

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Nov 03 2020**

APPEAL FROM BERKELEY COUNTY  
In the Court of Common Pleas

S.C. SUPREME COURT

Roger M. Young, Sr., Circuit Court Judge

**RECEIVED**

**Nov 04 2020**

Case No. 2020-CP-08-00821

**SC Court of Appeals**

City of Goose Creek,.....Appellant,

v.

South Carolina Public Service Authority,.....Respondent.

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**APPELLANT’S MOTION TO CERTIFY CASE FOR REVIEW AND TRANSFER  
TO THE SOUTH CAROLINA SUPREME COURT  
AND FOR EXPEDITED HEARING**

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Appellant, the City of Goose Creek (“Goose Creek” or the “City”), respectfully moves pursuant to Rules 204 and 240 of the South Carolina Appellate Court Rules for certification of this case for immediate review by the Supreme Court and for an expedited hearing. Certification and expedited review are appropriate because the case involves an issue of significant public interest that will have an immediate and significant effect on the livelihoods of thousands of people in the state. If the appeal of the decision below must undergo the normal course of appellate review, hundreds of people will lose their jobs, and billions of dollars of economic loss will be suffered by our state, as a result of what Goose Creek sincerely believes to be a patently erroneous ruling of the Circuit Court on a pure question of law.

The issue in this case is whether Goose Creek has the right to provide municipal electrical service to the Mt. Holly Aluminum Smelter (the “Mt. Holly Smelter” or “Smelter”), a current Santee Cooper customer, following annexation by Goose Creek of the land on which the Smelter sits. The Circuit Court incorrectly held that Goose Creek is prohibited from providing such service on the grounds that (1) “Santee Cooper has the exclusive right to provide electrical service” to the Smelter pursuant to S.C. Code Ann. § 58-31-440, and (2) Goose Creek is prohibited from providing such service unless and until it “follows the requirements of S.C. Code Ann. § 58-27-1360 which mandates the only way a municipality may oust a current service provider from its statutorily assigned service territory.” (Exhibit A, Order at 21). Furthermore, the Circuit Court also erroneously declared *sua sponte* that Goose Creek improperly delegated governmental authority to the Smelter’s owner in the agreement to annex the land on which the Smelter sits. In rendering its decision, the Circuit Court reached the exact opposite conclusion as the Federal Energy Regulatory Commission (“FERC”) which, just weeks prior to the circuit’s court’s decision, issued its own decision determining that Goose Creek has the right to serve the Smelter under both federal and South Carolina law. (Exhibit B).

For two reasons, this case involves issues of significant public interest. First, the case is of significant public interest due to the specific effects of the Circuit Court’s decision on the economic well-being of the state, the City and its inhabitants, and the workers at the Smelter and their families during a pandemic. The Smelter is a long-standing economic engine in Berkeley County that, when operating at full capacity, directly provides about 600 high-paying blue-collar jobs, hundreds more indirect jobs, and nearly \$1 billion in annual economic impact to the State of South Carolina. Now, as a direct result of the Circuit Court’s decision, the owner of the Smelter, Century Aluminum of South Carolina, Inc. (“Century”), has issued a notice pursuant to the Worker

Adjustment and Retraining Notice (“WARN”) Act to its employees and the City that the Smelter will permanently close at the end of the year. (Exhibit C). The loss of the Smelter will have a profoundly negative economic impact on the state at large, while directly and significantly harming the local economies of Goose Creek and Berkeley County in particular. It is a significant public interest that these jobs and economic activity not be lost due to a delay in review of the erroneous decision of the Circuit Court on these significant legal issues of first impression.

Second, this case is also of significant public interest because it addresses legal principles of major importance regarding the rights of cities to form and operate municipal utilities and, in particular, how those rights interact with the rights of the state-owned electrical utility, Santee Cooper. The Circuit Court issued a decision on a matter of first impression in which it misinterpreted the plain language of statutes that affect the rights of all suppliers of electricity in the state.

The public has an unquestioned interest in understanding the relative rights of these public bodies and regulated entities to provide electrical service vis-à-vis the other within the state. The answer to such questions has significant importance to all citizens of the state as demonstrated by this Court’s previously exercising both its original and appellate jurisdiction to resolve such questions. This case presents no less than *three* important issues that were not specifically addressed in previous cases:

1. Whether Act 399 of 1984, S.C. Code Ann § 58-31-420, protects the right of cities to provide electrical service to citizens within city boundaries who are current customers of Santee Cooper?
2. Whether a city is required to follow the eminent domain procedures established in S.C. Code Ann. § 58-27-1360 in order to provide electricity service to an existing customer of another supplier of electricity when the city does not seek to acquire any property of the electricity supplier to provide such service?

3. Whether a city improperly delegates governmental power merely by entering an annexation agreement with a property owner that provides both parties with the discretion to determine whether conditions precedent to annexation under S.C. Code Ann. § 5-3-150(3) have been met?

The importance of these legal principles is demonstrated not only by this Court's prior decisions related to municipal electricity service, but also by the recent FERC decision that reached the opposite conclusion of the Circuit Court on the same central issue—whether Goose Creek has the right to serve the Smelter. The FERC decision counsels in favor of this Court's immediate review of the issue for two independent reasons. First, while the FERC's decision was not binding on the Circuit Court's interpretation of state law, it is persuasive authority that the Circuit Court was in error on the state law issues, or at the least, that the Circuit Court's decision is subject to reasonable dispute. Second, the FERC also found that federal law required Santee Cooper to provide transmission access to Goose Creek, which means that the Circuit Court's erroneous decision is the only remaining impediment to Goose Creek being able to serve the Smelter and avoid the harmful economic effects resulting from closure of the Smelter.

Lastly, the Circuit Court's holdings on these issues were all strictly legal in nature, not fact-based, making this case a perfect vehicle to address these issues.

## **BACKGROUND**

### **I. Formation of the Goose Creek municipal utility.**

The Mt. Holly Smelter is located in unincorporated Berkeley County, adjacent to the City of Goose Creek, and has been an integral part of the local community and economy since 1980.<sup>1</sup> Due to the energy-intensive nature of aluminum smelting, the Smelter annually uses the same amount of power as approximately 250,000 homes when operating at full capacity. Thus, the cost

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<sup>1</sup> The Smelter was previously owned for many years by the Alcoa Corporation and is still often referred to as the Alcoa plant.

of electric power is the single most important input in determining the economic viability of the Smelter. The Smelter receives its electricity from the state-owned utility Santee Cooper, and the rate Santee Cooper charges the Smelter for electricity is nearly double the price of power on the open market. The Smelter has tried for years to find a solution to the problem of Santee Cooper's uneconomic rates, but Santee Cooper has blocked these efforts at every turn. Thus, in 2015, as a direct result of Santee Cooper's intransigence, Century was forced to shut down half of the Smelter's operations, putting approximately 300 people out of work and resulting in hundreds of millions of dollars in annual economic loss to Goose Creek and the surrounding community. Furthermore, Century has publicly announced that—due to Santee Cooper's exorbitant power rates—it will have to permanently close the Smelter when its current service contract with Santee Cooper expires on December 31, 2020.

Recognizing the devastating impact the closure of the Smelter would have on the local community, the leadership of Goose Creek and the Mt. Holly Smelter worked together to develop a plan for Goose Creek to annex and provide electrical service through creation and operation of a municipal utility to the 5,000-acre tract of land on which the Smelter sits. The first and immediate purpose of the Goose Creek plan is to prevent the closure of the Smelter by providing it with much lower-priced electric service than is being provided by Santee Cooper. However, the opportunity to attract and support new and additional commercial and industrial development in the newly annexed areas is also a primary purpose in forming the municipal utility. Indeed, Century has announced that, upon the successful result of this action and the commencement of operations by the City's municipal electric utility, it will reinvest in and reopen the half of the Smelter it was forced to close in 2015, which would almost double the number of current jobs at the facility and

result in an infusion of hundreds of millions of dollars of additional annual income into the region at a time when the Coronavirus pandemic has battered the South Carolina economy.

In December 2019, the citizens of Goose Creek overwhelmingly approved—by a more than two-to-one margin—a referendum to form a municipal electric utility in order to carry out this plan, despite fierce opposition from Santee Cooper taken for the self-professed purpose to delay, obstruct, and kill the Goose Creek municipal utility. (*See* Exhibit D).

## **II. Goose Creek’s steps to serve the Smelter.**

As noted, the Smelter currently sits in an unincorporated area of Berkeley County adjacent to Goose Creek. Under the statutory regime discussed below, once the Smelter agrees to annexation, Goose Creek is permitted to supply power through a municipal utility.

To provide for Goose Creek electric service by the municipal utility to the annexed area, the City and Century entered into a Master Annexation Agreement (“MAA”) which sets the terms under which Century will permit Goose Creek to annex its property under S.C. Code Ann. § 5-3-150(3). The MAA includes a series of conditions for annexation that must be fulfilled by December 31, 2020, in order for annexation to occur, which is also the date that Century’s service agreement with Santee Cooper expires.

Among the conditions for annexation is that Goose Creek and Century reach an agreement for conveying an electrical substation located adjacent to the Smelter from Century to Goose Creek for use in delivering electricity to the Smelter and future customers of the municipal utility. This substation is owned by Century and receives electricity from lines operated by Santee Cooper. Because the substation is currently owned by Century and not Santee Cooper, Goose Creek will be able to provide electricity service to the Smelter without the need to acquire any Santee Cooper

property. On August 26, 2020, Goose Creek and Century successfully reached an agreement for Goose Creek to lease this substation from Century, and, if necessary, to purchase it outright.

The MAA also requires Goose Creek to reach an agreement to purchase power and transmission services from suppliers in the interstate competitive power market and purchase transmission services from Santee Cooper at rates and terms provided for by federal law. However, Santee Cooper refused to provide this service to Goose Creek based largely on its assertion that state law gave it the exclusive right to provide electricity service to the Mt. Holly Smelter.

As a result, Goose Creek was forced to initiate an action with the FERC requesting that the agency order Santee Cooper to provide the transmission service required by federal law. Recognizing the need for state court resolution of the state law arguments raised by Santee Cooper, Goose Creek also filed the instant case in the Court of Common Pleas of Berkeley County on March 31, 2020 seeking a declaratory judgment that it has the right and authority under the laws and the Constitution of the State of South Carolina to provide electric utility service to the Mt. Holly Smelter after annexation.<sup>2</sup>

### **III. The FERC decision.**

On August 27, 2020, after reviewing and rejecting all of Santee Cooper's arguments (the same state law arguments Santee Cooper asserted in the instant action), the FERC issued an order requiring Santee Cooper to provide transmission service to Goose Creek. In response to Santee Cooper's argument that state law prohibited Goose Creek from serving the Smelter, the FERC stated:

While Santee Cooper is correct that S.C. Code section 58-31-440 provides for it to continue serving the Mt. Holly Smelter, the immediately preceding section 58-31-

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<sup>2</sup> Prior to the lower court order, Goose Creek filed a Petition for Original Jurisdiction in this Court on April 13, 2020, pursuant to Rule 245, SCACR. On July 8, 2020, this Court denied Goose Creek's Petition.

420 makes clear that Goose Creek’s right to serve the Mt. Holly Smelter under section 5-31-610 supersedes any authority provided to Santee Cooper under section 58-31-440. Section 58-31-420 expressly states that ‘any provisions of this article inconsistent with other laws are not applicable within the municipal limits.’ For these reasons, we find that section 58-31-440 is indeed inconsistent with Goose Creek’s right to serve the Mt. Holly Smelter under section 5-31-610 and is thus superseded by Goose Creek’s right to serve customers within its municipal limits.

(Exhibit B ¶ 84). The FERC also rejected Santee Cooper’s position that this Court’s decision in *City of Abbeville v. Aiken Electric Cooperative, Inc.*, 287 S.C. 361, 338 S.E.2d 831 (1985), barred Goose Creek from serving the Smelter:

Second, we disagree with Santee Cooper’s argument that the South Carolina Supreme Court’s finding in *Abbeville* preserves Santee Cooper’s right to serve customers after those customer premises are annexed by a municipality. *Abbeville* addressed the question of whether Article VIII, section 16 of the South Carolina Constitution, which provides for the formation of municipal utilities, is a limitation on the legislature’s power to regulate utility service areas. Here, unlike in *Abbeville*, Goose Creek does not seek an absolute right to serve in contravention of statute. Rather, it relies on explicit statutory language that preserves its right to serve customers within municipal limits to the exclusion of Santee Cooper. Because Goose Creek relies on explicit authorization from the legislature, it does not seek to limit the legislature’s right to regulate utility franchises and *Abbeville* is inapposite.

(Exhibit B ¶ 85). Based on this decision, the FERC is prepared to order Santee Cooper to provide Goose Creek with transmission access, waiting only on a final determination of the state law issue to do so.<sup>3</sup>

#### **IV. The Circuit Court decision.**

Prior to the FERC decision, Goose Creek filed motions for summary judgment and for judgment on the pleadings in the state court declaratory judgment action. The Circuit Court heard

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<sup>3</sup> The FERC observed that “given the fact that Goose Creek’s petition for declaratory judgment remains pending in South Carolina’s Court of Common Pleas for the Ninth Judicial Circuit, we acknowledge that, as a general matter, state courts are better positioned to analyze the specific questions at issue in this proceeding arising under state law, and emphasize that the Commission may reconsider this determination prior to issuing a Final Order in this proceeding, in light of the outcome of Goose Creek’s petition.” (Exhibit B at ¶ 83).

argument on the motions on September 17, 2020, requested post-hearing briefing on certain issues, and rendered a declaratory judgment on October 12, 2020.

In its Declaratory Judgment Order, the Circuit Court concluded, in direct conflict with FERC, that Goose Creek did not have a right to serve the Smelter after annexation. This holding was based on the mistaken conclusion that Santee Cooper's service rights under S.C. Code Ann. § 58-31-440 did not conflict with the municipal service rights provided in S.C. Code Ann. § 5-31-610 and S.C. Const. art. VIII, § 16, because those provisions “are silent on the questions of: (1) who a municipal electric utility may serve; and (2) whether a City may annex and furnish electric service to premises being served by another supplier of electricity.” (Exhibit A, Order at 12).

The Circuit Court further, and erroneously, held that “when a municipality creates a § 5-31-610 municipal utility and annexes premises being served by another supplier of electricity like Santee Cooper, there is only one method by which it can replace the current supplier and serve those newly annexed premises itself: S.C. Code § 58-27-1360.” (Exhibit A, Order at 14). Thus, the Circuit Court held “that Goose Creek must follow the procedure outlined in S.C. Code § 58-27-1360 in order to displace Santee Cooper as the service provider to the Century Facility.” (*Id.*)

Finally, the Circuit Court also held that the annexation “agreement between Goose Creek and Century illegally binds future actions of the City of Goose Creek and unlawfully delegates powers to Century which can only be exercised by the City Council of Goose Creek, and is therefore void as contrary to the public policy of South Carolina.” (Exhibit A, Order at 17–18).

Goose Creek timely moved for reconsideration of the Order, which the Court denied on November 2, 2020. Goose Creek immediately filed a notice of appeal the same day.

## ARGUMENT

This Court should certify this case because it involves issues of significant public interest and a legal principle of major importance. *See* Rule 204(b), SCACR.

### **The Court should certify this case because it involves issues of significant public interest.**

First and foremost, this case is of significant public interest and in need of expedited review due to the specific effects of the Circuit Court's decision. The customer at issue in this case—the Mt. Holly Smelter—is a long-standing economic engine in Berkeley County that, when operating at full capacity, has an estimated economic impact of close to one billion dollars on the Charleston tri-county region and supports over a thousand jobs, including close to 600 high-paying blue-collar jobs at the Smelter itself. *See* <http://www.savemtholly.com/wp-content/uploads/2015/10/Century-Aluminum-Economic-Impact-Study.pdf>. Due to Santee Cooper's refusal to supply competitively-priced electricity, the Smelter was forced to cut its operations in half in 2015, laying off 300 people and removing close to \$500 million from the South Carolina economy. Now, due to the Circuit Court decision, Century has issued a WARN notice to elected officials and the almost 300 remaining employees at the Smelter that the Smelter will permanently close at the end of the year, if it cannot access competitively priced power. (Exhibit C). The loss of the Smelter would have a profoundly negative economic impact on the state, and Berkeley County in particular. It is a significant public interest that these jobs and economic activity not be lost due to any delay in review of the erroneous decision of the Circuit Court on legal issues of first impression.

Moreover, this case is also of significant public interest because it addresses critical issues of state law regarding the rights of cities to form and operate municipal utilities and, in particular, how those rights interact with the rights of the state-owned electrical utility, Santee Cooper. The Circuit Court decision addressing these rights was fundamentally flawed in several respects.

First, in holding that Goose Creek did not have the right to serve the Smelter after annexation, the Circuit Court disregarded the General Assembly’s clear directive that the service rights granted Santee Cooper under S.C. Code Ann. § 58-31-440 “shall not repeal or modify other laws applicable to electric service within municipal corporate limits, and any provisions of this article inconsistent with other laws are not applicable within the municipal limits.” S.C. Code Ann. § 58-31-420. The Court erred in failing to recognize—as the FERC correctly did—that a reading of Section -440 to bar Goose Creek service to the Smelter after annexation would both “modify” and be “inconsistent with” S.C. Code Ann. § 5-31-610 and Article VIII, Section 16 of the Constitution, which give municipalities the right to form an electric utility and serve all of their inhabitants. *See* § 5-31-610 (“Any city or town may: (1) Construct, purchase, operate and maintain waterworks and electric light works within or without, partially within and partially without, their corporate limits **for the use and benefit of such city or town and the inhabitants thereof**” (emphasis added)); S.C. Const. art. VIII, § 16 (granting cities the right to form and operate a municipal electric utility).

The Circuit Court attempted to resolve the conflict between municipal service rights and Santee Cooper’s service rights by noting that S.C. Code Ann. § 5-31-610 and S.C. Const. art. VIII, § 16 “are silent on . . . whether a City may annex and furnish electric service to premises being served by another supplier of electricity.” (Exhibit A, Order at 12). But this is a quintessential example of begging the question, because those provisions cover the broader issue—that cities have the right to serve their inhabitants unless otherwise limited by statute. As this Court has recognized before, while municipal service rights can be limited by the General Assembly, the right exists unless specifically limited by statute. *See Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm’n*, 304 S.C. 15, 402 S.E.2d 674 (1991) (holding that S.C. Code Ann. § 58-27-670(1) does

not limit the right of cities to annex and provide service in the “corridors” of electrical utilities because such “corridor” areas are not assigned by the South Carolina Public Service Commission such that the limits of S.C. Code Ann. § 58-27-670(1) would apply).

Second, the Circuit Court committed additional legal error by injecting the “ouster” statute, S.C. Code Ann. § 58-27-1360, into its service rights analysis. The right of ouster is the right of cities “to condemn and purchase the facilities” of existing electricity providers “by the exercise of eminent domain.” *City of Abbeville v. Aiken Elec. Coop., Inc.*, 287 S.C. 361, 364, 338 S.E.2d 831 (1985). In 1984, the General Assembly amended S.C. Code Ann. § 58-27-1360 to provide that “condemnation may be instituted only after a PSC finding that existing [] service is inadequate, undependable or unreasonably discriminatory.” *Id.*; *see also* S.C. Code Ann. § 58-27-1360 (“[T]he city or town . . . has the right to acquire the property of a supplier of electricity brought within corporate limits upon a finding by the commission . . . that inadequate, undependable, or unreasonably discriminatory service is being provided and upon payment of just compensation.”) *emphasis added*)).

In finding that Goose Creek must follow the eminent domain procedure defined in S.C. Code Ann. § 58-27-1360 in order to serve the Smelter, the Circuit Court made the fundamental error of interpreting S.C. Code Ann. § 58-27-1360 as a requirement a city must meet in order to serve existing customers of another supplier of electricity in an annexed area rather than what it is: a right of cities to acquire property of another supplier of electricity through eminent domain powers. In finding that the procedures of S.C. Code Ann. § 58-27-1360 must be followed any time a city wishes to serve customers of another supplier of electricity even when it does not acquire the supplier’s property, the Circuit Court ignored the plain language of the statute that only requires a city to use the Section -1360 process when a city is acquiring property of an existing electricity

supplier in order to provide such service, which does not apply in this case. *See* S.C. Code Ann § 58-27-1360. The Circuit Court’s resort to cost-based policy reasons to justify its holding was not only legal error, but also misplaced as Santee Cooper has a mechanism to recover costs—to the extent it will actually suffer this type of loss—under federal law before the FERC, which Santee Cooper is currently pursuing. (Exhibit B at 47 (citing 16 U.S.C. § 824k(c))).

Finally, the Circuit Court also mistakenly *sua sponte* held that the City had unlawfully delegated governmental power in a circumstance where this doctrine had no application because state law itself grants the landowner discretion to determine whether to allow its land to be annexed. *See* S.C. Code Ann. § 5-3-150(3) (“[A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation”). Recognizing the inapplicability of the doctrine, Santee Cooper itself had not even raised the issue.

While the parties disagree on the merits of these legal issues as applied to Santee Cooper and Goose Creek, what cannot be denied is the importance of the issues and the ramifications of the Circuit Court’s broad legal holdings on the issues. The Circuit Court’s holding that S.C. Code Ann. § 58-31-420 has no effect when applied to customers receiving electricity service from Santee Cooper affects the rights of all cities in Santee Cooper’s service territory.

Furthermore, the Circuit Court held that the eminent domain procedure established in S.C. Code Ann. § 58-27-1360 applies *any time* a city seeks to annex land to provide service to a current customer of an electricity supplier, when the language of the statute makes clear that the procedure only applies when a city is acquiring any *property* of an electricity supplier in order to provide such service. This legal holding is perhaps even more significant than the S.C. Code Ann. § 58-

31-440 issue, affecting municipalities across the entire state, all electricity suppliers, and all citizens in the state, and thus warrants review by this Court under Rule 204(b), SCACR.

**The Court should certify this case because it involves important legal principles.**

Furthermore, the case also involves a “legal principle of major importance”: the scope of the right of cities to provide electricity service to their inhabitants in annexed territory, and the process that is or is not required in order to do so under state law. This Court has previously recognized the importance of questions associated with municipal electricity service in annexed territory by exercising both its original and appellate jurisdiction to resolve such questions. *See, e.g., Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm’n*, 304 S.C. 15, 402 S.E.2d 674 (1991); *City of Abbeville v. Aiken Elec. Coop., Inc.*, 287 S.C. 361, 338 S.E.2d 831 (1985). As outlined above, this case presents no less than *three* important issues that were not specifically addressed in those cases:

1. Whether Act 399 of 1984, S.C. Code Ann § 58-31-420, protects the right of cities to provide electrical service to citizens within city boundaries who are current customers of Santee Cooper?
2. Whether a city is required to follow the eminent domain procedures established in S.C. Code Ann. § 58-27-1360 in order to provide electricity service to an existing customer of a supplier of electricity when the city does not seek to acquire any property of the electricity supplier to provide such service?
3. Whether a city improperly delegates governmental power merely by entering an annexation agreement with a property owner that provides both parties with the discretion to determine whether conditions precedent to annexation under S.C. Code Ann. § 5-3-150(3) have been met?

The importance of these legal principles is demonstrated not only by this Court’s prior decisions related to municipal electricity service, but also by the recent FERC decision that reached the opposite conclusion of the Circuit Court on the same fundamental issue of state law—whether a municipality has the right to serve a current Santee Cooper customer once the customer’s

property is annexed. While the FERC's decision was not binding on the Circuit Court, the fact that the tribunals reached opposite conclusions demonstrates that the legal issues are not only of major importance but also subject to reasonable dispute. Moreover, the FERC also found that federal law required Santee Cooper to provide transmission access to Goose Creek, which means that the Circuit Court's erroneous decision is the only remaining impediment to Goose Creek being able to serve the Smelter and avoid the harmful economic effects from closure of the Smelter. Lastly, the Circuit Court's holdings on these issues were all strictly legal in nature, not fact-based, making this case a perfect vehicle to address these issues.

### **CONCLUSION**

This Court should certify this case under Rule 204(b), SCACR. The case raises significant issues of deep public concern regarding the rights of cities and all other suppliers of electricity suppliers in the state, especially the state-owned electricity provider Santee Cooper. Moreover, because the Mt. Holly Smelter is at risk of closing without an expedited decision, affecting the livelihoods of thousands in the state, the Court should order an expedited hearing in the appeal.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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November 3, 2020  
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