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BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2019-130-E

DOCKET NO. 2018-401-E / 2019-51-E

IN RE:	)	
	)	
Ecoplexus Inc.	)	
	)	
Complainant,	)	**ECOPLEXUS INC.'S BRIEF ON MOTION TO MAINTAIN STATUS QUO**
	)	
v.	)	
	)	
South Carolina Electric & Gas Company,	)	
	)	
Defendant.	)	
	)	

Pursuant to Order No. 2019-541, issued by the Public Service Commission of South Carolina ("Commission") on June 27, 2019, Ecoplexus Inc. ("Ecoplexus") hereby submits this brief on the issue of whether the Commission should grant the relief requested in Ecoplexus' Motion to Maintain Status Quo ("Motion") submitted in the above-captioned proceeding on April 15, 2019.[1] The Motion requests that the Commission decide to "stay Ecoplexus's obligations to make certain payments for Barnwell and Jackson under the terms of the [interconnection agreements ("IAs")], as well as all other milestone obligations under the IAs,

[1] Unless otherwise specified, references herein to "the above-captioned proceeding" shall refer to Docket No. 2019-130-E.

and to maintain the status quo of the IAs until the underlying proceeding initiated by the [Complaint[2]] . . . is resolved."[3]

Summary Of Argument

The question before the Commission is simple: is Ecoplexus required to pay over $10 million in interconnection costs that it contends are illegal and discriminatory under federal law in order to challenge the legality of those very same costs? While DESC believes that Ecoplexus should have to pay such costs *before* being able to challenge whether they are legal, DESC's position is plainly wrong as a matter of law, and would result in inequitable treatment of Ecoplexus.

Section I of this brief describes how DESC's position of requiring Ecoplexus to make the milestone payments while the Commission evaluates the Complaint risks violating federal law, namely PURPA and 18 C.F.R. Section 292.306(a) ("Section 292.306(a)"), as well as associated regulations of the Federal Energy Regulatory Commission ("FERC"). Section II explains why granting the Motion is squarely within the Commission's power, and describes how the Commission has recently either explicitly or effectively granted motions to maintain status quo under circumstances that were of equal or less severity compared to Ecoplexus' current position. Granting Ecoplexus' Motion would therefore be in line with the Commission's recent precedent related to evaluating motions to maintain status quo. Section III describes why granting the Motion is certainly within the "public interest," which according to DESC's counsel at the June

[2] On April 15, 2019, in the above-captioned proceeding, Ecoplexus filed a complaint ("Complaint") against Dominion Energy South Carolina's ("DESC") showing specific violations of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), several provisions of 18 C.F.R. Section 292, as well as specific violations of Commission orders related to the development of Barnwell PV1, a 74.9 MW-ac solar qualifying facility ("QF"), queue position 332 ("Barnwell"), and Jackson PV1, a 71 MW-ac solar QF, queue position 331 ("Jackson") (collectively, the "Projects"), both owned by Ecoplexus.

[3] *See* Motion at P 2.

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27, 2019, oral argument ("Oral Argument"), is the standard that the Commission should employ when deciding whether to grant a motion to maintain status quo or alter an already executed interconnection agreement. Next, Section IV refutes specific arguments raised by DESC in its April 24, 2019, Response to the Motion.[4] Last, Section V presents an alternative ground for the Commission to consider that would allow Ecoplexus to proceed with its Complaint without being required to make the milestone payments. Specifically, the Commission could find that because DESC violated Section 5.2.1 of the South Carolina Interconnection Procedures (the "SC Interconnection Procedures") by failing to provide "executable" and enforceable IAs to Ecoplexus for the Projects, that the IAs were never in effect, and thus that the milestone payments were never required to be paid by Ecoplexus.

Whether the Commission grants the Motion or proceeds under one of the alternative grounds described herein, Ecoplexus must be allowed to proceed with its Complaint, including its claim related to discriminatory interconnection costs under Section 292.306(a), without being required to pay the milestone payments at issue, which Ecoplexus contends are based on interconnection costs assigned to it in a discriminatory manner.[5]

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[4] *See generally* SCE&G's Response in Opposition to Motion to Maintain Status Quo, Docket No. 2019-130-E (Apr. 24, 2019) ("DESC April 24 Response").

[5] Notably, in evaluating the Motion, the Commission need not consider the underlying substantive issues in the Complaint. Prior to the Oral Argument, Hearing Officer Minges confirmed in an email exchange with counsel for Ecoplexus that the purpose of the Oral Argument was to address the issue of interconnection agreement milestone payments and the resulting motions to maintain status quo, and that the underlying substantive issues in the Complaint, such as DESC evaluation and assignment of interconnection costs, would be addressed at a later time. Further, as noted by Ecoplexus' counsel at the Oral Argument, the Oral Argument was not intended to be a "mini-trial" on the merits, which differs from South Carolina Circuit Court proceedings. Accordingly, Ecoplexus is not required to present a prima facie case related to the merits of its Complaint in order for the Commission to grant the Motion. *See* Transcript of June 27, 2019 Oral Argument at 70:22—72:9.

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I. DESC's Position Conflicts With Federal Law And FERC's Regulations

A. Requiring Ecoplexus To Pay Milestone Payments In Order to Proceed With Its Complaint Would Violate Federal Law

Ecoplexus filed its Motion in order to "stay Ecoplexus's obligations to make certain payments for Barnwell and Jackson under the terms of the IAs, as well as all other milestone obligations under the IAs, and to maintain the status quo of the IAs until the underlying proceeding initiated by the complaint of Ecoplexus against SCE&G (the 'Complaint'), submitted contemporaneously with the Motion, is resolved."[6] As previously described by Ecoplexus in the above-captioned proceeding, "the main reason Ecoplexus is seeking to stay its obligation to make the first milestone payments for the Projects is because [it is] Ecoplexus' position that the interconnection costs for the Projects, and therefore the milestone payments, were calculated in a discriminatory, *and therefore illegal*, manner."[7] Importantly, Section 292.306(a) states that "Each qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority (with respect to any electric utility over which it has ratemaking authority) or nonregulated electric utility may assess against the qualifying facility *on a nondiscriminatory basis* with respect to other customers with similar load characteristics."[8] Accordingly, if Ecoplexus were required to pay *any* interconnection costs that were assigned to it by DESC in a discriminatory manner, including the milestone payments, that payment would automatically result in a violation of Section 292.306(a).

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[6] *See* Motion at P 2.

[7] *See* Letter from Ecoplexus to SCE&G, Docket No. 2019-130-E, at 1 (Apr. 23, 2019) (emphasis in original).

[8] Section 292.306(a) (emphasis added).

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Importantly, the Commission need not reach a decision on the merits of Ecoplexus' discrimination claim outlined in the Complaint in order to grant the Motion. While the Complaint outlines facts and circumstances that give rise to Ecoplexus' discrimination claim under Section 292.306(a), the Commission will ultimately determine whether DESC assigned interconnection costs to the Projects on a discriminatory basis after discovery begins and hearing procedures are commenced. However, until such process is completed, if the Commission were to require Ecoplexus to pay milestone payments at this juncture, and such payments were later found to be discriminatory by the Commission, the payment of the milestone payments at this time would violate Section 292.306(a) because Ecoplexus is not required to pay *any* interconnection costs that are discriminatory in nature. For this reason alone, the Commission should grant the Motion in order to ensure that no discriminatory interconnection payments are made in a manner that violates Section 292.306(a).

B. Denying the Motion for the Reasons Requested by DESC Would Effectively Preclude Ecoplexus From Proceeding With Its Complaint

There is another important reason that the Commission should grant the Motion: denying the Motion for the reasons set forth by DESC would effectively deny Ecoplexus the opportunity to proceed with its Complaint. This is because DESC has taken the position that the IAs for the Projects have been terminated.[9] With no valid IAs for the Projects, all arguments raised in the Complaint would presumably be rendered moot and the Complaint dismissed.[10]

Notwithstanding the fact that DESC did not properly follow the SC Interconnection Procedures when attempting to terminate the IAs (which will be discussed further below in

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[9] According to DESC, even though the Complaint and Motion were filed before the milestone payments were due on April 16, 2019, as soon as such milestone payments were not made, that the IAs were "deemed terminated." *See e.g.*, DESC April 24 Response at 3–5.

[10] The issue of mootness is addressed further below in Section IV.A.

Section IV.A), DESC's position effectively reads the SC Interconnection Procedures to supersede PURPA and FERC's implementing regulations. According to DESC, because Ecoplexus did not allegedly follow the SC Interconnection Procedures, it is at this point prohibited from bringing its Complaint, including its claim of discrimination under Section 292.306(a), because the IAs have been terminated. Denying Ecoplexus the ability to bring forth several claims based on federal law (specifically PURPA and FERC's implementing regulations) due to a purported adherence to state law is plainly incorrect.[11]

Moreover, even if Ecoplexus *had* followed DESC's proposed approach for pursuing its Complaint, that too would have resulted in a violation of Section 292.306(a). As explained by DESC's counsel during the Oral Argument, DESC would have required Ecoplexus *to make* the allegedly discriminatory milestone payments in order to comply with their interpretation of the SC Interconnection Procedures, and *then proceed* with its claim under Section 292.306(a).[12] If such milestone payments were later found to be discriminatory, such payments would then be refunded to Ecoplexus "if that's a possibility."[13] However, under this interpretation and proposed approach, Ecoplexus *still would have paid interconnection costs that were later found to be discriminatory*, and thus, such payment would have been in violation of Section 292.306(a) at the time that they were made, even if they were eventually refunded to Ecoplexus. Accordingly, DESC's interpretation of the SC Interconnection Procedures as it relates to Section 292.306(a) would always require that allegedly discriminatory interconnection payments be

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[11] *See e.g.,* United States Constitution (art. VI, § 2) ("Supremacy Clause"); *In re TD Bank, N.A. Debit Card Overdraft Fee Litigation*, 150 F.Supp.3d 593, 603-06 (D.S.C. 2015) (noting that "conflict preemption" arises where state law stands as an obstacle to the accomplishment and execution of federal law)(citations omitted)).

[12] *See* Transcript of June 27, 2019 Oral Argument at 90:14-23.

[13] *See id.* at 90:23.

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made in order for a party to proceed with challenging the legality of such costs. This position is plainly backwards, is incorrect as it relates to the interaction of PURPA and FERC's implementing regulations and the SC Interconnection Procedures, and should be rejected by the Commission. Instead, the Commission should grant the Motion and allow itself the time make a final determination on the merits as to whether the milestone payments were based on interconnection costs assigned to Ecoplexus in a manner that violates Section 292.306(a) *before* requiring Ecoplexus to make the milestone payments.

C. DESC Misunderstands Section 292.306(a)

Before proceeding to other arguments, it is important to briefly address how DESC misunderstands Section 292.306 and the type of discrimination that it seeks to protect against. While this section admittedly touches on some of the merits of Ecoplexus' discrimination claim under Section 292.306(a), it is important to explain why DESC's understanding of Section 292.306(a) is patently incorrect, and why its argument that Ecoplexus is wrong to rely upon Section 292.306(a) should be rejected by the Commission.

Specifically, in its Motion to Dismiss, DESC incorrectly avers:

> Rather than asserting that Solar Developer was treated differently than 'with respect to any other customers with similar load characteristics,' as provided for in the regulations, Solar Developer instead alleges that it was treated differently than DESC. 18 C.F.R. § 292.306(a). Complaint at P. 30. Critically (and again), Solar Developer fails to state how DESC . . . violated PURPA's mandate that DESC not discriminate against 'other customers with similar load characteristics.' *Id.* The unsupported allegations should be dismissed.[14]

Thus, DESC essentially argues that if Ecoplexus' Projects are being treated the same as all other customers within a class (QFs) that Ecoplexus' Projects are not being discriminated

[14] Motion for Judgement on the Pleadings and to Dismiss, Docket No. 2019-130-E, at 13–14 (May 15, 2019).

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against. However, FERC Order No. 69[15], FERC's seminal order that established FERC's regulations implementing PURPA, specifically adopted Section 292.306(a) in order to ensure that utilities did not enact "unreasonable rate structure impediments, such as unreasonable hook up charges or other discriminatory practices . . ." to the detriment of QFs.[16]

FERC Order No. 69 thus demonstrates that in establishing Section 292.306(a), FERC was clearly concerned with utilities creating unreasonable interconnection-related impediments for QFs that were seeking to interconnect to utilities' transmission or distribution systems in order to sell power. Further, one of the core underlying purposes of PURPA is to ensure that the rates for such purchases of power by utilities from QFs be "just and reasonable to the electric consumers of the electric utility and in the public interest, and not discriminate against qualifying cogenerators or qualifying small power producers."[17] It would be nonsensical for Congress to enact PURPA with one of its main aims being to ensure that QFs were treated in a non-discriminatory manner by utilities, yet allow discriminatory allocations of interconnection costs to individual QFs so long as all QFs were receiving similar discriminatory interconnection cost allocations. However, this is precisely the position that DESC puts forth.

Contrary to DESC's position, Ecoplexus' argument that its Projects have been discriminated against because DESC "appears to have utilized study assumptions and methodologies that are arbitrary and unnecessarily conservative, which in turn has resulted in interconnection cost assignments to the Projects that are unreasonably high," and the fact that

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[15] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, 45 Fed. Reg. 12214 (1980) (to be codified at 18 C.F.R. pt. 292) (available at https://www.ferc.gov/industries/electric/gen-info/qual-fac/orders/order-69-and-erratum.pdf).

[16] *See id.* at 45 Fed. Reg. 12229-30.

[17] *See* 16 U.S.C. § 824a–3(b)(1) (2018).

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DESC "appears to have used different facilities ratings for the Projects compared to its own facilities,"[18] is *precisely* the type of discriminatory treatment that Section 292.306(a) was enacted to protect against. Accordingly, DESC's understanding of Section 292.306(a) is plainly incorrect.

II. The Commission Has Granted Motions to Maintain Status Quo in Less Grave Situations

It is clearly within the Commission's authority to grant motions to maintain status quo.[19] In fact, in holding the above-captioned proceeding in abeyance until July 31, 2019 in Order No. 2019-541, that is effectively what the Commission has done. Accordingly, the question before the Commission now is not *whether it has* the power to continue maintaining the status quo, but *whether it should* allow the status quo to continue.

As discussed previously in the above-captioned proceeding, "the core reason Ecoplexus is requesting a stay of its obligations to make milestone payments pursuant to the IAs is because Ecoplexus *is challenging the underlying validity of those payments and whether such payments were calculated in a legally permissible manner*."[20] As discussed, requiring Ecoplexus to make such payments, which Ecoplexus contends are discriminatory and illegal under Section 292.306(a), could result in a violation of federal law. Given the gravity of Ecoplexus' concern, and the fact that denying the Motion on the grounds that DESC requests would effectively preclude Ecoplexus from moving forward with its Complaint and claims of numerous violations

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[18] *See* Complaint at P 27.

[19] *See e.g.*, Section 12.12 of the IAs for the Projects ("[T]he Interconnection Customer shall have the right to make a unilateral filing with the Commission to modify this agreement."); S.C. Code Ann. § 58-27-980 (2019) (describing how the Commission has the statutory authority to amend, modify, and change any contract with an electrical utility that affects the use or disposition of an electrical utility's product or charges paid to an electrical utility when the public interest requires.).

[20] *See* Ecoplexus's Reply to SCE&G's Response in Opposition to Motion to Maintain Status Quo, Docket No. 2019-130-E, at 4-5 (Apr. 29, 2019) (emphasis in original).

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of PURPA and FERC's implementing regulations outlined therein, it is appropriate for the Commission to exercise its power and grant the Motion on this basis alone. However, this conclusion is reinforced and strengthened in light of the fact that the Commission has explicitly or effectively granted motions to maintain status quo in recent proceedings where movants were in less grave situations compared to what Ecoplexus currently finds itself in.

First, the Commission granted Beulah Solar, LLC's ("Beulah") motion to maintain status quo in Order No. 2018-177-E. The Commission granted Beulah's motion to maintain status quo and stay its obligation to make interconnection milestone payments when the financability of its project was in jeopardy because of concerns over the creditworthiness of South Carolina Electric & Gas Company ("SCE&G") following SCE&G's involvement in the VC Summer project. Notably, SCE&G did not object to Beulah's motion to maintain status quo at the time. Accordingly, if granting Beulah's motion to maintain status quo, and staying its obligation to make milestone payments based on a project's financability concerns stemming from SCE&G's creditworthiness was appropriate, then granting Ecoplexus' Motion in order to ensure that it does not pay discriminatory interconnection costs in violation of federal law, and so that it may proceed with its Complaint outlining numerous violations of PURPA and FERC's implementing regulations, is even more appropriate.

Second, in SolAmerica, SC ("SolAmerica") Docket No. 2018-163-E, SolAmerica submitted a motion to maintain status quo and stay its obligation to make a $450,000 milestone payment due under the project's power purchase agreement while it asked the Commission to align the project's completion date specified in its power purchase agreement with milestone deadlines specified in the project's interconnection agreement so that the interconnection

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agreement did not automatically terminate.[21] In that proceeding, SCE&G took nearly the identical position as DESC has here, arguing that the interconnection agreement had terminated because the milestone payment had not passed and the milestone payment had not been made while SolAmerica's motion to maintain status quo was pending.[22] Notably, the Commission ordered that the motion to maintain status quo be converted into a complaint,[23] and the proceeding was ultimately settled.

Importantly, in taking this approach, the Commission did not "deem" SolAmerica's interconnection agreement terminated merely because the deadline to pay the milestone payment had passed while SolAmerica's motion to maintain was pending before the Commission, nor did the Commission require the developer to pay $450,000 under the power purchase agreement in order to proceed with its claim against SCE&G.

Ecoplexus is seeking the same treatment that SolAmerica was afforded by the Commission, specifically, not being required to make a milestone payment due under an agreement associated with a project, and not having the IAs "deemed" terminated while its underlying concern is addressed by the Commission. The Commission ordered this treatment for SolAmerica when the amount of the payment at issue *was less than 5%* of the amount at issue for Ecoplexus. SolAmerica was seeking to align dates in a power purchase agreement with those in an interconnection agreement, compared to Ecoplexus, which is seeking to proceed with its Complaint and address numerous violations of PURPA and FERC's implementing regulations outlined therein. In fact, given the great disparity in amounts at issue in SolAmerica ($450,000)

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[21] *See* Motion to Maintain Status Quo, Docket No. 2018-163-E, at 1–2 (May 9, 2018).

[22] *See* SCE&G's Response in Opposition to Motion to Maintain Status Quo, Docket No. 2018-163-E, at 2–3 (May 21, 2018).

[23] *See* Order No. 2018-406, Docket No. 2018-163-E (Jun. 6, 2018).

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compared to here (over $10,000,000), it would be *inequitable* on that basis alone for the Commission to deny Ecoplexus' Motion.

Last, in the case of *Noller and Halwig v Daufuskie Island Utility Company* in Docket 2018-364-WS, two lot owners filed a complaint against a water and sewer utility for reimbursement of out of pocket expenses over water and sewer lines. In Order No. 2019-424, the Commission dismissed the complaint because it had no jurisdiction to award what it viewed as monetary damages, but more importantly stayed any disconnection of water/sewer services while the lot owners pursued their remedy in circuit court.[24] In taking this action, Commissioner Ervin stated, "to the extent that it is within our jurisdictional authority, I move that we stay any disconnection of service for the residences in question, while these contractual disputes are pending."[25] Thus, if the Commission has stayed customers' disconnection in a case where it dismisses the underlying case for lack of jurisdiction, then surely it should grant the Motion in this case where Ecoplexus simply wishes to proceed with its Complaint without needing to pay over $10 million in costs which are the very subject of the Complaint.

Notably, in the foregoing cases, *none* of the motions to maintain status quo were rejected by the Commission, as requested by DESC. In fact, based on Ecoplexus' review of the Commission's relevant precedent, it could not find *any instance* in which the Commission has outright rejected a motion to maintain status quo that it has reviewed. Accordingly, denying the Motion and requiring Ecoplexus to pay over $10 million in interconnection costs before proceeding with its Complaint challenging such costs, or, as DESC would prefer, entirely

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[24] *See* Order No. 2019-424, Docket No. 2018-364-WS (Jun. 12, 2019).

[25] *See id.*

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preventing Ecoplexus from proceeding with its Complaint, would not be equitable or in line with the Commission's recent precedent related to evaluating motions to maintain status quo.

III. It Is In the "Public Interest" to Grant The Relief That Ecoplexus Seeks

At the Oral Argument, DESC's counsel made several statements that actually support the relief that Ecoplexus seeks, and demonstrate why allowing Ecoplexus to proceed with its Complaint without requiring it to make the milestone payments is in the public interest.

First, DESC's counsel opined that granting Beulah's motion to maintain status quo in November 2018 (in Order No. 2018-177-E) was appropriate because SCE&G's financial health was in question and that the merger proceeding between SCE&G and Dominion Energy, Inc. was "not something we see every day" and "an extraordinary event, and it affected the public interest."[26] In other words, per DESC counsel's statements, Beulah's concerns related to the financial health of SCE&G at the time were sufficient to warrant the Commission granting its motion to maintain status quo, apparently because doing so was in the public interest.

Further, in answering Hearing Officer Minges' question related to the interaction between the "deemed withdrawn" language in Section 5.2.4 of IAs, which according to DESC's counsel require the IAs to be withdrawn automatically once milestone payments are not made, and the Commission's authority under Section 12.12 of the IAs to modify interconnection agreements, DESC's counsel opined that a "fundamental assumption" in invoking Section 12.12 is that amending an IA that has already been executed between parties must be "in the public interest."[27] DESC's counsel opined that "[i]f something in a contract that two people have contracted for, negotiated for, is somehow not in the public interest, or it's in the public interest

[26] *See* Transcript of June 27, 2019 Oral Argument at 47:18-22.

[27] *See id.* at 56:23—57:11.

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to change or amend, then I think that's really what's intended [by invoking Section 12.12 of the IAs]."[28]

These statements by DESC's counsel support Ecoplexus' position. This is because if it is in the public interest to grant a motion to maintain status quo based on financability concerns over a project due to the creditworthiness of a utility counterparty, especially when such creditworthiness concerns were due to events and actions that were within the control of such utility, then it is certainly in the public interest to grant a motion to maintain status quo when a party is seeking to stay its obligation to make payments that it alleges *are discriminatory and illegal* under federal law based on the actions of a utility, and where denial of such motion would effectively preclude such party from proceeding with its claim of discrimination and several other claims related to that utility's numerous violations of PURPA and FERC's implementing regulations.

Accordingly, even under the standard and logic employed by DESC's attorney at the Oral Argument, granting Ecoplexus' Motion, or in the alternative, denying the Motion but retroactively amending and reviving the IAs is appropriate.[29] Under either rationale, it is in the public interest for the Commission to allow Ecoplexus to proceed with its Complaint without requiring it to make the very interconnection payments that it alleges are discriminatory and illegal under federal law.

IV. Arguments Refuting Specific Points Raised in DESC April 24 Response to Motion to Maintain Status Quo

[28] *See id.* at 57:11-15.

[29] *See e.g., id.* at 51:6-14 (explaining DESC's position that the IAs have terminated pursuant to their terms, and that at this juncture, the Commission is considering whether to "revive" them).

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A. The IAs Have Not Terminated

Contrary to the arguments of DESC, the IAs have not terminated pursuant to their own terms.[30] Ecoplexus' Motion was filed prior to milestone payments being due on April 16, 2019, and therefore the Motion, and the relief that it seeks, was made in a timely manner. Further, as noted, DESC's position here is identical to SCE&G's position in the SolAmerica case, where SCE&G argued that SolAmerica's interconnection agreement had terminated because the milestone payments had not been made even though a motion to maintain status quo had been filed before the milestone payments were due and the motion was pending before the Commission. Accordingly, the question of whether IAs are terminated is currently pending before the Commission.

Further, even assuming *arguendo* that Ecoplexus' failure to make the milestone payment was a breach of the IAs, SCE&G's resulting actions constituted a clear violation of Section 7.6.1 of the IAs. Section 7.6.1 addresses defaults under the IAs, and states in relevant part that "[u]pon a Default, the non-defaulting Party *shall give written notice* of such Default to the Defaulting Party. . . .[T]he defaulting Party *shall have five (5) Business Days from receipt of the Default notice within which to cure such Default*."[31] DESC provided no such written notice to Ecoplexus, nor did it provide Ecoplexus with an opportunity to cure the alleged default (*i.e.* by paying the first milestone payment), and instead simply proclaimed that the IAs were terminated.[32] There are <u>no exceptions</u> to the requirement set forth in Section 7.6.1 of the IA that a non-defaulting party under the IA provide an opportunity to a party that has allegedly breached

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[30] *See e.g.* DESC April 24 Response at 3–5.

[31] *See* Section 7.6.1 of the IAs (emphasis added).

[32] *See e.g.*, Letter from Ecoplexus to SCE&G, Docket No. 2019-130-E, at 2–3 (Apr. 19, 2019).

an interconnection agreement to cure its breach before declaring a default under an IA and terminating an interconnection agreement. Because DESC did not follow, and still has not followed, the procedures clearly specified in Section 7.6.1, its attempts to declare the IAs terminated are invalid, and the IAs are still in effect.

Importantly, DESC's argument that IAs have terminated pursuant to their terms and that the Motion should therefore be denied, which would mean that Ecoplexus could not proceed with its Complaint because no IAs would be in effect, is a thinly veiled attempt at arguing that the arguments raised in the Complaint are moot so that DESC may evade the Commission's review of the issues raised in the Complaint. However, there are well established exceptions to mootness arguments, all of which are applicable here.[33] Accordingly, DESC's attempt to render the arguments raised in the Complaint moot should be not be permitted by the Commission.

B. The Motion Clearly Provides a Basis For Relief

SCE&G's argument that the Motion does not provide a basis for relief because it did not "present 'a concise and cogent statement of the facts' to the Commission or otherwise provide appropriate grounds to grant the requested relief" is nonsensical.[34] The Motion made clear that the facts and circumstances giving rise to the relief requested were outlined in the Complaint, which was submitted contemporaneously with the Motion in the same proceeding. It strains

[33] *See S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 421 S.C. 110, 121, 804 S.E.2d 854, 860 (2017) ("'A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.' There are three exceptions to mootness. 'First, if the issue raised is capable of repetition but generally will evade review, the appellate court can take jurisdiction.' 'Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest.' 'Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case.'") (internal citations omitted).

[34] *See* DESC April 24 Response at 5.

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credulity to argue that the Complaint and Motion together do not outline "a concise and cogent statement of the facts" giving rise to the relief sought in the Motion.[35] The Motion clearly states:

> As outlined in the Complaint, the interconnection costs assigned to the Projects by SCE&G were made in a discriminatory manner, in violation of 18 C.F.R. Section 292.306(a). In light of this, as well as additional violations of the Public Utility Regulatory Policies Act of 1978 ('PURPA'), several provisions of 18 C.F.R. Section 292, and Commission orders outlined in the Complaint, the Projects should not be required to make any milestone payments required under the IAs until the issues raised in the proceeding initiated by the Complaint are resolved by the Commission. There will be no harm to SCE&G, other parties, or the public interest by delaying the Projects' milestone payments.[36]

This language thus meets standard for what Motions must demonstrate in order to provide a basis for relief, per the Commission's rules and the S.C.R.C.P.

C. Granting Ecoplexus' Motion to Maintain Status Quo Would Not Harm Any Other Interconnection Customers

DESC's argument that other interconnection customers would be harmed by granting Ecoplexus' Motion is incorrect,[37] as no harm would come to any other customers for several reasons. First, Ecoplexus does not seek an "indefinite"[38] extension related to making the milestone payments. Instead, Ecoplexus seeks a temporary extension until the Complaint can be resolved. Second, Ecoplexus is not seeking preferential treatment in submitting the Motion. In fact, Ecoplexus is submitting the Motion in order to ensure that its rights under PURPA are not violated. Further, as discussed at the Oral Argument, DESC's argument that other solar developers in the queue would be harmed by granting Ecoplexus' Motion is not supported by

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[35] *See* S.C. Code Ann. Regs. 103-829 (2019); *see also* S.C.R.C.P. § 7(b)(1) ("An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.").

[36] Motion at P 4.

[37] *See* DESC April 24 Response at 7–8.

[38] *See id.* at 3.

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any evidence given that *no solar developers* have intervened in any of the above-captioned proceedings to protest the motions to maintain status quo at issue.[39] On the other hand, for the reasons previously discussed herein, denying Ecoplexus' Motion for the reasons put forth by DESC would materially harm Ecoplexus. In any event, DESC cannot hide behind the excuse of "trying to administer the queue" to evade the Commission's review of numerous practices that are alleged to have violated of PURPA and FERC's implementing regulations.

V. Alternatively, The Commission Could Allow The Complaint To Proceed Without Requiring Ecoplexus to Make the Milestone Payments On the Grounds That No Valid IAs Ever Existed For The Projects Because DESC Violated The SC Interconnection Standards In Offering IAs That Were Not "Executable"

For the reasons specified previously in the Complaint and in the above-captioned proceeding, and as Ecoplexus looks forward to demonstrating moving forward, DESC violated Section 292.306(a) by assigning interconnection costs in a discriminatory manner, and other provisions of PURPA and FERC's implementing regulations, all of which are illegal. Further, as discussed previously herein, Ecoplexus believes that the IAs for the Projects are currently valid and enforceable, and that it is well within the Commission's power to grant the Motion and stay Ecoplexus' obligation to make the milestone payments until the Commission can make a determination on the merits of the Complaint after a hearing. However, there is an alternative ground for the Commission allowing Ecoplexus to proceed with its Complaint without requiring it to make the milestone payments, and that is the fact that the Commission could conclude that no valid IAs ever existed for the Projects because of DESC's violation of the SC Interconnection Procedures.

It is well established law in South Carolina that "courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as

[39] *See e.g.*, Transcript of June 27, 2019 Oral Argument at 87:22—88:3.

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expressed in constitutional provisions, statutory law, or judicial decisions."[40] It is also axiomatic that contracts must incorporate the law in force at the time that a contract is in effect, and thus cannot override such law.[41] Accordingly, if the IAs contain illegal, or even allegedly illegal provisions, then the Commission cannot "lend its assistance" to enforcing them.[42] Further, Section 5.2.1 of the SC Interconnection Procedures states: "Within fifteen (15) Business Days of the Construction Planning Meeting, the Utility ***shall provide an executable*** Interconnection Agreement containing the detailed estimated Upgrade charges, detailed estimated Interconnection Facility charge, Appendix 4 (Construction Milestone and payment schedule listing tasks, dates and the party responsible for completing each task), and other appropriate information, requirements, and charges."

Accordingly, by providing Ecoplexus with IAs that contained *unenforceable* provisions, DESC provided Ecoplexus with IAs that were not *executable*, in clear violation of Section 5.2.1 of the SC Interconnection Procedures. Given this, the Commission could conclude that because the IAs were not enforceable or executable, no valid IAs ever existed, meaning that Ecoplexus should be placed in the same position as it was prior to the IAs being offered to it by DESC. In other words, Ecoplexus' Projects would retain their current queue position, and DESC would be required to offer IAs that were "executable." Importantly, if the Commission finds that the IAs are unenforceable and not executable, then the milestone payments required by the IAs were

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[40] *See White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004).

[41] *See e.g. Acosta v. Tyson Foods*, 800 F.3d 468, 474 (8th Cir. 2016) (noting the principle that current laws of the time and place where a contract is made are incorporated into the contract); *United Van Lines, Inc. v. United States,* 448 F.2d 1190, 1195 (D.C.Cir.1971) ("Because the regulation was in existence at the time [the party] entered on performance, it became, in effect, a part of the contract between the parties.").

[42] *See e.g., Ward v. West Oil Co., Inc.*, 387 S.C. 268, 274-5, 692 S.E.2d 516, 519-20 (2010) (the court "will not 'lend its assistance' to carry out the terms of a contract that violates statutory law or public policy.").

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never required to be paid by Ecoplexus, and Ecoplexus must be allowed to proceed with its Complaint without being required to make the milestone payments.

Conclusion

Whether the Commission grants Ecoplexus' Motion, or allows Ecoplexus to proceed with its Complaint and claim of discrimination under Section 292.306(a) under one of the alternative grounds discussed herein, Ecoplexus must be allowed to proceed with its Complaint without first being required to make the milestone payments. Any other result would require Ecoplexus to incur over $10 million in costs in order to challenge the legality of the very same costs, or worse, be barred entirely from bringing forth its Complaint – which make no mistake, is exactly what DESC is seeking. Put succinctly, the Commission should not be persuaded by DESC's thinly veiled attempts to evade Commission review of practices that Ecoplexus contends have resulted in numerous violations of PURPA and FERC's implementing regulations.

For the aforementioned reasons, Ecoplexus requests that the Commission consider the arguments outlined herein.

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