy between the parties due to an absence of standing on the part of Appellants (the "Motion"). In addition to being without merit, Appellants' memorandum presents an argument in opposition based on a matter which was not presented below and is, in any event, unfounded and incorrect speculation.

In the Opposition, Appellants principally argue that this appeal is not moot because it falls into the exception to mootness for "harm capable of repetition but evading appeal." (Mem. at 4). However, the "harm" identified by Appellants is not any conduct of another party to this case, but rather their general complaints about how the Public Service Commission (the "Commission") conducted its analysis in the case below. That is not only outside the intended scope of the exception, but it is patently incorrect as the Commission's analyses constitute a matter that is quintessentially subject to appeal in the future by function of express South Carolina law. *See* S.C. Code Ann. § 58-27-2310. Moreover, the Commission's analysis of which Appellants complain was conducted under a substantially different legal framework than what has since been required and enacted by the General Assembly for avoided cost proceedings in Act 62, making any further consideration of this issue on appeal a purely academic exercise. The other exceptions to mootness

invoked by Appellants are red herrings, and their arguments in favor of their standing in this case are likewise flawed. DESC's/SCEG's motion should be granted and the appeal dismissed.

ARGUMENT

A. The Appeal Is Moot.

As observed in DESC/SCE&G's Motion, "[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 effectual relief impossible for the Court." *Wachesaw Plantation E. Cmty. Servs., Ass'n, Inc. v Alexander*, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (citing *S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013)). "Moot appeals result when intervening events prevent a decision on appeal from having an immediate impact on the parties." *Id.* (quoting 15 S.C. Jur. *Appeal and Error* § 19 (Supp. 2014)). "Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Id.* (citing *Linda Mc Co., Inc. v. Shore*, 390 S.C. 543, 558, 703 S.E.2d 499, 506 (2010)).

As DESC/SCE&G explained in the Motion, any appeal as to the 2018 PR-2 rates has been mooted by the orders of the Commission in Docket No. 2019-184-E, which superseded those rates and rendered them unavailable to any QF, and in fact no QF has an active contract under those rates. In the Opposition, Appellants initially assert two arguments why this decisive set of events does not render this appeal moot: first, the fact that no QF has an active PPA with DESC/SCE&G under the 2018 PR-2 rates is actually evidence that they *were* harmed; and second, that a QF could still have establish a "legally enforceable obligation" or "LEO" while the 2018 PR-2 rates were in effect and "DESC's Motion to Dismiss . . . do[es] not address whether any QFs have established a[n LEO] to sell to DESC under the 2018 PR-2 rates." (Mem. at 7-8). To the first point, DESC/

SCE&G cannot fathom how the absence of a contractual arrangement based on rates from 2018 which rates now no longer exist could constitute harm sufficient to make an otherwise non-justiciable case justiciable, and Appellants do not explain why this is so. Whether and under what circumstances such contracts could have existed is a purely speculative and hypothetical exercise that does not merit judicial inquiry, and it certainly does not change this appeal from one that is moot to one that is not.

To the second point, the record below reveals that no issue was raised before the Commission regarding a legally enforceable obligation ("LEO") which a qualifying facility might have sought. To the contrary, LEOs are discussed only in the initial order issued by the Commission under Act 62 that moots the instant appeal. *See* Motion Exhibit A at 73, 78-82, 138, 168, 179-182. Of course, Appellants have not challenged the Commission's orders issued under Act 62 – a clear demonstration of why the instant appeal is moot. Regardless, Appellants' unpreserved contentions with respect to LEOs are not only unsupported speculation, but factually wrong. *See* Reply Affidavit of Daniel F. Kassis, copy attached as Reply Exhibit A.[1]

Otherwise, Appellants assert that this case falls into each of the three general exceptions to the mootness doctrine that are available in civil cases:

> 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.

[1] Although unnecessary to a determination of this motion in view of this fact, the reply affidavit of Mr. Kassis provides an explanation of the nature and import of a LEO for the Court's benefit. See Reply Ex. A, ¶ __. And, to the extent that Appellants' arguments in this regard seek to have reviewed the Commission's determinations in the orders issued in the Act 62 proceeding, this Court would of course lack jurisdiction to do so. *See* n.2, *infra*, and Rule 230(b)(6), SCACR.

Id. (internal citations omitted). It is the first of these exceptions—'capable of repetition yet evading review'—upon which Appellants in this case principally rely; however, for the reasons set forth below, none of these exceptions apply to this case.

1. The Issues Presented in this Case Are Not "Capable of Repetition but Evading Review."

Appellants argue that they were aggrieved by the manner in which the Commission undertook its analysis in the case below, and that because avoided cost proceedings under the newly-enacted Act 62 are required every two years, it is unlikely that such issues will ever reach this Court for determination before a new avoided cost proceeding is taken up by the Commission; therefore, the Court should take up this issue notwithstanding the non-justiciability of this case. There are a number of problems with this argument.

To begin, the harm that Appellants assert is capable of repetition yet evading review is not a harm inflicted upon them by a party to this case which might cease before it can be addressed and resolved by the courts of this state, but is rather a set of general procedural questions concerning the manner in which the Commission undertook its analysis in the case below. (*See* Mem. at 9 (asserting that the issues of "(1) whether the Commission may shift the burden of proof from the utility to the Intervenors challenging the utility's proposed rate; (2) whether a Commission finding that the 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 factual findings as to its application of the burden-shifting scheme" are not addressed by Act 62 and thus capable of

repetition evading review).[2] The idea that these procedural issues "evade review" is in direct conflict with S.C. Code Ann. § 58-27-2310, which gives "[a] party in interest dissatisfied with an order of the commission" the right to "appeal to the Supreme Court or court of appeals as provided by statute and the South Carolina Appellate Court Rules." So rather than "evading review," these questions of procedure are in fact *always*, by statute, subject to review in a case involving a live controversy.

Aware of this, Appellants set up a cascading, multi-level hypothetical in an attempt to demonstrate to the Court why it may never get to hear these issues again:

> [T]he 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/SCE&G 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, it is likely that future challenged rates will have expired by the time this Court can decide an appeal of the Commission's avoided cost decisions.

(Mem. at 8-9). Even reviewing and attempting to digest this collection of multi-layered contingent events is an academic exercise, and it illustrates precisely why courts will not pass on questions without a live controversy. *Wachesaw*, 414 S.C. at 359, 778 S.E.2d at 900 ("Appellate courts will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." (internal quotations omitted)).

[2] As previously noted, Mot. to Dism. p. 3, n.1 and p.7, Act 62 places upon QFs generating more than two megawatts a burden to demonstrate that the price offered by DESC/SCE&G for the electricity sought they seek to sell is inconsistent with approved avoided cost methodologies in a complaint proceeding brought by them. *Cf.* S.C. Code Regs. 103-824 (2012). Thus, at least as far as these Appellants are concerned, no resolution of the burden of persuasion in this appeal will bear on future proceedings – even assuming they possess standing.

Moreover, and highlighting that the scenario put forward by Appellants truly is hypothetical is the fact that, under the orders issued by the Commission in the Act 62 proceeding in Docket No. 2019-184-E, the Commission adopted significantly higher avoided energy cost values, as well as new avoided capacity cost values. Thus, the central point of contention in this appeal – the zero avoided capacity payment proposed by DESC/ SCE&G and adopted by the Commission in the 2018 proceedings – has been superseded and resolved by the Commission in favor of higher avoided capacity cost payments available to solar energy producers in the very first proceeding under Act 62. Therefore, not only is the scenario put forward by Appellants about a dearth of QFs entering into contracts with DESC/SCE&G a hypothetical one, but recent events have demonstrated that is unlikely to actually occur. *See Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 630 S.E.2d 474 (2006) (in order to satisfy the capable-of-repetition-yet-evading-review exception, "the action must be one which will *truly* evade review" (emphasis added) (citing *Byrd v. Irmo High Sch.*, 321 S.C. 426, 432, 468 S.E.2d 861, 864 (1996)). This is made especially true by the fact that Act 62, which significantly altered the procedural and substantive framework under which the Commission makes decisions in avoided cost proceedings, and which led to the ordering of these higher avoided cost payments, is the framework that the Commission will now use in all future avoided cost proceedings.

Indeed, were the Court to accept Appellants' suggestion and take up review of these issues now, it would do so without the benefit of a case and proceeding conducted in the first instance under the revised framework of Act 62. Of course, this is not a court of first impression. *See Jackson v. Atl. Soft Drink Co., Inc.*, 286 S.C. 577, 579, 336 S.E.2d 13, 14 (1985) ("Before we are called upon to decide this novel question, the case should be fully developed and tried on its merits."). Respectfully, the Commission – which is the tribunal that is statutorily responsible for

implementing the procedures and requirements of Act 62 – should be afforded a full opportunity to do so. And this Court should likewise be afforded the opportunity to make appellate-level decisions on important issues with the aid of a full and complete record that accurately reflects the statutes and procedures that are being challenged and tested in the case. The result that Appellants seek would require the Court to create procedures and to resolve questions before they have been fully practiced or tested at the trial level.[3] That is not the appropriate role of this Court, and it is precisely the reason why appellate courts do not entertain disputes where there is no active case or controversy.

[3] Appellants' argument that they did not appeal the Commission's orders in the Act 62 proceeding due to "the pendency of this appeal (which they hope will solve the recurring errors)" is misplaced and does not resolve the requirement for an active case or controversy. Appellants' further argument that they are "non-profit associations with limited resources" and "are simply unable to appeal each and every single order by the PSC that they believe includes erroneous holdings" (Opp. at 11, n.5) is equally unavailing. While Appellants' choice not to appeal from the Commission's orders in Docket No. 2019-184-E is certainly their prerogative, their reasoning in *that case* is not relevant to this Court's consideration in *this case* of whether to take up and decide a non-justiciable case in an earlier proceeding conducted under a different statute. Further, Appellants' reliance upon their status as "non-profit associations" is not relevant to the Court's justiciability determination, while a review of public records suggests Appellants' claims of "limited resources" bearing on the choice to appeal in the other proceeding defies any suggestion of reasonable limitation. Relevant Internal Revenue Service records "Open to Public Inspection" during this period reflect the fact that SCCL and SACE reported in excess of $12 Million Dollars and $4.5 Million Dollars of "Unrestricted net assets," respectively, and SACE reported expending almost $450,000 on legal services. *See* Reply Exhibits B and C, IRS Form 990 Returns. However, it is unclear that either SCCCL or SACE have had to expend any resources on legal services in this matter as the corporate entity for one of its counsel has recently represented in Federal court that it "works with its partners and clients exclusively on a pro bono basis," *see* October 15, 2018 Complaint, *Southern Environmental Law Center* v. *Federal Aviation Commission*, C/A No. 1:18-cv-04763-CAP, copy attached as Reply Exhibit "D," and the corporate entity reported "Unrestricted net assets" of over $83 Million dollars in 2018. *See* Reply Exhibit E, IRS Form 990 Return. "Non-profit" does not mean insufficient funds to initiate an appeal, if so-inclined. For SCSBA's part, it is obvious that it can afford to appeal – when that is a necessary choice – given its sixty members' "substantial business interest in SCE&G's assigned territory in South Carolina." Opp. at 19.

2. The Other Mootness Exceptions Do Not Apply.

Appellants also argue that the other two exceptions to the mootness doctrine apply to this case, but those arguments are merely restatements of Appellants' arguments under the first exception. Notably, Appellants argue that the "lack of clarity" afforded by Act 62 led them to experience uncertainty and additional discovery procedures in Docket No. 2019-184-E, and that the Court should take these issues up in this case in order to avoid similar issues in future proceedings. Again, however, Docket No. 2019-184-E is a *different case*, and Appellants *have not appealed that case*. They could have, and their decision not to speaks to the relative import of the questions that they now assert are "of imperative and manifest urgency" such that the Court should take these issues up in a different, non-justiciable case.

In any event, however, Appellants' invocations of the other two exceptions to the mootness doctrine fail for the same reasons noted above as to why the first exception does not apply. The Court should decline Appellants' request to resolve procedural issues that could perhaps arise in future cases or controversies, based on an incomplete and incongruous record in this, now mooted, appeal.

3. Any Issues as to the PR-1 Rate Are Also Moot.

The arguments above apply equally to the PR-1 Rate. As DESC/SCE&G noted in its Motion, only forty (40) QFs – none of whom are parties to this case – purchased electricity under this rate during the period in question, and any potential additional payment which could be due to those QFs would have generated approximately $600 in additional aggregate revenues for them. *See* Mot. Ex. C ¶ 5. Again, "[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 effectual relief impossible for the Court." *Wachesaw Plantation E. Cmty. Servs., Ass'n, Inc. v*

Alexander, 414 S.C. 355, 359, 778 S.E.2d 898, 900 (2015) (emphasis added) (citing *S.C. Ret. Sys. Inv. Comm'n v. Loftis*, 402 S.C. 382, 384, 741 S.E.2d 757, 758 (2013)); *see also id.* ("Moot appeals result when intervening events prevent a decision on appeal from having an *immediate impact on the parties*." (emphasis added) (quoting 15 S.C. Jur. *Appeal and Error* § 19 (Supp. 2014)). 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. S.C. Pub. Serv. Comm'n*, 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").

DESC/SCE&G respectfully submits that, given the substantial legislative alterations in the regulatory and procedural framework affecting avoided-cost producers since 2018, any issue with respect to the PR-1 rate in this appeal is at best *de minimis* and certainly does not practically affect these smaller QFs such as to warrant this Court taking up a non-justiciable appeal. Appellants' arguments to the contrary ignore these practical realities, which for the reasons stated above, are important considerations for a Court of ultimate appeal that must decide how and when to devote its energy and attention to resolve real, live, justiciable controversies between parties with a meaningful interest in the case. This case no longer meets those criteria and should thus be dismissed.

B. Appellants Lack Standing

The question of Appellants' standing to maintain the instant appeal, which was posited to the parties by the Court shortly before the start of the oral argument, is plainly an appropriate question to probe even at the current stage of this appeal. Despite Appellants' dismissive rhetoric as to the viability of the standing question raised in the motion, their Opposition devotes nearly

half of its argument to erecting non-existent procedural hurdles and redundant grounds to avoid the Court's relevant inquiry into whether any of the Appellants are "part[ies] in interest" that are "aggrieved" and thus have standing to pursue this appeal. As astutely raised by the Court, inquiry into the topic reveals Appellants' protestations are a mile wide, yet an inch deep, and lack any substance demonstrating that they have met their heavy burden of proving standing to challenge the PR-1 rate.[4]

Appellants have the burden of establishing standing. *Georgetown County League of Women Voters v. Smith Land Co.*, 393 S.C. 350, 358, 713 S.E.2d 287, 292 (2011). As noted with derision by Appellants in the opposition, standing is conferred by statute; by the constitution; or by the public importance exception. *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013). As associations, Appellants have standing only if one or more of their individual members would have standing. *Sea Pines Assoc. for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600-01, 550 S.E.2d 287, 291 (2001); *see also Baird v. Charleston County*, 333 S.C. 519, 530, 511 S.E.2d 69, 75 (1999). Because the associations are not subject to the PR-1 rate of the Commission for the operative period, Appellants' burden to prove standing is "substantially more difficult." *Beaufort Realty Co., Inc. v. Beaufort County*, 346 S.C. 298, 301, 551 S.E.2d 588, 589 (Ct. App. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) ("*Lujan II*")). Similar to the Court's mootness inquiry, *see Jackson v. State*, 331 S.C. 486, 490, n.2, 489

[4] DESC/SCE&G's motion sought a determination of lack of standing by Appellants under the PR-1 rate, but did not address Appellants' standing to challenge the PR-2 rate, a distinction that Appellants ignore in the opposition. The distinction was intentional, however, in that it implicitly recognizes the fact that forty (40) QFs sold electricity to DESC/SCE&G during the period in which it was in effect, in which case a claim by one of the forty (40) QFs for the period in question would survive the implementation of a new PR-1 rate by the Commission. Appellants only address the general question of standing, but glaringly avoid the specific question of their entitlement to represent the interests of the forty (40) QFs.

S.E.2d 915, 917 (1997), even an actual demonstrated injury is non-justiciable when it is not capable of being redressed by a favorable decision of the Court or where a favorable decision would have no practical effect on an actual, live controversy.

1. Inquiry into Appellants' standing is appropriate

Appellants first attempt to argue that the inquiry into standing initiated by the Court prior to oral argument is improper and unpreserved, criticizing DESC/SCE&G for addressing the Court's concerns in its motion. Opp. at 15. Appellants' criticism is misplaced and they misread and incorrectly rely upon the cited case law for the application of preservation arguments to standing under these circumstances. As an initial matter, the case of *James v. Anne's Inc.*, upon which Appellants principally rely, unequivocally holds that "[t]his Court has the inherent authority to consider justiciability," including, as was at issue in that case, a question regarding a party's standing. 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). Given that the Court initiated the inquiry into standing, Appellants' attempts to avoid consideration of the issue by attributing the question to DESC/SCE&G is unavailing and does not thwart the Court's obvious interest in this valid line of inquiry.

Even if Appellants could overcome this Court's "inherent authority," however, their reading of the rules of preservation under these circumstances is mistaken. In short, because DESC/SCE&G was the "winning party" below and the "respondent" in this appeal, error preservation principles are not applied to it in the same manner that they are to Appellants. *See I'On, L.L.C. v, Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("[I]t is not always necessary for a *respondent*—as the winning party in the lower court—to present his issues and arguments to the lower court and obtain a ruling on them in order to preserve an issue for appellate review.") (emphasis in original). "This approach is in keeping with the view, as expressed

in Rule 220(c), SCACR, that an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal." *Id.* at 420-21, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). In short, "different preservation rules apply to an appellant-the losing party in the lower court." *I'On*, 338 S.C. at 421, 526 S.E.2d at 724.[5] The Court's inquiry into Appellants' standing, and DESC/SCE&G's efforts to address same in its motion, is not subject to the preservation arguments incorrectly erected by Appellants to avoid consideration of this issue, which is imminently appropriate under either the Court's "inherent authority" or on motion raised by DESC/SCE&G.

2. Even if statutory standing is deemed to exist by virtue of S.C. Code Ann. § 58-27-2310, none of the Appellants' qualify as a "party in interest"

Contrary to Appellants' assertions to the contrary, it is not clear from the plain language of S.C. Code Ann. § 58-27-2310 that the General Assembly has evinced its intent to afford statutory standing to a "party in interest" without inquiry into the traditional 3-part test for constitutional standing. This Court has stated that "[s]tatutory 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." *Youngblood v. S.C. Dep't of Soc. Servs.*, 402 S.C. 311, 317, 741 S.E.2d

[5] This holding is consistent with the Court's analysis in *James*, relied upon by Appellants, as the issue of standing there related to the *respondent's* standing, not appellant's, and the issue was raised on behalf of the appellant by several amici briefs, despite the fact that the appellant had not raised the issue of standing in either its own briefing or to the lower court. 390 S.C. at 193-94, 701 S.E.2d at 732-33. Appellants' misunderstanding of the issue applies equally to the other cases cited in the opposition. *See Kolle v. State*, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010) (same, applying preservation principles against the State, who was the appellant); *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 (Ct. App. 2009) (same). Thus, in each of the cases cited by Appellants in support of preservation arguments, the principles of preservation were being faithfully applied by the Court to *the appellant*, not the respondent, as Appellants incorrectly advocates here.

515, 518 (2013) (citing *Freemantle v. Preston,* 398 S.C. 186, 194-95, 728 S.E.2d 40, 44-45 (2012) (relying on the fact that "FOIA contains a *specific standing provision* allowing any citizen of South Carolina to seek a declaratory judgment or injunctive relief to enforce the Act's requirements," and later indicating that the Court was "following the legislature's unmistakable intent") (emphasis supplied)). In that respect, the grant of statutory standing by the General Assembly either exists under the plain language of the statute, or it does not. If the Court is forced to look beyond the text of the statute to supply a definition in accordance with *the Court's view* of the usual and customary meaning of the term in question, then the General Assembly has not "unmistakabl[y] inten[ded]" to confer statutory standing. *Contra Freemantle,* 398 S.C. at 194, 728 S.E.2d at 44.

Here, the General Assembly has not provided a definition for a "party in interest" within Chapter 27 of Title 58. Indeed, this Court has never held that the concept of statutory standing applies to challenges of order of the Commission. *Contra S. Ry. Co. v. Pub. Serv. Comm'n,* 195 S.C. 247, 10 S.E.2d 769, 772 (1940) (requiring a party to be "aggrieved" in order to apply to the Court for relief from an order of the Commission); *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 312 S.C. 79, 83–84, 439 S.E.2d 270, 272 (1994) (applying the general administrative challenge procedures of S.C. Code Ann. § 1-23-380(a) to an appeal from an order of the Commission and requiring the appealing party to meet § 380's requirement that they be "aggrieved"). Given the lack of specificity in the statute and this Court's prior precedent applying the "aggrieved" standard, default to the traditional 3-part test for constitutional standing, which allows the Court to effectively probe the concept of being a "party in interest" that is "aggrieved" would be appropriate.

However, even if this Court were inclined to recognize the existence of "statutory standing" in this circumstance,[6] which DESC/SCE&G disputes, such a recognition would not end the inquiry. Instead, the Court would still be required to engage in some type of factual analysis of Appellants' specific circumstances to determine whether each of the Appellants, individually, satisfies the threshold and meets its individual burden of being a "party in interest" that is "aggrieved." In interpreting similar language, this Court has stated that "[g]enerally, a party must be a real party in interest to the litigation to have standing." *Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 28, 630 S.E.2d 474, 479 (2006). "A real party in interest is a party with a real, material, or substantial interest in the outcome of the litigation." *Id.* "When an organization is involved, the organization has standing on behalf of its members if one or more of its members will suffer an individual injury by virtue of the contested act." *Sea Pines Ass'n for the Protection of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600–01, 550 S.E.2d 287, 291 (2001). Here, it is undisputed that none of the Appellants – as organizations – are QFs who were entitled to sell electricity to DESC/SCE&G at the PR-1 rate. And none of the "numerous interests" identified by Appellants, *see* Opp. at 18-19, relate in any way to the operative question of an

[6] Appellants' citation to the Court's opinion in *Preservation Society of Charleston v. S.C. Dep't of Health & Envtl. Control*, No. 2018-000137, 2020 WL 811729 (S.C. Feb. 19, 2020), *pets. for reh'g filed* (April 27 and May 1, 2020), in addition to being premature given the pending petitions for rehearing, likewise misapplies the operative standing concepts and is unavailing to Appellants' positions in this appeal. In *Preservation Society*, this Court clearly distinguished participation by interested persons "seek[ing] administrative review … in the first instance," *id.* at *6, before the operative agency (there, the ALC, and here, the Commission) with the "statutes and regulations governing *judicial* review, which set forth particularized requirements for invoking the jurisdiction of the appellate courts," *id.* at *5 (emphasis in original). Thus, the fact that Appellants met the standard for intervention as a "party in interest" before the Commission is of no moment to the question of whether each individually meets its burden of invoking this Court's jurisdiction for judicial review of the resulting decision. *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").

identifiable interest in the challenged PR-1 rate. Thus, under any definition of a "party in interest" that is "aggrieved," Appellants have no real, material, or substantial interest in the outcome of the litigation. *Contra Sloan, supra.*

3. This matter is not one of "public importance" and challenges by actual entities affected by the PR-1 rate are foreclosed; therefore, no future guidance on the issue is needed

Like any standing argument that lacks real substance or basis in fact, Appellants next predictably seek refuge in the life raft of public importance standing. Here again, Appellants' arguments do not pass muster.

The public importance exception affords standing only if "'an issue is of such public importance as to require its resolution for future guidance.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 79, 753 S.E.2d 846, 852-53 (2014) (quoting *Davis v. Richland Cnty. Council,* 372 S.C. 497, 500, 642 S.E.2d 740, 741 (2007)). Despite Appellants' efforts in their opposition to muddy the waters of the issues in question, the only relevant issue raised for consideration is the continuing applicability and relevance of the PR-1 rate set by the order at issue in this case. Yet, it is undisputed that the PR-1 rate in question has already been superseded by subsequent order of the Commission and that none of the forty (40) QFs who have contracts subject to the rate for the period in question are parties to this appeal individually. It is thus axiomatic that a decision by this Court as to the PR-1 rate will provide no guidance to future avoided cost proceedings, as there are no analytical guideposts at issue on which future challenges could be case. *Contra ATC South, Inc. v. Charleston Cnty.*, 380 S.C. 191, 199, 669 S.E.2nd 337, 341 (2008) ("For a court to relax general standing rules, the matter of importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance.").

Nor do the issues in this appeal resound with any profound public importance. Any revised PR-1 rate would have no retroactive application, beyond the existing forty (40) QFs, nor could other QFs seek a contract under a revised rate for that period, as any entity seeking a PR-1 rate today would receive the rate approved in the Commission's recent, unappealed order. Appellants seem to conflate the "public importance" standard this Court applies for the application of the exception to standing with Appellants' alleged "public interest" in seeking a revision to the broader avoided cost rate structure. *See* Opp. at 21 (stating Appellants "sought to promote their members' interests as well as the broad '*public interest*.'") (quotation in original, emphasis added); and Opp. at 22 (stating the "relevant federal statutory and regulatory provisions acknowledge the *public interest* at stake in determining avoided cost rates") (emphasis added); *but see Carnival Corp.*, 407 S.C. at 80, 753 S.E.2d at 853 (criticizing the plaintiff's use of the Court's granting of its petition for original jurisdiction on the basis of the case's "public interest" to argue "*a fortiori* the case is also of sufficient public importance such that the public importance exception applies").

Indeed, Appellants' arguments on these points actually undercut the public importance justification that they are attempting to achieve. *See* Opp. at 21 (stating that the public importance of this issue is supported "by the fact that not a single qualifying renewable energy has contracted with DESC/SCE&G under the most contentious tariff in this proceeding, the PR-2 tariff, whereas prior rates did elicit such projects."). If the issues were so controversial as to create the public firestorm that Appellants suggest, would it not be presumed that at least one of the alleged disenfranchised QFs would have intervened below or joined one the Appellants in objecting to the avoided cost rates and be a participant in this appeal? The silence and lack of participation speaks volumes undercuts Appellant's claims of public importance. In truth, this case is similar to others

in which this Court has declined to apply the public importance exception and it should do so here again.

4. Appellants have failed to meet their burden of demonstrating all three elements of constitutional standing

Finally, even if this Court agrees that the 3-part test for constitutional standing adopted by the Court in *Sea Pines* provides an appropriate rubric to analyze whether Appellants have properly invoked this Court's appellate jurisdiction as a "party in interest" that is "aggrieved," Appellants have failed to satisfy the test for constitutional and, by extension, associational standing. *See Beaufort Realty Co.*, 346 S.C. at 301, 551 S.E.2d at 589 ("An organization has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.") (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). In order to satisfy Constitutional standing, a party must show all three elements of the test throughout the litigation: "[f]irst, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[; s]econd, a causal connection must exist between the injury and the challenged conduct[; and t]hird, it must be likely that a favorable decision will redress the injury." *Carnival*, 407 S.C. at 75, 753 S.E.2d at 850 (citing *Sea Pines*, 345 S.C. at 600–01, 550 S.E.2d at 291–92 (2001) ("The party seeking to establish standing carries the burden of demonstrating each of the three elements.")). As is particularly relevant the Court's instant inquiry, the elements of standing "'are not mere pleading requirements but rather an indispensable part of the plaintiff's case[;]' therefore, 'each element must be supported ... with the manner and degree of evidence required at the successive stage of

the litigation." *Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 745 S.E.2d 385 (Ct. App. 2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Appellants unabashedly argue that "SCSBA members were deprived of just and reasonable, non-discriminatory avoided cost rates, resulting in no projects contracting under the 2018 PR-2 rates," Opp. at 23, in support of its argument of injury. Yet, earlier in their opposition, Appellants state that they "do not dispute DESC's claim that no QFs have sought to enter into PPAs with DESC based on the 2018 PR-2 rate." Opp. at 7. Thus, in fact, contrary to the concrete and particularized injury that is required, Appellants admit that none of their members have been "injured" by these allegedly discriminatory avoided cost rates. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (rejecting a claim for injury that is merely "conjectural or hypothetical"). Appellants essentially request this Court to suspend reality and the facts of what actually occurred in favor of its claim that its members would have been injured, had they actually signed onto the allegedly discriminatory avoided costs rates. Appellants' reliance on hypothetical injuries should be rejected. Moreover, and with respect to the PR-1 rate actually at issue here, the fact that forty (40) QFs applied for the rate during the operative period disproves Appellants' suggestion that the rate was so punitively low that no projects were willing to contract for the rate.

Likewise, because there have been no actual injuries suffered by Appellants, then there does not exist a "cause" for such hypothetical harm that is attributable in the manner suggested by Appellants. Even if the Court were inclined to ignore Appellants' admission that "no QFs have sought to enter into PPAs with DESC/SCE&G based on the 2018 PR-2 rate," the avoided cost rate is not attributable to any mistake or malfeasance on DESC/SCE&G's part, but instead, as detailed extensively in its primary briefing to the Court, it resulted from the fact that during the period immediately preceding the order subject to the instant appeal, DESC/SCE&G experienced a

substantial growth in the number and output of solar facilities interconnected with its system, to the tune of the addition of 875 MW[7] of solar generating capacity, equivalent to 17% of the company's 2018 forecasted system peak demand. [Tr. Vol. 1, p. 231, ll. 19-21, R. p. 861; tr. Vol. 1, p. 285, ll. 10-13, R. p. 915.] If anything, the low avoided cost component was traceable directly to the actions of qualifying solar generating facilities flocking to sign up for the previous rate, which, in turn, drove the incremental avoided costs downward.

Lastly, the concepts of mootness in this case truly parallels the doctrine of standing when considering the redressability prong of standing. Even if a party can demonstrate an injury-in-fact that has a causal connection to the alleged harm, the party must still demonstrate that is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision of the Court. *See Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (citing *Lujan*, 504 U.S. at 560-61); *see also Vt. Agency of Natural Res. v. Stevens*, 529 U.S. 765, 771 (2000) (stating that there must be "a '***substantial likelihood***' that the requested relief will remedy the alleged injury in fact") (emphasis added) (internal citations omitted); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) ("The redressability requirement ensures that a plaintiff 'personally would benefit in a tangible way from the court's intervention.'").

Similar to the discussion *supra* regarding mootness, it is in the context of redressability that the insufficiency of Appellants' arguments are most readily apparent. With respect to the PR-1 rate directly at issue here, because none of the Appellants (as associations) are among the forty

[7] For example, on February 23, 2018, when it pre-filed the direct testimony of its witnesses with the PSC, SCE&G had 700 MW of solar capacity available under existing power purchase agreements. [Tr. Vol. 1, p. 208, ll. 9-11, R. p. 838.] When it pre-filed rebuttal testimony on March 29, 2018, the amount of solar capacity under contract had increased to 865 MW. [Tr. Vol. 1, p. 231, ll. 18-19, R. p. 861.] By the time of the hearing, that amount had increased to 875 MW. [Tr. Vol. 1, p. 285, ll. 10-13, R. p. 915.]

(40) QFs who contracted under the PR-1 rate, then a favorable decision of this Court will not impact any of the Appellants as to the PR-1 rate in any way, shape or form. In short, none of the Appellants allege an injury or interest based on the PR-1 rate; thus, Appellants' injuries, to the extent they exist at all with respect to non-PR-1 issues, would not be redressed by a favorable decision of the Court on the PR-1 rate.

In sum, while DESC/SCE&G contends that the Court should apply the traditional 3-part constitution test to determine whether Appellants' invocation of this Court's appellate jurisdiction as a "party in interest" that is "aggrieved" is sufficient to confer standing, the facts and evidence before the Court conclusively demonstrate that Appellants are unable to show an injury-in-fact that is traceable to complained-of conduct and can be redressed by a favorable decision of the Court. Appellants lack standing to challenge the PR-1 rate.

WHEREFORE, having fully set forth its reply, 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
June 2, 2020