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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, ... Appellant,

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.

RETURN OF RESPONDENT DOMINION ENERGY SOUTH CAROLINA, INC. IN OPPOSITION TO MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF APPELLANT SOUTH CAROLINA SOLAR BUSINESS ALLIANCE, INC.

Pursuant to Rules 213 and 240(e) of the South Carolina Appellate Court Rules ("SCACR"), Respondent Dominion Energy South Carolina, Inc. ("Dominion") submits the within combined Return and memorandum in opposition to the motion of *Appellant* South Carolina Solar Business Alliance, LLC, ("Solar Business Alliance") to file an *Amicus Curiae* brief ("Motion") in support of the petition for rehearing ("Petition") of co-Appellants Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy ("Conservation Groups"), of *South Carolina Coastal Conservation League, et al. v. Dominion Energy South Carolina, Inc*., Opinion No. 27994 (S.C. Sup. Ct. filed September 9, 2020, Shearouse Adv. Sht. No. 35 at 53) ("Opinion"). For the reasons set forth herein, the relief sought by the Solar Business Alliance is untimely, improper, and should be denied. In short, the Solar Business Alliance is a party of record in this appeal, and as a real party in interest in this case, does not qualify as a "friend of the court" affording it the right to seek limited non-party status to file an *amicus curiae* brief in the purported attempt to assist the Court in resolving the issues raised in the Petition. Further, having itself failed to file a petition for rehearing of the Opinion, the Solar Business Alliance's attempted use of an *amicus curiae* brief to circumvent the time period set forth in Rule 221(a), SCACR for the filing of a petition for rehearing, is improper. The Motion should be denied.

STANDARD

"A brief of an amicus curiae (literally 'friend of the court') may be filed only after obtaining leave of the appellate court via motion or at the appellate court's request." Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 439 (3rd Ed. 2016). The determination of whether to grant leave to file a brief as an *amicus curiae* under Rule 213, SCACR, is within this Court's discretion. *See, e.g., Cook v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 179, 184, 420 S.E.2d 847, 850 (1992) (finding no abuse of discretion in the granting of leave to file an *amicus curiae* brief). "An

amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J.).

ARGUMENT

In cases involving *amicus curiae* briefs, it is often stated an *amicus curiae* means "friend of the court," not friend of a party. Through this motion, the Solar Business Alliance dissolves that invisible line even further, as it is a party to *this appeal*. *See* BLACK'S LAW DICTIONARY 106 (11th ed. 2019) (defining an *amicus curiae* as "someone *who is not a party to a lawsuit* but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.") (emphasis added). The Solar Business Alliance cannot satisfy any element of this definition inasmuch as it had a clear ability to seek rehearing of the Opinion if it believed such an action was necessary in order for it to protect against the "unintended consequences that will negatively impact the interest of [the Solar Business Alliance's] members, and businesses and ratepayers across South Carolina, going forward." Motion at 3. It chose not to do so. As a party to this appeal, the Solar Business Alliance is improperly positioned and lacks the authority to seek *amicus curiae* status in an appeal that adversely determines *its* rights. *Alexander v. Hall*, 64 F.R.D. 152 (D.S.C. 1974) (describing an *amicus curiae* brief as a "'friend of the court' as distinguished from an advocate before the court."); *see also* 3B C.J.S. Amicus Curiae § 1 ("[a]n amicus is one who, not as party but just as any stranger might, gives information for the assistance of the court on some matter of law in regard to which the court might be doubtful or mistaken

rather than one who gives a highly partisan account of the facts").On that basis alone, it may not be afforded "friend of the court" status as an *amicus curiae*, but is instead governed by the rules governing parties.

Moreover, because the Solar Business Alliance failed to file a timely petition for rehearing, its own inaction has forever extinguished its appellate rights in this case and it would be improper for it to circumvent the Appellate Court Rules and reassert those rights and interests in the requested form and format. As a party to this appeal and therefore directly subject to the Opinion and its holdings, if the Solar Business Alliance believed the Opinion was wrongly decided on any point, it had an obligation to file a petition for rehearing. Rule 221, SCACR provides that "[p]etitions for rehearing must be actually received by the appellate court no later than fifteen (15) days after the filing of the opinion, order, judgment, or decree of the court." The Opinion was issued on September 9, 2020; therefore, absent an extension,[1] any petition for rehearing was due September 24, 2020.

The Solar Business Alliance acknowledges that it did not file a petition for rehearing, stating that it decided not to do so "[d]ue to several factors," none of which it details in the Motion. To the extent that the Solar Business Alliance believed that the Opinion was wrongly decided by this Court on *any* point, it was incumbent upon it to timely seek rehearing. The fact that it did not legally indicates its acquiescence to the holdings of the Opinion. *Lindsay v. Lindsay*, 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997) ("Failure to challenge the ruling 'is an abandonment of the issue and precludes consideration on appeal.'") (quoting *Biales v. Young*, 315 S.C. 166, 432

[1] In fact, co-Appellants Conservation Groups, represented by different counsel than the Solar Business Alliance, sought and was granted an extension of time to file their collective petition for rehearing, which was ultimately filed on October 9, 2020.

S.E.2d 482 (1993)). Notwithstanding the interest that it seeks to newly assert in the Motion, by failing to exercise its right and obligation to petition for rehearing in accordance with the rules governing the conduct of parties to an appeal, the Solar Business Alliance has abandoned the issues it now seeks to argue in the Proposed *Amicus Curiae* Brief in a manner which exceeds its statutory authority.

In fact, the Solar Business Alliance does not challenge this Court's holding against it that its claims – and the claims of its constituents that it represents as an association in this appeal – are moot. Mot. at 2 ("SBA did not file a [petition] for rehearing on this Court's factually-bound mootness holding."). Further, the Opinion expressly declined to address whether the Solar Business Alliance has associational standing, *see* Opinion at 6 (Shearouse Adv. Sht. No. 35 at 58); therefore, it cannot argue that the Opinion has some preclusive effect on its rights to represent the interests of its constituents going forward, meaning that it has no *standing* interest as it relates to the appeal. Yet, that is the very interest on which it seeks to opine here, further demonstrating that its voice on this issue is not relevant or required.

Setting those infirmities aside, the Solar Business Alliance's stated interest in filing an amicus brief on the issue of the Opinion's holdings as to the Conservation Groups' standing is identical to the arguments and alleged interest advanced by the Conservation Groups in the Petition.[2] *See Ryan*, 125 F.3d at 1063 ("The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse.").

[2] The Motion includes substantial argument that is nearly identical to what is included in its provisionally-filed amicus brief. Rather than address those issues in this Return, consistent with Rule 213, SCACR, Dominion reserves the right to address those topics in a response brief, if the Court is inclined to accept the Solar Business Alliance's brief.

As a result, the proposed amicus brief would not amount to a "friend of the court" brief, but would instead amount to a friend of the Conservation Groups brief that exceeds the purpose and scope of an *amicus curiae* brief. *Id.* at 1064 ("In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation … judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help [they] need for deciding the appeal."); *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000) ("The policy of this court is, therefore, not to grant rote permission to file an amicus curiae brief [and] never to grant permission to file an amicus curiae brief that essentially merely duplicates the brief of one of the parties….").[3] As a result, the Motion is advanced for the purpose of bolstering positions already advanced by the Conservation Groups and circumvents the South Carolina Appellate Court Rules in the effort

CONCLUSION

For the reasons discussed above, the Solar Business Alliance's Motion for Leave to File *Amicus Curiae* Brief should be denied.

[SIGNATURE PAGE FOLLOWS]

[3] There, a three member panel of the Seventh Circuit reaffirmed a decision of a single judge to reject a motion for leave to file amicus curiae briefs by a **non-party** and, in so doing, observed that the proposed amici often seek such leave for the purpose of "circumvent[ing] the page limitation on the parties' briefs, to the prejudice of any party who does not have an amicus ally." *Nat'l Org. for Women, Inc*. 223 F.2d at 617. Here, a **party** is simply attempting to circumvent this Court's rules obligating it to seek rehearing within the time period required under Rule 221, SCACR. As did the Seventh Circuit, this Court should reject the effort of the Solar Business Alliance to impose "a real burden on the court system" and "a burden of study and the preparation of a possible response" by Dominion. *Id.*

Respectfully submitted,

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