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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2020-229-E

IN RE: Dominion Energy South Carolina, Incorporated's Establishment of a Solar Choice Metering Tariff Pursuant to S.C. Code Ann. Section 58-40-20 (See Docket No. 2019-182-E)	)))))))	**DOMINION ENERGY SOUTH CAROLINA, INC.'S MOTION TO RECUSE**

Pursuant to S.C. Code Ann. Reg. 103-829, Dominion Energy South Carolina, Inc. ("DESC") submits to the Public Service Commission of South Carolina (the "Commission") its Motion to Recuse Commissioner Thomas J. Ervin for his actions and statements on the record during the virtual hearing conducted on February 25, 2021, in the above-captioned matter.

INTRODUCTION AND PROCEDURAL BACKGROUND

S.C. Act No. 62 of 2019 ("Act 62"), which was signed into law on May 16, 2019, required the Commission to establish a new net energy metering program for South Carolina (the "Solar Choice Program") for customers submitting applications after May 31, 2021. Pursuant to that mandate, the Commission established the above-referenced docket on September 16, 2020,[1] to review and evaluate DESC's proposed Solar Choice Program tariffs (the "Solar Choice Tariffs"). The hearing in this docket commenced on February 23, 2021.

BASIS FOR RECUSAL

The stated mission of the Commission is "to serve the public of South Carolina by providing open and effective regulation and adjudication of the state's public utilities, through consistent administration of the law and regulatory process."[2] In fulfilling that mission, S.C. Code

[1] *See* Order No. 2020-622.
[2] https://psc.sc.gov/about-us-0/mission-statement

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Ann. § 58-3-30 (B) provides that "[t]he commissioners and commission employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules." In-line with the Commission's stated purpose, Canon 1 of the Judicial Code mandates that each Commissioner must establish, maintain, and enforce "high standards of conduct" to ensure that "integrity and independence" will be preserved.[3] In furtherance of that purpose, Canon 3 of the Judicial Code requires that Commissioners perform their duties "without bias or prejudice."[4] Where a Commissioner's impartiality may reasonably be questioned, that Commissioner "shall disqualify himself or herself."[5] The Comments to the Judicial Code make clear that a Commissioner "is disqualified whenever the [Commissioner's] impartiality might reasonably be questioned."[6]

Where a party shows some evidence of bias or prejudice, South Carolina law makes clear that such Commissioner shall be disqualified.[7] As explained more fully below, Commissioner Thomas J. Ervin should be recused because he violated the Judicial Code and South Carolina law by and through his:

1. Stated personal bias in this proceeding; and
2. Desire to impermissibly serve in a dual role as adjudicator and prosecutor.

A central issue in the current proceeding is the impact the proposed Solar Choice Tariffs will have on all customers. The General Assembly provided the express statutory requirement to "eliminate any cost shift to the greatest extent practicable on <u>customers who do not have customer-sited generation</u> while also ensuring access <u>to customer-generator options for customers who choose to</u>

[3] S.C. App. Ct. R. RULE 501 Canon 1.
[4] S.C. App. Ct. R. RULE 501 Canon 3.
[5] *Id*.
[6] *Id*.
[7] *See, e..g.*, *Patel v. Patel*, 599 S.E.2d 114 (2004); *Roche v. Young Bros., of Florence*, 504 S.E.2d 311 (1998).

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enroll in customer-generator programs."[8] Commissioner Ervin violated the Judicial Code and South Carolina law applicable to this Commission during his examination of DESC Witness Rooks when he stated the following:

> Yeah, there's a market until you take it away, that's exactly right. There's a big market until you take it away and that's what you're proposing we do and I'm not buying it. I'm not buying it and I can tell you that I'm gonna fight it because it's wrong and it's wrong for all of these eleven thousand customers of yours that made a financial investment thinking that they would have a chance over time to save money and you're taking that away. And so I just want you to know I'm not happy about your proposed rate, I don't think it's justified and I'm going to do everything in my power to see that it doesn't pass. I just want to put you on notice because it's not right.
>
> (emphasis added)

Commissioners are expected to conduct themselves with the utmost integrity and impartiality—concepts reflected in the Judicial Code, South Carolina law, and the Commission's stated mission. This requires the Commissioners to hear all evidence, consider all testimony, and rule on all motions in a fair and equitable manner. Prior to Commissioner Ervin expressing his pre-determined conclusions about the outcome of the hearing—and his commitment to serve an impermissible dual role as adjudicator and prosecutor[9]—the South Carolina Office of Regulatory Staff's (the "ORS") Attorney Pittman cross-examined DESC Witness Rooks about the statutory role of the ORS. By way of background, the ORS is statutorily mandated to represent:

> The concerns of the using and consuming public with respect to public utility services, regardless of the class of customer and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high-quality utility services.
>
> S.C. Code Ann. § 58-40-10(B)

Through DESC Witness Rooks's testimony, ORS Attorney Pittman elicited the following:

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[8] S.C. Code Ann. § 58-40-20(G)(1). (emphasis added).
[9] *See Ross v. Med. Univ. of S.C.*, 492 S.E.2d 62 (1997).

1. The ORS is not concerned with the financial viability of any utility;
2. The ORS must necessarily advocate for the best interests of all customers; and
3. The ORS's mission is not concerned with attracting jobs or advancing economic development.

Having just heard ORS Attorney Pittman—with full knowledge of the ORS's statutory obligations to advocate in the best interest of all of DESC's approximately 750,000 customers—Commissioner Ervin declared his allegiance to DESC's "eleven thousand" customer-generators. This declaration was made without the ORS having the opportunity to call its first witness regarding the impact on DESC's remaining hundreds of thousands of non-participating customers and ignoring the fact that the ORS filed testimony advocating for the elimination of certain costs borne by non-participating customers—particularly low-income customers. This conduct runs afoul of the Judicial Code and South Carolina law. Specifically, it reveals a personal bias on the part of Commissioner Ervin—evidenced by a pre-determined conclusion prior to the close <u>any party's</u> case in chief—and a desire to serve as adjudicator and prosecutor. It is clear that Commissioner Ervin has already made a decision in this docket on the record when saying "I'm going to do everything in my power to see that it doesn't pass." DESC is simply forced to submit this Motion to avoid a biased and prejudicial decision in this docket. Sadly, Commissioner Ervin's conduct—with this clear and unambiguous action—threatens the public confidence in the ability of the Commission to faithfully perform its adjudicative function in this docket.

For the reasons above, DESC has due process concerns regarding the remainder of this proceeding and the logical outcome and therefore respectfully requests:

1. Commissioner Ervin shall disqualify himself from the remainder of this proceeding;

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2. Commission Ervin shall avoid any further contact with members of the Commission or its staff regarding this proceeding; and

3. Commissioner Ervin shall not attempt to influence any member of this Commission or its staff regarding this proceeding.

CONCLUSION

For these reasons, and for those set forth above, the Motion should be granted.

Respectfully Submitted,

s/ Matthew W. Gissendanner
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Attorneys for Dominion Energy South Carolina, Inc.

Cayce, South Carolina

This 26th day of February, 2021.

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This is to certify that I have caused to be served on this day one (1) copy of **Dominion Energy South Carolina, Inc.'s Motion to Recuse** via electronic mail upon the persons named below, addressed as follows:

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This 26th day of February, 2021.

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