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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Public Service Commission Docket No. 2018-319-E

Duke Energy Carolinas, LLC .....Appellant-Respondent,

v.

Office of Regulatory Staff, Hasala Dharmawardena, CMC  
Recycling, Cypress Creek Renewables, LLC, S.C. Department  
of Consumer Affairs, Sierra Club, South Carolina Coastal  
Conservation League, South Carolina Energy Users Committee  
South Carolina Solar Business Alliance, Inc., the South  
Carolina State Conference of the National Association for the  
Advancement of Colored People, Upstate Forever, Vote Solar,  
and Walmart, Inc., ..... Respondents,

of whom South Carolina Energy Users Committee and The  
South Carolina Office of Regulatory  
Staff are ..... Respondents-Appellants.

Appellate Case No. 2019-001900

And

Duke Energy Progress, LLC .....Appellant-Respondent,

v.

Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress  
Creek Renewables, LLC, S.C. Department of Consumer Affairs,  
Sierra Club, South Carolina Coastal Conservation League,  
South Carolina Energy Users Committee, South Carolina  
Solar Business Alliance, Inc., the South Carolina State Conference  
of the National Association for the Advancement of Colored  
People, Upstate Forever, Vote Solar, and Walmart,  
Inc., ..... Respondents,

of whom the Office of Regulatory Staff is .....Respondent-Appellant.

Appellate Case No. 2019-001904

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BRIEF OF *AMICUS CURIAE*  
SOUTH CAROLINA FARM BUREAU FEDERATION  
IN SUPPORT OF THE OFFICE OF REGULATORY STAFF

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## **INTEREST OF AMICUS**

Agribusiness is one of the largest sectors of the South Carolina economy. The South Carolina Farm Bureau is a statewide organization that brings together farmers, ranchers, entrepreneurs, agribusiness professionals, and food enthusiasts to strengthen the future of agriculture in South Carolina. With approximately 90,000 members, the South Carolina Farm Bureau works at the federal, state, and local levels to develop and promote unified policy positions to help farmers and strengthen our economy.

As explained here, electricity is critical to modern farming. Farmers therefore have a strong interest in the rates that are approved by the Public Service Commission of South Carolina.

## INTRODUCTION

Everyone eats. For all of our differences, that is one thing we have in common. Sometimes we eat because we are hungry. Sometimes we eat because the clock says it is meal time. Sometimes we eat because it is an occasion, like Thanksgiving or a birthday. But we always eat.

To feed us all, farms and farmers play a major role in our State and our economy. Agribusiness supports more than 200,000 jobs and has an annual impact of more than \$40 billion. The State's 25,000 farms cover almost a quarter of its land. The millions of bushels, barrels, and pounds of food, along with hundreds of thousands of livestock, on these farms ensures that we have food in grocery stores and restaurants.

Providing this food for everyone is hard work. Physically so, to be sure, but also financially. Farmers operate on narrow margins. Thus, a small increase in their costs has a significant impact on their bottom line.

Electricity is an unavoidable cost in modern farming. Many farmers have multiple (even dozens) of meters, each with a monthly base charge. Farms need so many meters because fields and buildings can be too far apart to share a single meter. Farmers use electricity in a variety of ways, from running irrigation systems to turning on lights in barns and shops to operating equipment. Put simply, today's farmers cannot function without electricity.

Taking into account the impact of electricity rates on farmers is an important part of determining what rates are just and reasonable. The Public Service Commission has done that here. Nothing Duke Energy Progress and Duke Energy Carolinas argue

warrants overturning the comprehensive orders in these cases, which strike the required balance between the companies' profits and customers' interests. Indeed, doing what the companies want will threaten to put some farmers out of business, which hurts all South Carolinians.

## ARGUMENT

### I. Utility rates must take customers' interests into account.

Unlike most businesses that compete against other companies, utilities are typically monopolies. Because of their unusual market position, utilities are regulated, including the rates they can charge. In South Carolina, the General Assembly has given that regulatory power to the Public Service Commission. *See* S.C. Code § 58-3-140(A).

An electric utility's rates "shall be just and reasonable." *Id.* § 58-27-810. What is just and reasonable "depends upon many circumstances." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978) (quoting *Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692 (1923)). The Public Service Commission must take into account "all relevant facts." *Id.*

From the perspective of a utility, the Public Service Commission must approve rates that allow the utility to have a fair but not unreasonable profit. As this Court has explained, on the one hand, a utility "is entitled" to rates that will give it a return on equity that is "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties." *Id.* at 595–96, 244 S.E.2d at 281 (quoting *Bluefield*, 626 U.S. at 692). On the other hand, a utility is not entitled "to profits

such as are realized or anticipated in highly profitable enterprises or speculative ventures.” *Id.* at 596, 244 S.E.2d at 281 (quoting *Bluefield*, 626 U.S. at 692–93).

But the inquiry of what rates are just and reasonable is not limited to the utility company itself. The Public Service Commission must also take into account “the consumer interests.” *Id.* (quoting *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *see also* S.C. Code § 58-4-10(B) (“‘public interest’ means the concerns of the using and consuming public with respect to public utility services, regardless of the class of customer, and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services”). Based on this requirement, rates may not be “so high as to be unduly burdensome to the utility’s customers.” *Mims v. Edgefield Cty. Water & Sewer Auth.*, 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983).

## **II. The Public Service Commission has properly taken farming customers’ interests into account.**

### **A. Farming plays a critical role in South Carolina.**

Agriculture has been a core part of South Carolina’s economy since before the Revolution, and today, agribusiness is the biggest economic sector of our economy. (R. p. 209, lines 22–24.) It is also the biggest employer in the State, directly supporting more than 68,000 jobs and supporting generally more than 210,000 jobs. *See* (R. p. 209, lines 24–25); S.C. Dep’t of Commerce, *Agribusiness Industry* (last visited July 8, 2020);<sup>1</sup> Palmetto Agribusiness Council, *Our Vision* (last visited July 8, 2020).<sup>2</sup> South Carolina

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<sup>1</sup> Available at <https://www.sccommerce.com/industries/agribusiness-industry>.

<sup>2</sup> Available at <http://www.scagribusiness.org/vision.php>

has approximately 25,000 farms, comprising almost a quarter of the State's 20 million acres. *See* S.C. Dep't of Agriculture, *About* (last visited July 8, 2020).<sup>3</sup> Agribusiness has an annual impact of almost \$42 billion in this State. *See* S.C. Dep't of Commerce, *Agribusiness Industry* (last visited July 8, 2020).<sup>4</sup>

Beyond the impact that agriculture has on our economy, it also is essential for feeding people, both here in South Carolina and beyond. Last year, South Carolina farms produced more than 37 million bushels of grain, more than 8 million bushels of soybeans, more than 235 million pounds of peanuts, more than 560,000 tons of hay, more than 140 million pounds of watermelons, and more than 90,000 tons of peaches. *See* National Agriculture Statistics Service, U.S. Dep't of Agriculture, *2019 State Agriculture Overview: South Carolina* (last visited July 8, 2020).<sup>5</sup> These farms also produced more than 206 million pounds of milk and had 179,000 beef cattle and 195,000 hogs. *See id.*

## **B. Farmers face unique challenges.**

As Commissioner of Agriculture Hugh Weathers testified to the Public Service Commission, "the farming economy is different." (R. p. 199, line 11.) As a starting point, farms have much lower margins than many businesses. They operate on margins as narrow as 1 or 2 percent. (R. p. 209, lines 2–3.)

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<sup>3</sup> Available at <https://agriculture.sc.gov/about/>.

<sup>4</sup> Available at <https://www.sccommerce.com/industries/agribusiness-industry>.

<sup>5</sup> Available at [https://www.nass.usda.gov/Quick\\_Stats/Ag\\_Overview/state/Overview.php?state=SOUTH%20CAROLINA](https://www.nass.usda.gov/Quick_Stats/Ag_Overview/state/Overview.php?state=SOUTH%20CAROLINA).

On top of that challenge, recent years have been particularly hard on farmers. The weather has been harsh. From the historic flood of 2015 to hurricanes in 2016 and 2018, rain and wind have destroyed crops. (R. p. 198, line 17; p. 208, lines 18–20; p. 221, lines 6–12; p. 271, lines 18–20.) Fertilizer prices continue to rise. (R. p. 218, line 23.) And tariffs have hit farmers especially hard. (R. p. 209, lines 12–16; p. 213, lines 15–19; p. 216, lines 5–16.) In the face of these challenges, commodity prices are going down. (R. p. 218, line 24.) And now there is a global pandemic, which has depressed markets further. As Commissioner Weathers succinctly put it, “the markets have not been very kind to farmers in the last few years.” (R. p. 199, lines 14–16.)

Put together, these challenges pose grave threats to many farms. Making a profit is hard. (R. p. 222, lines 13–17.) And farmers who are the fifth or sixth generation to work their land worry that they might be the last generation to do so. (R. p. 214, lines 2–5.)

### **C. Electricity is essential to modern farming.**

The nature of farming has changed. For generations, farm labor was exclusively manual. Draft animals pulled plows, and rain was the only irrigation system that existed. Now, however, farming is much different. Electricity is a critical part of farming operations. Farms need electricity for things such as irrigation systems, fuel pumps, lights in barns and shops, and equipment like welders. (R. p. 210, line 17–p. 211, line 1.)

Unlike most residential consumers, farmers do not have a single electric meter. Farmers have multiple meters, up to even thirty or forty. (R. p. 198, line 22–p. 199, line

10.) For example, one witness testified he had forty-two separate power bills. (R. p. 91, line 23.) Some meters are tied to irrigation systems, and others to systems for drying crops. (R. p. 199, lines 1–3.) Still others are connected to pack houses, tobacco houses, small services, barns, bulk barns, and grain bins. (R. p. 220, lines 19–22.) Many of these meters are used only seasonally. Irrigation systems, for instance, need to run only a couple months each year, and crop-drying buildings are used only while storing crops. (R. p. 199, lines 1–4.)

Switching fuel sources is not a realistic option. Moving from electricity to diesel,<sup>6</sup> for example, would be “very costly” because of the infrastructure necessary for different fuel sources. A farmer would have paid for the electric lines to be installed, and he would face new expenses from having the required equipment for diesel to be put in. (R. p. 217, line 14–p. 218, line 4.)

One final (if obvious) observation about farms and electricity: Farmers have only one source to obtain electricity. (R. p. 32, lines 3–5.) They cannot shop around and compare prices, as they can for fertilizer or feed. Electricity comes only from the utility company, and only at the rates approved by the Public Service Commission. *See supra* Part I.

**D. Rate increases hit farmers particularly hard.**

The heart of South Carolina’s agriculture economy is the Pee Dee. (R. p. 209, line 25–p. 210, line 2.) Many of the farms in the Pee Dee get their power from Duke Energy

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<sup>6</sup> Diesel was the only alternative fuel source discussed by any of the witnesses. Given concerns about global warming, pushing farmers toward diesel is probably not good public policy.

Progress. (*E.g.*, R. p. 270, lines 23–25.) Thus, any increase in rates for Duke Energy Progress will have a substantial effect on farms in South Carolina.<sup>7</sup>

Particularly so with increases on the base facilities charge (“BFC”). (This is the set charge that applies to each meter every month, regardless of how much energy is used.) Some farmers are small general service (“SGS”) customers, but others are medium general service (“MGS”) customers. (R. p. 211, lines 11–24.)

Duke Energy Progress proposed large increases to the BFC for both SGS and MGS customers. After negotiations, Duke Energy Progress agreed to ORS’s proposed BFC of \$12.34 for SGS customers, and the Commission adopted that rate. (R. p. 109.) This was a 24.5 percent increase from the previous BFC for SGS customers.

Reaching the new BFC for MGS customers was not such an easy process. Duke Energy Progress proposed a BFC of \$40.03—a whopping 133 percent increase over the previous rate of \$17.17. The South Carolina Farm Bureau and its members objected to such a drastic increase. Ultimately, the Commission approved an increase in the BFC for MGS customers that was more in line with the increase in the BFC for SGS customers. (R. p. 109–10 (allowing an increase no greater than the average of the increase for SGS customers and SGS Constant Load customers).)

Had Duke Energy Progress gotten the BFC it wanted for MGS customers, farmers would have suffered disproportionately. They would have paid this higher BFC

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<sup>7</sup> Lest the Court be left with the impression that farmers are outliers on this front, other groups will also suffer from these increases. Low-income people might have to decide whether to pay their power bill or for their medicine, (R. p. 239, lines 5–9), and seniors on a fixed income may not be able to keep up with the rate of the increases, (R. p. 242, lines 18–25).

on all of their meters—including those that are used only seasonally. For a farmer with thirty meters, Duke Energy Progress would have imposed an annual increase of over \$8,200 dollars—before including any increase in the rate for electricity that the farmer used. Farmers’ slim margins make this increase hard to absorb. For some, it may be impossible. (R. p. 202, line 21–p. 203, line 3.) These are fixed costs that cannot be passed on to consumers. Commodity prices are driven by larger market forces, so any increase in the BFC necessarily cuts into farmers’ already slim margins. (R. p. 202, lines 7–18.)

This same analysis applies to the other costs the Duke companies sought to recover through rate increases but were not allowed to. These disallowed costs—including the CAMA costs in North Carolina, the litigation expenses, and the deferred operating costs—total more than \$800 million. There is only one source for this revenue: customers, including farmers. Under the Commission’s order, consumers are paying enough. There is no need to upset the balance the Commission struck and impose a greater—and unbearable, in some cases—burden on customers.

In the final analysis, farmers do not take issue with Duke Energy Progress making a profit. Farmers run businesses too and understand that a primary goal of a successful business is making a profit. But what profit Duke Energy Progress may make must take into account the burden on the public. The Commission did just that, ensuring that Duke Energy Progress is able to make a reasonable return on equity while not overly burdening the public, including farmers.

## **CONCLUSION**

The Public Service Commission’s orders should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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This Brief of *Amicus Curiae* complies with Rules 208(b) and 211, SCACR, as required by Rule 213, SCACR.

s/ Wm. Grayson Lambert  
Wm. Grayson Lambert