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THE STATE OF SOUTH CAROLINA

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In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2018-001165

Commission Docket No. 2018-2-E

South Carolina Solar Business Alliance, LLC,

Appellant,

v.

South Carolina Public Service Commission, CMC Steel South Carolina, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, LLC, Southern Current, LLC, and South Carolina Coastal Conservation League and Southern Alliance for Clean Energy,

Of whom, South Carolina Electric & Gas and South Carolina Office of Regulatory Staff are,

Respondents.

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INITIAL REPLY BRIEF OF APPELLANT SOUTH CAROLINA SOLAR BUSINESS ALLIANCE, LLC

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ARGUMENT IN REPLY

Introduction to Argument

In its Initial Brief, appellee South Carolina Electric & Gas Company (hereinafter as, "SCE&G") does its best to characterize the Appeal of the South Carolina Solar Business Alliance (hereinafter as, "SBA"), as an invitation to this Court to second-guess factual findings made by the Public Service Commission of South Carolina (hereinafter as, the "Commission"), motivated by the SBA's "dissatisfaction with the fact that SCE&G did not use historical and outdated information" in its avoided cost calculations. (Respondent, SCE&G's Initial Brief at 36.) Nothing could be further from the truth. The SBA's Appeal focuses on fundamental legal errors in the Commission's Orders: namely, imposing on Intervenors the burden of proving viable alternatives to SCE&G's proposed rates, rather than properly requiring SCE&G to prove that its proposed rates accurately reflected the utility's avoided cost, and were just and reasonable. The SBA also challenges the Commission's failure to make factual findings legally sufficient to support the Commission's approval of the proposed rates.

The substantive impact of the Commission's errors was the "rubber-stamping" of SCE&G's avoided cost calculations that, rather than reflecting the most accurate and up-to-date information, were specifically designed to *avoid* taking into account the single most important "changed circumstance" affecting SCE&G's generation portfolio in 2017-18: the failure and abandonment of the V.C. Summer nuclear project. This failure left SCE&G with a massive capacity shortfall that would naturally have led to a substantial increase in avoided capacity rates had SCE&G not changed its approach to assessing avoided capacity costs. (R.___ Lynch Cross/Exhibit). SCE&G received a pass from the Commission on the (required) fall 2017 PR-2 update, which gave the company time to come up with a rationale for concluding that solar

facilities are ineligible for capacity payments on SCE&G's system, because (according to SCE&G) they do not provide capacity during certain winter peak hours.

To be clear, because of this conceptual leap SCE&G did not find it necessary to (and did not in fact) actually *calculate* any avoided capacity rates for solar facilities.

ARGUMENT IN REPLY

The Commission committed at least two fundamental, and reversible, legal errors by improperly shifting the burden of proof to intervenors, including the SBA, and by failing to even consider whether intervenors had raised a specter of imprudence with respect to SCE&G's proposal to eliminate avoided capacity payments to independent power producers. Rather than addressing these issues head on, SCE&G argues that the burden shifting scheme set forth by this Court in *Hamm* does not apply to avoided cost rate-making. That argument is incorrect as it lacks any basis in the text of *Hamm*, any other case law, or any governing statutory authority.

SCE&G next argues that intervenors "have not identified any evidence that the PSC misapprehended or overlooked or that presented a tenable basis to raise the specter of imprudence." (Respondent, SCE&G's Brief at 31.) But there is no indication from the Commission's Amended Order that it even considered whether intervenors had raised a specter of imprudence, as they were required to do in applying the burden-shifting scheme from *Hamm*. Finally, grasping for legal authority, SCE&G seeks to apply commercial income tax case law to require intervenors to carry the burden of proving the viability of their alternative proposals. Those cases have no application here (as the cases themselves say), and there is simply no authority that would shift the burden to intervenors to prove their alternative avoided cost proposal. Absent any controlling legal authority, the Commission erred in concluding that SCE&G's proposal was reasonable in the absence of a prove, viable alternative.

The Commission committed these legal errors that must be reversed by this Court.

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I. THE BURDEN SHIFTING SCHEME SET FORTH BY THIS COURT IN *HAMM* APPLIES TO RATE-MAKING AS A WHOLE AND NOT ONLY TO A UTILITY'S PREVIOUSLY INCURRED EXPENSES.

In their Brief, SCE&G argues that "*Hamm* does not apply to the PSC's determination of prospective avoided costs. Avoided costs do not reflect any prior 'expenses' that SCE&G incurred and is seeking to recover through increased rates, such as those that were at issue in *Hamm*." (Respondent, SCE&G's Brief at 14.) SCE&G suggests that this Court in *Hamm* applied the presumption of reasonableness only to expenses and not to rates. (Respondent, SCE&G's Brief at 13-14 & n. 8.) But the *Hamm* court made no such distinction, as the burden-shifting scheme set forth in *Hamm* applies to all costs and expenses that go into utility rate making, including those for avoided costs.

In *Hamm*, this Court held that: "Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith." *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992) (remanding for further findings by the Commission). The Court said nothing to indicate that this presumption would apply only to retrospective costs. SCE&G further implies that the *Hamm* court distinguished between "costs" and "expenses" (Respondent, SCE&G's Brief 13-15), but the Court actually used those words interchangeably, *Hamm*, 309 S.C. at 289, 422 S.E.2d at 114 ("Although the burden of proof of the reasonableness of *all costs incurred* which enter into a rate increase request rests with the utility, *the utility's expenses* are presumed to be reasonable and incurred in good faith." (emphases added)). And SCE&G points to no specific language in *Hamm* that would create the distinction upon which they seek to rely.

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Not only is SCE&G's argument not supported by the text of *Hamm*, it would be virtually impossible to implement in practice. SCE&G fails to explain how it would differentiate between retrospective *expenses* that are entitled to a presumption of reasonableness and prospective *costs* that would not be entitled to such a presumption. In any event, the Commission here certainly did not make that distinction and there is nothing in the record to indicate that SCE&G itself did either. Moreover, it is curious why a utility would argue that it is *not entitled* to a presumption of reasonableness in the first place. But here it is clear here that SCE&G seeks to avoid the application of *Hamm*'s burden-shifting scheme as it cannot point to anything in the Commission's decision (a draft of which SCE&G was responsible for drafting) that it adequately evaluated and weighed the evidence in light of the shifting burden.

Grasping for some textual support for its retroactive/prospective argument, SCE&G asserts that both the Conservation Groups and the SBA erroneously cited to S.C. Code Ann. §§ 58-27-810 and -865(f) for the proposition that "[e]very rate made, **demanded or received** by any electrical utility ... shall be just and reasonable." (Respondent, SCE&G's Brief at 15 n.12 (emphasis in original).) According to SCE&G, "[a]voided costs do not pertain to rates 'demanded or received' by SCE&G, but reflect the amounts **to be paid** by SCE&G to Qualifying Facilities." (*Id.* (emphasis in original).) But SCE&G completely ignores the word "made" in the referenced statute. Avoided cost rates are indisputably a "rate made" under S.C. Code Ann. § 58-27-810 and thus they are presumed to be "just and reasonable." *See also* S.C. Code Ann. § 58-27-10 (defining "rate" to "mean[] and include[] every compensation, charge, toll, rental, and classification, or any of them, demanded, observed, charged, or collected by any electrical utility for any electric current or service charged by it to the public and any rules, regulations, practices, or contracts affecting any such compensation, charge, toll, rental, or classification"); Public

Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3(b)(stating that a utility's rates for purchases from Qualifying Facilities "shall be just and reasonable"); 18 C.F.R. § 292.304(a) (same). There is nothing in the statute's words "demanded or received," nor anywhere else in statute or case law, that creates the distinction SCE&G seek to manufacture – namely that the presumption of reasonableness applies only to retrospective expenses and not to prospective costs that are components of the overall avoided cost rate.

II. THE COMMISSION FAILED TO EVEN CONSIDER WHETHER INTERVENORS, INCLUDING THE SBA, RAISED A SPECTER OF IMPRUDENCE.

SCE&G accuses the Conservation Groups and the SBA of "opportunistically identify[ing] discrete issues and portions of the record taken in isolation to suggest the PSC ignored evidence presented by the parties that allegedly demonstrated SCE&G's proposed avoided cost rates were imprudent." (Respondent, SCE&G's Brief at 31.) According to SCE&G, "[a] close review of the record reflects that the Conservation Groups and the Solar [Business] Alliance have not identified any evidence that the PSC misapprehended or overlooked or that presented a tenable basis to raise the specter of imprudence." (*Id.*) Finally, SCE&G asserts that intervenors have not met "their burden to prove the PSC's order 'is clearly erroneous in view of the substantial evidence on the whole record.'" (*Id.* (quoting *Leventis v. S.C. Dep't of Health & Envtl. Control*, 340 S.C. 118, 136, 530 S.E.2d 643, 653 (Ct. App. 2000)).)

As an initial matter, SCE&G is mistaken that intervenors, including the SBA, have a burden to prove that the Commission's order was clearly erroneous. As the Court of Appeals noted in the case relied upon and quoted by SCE&G, an agency's decision must be overruled if it is "(a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e)

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clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; ***or*** (f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion." (*Leventis*, 340 S.C. at 130, 530 S.E.2d at 650 (citing S.C. Code Ann. § 1-23-380(A)(6)) (emphasis added).)

As raised below and in the SBA's Initial Brief, the Commission created a number of reversible legal errors here by (1) improperly shifting the burden of proof to intervenors; (2) failing to find that intervenors raise a specter of imprudence (or making any findings on the question; and, in the alternative, (3) failing to make sufficient factual findings as to its application of the burden-shifting scheme. Where, as here, intervenors have raised a number of reversible legal errors, there is no independent requirement that intervenors also have a burden to prove that the Commission's order was clearly erroneous.

As noted above, SCE&G argues that intervenors have taken a narrow view of the record and "have not identified any evidence that the PSC misapprehended or overlooked or that presented a tenable basis to raise the specter of imprudence." (Respondent, SCE&G's Brief at 31.) But it is SCE&G that ignores the Commission's complete failure to even address the question of whether, assuming the *Hamm* burden-shifting scheme applies, intervenors raise a specter of imprudence. In that light, it is hard to imagine how intervenors could possibly identify any evidence that the Commission misapprehended or overlooked in the context of raising a specter of imprudence because neither SCE&G, intervenors, nor this Court have any idea what the Commission thought about whether intervenors had raised such a specter. That is in stark contrast to *Hamm* where the Court found that the Commission had made specific findings on the issue of imprudence. *See Hamm*, 309 S.C. at 287, 422 S.E.2d at 113 ("In this case, there was no direct evidence of imprudence. The Commission found the rerating itself did not suggest

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imprudence but was the result of normal operating and engineering constraints."). In this case, the Commission did not even mention the concept of "specter of imprudence" in its decision. *See Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("The Commission's findings of fact "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings."); *see also* S.C. Code Ann. § 58-27-2100 (The Commission's "findings shall be in sufficient detail to enable the court on review to determine ... whether proper weight was given to the evidence.").

SCE&G also asserts, in setting forth the standard of review, that "[t]he PSC is recognized as the 'expert' designated by the legislature to make policy determinations regarding rates; thus, the role of a court reviewing such decisions is very limited." (Respondent, SCE&G's Brief at 10 (quoting *GTE Sprint Commc'ns Corp. v. Pub. Serv. Comm'n of S.C.*, 288 S.C. 174, 179, 341 S.E.2d 126, 128-29 (1986)).) In *Hamm*, however, the Court clarified that "[t]he Commission sits as the trier of *facts*, akin to a jury of experts. This Court is without authority to set aside an agency's judgment on a *factual issue* where there is substantial evidence of record to support the agency's decision." 309 S.C. at 287, 422 S.E.2d at 113 (emphases added; citation omitted). The issues complained of by intervenors are not factual issues, but rather legal errors for which the Commission is not entitled to such deference. *See Seabrook Island Prop. Owners Assoc. v. S.C. Pub. Serv. Comm'n*, 303 S.C. 493, 497, 401 S.E.2d 672, 674 (1991) (noting that the "expert" status of the Commission "does not somehow diminish the PSC's duty to support its conclusions with factual findings; indeed, that status *heightens* the duty to make explicit findings of fact which allow meaningful appellate review of these complex issues" (emphasis added)).

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III. INTERVENORS BORE NO BURDEN OF PERSUASION TO DEMONSTRATE THAT ANY ALTERNATIVE AVOIDED COST PROPOSAL WAS JUST, REASONABLE, AND APPROPRIATE.

According to SC&G, intervenors "each bore a burden of persuasion to demonstrate by a preponderance of the evidence that their recommendations would result in avoided costs that were just, and reasonable and appropriate [because] '[i]n general, the party asserting the affirmative issue in an adjudicatory administrative proceeding has the burden of proof.'" (Respondent, SCE&G's Brief at 16-17 (quoting *DIRECTV, Inc. & Subsidiaries v. S.C. Dep't of Revenue*, 421 S.C. 59, 78, 804 S.E.2d 633, 643 (Ct. App. 2017)). The *DIRECTV* decision has no application here because it involved "corporate income tax, or more importantly, the apportionment of corporate income tax." 421 S.C. at 80, 804 S.E.2d at 644. The *DIRECTV* Court in fact refused to consider a case that discussed "the burden of proof in personal income tax, sales tax, and accommodation tax cases" "because the facts of *Cloyd* are too far removed from the facts of the instant case [involving corporate income tax]." *Id.* If it is improper for a court to consider a case involving the burden of proof in a personal income tax decisions when considering corporate income tax, then it would certainly be inappropriate to apply the burden of proof from a corporate income tax case to a case involving the setting of capacity payments to independent power producers. *See id.* ("We find DIRECTV's reliance on *Cloyd* [the personal income tax case] is misguided.").

SCE&G attempts to rely on another decision involving corporate income tax, *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79, 767 S.E.2d 195 (2014), to support its argument that intervenors bore some burden to prove its alternative proposal. (Respondent, SCE&G's Brief at 17.) This Court in *CarMax* held that the Department of Revenue bore a burden of proving by a preponderance of evidence that its alternative statutory apportionment formula was reasonable because it sought to deviate from a statutory

apportionment formula. 411 S.C. 79, 767 S.E.2d 195. But, in reaching that decision, the *CarMax* court relied upon the apportionment statute in question which specifically contemplated the adoption of an alternate apportionment formula "if reasonable" and meeting several additional requirements. *Id.* (citing and relying upon S.C. Code Ann. § 12-6-2320(A)).

Neither *CarMax* nor *DIRECTV* have any application here as they both involved corporate income tax and the application of tax-specific statutes. In any event, SCE&G is the party who "assert[ed] the affirmative issue in an adjudicatory proceeding" and thus is the party who bears the burden of proof, at least as an initial matter. SCE&G cites no applicable authority to suggest otherwise.

In its Amended Order, the Commission found that "SCE&G's proposal to set avoided capacity costs for its PR-1 and PR-2 rates at zero is reasonable at this time, *in the absence of a viable alternative proposal being presented by any other party.*" (R. ___; Order No. 2018-322(A) at 15 (emphasis added).) Thus, not only did the Commission improperly shift the burden to intervenors, it in fact presumed that SCE&G's proposal to *eliminate avoided capacity costs* was reasonable in the absence of a viable alternative. This effectively shifted the burden from the outset to intervenors to demonstrate the reasonableness of an alternative proposal. The Commission therefore committed a reversible error of law. This error is compounded by the fact that it is virtually impossible for a third party to adequately establish a viable alternative proposal where the utility using a proprietary modeling system that is highly complex in order to evaluate rates, a modeling system to which neither the SBA nor the Conservation Groups had any access during the course of the proceedings below. This information asymmetry underscores the need for the Commission (and the courts) to properly apply the burden-shifting scheme set forth in *Hamm.*

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IV. THE SBA DID NOT WAIVE ITS ARGUMENT THAT THE COMMISSION FAILED TO MAKE SUFFICIENT FACTUAL FINDINGS WITH RESPECT TO ITS APPLICATION OF THE BURDEN OF PROOF.

SCE&G argues that the SBA did not properly preserve for review its argument that the Commission failed to find that intervenors had raise a specter of imprudence. (Respondent, SCE&G's Brief at 48 (citing SBA's Initial Br. at 21).) But SBA plainly raised this issue in its Petition for Rehearing and/or Reconsideration. (SBA's Pet. for Rehearing and/or Reconsideration at 3; R. __.) In its Rehearing Petition, the SBA stated that: "A utility seeking … a proposed rate change bears the burden of showing that its proposed rates are reasonable. Although a utility's proposed rates are entitled to a presumption of reasonableness, *when another party produces evidence to rebut that presumption*, the burden of persuasion shifts back to the Company." (*Id.*; R. __ (emphasis added).) This is precisely the error the SBA now complains of: Did the Commission find, or even address, whether intervenors had produced enough evidence to rebut the initial presumption of reasonableness (i.e. raise a specter of imprudence)? Given that the Commission and the SCE&G were put on notice of this legal error in the SBA's Petition for Rehearing, the SCE&G cannot now rely on waiver to avoid dealing directly with this issue.

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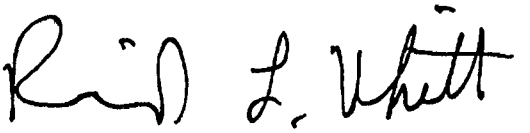
CONCLUSION

For these reasons and the reasons stated in the South Carolina SBA's Initial Brief, this Court therefore must reverse the Commission's approval of SCE&G's Avoided Cost Tariffs PR-1 and PR-2 and 2018 Net Energy Metering Rider to Retail Rates, which is set out in the Commission's May 2, 2018 Amended Order, May 23, 2018 Directive Order, and October 30, 2018 Order denying the petitions for reconsideration or rehearing. Further, this Court should remand to the Commission with instructions that: (i) intervenors have met their burden of raising a "specter of imprudence" with respect to the proposed rates (or, in the alternative, that the Commission must make factual findings with regard to whether intervenors have met their burden of production on this issue); (ii) SCE&G must meet its burden to demonstrate that its proposed rates (and in particular its proposal to eliminate capacity payments to independent power producers) are just, reasonable, and in the public interest; and (iii) petitioners are not required to calculate a "fully viable alternative rate" in order to defeat SCE&G's attempts to prove that its rate are just, reasonable, and in the public interest.

[Signature Page Follows]

Respectfully submitted this the 22nd day of April, 2019.



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