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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

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, 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, South Carolina Electric and Gas, CMC Steel South Carolina, South Carolina Energy Users Committee, Southern Current, LLC, and South Carolina Office of Regulatory Staff,

Of whom South Carolina Electric & Gas and South Carolina Office of Regulatory Staff, are Respondents.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (together, "Conservation Groups") petition for partial rehearing of Opinion No. 27994 issued on September 9, 2020 ("Opinion"), which dismissed this matter on the grounds that the issues were moot and the Conservation Groups lacked standing.

The Conservation Groups do not seek rehearing on mootness but respectfully submit that the mootness decision made the standing holding unnecessary. The standing holding overlooks the direct, immediate impacts that avoided cost rates have on the Conservation Groups and their members, and threatens to foreclose review of various other Public Service Commission ("Commission") decisions at a time when more—not less—oversight is needed. South Carolina is in the midst of an energy transformation. With the abandonment of the $9 billion V.C. Summer nuclear units by respondent Dominion Energy South Carolina f/k/a South Carolina Electric & Gas Co. ("Dominion"), both the state legislature and this Court have recognized the need for greater oversight of Commission decisions. Left uncorrected, however, the Opinion could usher in a new era in South Carolina utility law, with ratepayers stripped of their rights to contest Commission decisions however erroneous or harmful they may be.

STANDARD FOR REHEARING

Rule 221(a), SCACR, provides that a party who believes the Court overlooked or misapprehended points of law or fact is authorized to petition the Court for rehearing. The petition for rehearing must state "the points supposed to have been overlooked or misapprehended by the court," Rule 221(a), SCACR, so as "to aid the court in deciding correctly a case heard by it." *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, __, 167 S.E. 234, 238 (1933).

ARGUMENT

I. DISMISSAL ON STANDING OVERLOOKS IMMEDIATE HARM FROM ERRONEOUS AVOIDED COST RATES

Given the Court's holding that the case is moot, it was unnecessary to also hold that the Conservation Groups lacked standing, especially where the Opinion overlooks the serious and immediate injury done by the Commission's decision on appeal.

The Opinion reasons that, as to ratepayer bill impacts from erroneous avoided cost rates, "any impact on customers' rates must come from the PSC's ruling in a general ratemaking proceeding, not from the PSC's ruling to set rates for renewable energy under PURPA." Op. at 5. That is factually incorrect. Recovery of utility costs incurred under avoided cost rates occurs through annual fuel cost rider proceedings—the exact type of docket at issue in this case—and not in general ratemaking proceedings. S.C. Code Ann. § 58-27-865(A)-(B). Once the Commission approved the avoided cost rates on appeal, the utility was entitled to charge ratepayers for amounts expended under those rates *immediately*; it was not required to wait until a general rate case. Even after the Energy Freedom Act, which now requires the Commission to set avoided cost rates in "separate [proceedings] from the electrical utilities' annual fuel cost proceedings conducted pursuant to Section 58-27-865," the actual recovery of avoided costs from ratepayers is determined in the fuel cost proceedings. S.C. Code Ann. § 58-27-865(A)(2)(c) (including as "fuel costs related to purchased power" the "avoided costs under the Public Utility Regulatory Policy Act of 1978, also known as PURPA"); *see also, e.g.*, *In re Annual Review of Base Rates for Fuel Costs for Dominion Energy South Carolina, Inc.*, Docket No. 2020-2-E, Order No. 2020-331 (S.C. P.S.C. Apr. 30, 2020) (recovering avoided cost expenditures as part of annual fuel cost proceeding).

More significantly, the Opinion overlooks the immediate impacts of avoided cost rates on the deployment of renewable power. While the Conservation Groups and their ratepaying members are impacted by avoided cost recovery through their electricity bills, they are *also* directly impacted by improperly set rates (as in this case) that *preclude* solar and other renewable energy projects enabled by the Public Utilities Regulatory Policies Act ("PURPA"), 16 U.S.C. §§ 824a-3 *et seq.* PURPA seeks to "introduce new energy producers into the marketplace" and counteract traditional monopoly efforts to exclude qualifying competitors. *Kamine/Besicorp Allegany L.P. v. Rochester Gas & Elec. Corp.*, 908 F. Supp. 1180, 1192 (W.D.N.Y. 1995). The law is also intended to reduce dependence on fossil fuels for electricity generation and to encourage renewable energy development and energy efficiency, *see FERC v. Mississippi*, 456 U.S. 742, 745-46 (1982)—goals which the South Carolina General Assembly echoed with its unanimous passage of the Energy Freedom Act, *see, e.g.*, S.C. Code Ann. §§ 58-40-20; 58-41-05. However, when, as here, avoided cost rates are set incorrectly, the competition from independent power producers required by PURPA is thwarted, and ratepayers represented by the Conservation Groups are injured by the lack of competitive clean energy projects that reduce pollution and resource consumption. *See* Conservation Groups Reply at 1; Conservation Groups Opp'n to Mot. To Dismiss at 18-19.

The Opinion does not question or even address the Conservation Groups' evidence showing that their members' interests are directly harmed by erroneous avoided cost rates beyond any cost recovery considerations. Whereas PURPA charges the Commission with facilitating renewable independent power, it is undisputed that not a single independent power producer entered into a power purchase agreement with Dominion under the artificially depressed 2018 PR-2 tariff. Conservation Groups Opp'n to Mot. To Dismiss at 20. The harm to

the Conservation Groups' members' interests cannot be remedied by a future rate case, since the independent power thwarted by erroneous rates—and the pollution avoidance that those clean energy facilities would have provided—*cannot be retroactively cured in a subsequent general rate case*. The Opinion overlooks this critical fact.

Thus, as a practical matter, for PURPA to properly function in South Carolina, avoided cost rates and other conditions for independent power producers set by the Commission must be judicially reviewable. This is also true as a legal matter. Section 210(g) of PURPA states that:

> [j]udicial review may be obtained respecting *any proceeding* conducted by a State regulatory authority . . . for purposes of implementing any requirement of a rule under [Section 210(a)] in the same manner, and under the same requirements, as judicial review may be obtained under section 2633 of this title . . . .

16 U.S.C. § 824a-3(g)(1) (emphasis added). Section 210(a) directs the Federal Energy Regulatory Commission to issue rules requiring "electric utilities to offer to . . . purchase electric energy from [small power production] facilities," *id.* § 824a-3(a), including rules for determining the avoided cost rates paid to such facilities, *id.* § 824a-3(b). Those rules are then implemented by state regulators through proceedings like the one at issue in this litigation. *Id.* § 824a-3(f). Section 2633, meanwhile, permits "[a]ny person [to] obtain review of any determination . . . in the appropriate *State court* if such person *intervened* or otherwise participated in the original proceeding . . . ." 16 U.S.C. § 2633(c)(1) (emphasis added). Case law from other states confirms that this guarantee of judicial review extends to solar advocates and environmental non-profit organizations. *See, e.g., Vote Solar v. Mont. Dep't of Pub. Serv. Regul.*, No. DA 19-0223, 2020 WL 4931491 (Mont. Aug. 24, 2020) (reviewing and reversing order setting erroneous avoided cost rates); *Sierra Club v. Pub. Serv. Comm'n of W. Va.*, 241 W. Va. 600, 827 S.E.2d 224 (2019) (reviewing method employed to analyze and approve avoided cost rate increase); *see also MTSUN, LLC v. Mont. Dep't of Pub. Serv. Regul.*, No. DA 19-03632020 WL 5639709, at

*12-13 (Mont. Sept. 22, 2020). If granted, the Conservation Groups' petition would avoid the direct conflict that currently exists between the Court's dismissal and federal law.

Finally, it is important to note that, in addition to harming the Conservation Groups by thwarting the renewable power intended by PURPA, the erroneous avoided cost rates challenged on appeal also factor into the deployment of Dominion's Demand Side Management and Energy Efficiency (together, "DSM/EE") measures. Avoided cost rates are used to set the threshold for "cost effectiveness" for DSM/EE measures, meaning that an improperly deflated avoided cost will (improperly) prevent DSM/EE from qualifying as cost-effective. The result is to reduce the deployment energy efficiency and other programs that would otherwise save customers money and reduce environmentally harmful fossil fuel generation.

In sum, the dismissal based on standing misapprehends and overlooks how the Commission's erroneous avoided cost determinations harm the Conservation Groups and their members beyond impacting cost recovery on electricity bills. Conservation Groups thus respectfully request that the Court grant rehearing and withdraw its standing holding.

II. DISMISSAL ON STANDING HAS FAR-REACHING CONSEQUENCES, POTENTIALLY GUTTING COURT OVERSIGHT OF AN ARRAY OF SIGNIFICANT COMMISSION DECISIONS

The Conservation Groups further request that the Court withdraw its standing holding as it could severely curtail judicial oversight of the Commission at a time when the citizens of South Carolina and their elected leaders have sought more—not less—oversight of monopoly utilities. In denying standing to challenge a Commission decision on the erroneous theory that a party could seek to undo the damage in a general rate case, the Opinion could be read to insulate other important Commission decisions from judicial review. Beyond avoided cost rate determinations, integrated resource plans ("IRPs"), S.C. Code Ann. § 58-37-40, Certificates of Need, S.C. Code Ann. § 58-33-110, and DSM/EE programs, S.C. Code Ann. § 58-37-20, all

approve utility projects or courses of action that set in motion hundreds of millions, and indeed billions, of dollars in expenditures that utilities will *later* seek to pass on to ratepayers.[1]

For example, pursuant to S.C. Code Ann. § 58-37-40, South Carolina utilities must prepare and submit IRPs to the Commission every three years to forecast long-term electricity demand and to propose resource investments to meet that demand. The Commission, in turn, must approve, modify, or reject a utility's proposal according to the "reasonable and prudent" standard in S.C. Code Ann. § 58-37-40(C)(2), but that determination has no immediate rate impacts, as any cost recovery resulting from an IRP is still subject to Commission approval in a *future* proceeding. *See* S.C. Code Ann. § 58-37-40(C)(4). A utility IRP may propose, for instance, to build a billion-dollar coal-fired power plant in ten years to meet projected demand, whereas intervenors urge less expensive, risky, and polluting investments in solar generation or energy efficiency measures. Under the Opinion, if the Commission were to approve the IRP, intervenors like the Conservation Groups might not have standing to appeal that determination. Even if intervenors could challenge cost recovery for the power plant in a future rate case, by that time, the opportunity for intervenors' preferred solution—investing in solar generation and energy efficiency over the intervening years—would have long passed, and their injuries—higher energy costs and fossil fuel emissions—would be beyond remedy. Further, the approved IRP would serve as a basis for the utility to later seek a Certificate of Need, as discussed below, to construct the power plant. The IRP decision would therefore evade any meaningful judicial review despite its direct impacts on ratepayers.

[1] As in the avoided cost rate context, the right to appeal an IRP decision, Certificate of Need, and DSM/EE decision is governed by S.C. Code Ann. § 58-27-2310.

The same issue could arise in Certificate of Need proceedings, in which the Commission authorizes utilities to construct major new facilities such as the aforementioned coal-fired power plant. S.C. Code Ann. § 58-33-110. Here again, utilities recover the costs associated with new facilities in separate general rate cases, not in the Certificate of Need proceedings themselves. But that is not to say, applying the Opinion's reasoning, that a Certificate of Need proceeding has no impact on ratepayers; rather, a Commission decision to grant a Certificate of Need has serious, direct ramifications for ratepayers, the electrical grid, and the environment. The General Assembly acknowledged as much when it required the Commission to make a host of factual findings before issuing a Certificate of Need, including "[t]he nature of the probable environmental impact"; "[t]hat the impact of the facility upon the environment is justified"; "[t]hat the facilities will serve the interests of system economy and reliability"; and "[t]hat public convenience and necessity require the construction of the facility." S.C. Code Ann. § 58-33-160(1). Just as artificially depressed avoided cost rates suppress renewable independent power and guarantee more, harmful pollution, improper approval of a new coal-fired power plant increases carbon emissions and occupies load which could have otherwise been met by renewable power and energy conservation. These impacts to consumer and environmental interests are distinct from any future rate impacts and stem directly from the Certificate of Need decision. Nonetheless, the Opinion would appear to render Certificates of Need unreviewable by this Court, permitting intervenors such as the Conservation Groups to challenge only later cost recovery and not facility approvals that independently injure their members.

On its face, the Opinion may also limit public appeal rights from DSM/EE mechanism proceedings. The Commission has authority to adopt procedures encouraging utilities to offer energy efficiency programs, for which utilities may recover their costs and obtain a reasonable

rate of return on their investment. S.C. Code Ann. § 58-37-20. Pursuant to this authority, the Commission has established independent dockets for each utility in which it approves the mechanism for utilities to pass their DSM/EE program costs to ratepayers, along with the formula for calculating their DSM/EE financial incentives. *See, e.g.*, *Application of Duke Energy Progress, LLC to Establish a New Cost Recovery and Incentive Mechanism for DMS/EE Programs*, Docket No. 2015-163-E (Apr. 30, 2015). However, a utility does not seek Commission approval to pass those costs to ratepayers until separate future proceedings—specifically, the annual DSM/EE rider docket. *See, e.g.*, *Dominion Energy South Carolina, Inc.'s 2020 Annual Update on DSM Programs and Petition for an Update to Rate Rider*, Docket No. 2020-41-E (Jan. 31, 2020). The Commission could, for example, approve an incentive in a DSM/EE mechanism proceeding that, intervenors argue, would not sufficiently encourage DSM/EE or displace fossil fuel generation. Because a DSM/EE mechanism proceeding has no immediate rate impacts, though, the Opinion could prevent intervenors from appealing the decision, even though they suffer direct injuries from increased pollution and electricity costs. While intervenors could later challenge cost recovery in the annual rider docket, that would not provide an effective remedy because they would be precluded from litigating the incentive mechanism previously set by the Commission. *See, e.g.*, *In re Dominion Energy South Carolina, Inc.'s Request for Approval of an Expanded Portfolio of DSM Programs, and a Modified DSM Rate Rider*, Docket No. 2019-239-E, Order No. 2019-880 at 29-30 (S.C. P.S.C. Dec. 20, 2019) (authorizing Dominion's DSM programs for five years and forbidding any party from requesting program review over that period, including in annual rider dockets).

In each example provided, the Commission has authority to approve a utility project or course of action before, and sometimes long before, a cost recovery proceeding in which rates

are set. While the Opinion would still permit appeals from ratepayer bill decisions, rate cases to recover utility costs do not provide a forum to litigate the Commission's prior approval of the actions that incurred those costs. By potentially rendering significant Commission decisions unreviewable, the Opinion would make it nearly impossible for ratepayers to challenge cost recovery at a later date—after the action has already been taken and the money irretrievably spent. There is also a separate opportunity cost: if ratepayers cannot challenge erroneously approved projects *before* they occur, then this Court will have no chance to correct Commission mistakes in time to steer projects in a more prudent direction, ratcheting up the risk of future V.C. Summer debacles. The General Assembly could not have foreseen such an outcome when it passed the Energy Freedom Act and specifically increased public participation in important forward-looking Commission proceedings. *See, e.g.*, S.C. Code Ann. § 58-37-40(C)(1) (directing the Commission to hold proceedings with "intervention by interest parties" for IRPs).

In sum, the broad sweep of the Opinion could have serious consequences for ratepayers and the environment beyond avoided cost rate proceedings, and undermines the guarantee of due process embodied in the state Constitution. S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . .").

III. BECAUSE THIS CASE WAS FOUND MOOT, IT WAS UNNECESSARY TO REACH THE CONSERVATION GROUPS' STANDING

The Opinion declines to reach the standing of the South Carolina Solar Business Alliance because it found the appeal was moot. Op. at 6. The same logic applies to the Conservation Groups, and the Court therefore had no need to reach the issue of their standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (holding courts need not reach standing if a

case is determined moot); *see also Sloan v. Greenville Cnty.*, 361 S.C. 568 (2004) (dismissing cases based on mootness without reaching standing).

In finding the Solar Business Alliance's appeal moot (and therefore not reaching standing), the Opinion recognizes that Dominion did not challenge standing until after briefing such that the Solar Business Alliance "was deprived of the opportunity to fully develop a factual record supporting its claim that its members would have standing." Op. at 6. Dominion likewise did not challenge the Conservation Groups' standing until after the completion of briefing. As with the Solar Business Alliance, that reality favors declining to reach the issue of the Conservation Groups' standing given the Court's dismissal of this case as moot.

On rehearing, the Court should withdraw the Opinion's holding regarding standing to contest Commission orders. The holding is unnecessary given the finding of mootness and, as discussed above, misapprehended the mechanics and impacts of avoided cost rate determinations and overlooked far-reaching effects that could insulate a variety of Commission decisions from judicial scrutiny. Removing the standing holding would preserve the accountability needed to avoid future utility debacles and protect South Carolina ratepayers from needlessly paying millions more for energy than they rightfully should.

CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully request that the Court grant this petition for rehearing and withdraw its holding on the Conservation Groups' standing, as it need not reach this issue if it dismisses the case for mootness.

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/s/ Christopher K. DeScherer
Christopher K. DeScherer
South Carolina Bar No.: 72260
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, SC 29403
Telephone: (843)720-5270
Fax: (843) 414-7039
Email: cdescherer@selcsc.org; and

/s/ Katherine N. Lee
Katherine N. Lee
South Carolina Bar No.: 104478
Southern Environmental Law Center
525 East Bay Street, Suite 200
Charleston, SC 29403
Telephone: (843)720-5270
Fax: (843) 414-7039
Email: klee@selcsc.org

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