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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

Public Service Commission Docket Nos. 2018-319-E & 2018-318-E

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

v.

The South Carolina Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC 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 is ..... Respondent-Appellant.

Duke Energy Progress, LLC ..... Appellant,

v.

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

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellants-Respondents Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, the "Duke Entities" or the "Companies") petition the Court for a rehearing of the opinion filed in this case on October 27, 2021 ("Opinion"). In the Opinion, this Court affirmed in full the appealed rulings of the Public Service Commission of South Carolina (the "PSC" or the "Commission") in the 2018 rate cases filed by the Companies.

As explained below, the Opinion changes the test for rate recovery in South Carolina in a way that is uniquely detrimental to the Companies as the only multi-state electric utilities serving in the state. The Companies have operated a shared system to provide reliable and affordable electric power to customers in South Carolina and North Carolina for decades and have recovered the reasonable and prudent costs of that system on an allocated basis throughout that time. The costs of operating these systems have historically been shared by customers in both states. This cost sharing arrangement has been beneficial to customers in both states, and has resulted in average retail rates for the Companies that are consistently well below national averages. The Companies believe that continued cost sharing will continue to be beneficial to customers as the Companies proceed with future resource planning across their respective footprints in the Carolinas. Because their North Carolina footprint is larger, the Companies' South Carolina customers pay a relatively small allocated portion of these total costs, approximately 10% of the DEP costs and approximately 24% of the DEC costs. The impact of the Opinion could result in significant strain to the shared system approach.

With respect to coal ash, the compliance measures required in the two states were similar, but as a result of the Opinion, the Companies' North Carolina customers will pay their full allocated share of the South Carolina remediation costs while their South Carolina customers will

not be required to pay their allocated share of many of the same costs in North Carolina. This anomaly results from the majority of the Court's failure to recognize the direct benefit to the Companies' South Carolina customers, even though the existence of such a benefit has never been a part of the test for cost recovery in this state.

Similarly, the Court has failed to appreciate that the Commission's denial of a return on deferrals for expenses that would originally have been classified as operations and maintenance ("O&M") costs is not a policy decision, but rather the disallowance of a reasonable and prudent cost incurred by the Companies. When the Commission agrees a cost should be deferred, it must allow for the recovery of a return on that deferral, regardless of the nature of the underlying expense. Otherwise, the Companies have been denied the recovery of a reasonable and prudent cost in violation of *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) and *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923).

GROUNDS FOR PETITION

The Companies respectfully submit that the Court's Opinion overlooked or misapprehended the following points:[1]

I. The Court ignored many of the points raised by the Companies with respect to their request to recover coal ash compliance costs.

A review of the Opinion shows that the Court ignored several of the arguments raised by the Companies, including the following:

- The Commission approved in full the Companies' costs for doing the same things in South Carolina that they did in North Carolina but which the Commission disallowed. If those costs were reasonable and prudent when incurred in South Carolina, why were they not reasonable and prudent when incurred in North Carolina?
- The Companies did not seek to recover anything relating to the Dan River spill, including any penalties. Although the Court accepted that the North Carolina Coal Ash

[1] The Companies incorporate their Appellants' Brief and Reply Brief by reference herein.

Management Act ("CAMA") was remedial in nature, it appeared to place great weight on the Dan River spill in reaching its ruling. It is puzzling, however, that in addressing the dissent, the majority notes that the absence of a spill at the Riverbend plant weighs against any finding of a benefit to South Carolina customers from its closure. If there had been a spill, would the compliance costs have been recoverable? Do South Carolinians have to be harmed to enjoy a benefit?

- Dan Wittliff admitted, "[d]etermining with great precision the CCR [Coal Combustion Residuals] cost increases above and beyond what the federal CCR rules require based on the limited information I received during 12 rounds of discovery— I mean it was a lot of information; it just missed the mark in some cases— is a bit like performing brain surgery with a pick ax." (R. at 4751:17-24). Thus, his testimony does not rise beyond the level of "surmise, speculation or conjecture" and the Commission's order on this point should be reversed as a matter of law. *Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff,* 420 S.C. 305, 317, 803 S.E.2d 280, 286 (2017). The Opinion simply excuses this and finds that despite the clear errors in his testimony, the Commission did not err in accepting it in full. The calculations were not "well-explained and reasonably certain" by Wittliff's own admission.

- The Companies' South Carolina customers benefitted from the Companies' compliance efforts system-wide. The dissent recognized the plain fact that the waters of North and South Carolina are inextricably linked. The Office of Regulatory Staff ("ORS") conceded this point and admitted that South Carolina customers benefitted from the Companies' multi-state system and having these coal ash basins located in another state. Contrary to decades of precedent, the Opinion improperly divorces the compliance phase from the rest of the life cycle of these plants. South Carolinians shared in the cost of building the plants and the ash basins, enjoyed the inexpensive power produced as coal was burned in these plants, and should now share in the cost of retiring these ash basins. The Companies' North Carolina customers are doing so with respect to the South Carolina ash basins.

- The statutory schemes referenced by the ORS and in the Opinion provide for direct allocation. CAMA does not. This alone distinguishes these schemes from CAMA. Similarly, the costs in question in *N. Virginia Elec. Coop., Inc. v. Fed. Energy Regulatory Comm'n*, 945 F.3d 1201, 1207 (D.C. Cir. 2019) were not system costs, but rather related to aesthetic concerns in one jurisdiction. Here, the costs were incurred as part of the life cycle of burning coal to generate electric power across the entire system. As such, they should have been allocated as system costs.

II. The Opinion changes the established basis for cost recovery.

The Opinion appears to add two new requirements to the established basis for cost recovery in South Carolina. In addition to establishing costs were reasonable and prudent (which has always been the standard), utilities will now be required to show (1) that the cost resulted from local (South Carolina) or national regulation; and (2) that it benefitted South Carolina ratepayers beyond the

low cost electricity they received. This after the fact change is arbitrary and capricious. Moreover, it stands to disproportionately (if not uniquely) affect the Companies as the only South Carolina electric utility serving customers in multiple states. Per the Opinion and the Commission's orders, if all of the Companies' plants had been located in South Carolina, all of the requested compliance costs would have been recoverable. Similarly, if all of the costs incurred are directly traceable to federal law, all of the requested compliance costs are recoverable.

In addition, this change ignores that the current cost allocation system works in some cases for the benefit of South Carolina rate payers. For example, historically, North Carolina rate payers pay their share of increased South Carolina property tax costs that do not benefit them.

III. The Opinion contains factual errors.

The Opinion contains several errors or misapprehensions as to the numbers involved in the Companies' requests to recover certain coal ash compliance costs. As an initial concern, the Opinion speaks in terms of total system numbers, rather than the much smaller South Carolina retail allocated share. For DEC, the Company sought to recover deferred coal ash compliance costs incurred between January 1, 2015 through September 30, 2018 and estimated costs to be incurred from October 2018 through December 2018 plus deferred depreciation and a return on the deferred balances totaling $242 million on a South Carolina retail basis. For DEP, the request was $50 million on a South Carolina retail basis at the time of the application, which was later revised to $45 million when the full 2018 numbers became available. The Opinion speaks entirely in terms of gross numbers without acknowledging that the Companies only allocated a small percentage of the total bill for compliance to their South Carolina customers, consistent with approved allocation methodology.

In addition, the Opinion appears to be confused about Jon Kerin's revised Exhibit 10 in the DEP case. Very simply, this revised exhibit reflected actual costs through the end of 2018, rather

than the estimates used at the time of the original application in November 2018. As the Court will recall, the applications were made in late 2018 and the early pre-filed testimony did not include final numbers for that year. This change is explained in Kerin's pre-filed testimony. (R. at 700, 704). This timing issue could have been addressed easily by Wittliff or the Commission.

The Opinion further states that the Companies did not provide the Commission with an alternate path other than accepting Wittliff's calculation as a whole. This is incorrect. The Companies did not pursue an all or nothing stance with respect to Wittliff's assessment of costs attributable to CAMA. Although the Companies did not present a competing calculation, they did provide a basis for allowing costs Wittliff questioned, both through their own witnesses and the cross-examination of Wittliff. The Commission could certainly have accepted less than all of Wittliff's recommendations. And should have, as previously briefed.

In addition, the Court suggests the Companies somehow benefitted from Wittliff's failure to use the correct numbers. Again, this is incorrect. The Commission looked to Wittliff for the amount to disallow. The Companies have not been authorized to recover more than was requested.

IV. The Court erred in finding the commerce clause argument to be unpreserved.

The Court erred in finding the Companies' Commerce Clause argument to be unpreserved. "To preserve an issue for appellate review, an appellant must object at his first opportunity." *State v. Sullivan*, 310 S.C. 311, 314, 426 S.E.2d 766, 768 (1993). In this case, this issue was not ripe until the Commission ruled, revealing the violation of the Commerce Clause for the first time. Under these circumstances, raising the issue in a petition for rehearing or reconsideration is sufficient to preserve it. *Id; see also MailSource, LLC v. M.A. Bailey & Assocs., Inc.*, 356 S.C. 370, 374–75, 588 S.E.2d 639, 641 (Ct. App. 2003) (holding issue of whether court used the proper standard could be raised in a motion for reconsideration). There is no equivalent to a directed

verdict motion in Commission practice. The first chance the Companies had to make this argument was at the Petition for Rehearing stage. The Court erred in failing to reach this issue on its merits.

V. The Court erred in failing to find that a return was required on deferrals as a matter of law.

Once a cost has been deferred, it is no longer an O&M cost, but is instead a regulatory asset. *See* 18 C.F.R. pt. 101. As such, it should earn a rate of return. Jonathan Lesser and Leonardo Giacchino, *Fundamentals of Energy Regulation* 122 (2007). Financing a deferred cost over decades with no return does not make the utility whole and does not allow it to recover all of its reasonable and prudently incurred costs as required by *Hope* and *Bluefield*—instead, it requires the utility to make an interest free loan to its customers. As such, this determination by the Commission as affirmed in the Opinion went beyond a mere policy choice and amounted to an error of law. If this portion of the Opinion is not reconsidered, customers will find themselves paying for these extraordinary expenses as they are incurred, rather than spread out over a period of years. That will result in more rate cases and more rate increases.

CONCLUSION

For all of these reasons, the Court should grant rehearing of the Opinion.

Respectfully submitted,

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