RECEIVED

Nov 09 2020

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.

REPLY TO RETURN TO PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240(f) of the South Carolina Appellate Court Rules, the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (together, "Conservation Groups") respectfully submit this Reply in response to the Return of Respondent Dominion Energy South Carolina, Inc. ("Dominion") and in support of the Petition for Rehearing ("Petition") of Opinion No. 27994 ("Opinion").

The Petition was narrowly tailored to the Court's standing ruling and properly identified important issues and implications of the Opinion that the Court overlooked or misapprehended, including the immediate harm inflicted by inaccurately set avoided cost rates and the far-reaching potential to bar Conservation Groups and other intervenors from appealing many important Public Service Commission ("Commission") decisions at a time when South Carolina energy decisions are, and should be, under increased scrutiny. In its Return, Dominion not only admits that the Opinion's standing holding would have far-reaching effects, but indeed seems to exalt in it, going so far as to call Conservation Groups' desire to represent their members' particular interests before the Commission and state courts "an incredible conceit." Return at 12.

Contrary to Dominion's assertions, Conservation Groups' arguments are not barred and were properly included in the Petition as issues overlooked or misapprehended in the Opinion.[1] Moreover, Conservation Groups' proposed remedy—that the Court withdraw the unnecessary standing holding given its dismissal for mootness—is a permissible and appropriate remedy.

[1] Also contrary to Dominion's unfounded accusations, Conservation Groups have no intention to "clog up South Carolina appellate courts," Return at 14, and do not ask this Court to legislate, Return at 11. Rather, Conservation Groups narrowly ask this Court to withdraw the Opinion's holding on standing given its dispositive ruling on mootness. This request would avoid the points misapprehended and overlooked in the Opinion and is well within this Court's authority as described below in this Reply.

ARGUMENT

I. CONSERVATION GROUPS PROPERLY PETITIONED FOR REHEARING ON THE ISSUE OF STANDING

In the Petition, Conservation Groups "state[d] with particularity the points supposed to have been overlooked or misapprehended by the court" as required by Rule 221(a), SCACR. These points included that dismissal for standing overlooks (1) the immediate harm from erroneous avoided cost rates, Pet. at 3-6, and (2) the Opinion's potentially far-reaching consequences that could gut Court oversight of an array of significant Commission decisions, Pet. at 6-10.

In its Return, Dominion contends that Conservation Groups are barred from raising these two points because they were not included in Conservation Groups' opposition to Dominion's Motion to Dismiss. Return at 12. This contention is incorrect for three reasons. First, Conservation Groups did previously address and preserve the issue of immediate harm from inaccurately set avoided cost rates. *See* Pet. at 4 (citing Conservation Groups Opp'n to Mot. To Dismiss at 18-19); *see also* Conservation Groups Opp'n to Mot. to Dismiss at 21-22, 24 (describing Conservation Groups' interests and how inaccurate setting of avoided costs can stifle clean, renewable energy competition in addition to cost recovery impacts on ratepayer bills).

Second, the Court provided a new rationale for dismissing Conservation Groups' appeal for lack of standing that was not argued in Dominion's Motion to Dismiss.[2] In particular, the Opinion provides that "any impact on rates must come from the PSC's ruling in a general

[2] In its Motion to Dismiss, Dominion argued that Conservation Groups were not "aggrieved parties" because the organizations were not Qualified Facilities entitled to sell electricity at the avoided cost rates at issue in the proceeding. Dominion Mot. to Dismiss at 9-10. However, nowhere did Dominion assert that ratepayer challenges to avoided cost rate determinations must wait until a general rate case, as held in the Opinion.

ratemaking proceeding, not from the PSC's ruling to set rates for renewable energy under PURPA." Op. at 5. In addition to being factually inaccurate, *see* Pet. at 3, this language requires Conservation Groups to wait until a general rate case even when ratepayer and member interests are *immediately* impacted by an earlier Commission decision.[3] Taken a step further, the Opinion appears to suggest that ratepayer and Conservation Group member harm can *only* occur in general ratemaking proceedings, which threatens to strip Conservation Groups' members and other ratepayers of their rights to contest Commission decisions that set in motion projects costing millions, or even billions, of dollars and that utilities will later seek to pass on to ratepayers. These are novel standing assertions never raised by Dominion or any other party, and Conservation Groups properly identified with particularity the points overlooked or misapprehended as required by Rule 221(a), SCACR.

Third, Dominion misstates the purpose for which Conservation Groups raise these points to begin with. As discussed in more detail below, the Petition details the points the Court appears to have misapprehended or overlooked—particularly when avoided costs are passed to

[3] Conservation Groups note that it is unclear whether any immediate interests would qualify under the test laid out in the Opinion; the Opinion did not address any of the Conservation Groups' arguments as to the immediate impacts and clean energy market signals of the Commission's erroneous avoided cost decision. These immediate impacts were addressed in the Conservation Groups' Return to the Motion to Dismiss. *See, e.g.*, Conservation Groups Opp'n to Mot. to Dismiss at 18-19, 21-22, 24 (describing interests and the potential of inaccurate avoided cost rate to stifle clean, renewable energy competition in addition to impacts on ratepayer bills). Accurately set avoided cost rates are meant to leave ratepayers indifferent, as recognized in both the Opinion and Dominion's Return, but *inaccurately* set avoided cost rates have immediate impacts as discussed in Conservation Groups' Return to the Motion to Dismiss and Petition for Rehearing. *Compare* Op. at 5; Return at 8 (describing the effect of accurately set avoided cost rates) *with* Conservation Groups Opp'n to Mot. to Dismiss at 20; Pet. at 4 (describing the effect of *inaccurately* set avoided cost rates that "suppress[] renewable generation deployment and improperly inflate[] the costs of DESC's distributed energy generation program for ratepayers").

ratepayers, in what type of proceeding that occurs,[4] and the ways in which Conservation Groups' members are directly harmed by erroneous avoided cost rates.[5] Conservation Groups provided information in the Petition about how those misunderstandings in the Opinion could have the extreme consequence of stripping appellate standing in many significant cases from Conservation Groups and other intervenors.[6] Under the Opinion, it appears that almost no organization could demonstrate standing to appeal, for example, an integrated resource planning decision because it is a not a general rate case, even though such a decision would have sweeping, long-term impacts on utility decisions regarding what electricity resources to build and ultimately charge to ratepayers.

Conservation Groups find little comfort in Dominion's argument that such a result is appropriate because ratepayer interests are also represented by other entities. Return at 13. Certainly, Dominion must understand that the interests of Conservation Groups' members are sometimes aligned but can also differ from those represented by government agencies such as the Office of Regulatory Staff ("ORS") and Division of Consumer Advocacy ("DCA"). Conservation Groups are non-profit, non-governmental organizations whose members share both

[4] Absurdly, Dominion attempts to argue that the Opinion is not factually incorrect on this point because, technically, the avoided costs at issue in this proceeding were not passed to customers in the fuel proceeding. Return at 7 n.4. However, as Dominion concedes, this is only because Dominion had not entered into any contracts under that rate; regardless, in no circumstance would these costs have been passed on in a general rate case. *Id*.

[5] The Court provides as its rationale the fact that under PURPA, avoided cost rates are intended to hold ratepayers harmless. Op. at 5. However, whether or not ratepayer harm actually occurs depends on a factual determination that the rates are properly determined, which Conservation Groups asserted was not the case with the underlying Commission decision. Further, as discussed in the Petition, there are ratepayer and public interest impacts beyond the particular avoided cost rates offered and recovered. Pet. at 4.

[6] Conservation Groups' arguments related to PURPA's judicial review provisions provided further evidence of the Opinion's impractical result in the context of this proceeding. The Opinion would prevent intervenors from appealing PURPA avoided cost rates, a result clearly not intended by that statute. Pet. at 5-6.

pecuniary *and* environmental interests, including promoting clean energy to serve the broader public interest. *See* Conservation Groups Opp'n to Mot. To Dismiss at 18-24. Conservation Groups never stated that they alone could represent the interests of *all* ratepayers; they represent the particular interests of their rate-paying members.

Moreover, it is not clear from Dominion's Return whether even ORS and DCA would be spared the limitations on appellate standing if the Opinion's holding remains in place. ORS has standing to seek review of Commission orders or decisions that "may substantially affect the public interest," but has "the same rights of appeal from commission orders or decisions as other parties to commission proceedings." S.C. Code Ann. § 58-4-80. DCA likewise is authorized to intervene as a party "to advocate for the interest of consumers." S.C. Code Ann. § 37-6-604. But the Opinion provides, incorrectly, that avoided cost rates *only* impact qualifying facilities and have no impact on environmental or consumer interests outside of a general rate case. Op. at 5. As such, it is unclear whether even ORS or DCA could meet this test.

II. A RULING ON STANDING IS NOT REQUIRED TO DISMISS THE CASE AS MOOT

By dismissing the case as moot, the Court obviated any need to rule on Conservation Groups' standing; indeed, judicial restraint cautions against such a ruling where it is unnecessary to the disposition of the case. *See* Black's Law Dictionary (11th ed. 2019) (defining "judicial restraint" as "[t]he principle that when a court can resolve a case based on a particular issue, it should do so without reaching unnecessary issues."). The Opinion's rationale for finding the case moot and declining to reach standing with respect to the Solar Business Alliance ("SBA") applies equally to Conservation Groups, and Conservation Groups respectfully request withdrawal of the standing portion of the Opinion with that recognition.

As an initial matter, Dominion is incorrect that Conservation Groups' decision not to seek rehearing on mootness somehow makes the standing holding necessary to dismiss the case. Return at 5-6. The Opinion found all issues related to the PR-2 rate moot because the Energy Freedom Act made it "no longer necessary or required," Op. at 6, and all issues related to the PR-1 rate moot because any ruling on the expired rate would have no effect on SBA but only result in additional revenue to non-parties, *id.* at 6-7. Applied to Conservation Groups, that two-prong analysis means that their appeal is likewise moot. More importantly, the Court's rationale for not reaching SBA's standing also applies to Conservation Groups—namely, that "[b]ecause Dominion did not challenge the standing of [SBA] until after briefing, [SBA] was deprived of the opportunity to fully develop a factual record supporting its claim that its members would have standing." *Id.* at 6. As with SBA, Dominion waited until after briefing to challenge Conservation Groups' standing, so Conservation Groups were similarly "deprived of the opportunity to fully develop a factual record supporting [their] claim that [their] members would have standing." *Id.* Granting rehearing would therefore allow the Court to make consistent its holdings with respect to all similarly situated appellants.

Where the entire case is moot, judicial restraint counsels against reaching unnecessary issues such as standing. *See PDK Laboratories Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) ("This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further.") (Roberts, J., concurring); *see also Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not reach remaining issues if another is dispositive). Contrary to Dominion's claim, standing is not a "threshold issue for justiciability" that the Court must address before mootness. Return at 6 n.2.

While a justiciable controversy must exist to maintain any action, "[j]usticiability encompasses several doctrines, including ripeness, mootness, and standing." *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 732 (2010). There is simply no evidence whatsoever in the case law that standing takes precedence over, or must be resolved before, mootness; in fact, if anything, the *opposite* is true.[7] The Supreme Court practice, for example, is to "inquire, as a primary matter, whether [the] originating plaintiff . . . still has a case to pursue" before addressing standing to pursue that case. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 (1997); *see also Burke v. Barnes*, 479 U.S. 361, 363 (declining to reach congressional standing because the Court determined the case was moot). Conservation Group's Petition, if granted, would bring the Opinion in conformity with that practice and with the doctrine of judicial restraint.

III. A RULING TO DISMISS ON MOOTNESS WITHOUT REACHING STANDING AVOIDS THE POINTS OVERLOOKED AND MISAPPREHENDED IN THE OPINION

Because the Court dismissed this case for mootness, it need not reach the issue of standing, and withdrawing the unnecessary standing holding would avoid the points overlooked and misapprehended in the Opinion as identified by Conservation Groups in their Petition.

Despite Dominion's claim to the contrary, the Conservation Groups specifically identified the points overlooked or misapprehended in the Opinion on standing as required by Rule 221(a), SCACR. These points include the immediate harm from erroneous avoided cost

[7] Dominion also notably fails to dispute or even reference the cases cited in Conservation Groups' Petition that hold standing need not be determined if a case is dismissed for mootness. *See* Pet. at 10-11 (citing relevant cases); *see also Pres. Soc'y of Charleston v. S.C. Dep't of Health & Envtl. Control*, 430 S.C. 200, 219 n.5, 845 S.E.2d 481, 491 n.5 (2020), reh'g denied (Aug. 7, 2020) (citing *Futch v. McAllister* for holding that an appellate court need not reach remaining issues if another is dispositive); *S.C. Pub. Int. Found. v. S.C. House of Representatives*, 425 S.C. 407, 411, 822 S.E.2d 805, 807 (2019) (citing *Futch v. McAllister* and declining to reach issues of standing and mootness because legislation at issue did not violate state Constitution's One Subject Rule).

rates and the link between avoided costs, annual fuel cost proceedings, and general rate cases, *see* Pet. at 3-6, and the far-reaching consequences of the Opinion's ruling on standing, including stripping oversight of an array of significant Commission decisions such as demand-side management and energy efficiency proceedings, integrated resource planning proceedings, and certificates of need proceedings. *See* Pet. at 6-10; *supra* Section I.

Regarding the immediate harm caused by erroneous avoided cost rates and the link between avoided cost rates and rate case proceedings, Dominion attempts to muddle these issues by discussing instead the distinction between PR-1 and PR-2 rates. Return at 5-6. However, Dominion never actually addresses or disputes Conservation Groups' point that the Opinion misapprehended the immediate harm, including harm beyond pecuniary impacts on electricity bills, from improperly set avoided cost rates and the link between avoided costs, fuel cost proceedings, and rate cases. Regardless of whether PR-1 or PR-2 avoided cost rates are in dispute, the analysis set forth by Conservation Groups is the same. Setting avoided cost rates sends immediate market signals to potential renewable energy providers, and the recovery of avoided costs occurs in annual fuel cost proceedings such as the one at issue in this appeal, not in general rate cases.[8] *See supra* Section I.

Conservation Groups also described at length the far-reaching implications overlooked in the Opinion's ruling on standing. *See* Pet. at 6-10. Dominion does not deny that the Opinion's standing determination has far-reaching consequences. Instead, Dominion essentially argues that

[8] Dominion argues that PURPA has no role in fostering clean energy competition with incumbent monopoly utilities, but this issue has been briefed and cited repeatedly through this case. PURPA's primary intent is to encourage the development of independently produced clean, renewable energy, and the law includes requirements to overcome incumbent utilities' historic resistance to allowing competition from independent power producers. *See, e.g.*, Pet. at 4; Conservation Groups Initial Reply at 2 n.2.

it is fine to deprive Conservation Groups or other interested parties standing to appeal future Commission decisions, even those of grave and substantial import, because there may be other parties that have overlapping interests. *See supra* Section I. In other words, Dominion views standing as a zero-sum game where one party's right to appeal justifies divesting other parties with some similar interests of that right. This is not a sufficient reason to dramatically curtail citizen rights to appeal erroneous Commission decisions, particularly in light of past energy decisions that have led to enormous costs borne by South Carolina ratepayers and resulted in the statewide call for increased scrutiny.

Granting rehearing to withdraw the standing portion of the Opinion avoids both of these issues, and the Court has the authority and ability to do so. *See supra* Section II. The Court need not reach the issue of standing if it has already dismissed the case for mootness. *Id.* Conservation Groups have limited their petition for rehearing to the issue of standing and identified the points misapprehended or overlooked in the Opinion. A ruling dismissing the case for mootness but withdrawing the dismissal for standing would avoid the points misapprehended or overlooked and identified in Conservation Groups' Petition.

CONCLUSION

For the foregoing reasons, the Conservation Groups respectfully renew their request that the Court grant the Petition for Rehearing and withdraw its holding on the Conservation Groups' standing, as it need not reach the issue of standing if it dismisses the case for mootness.

Respectfully submitted,

/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

/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

November 9, 2020