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May 19, 2020

Mr. Walter L. Thomas, Jr.
Secretary
Alabama Public Service Commission
RSA Union Building
100 North Union Street, Suite 950
Montgomery, Alabama 36130

Re: Response of Alabama Power Company to Second Notice of New Authority
Docket Nos. U-4226 and 32767

Dear Mr. Thomas:

Alabama Power Company submits the attached response to the Notice of New Authority filed on Friday, May 15, 2020 in the above-captioned dockets. This response is being submitted through the Commission's e-filing system, with an original and two copies being delivered to the Commission tomorrow.

Please feel free to contact me with any questions.

Sincerely,

Scott B. Grover

Encl.

cc: Service List

BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION

JAMES H. BANKSTON, ET AL.,	)	**DOCKET NO. 32767**
	)	
Petitioners/Complainants	)	
	)	
v.	)	
	)	
ALABAMA POWER COMPANY	)	
	)	
Respondent	)	
	)	
and	)	
	)	
ALABAMA POWER COMPANY	)	**DOCKET NO. U-4226**
	)	
Petitioner	)	
	)	
In re: Rate Rider RGB (Supplementary, Back-Up, or Maintenance Power)	)	

ALABAMA POWER COMPANY'S RESPONSE
TO COMPLAINANTS'/INTERVENORS' SECOND NOTICE OF NEW AUTHORITY

Alabama Power Company ("Alabama Power" or "Company"), by and through its undersigned counsel, hereby submits this response to the second "Notice of New Authority" filed by James Bankston, Ralph Pfeiffer, and Gasp, Inc. ("Complainants/Intervenors") in the above-captioned dockets. This Second Notice of New Authority calls the Commission's attention to a recent decision by the Kansas Supreme Court,[1] then quickly shifts to renewing the same, unavailing arguments previously made—arguments that continue to misconstrue the purpose and design of Rate Rider RGB.

[1] *See In Re Westar Energy, Inc., et al.*, 460 P.3d 821 (Kan. April 3, 2020) ("*Westar*"). In the six weeks since the Kansas Supreme Court's decision, the opinion has frequently been subject to industry press. *See, e.g.*, *Kansas ruling against Evergy's rooftop solar demand charges could have wider impacts, advocates say*, Utility Dive (April 13, 2020), available at https://www.utilitydive.com/news/kansas-supreme-court-evergy-rooftop-solar-demand-charges-impacts/575894/.

Kansas judicial orders do not bind this Commission any more than administrative decisions from the state of Michigan (the first notice of new authority). More importantly though, Alabama does not have a statute similar to the one driving the decision in *Westar*. Complainants/Intervenors concede this point, but represent to the Commission that it is of no consequence, because "PURPA's protections nevertheless apply here …."[2] PURPA obviously applies, but as the record in this case reflects, PURPA and its implementing regulations explicitly allow demand-based charges for back-up power service such as those set forth in Rate Rider RGB.[3] Hence the focus of the *Westar* Court on the state statutory issue, not PURPA.[4]

For these reasons, *Westar* has no relevance here, and instead merely serves as pretext for the Complainants/Intervenors to again accuse the Company of "price discrimination against DG customers."[5] The record in this case demonstrates the contrary to be so. Rate Rider RGB does not discriminate. Rather, it provides for the non-discriminatory treatment of all of the Company's partial requirements customers—including those taking service under rate schedules subject to Part I.B of the rate rider as well as those taking service under Part I.A of the rate rider.[6]

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[2] Second Notice of New Authority, page 3.

[3] *See* Ex. NDReply-5 to Reply Testimony of Ms. Natalie Dean, Order No. 69, 45 FR ¶ 12213, 12228 (Feb. 25, 1980 ("Thus, where the utility must reserve capacity to provide service to a qualifying facility, the costs associated with that reservation are properly recoverable from the qualifying facility, if the utility would similarly assess these costs to non-generating customers."); *see also id.* at ¶ 12229 ("In the example provided above, a cogeneration facility might contract with an electric utility for the utility to have available ten megawatts, should the cogenerator's units experience an outage.").

[4] Indeed, the Kansas Court of Appeals considered and rejected an argument by Sierra Club that the rate design approved by the Kansas Corporation Commission violated PURPA's implementing regulations. *See In re Westar Energy, Inc., et al.*, 438 P.3d 312, at *7-*9 (2019). For convenience, Alabama Power has appended to this response copies of the Court of Appeals' decision and the Supreme Court's decision at Appendix A and Appendix B, respectively.

[5] Second Notice of New Authority, page 4.

[6] *See* Brief of Alabama Power Company in the Form of a Proposed Order, page 8 ("To forego such charges, she observed, not only would result in the Part I.B customers receiving back-up power service at the expense of other customers, but doing so also would discriminate against customers receiving back-up power service under Part I.A of Rate Rider RGB.").

Furthermore, the design of the Part I.B charge for back-up service is cost-based, a fact that Complainants/Intervenors continue to ignore.[7]

Should the Commission choose to reflect on the Kansas Supreme Court decision in *Westar*, three pertinent considerations warrant mention. First, the Kansas law that governed the court's ultimate conclusion states simply:

> No electric or gas utility providing electrical or gas service in this state shall consider the use of any renewable energy source other than nuclear by a customer as a basis for establishing higher rates or charges for any service or commodity sold to such customer nor shall any such utility subject any customer utilizing any renewable energy source other than nuclear to any other prejudice or disadvantage on account of the use of any such renewable energy source.[8]

In essence, this provision "prohibits utilities from charging DG customers a higher price than non-DG customers for the same service."[9] Second, as the *Westar* Court noted twice in its decision, the utilities admitted that their rate's design violated the statute.[10] Third, nowhere in the *Westar* decision (or in the underlying Court of Appeals decision that initially upheld the rate) will this Commission find a reference to back-up power service.

In contrast, PURPA and Alabama law expressly allow for the recovery of costs associated with the provision to partial requirements customers of distinct services such as back-up power service, and Alabama Power maintains Rate Rider RGB consistently with these laws. Moreover,

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[7] *Compare* Second Notice of New Authority, page 5 ("The record shows that the Capacity Reservation Charge *is based solely* on the cost recovery decrease (i.e. lost revenues) …" *with* Brief of Alabama Power Company in the Form of a Proposed Order, pages 9-11 (explaining how the company calculated a "*threshold capacity reservation charge of $6.99 per kW* of generation requiring back-up service", *before taking the subsequent step* "to determine how much of this cost of providing back-up power service would be recovered under the existing provisions of Rate FD for the supplementary service of a representative customer with on-site generation." (emphasis added in both)).

[8] K.S.A § 66-117d.

[9] *Westar*, 460 P.3d at 826.

[10] *See id.* at 825 ("Indeed, the Utilities admitted at oral argument that under their proposed RS-DG rate design, DG customers will pay more for their electricity than other customers and that, considered in isolation, this violates K.S.A. 66-117d."); *see also id.* at 827 ("By its plain text, K.S.A. 66-117d clearly prohibits the Utilities from price discrimination against DG customers, something the Utilities admit they are trying to do.").

in a reversal from *Westar*, Complainants/Intervenors are the parties with the fatal admission;[11] namely their reluctant recognition that Alabama Code § 37-4-140(c)(1) expressly authorizes cost recovery for back-up power service:

> The commission shall approve the utility's rates, fees, and charges for services to a distributed generation facility including … back-up power …. The commission may not require the utility to allocate such costs to the utility's entire customer base. The commission shall require that a customer with a distributed generation facility pay for all such applicable costs.

Complainants/Intervenors try and avoid these provisions of Alabama law by offering the truism that rates must be non-discriminatory and cost-based.[12] Of course they must, and the record is replete with substantial evidence confirming the back-up power charges in Part I.B of Rate Rider RGB satisfy these requirements.

Complainants/Intervenors also invoke the "legislative history" of Alabama Code § 37-4-140. The legislative findings of a 2008 law certainly are not "new authority"—but even had Complainants/Intervenors plumbed this theory earlier, the decisional course for this Commission, as supported by the record, would remain unchanged. The principal reason for this lies in the tenets of statutory construction—where the language is unambiguous, the court is bound by the words of the statute.[13] Additionally, it bears noting that while the statute at issue in *Westar* reflects a specific focus on renewable energy resources, efficiency, and conservation,[14] Act 2008-275 establishes state programs and incentives for a broad base of technologies, including renewable

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[11] *See* Second Notice of New Authority, pages 4-5.

[12] *See id*. at pages 5-6.

[13] *See Ex parte Pfizer, Inc.*, 746 So. 2d 960, 964 (Ala. 1999) ("When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature." (citing *Ex parte T.B.,* 698 So. 2d 127, 130 (Ala.1997))). *Compare* Ala. Code 37-§ 4-140(c)(1) ("The commission shall require that a customer with a distributed generation facility pay for all such applicable [e.g., back-up power] costs.").

[14] *See* 1980 Kan. Sess. Laws 890 (S.B. No. 789).

energy resources such as distributed solar generation, as well as clean fossil fuel technologies, nuclear power, and hydropower.[15] Thus, Complainants/Intervenors do not have to strain clear and unequivocal language of Alabama Code § 37-4-140(c)(1) to find the nexus for the Legislature's intent to "assist in the development of market demand that will help expand the use of alternative and renewable resources"—they just need to look to actual laws enacted in Title 40.

In closing, nothing in the *Westar* decision calls for a departure from the record before this Commission. Rate Rider RGB is a non-discriminatory tariff that abides by PURPA, its implementing regulations and the law of the State of Alabama. Moreover, the cost basis for the charges is supported by substantial evidence and ensures the comparable treatment of all customers with on-site generation, including but not limited to those with solar generation, who call on the Company to stand ready to provide back-up service for generation at any time. For this reason, Alabama Power again renews its request, as reflected most recently in its Brief in the Form of a Proposed Order, that the Commission approve the proposed modifications in Docket No. U-4226, and that the Commission deny the complaint in Docket No. 32767.

Respectfully submitted,

Attorney for Alabama Power Company

[15] *See* Alabama 2008 Session Law Service, 2008 Regular Session, Act 2008-275 (H.B. No. 234), at page *1 (attached as Appendix C).

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following counsel of record in this public proceeding by electronic mail on this the 19th day of May, 2020.

OF COUNSEL

Appendix A

438 P.3d 312 (Table)
Unpublished Disposition
This decision without published opinion is referenced in the Pacific Reporter. See Kan. Sup. Ct. Rules, Rule 7.04.
NOT DESIGNATED FOR PUBLICATION
Court of Appeals of Kansas.

In the MATTER OF the JOINT APPLICATION OF WESTAR ENERGY, INC. AND KANSAS GAS AND ELECTRIC COMPANY.

No. 120,436
|
Opinion filed April 12, 2019.
|
Review Granted September 3, 2019

Appeal from Kansas Corporation Commission.

Attorneys and Law Firms

David Bender, of Earthjustice, of Madison, Wisconsin, Robert V. Eye, of Robert V. Eye Law Office, LLC, of Lawrence, and Sunil Bector, of Sierra Club, of Oakland, California, for petitioners/appellants Sierra Club and Vote Solar.

Martin J. Bregman, of Bregman Law Office, L.L.C., of Lawrence, and Cathryn J. Dinges, of Westar Energy, Inc., for respondents/appellees Westar Energy, Inc. and Kansas Gas and Electric Company.

Michael J. Duenes, assistant general counsel, for appellee Kansas Corporation Commission.

Before Malone, P.J., Hill and Atcheson, JJ.

MEMORANDUM OPINION

Per Curiam:

***1** Sierra Club, Vote Solar, and Climate and Energy Project (collectively "Sierra Club") appeal the Kansas Corporation Commission's decision to approve the non-unanimous stipulation and agreement (settlement agreement) resolving the rate application of Westar Energy, Inc. and Kansas Gas and Electric Company (collectively "Westar"). As part of the settlement agreement, Westar implemented a new three-part rate structure for a class of residential consumers who generate some of their own electricity needs—the Residential Distributed Generation (RS-DG) class—consisting of a basic service fee, an energy charge, and a demand charge. Sierra Club argues that the imposition of a different rate design for the RS-DG class is discriminatory and thus violates state and federal law.

But K.S.A. 66-1265(e), enacted in 2014, expressly gives Westar the option to propose rates for "customer-generators"—which includes customers using a renewable energy resource—based on different rate structures than those applied to other customers. And here there was substantial competent evidence supporting the Commission's finding that the three-part rate design for the RS-DG class was based on a neutral cost-based rationale. So based on the evidence, we conclude that Westar has not discriminated against the RS-DG class in violation of state and federal law, and, applying our standard of review, we have no basis to set aside the Commission's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Growth of residential self-generation in Kansas and the effect on rate calculation

As in many states, Kansas has seen a growth in the use of renewable energy resources to self-generate electricity. For residential customers who self-generate electricity, however, the largest subclass is customers who use photovoltaic (or solar) cells or panels. The record does not establish when residential use of solar power began in Kansas, but the use of solar power in Kansas significantly increased in 2015. Before 2015, Westar reported 350 consumers who were self-generating electricity. The class size increased to about 790 customers by the time of the evidentiary hearing in this case. Westar predicted the number of customers who would rely on solar power to

self-generate some of their electricity demands would increase at an annual rate of roughly 72 percent. Still, the class of consumers who self-generate electricity remains small when compared to the overall number of residential customers served by Westar.

A utility's production and distribution of electricity incurs three types of costs: energy-related costs (the cost of producing the electricity), demand-related costs (the costs associated with meeting the peak demands for the electricity), and customer-related costs (the costs of distributing the electricity to a consumer and the service costs). Most of the costs incurred by Westar to provide electricity for residential customers are fixed costs. Only the costs related to the generation of electricity and a few operations and maintenance (O&M) costs decrease or increase directly related to energy consumption. The costs of maintaining distribution lines and meters for customers and the costs of providing service and billing personnel to meet the needs of the customers do not change relative to the amount of energy consumed.

***2** Traditionally, Westar has recovered the costs of providing electricity through a two-part rate involving a flat service charge and a variable energy charge based on the number of kilowatt hours (kWh) used in a monthly billing period. Westar recovers only 18.25 percent of its revenue requirement allocated to the residential class through fixed charges. The variable charge is established to collect the energy costs plus a substantial portion of the utility's fixed costs. A utility company could apportion its fixed costs among its customers at a flat rate and limit the variable rate to the recovery of actual generation costs, but utilities have traditionally sought to recover fixed costs through the variable rate as an incentive for customers to exercise prudent energy consumption.

A "partial requirements customer" is a utility customer who provides some of his or her electricity needs through self-generation but cannot generate enough to be self-reliant. When such a customer is billed under a traditional two-part rate, the utility fails to recover some of its fixed costs in two ways. First, the utility loses some of its fixed costs through the customer's reduced consumption of energy. A partial consumer generates a portion of the electricity it needs but taps into the utility's grid to meet its higher consumption needs. So the self-generator is contributing to the utility's fixed generation, transmission, distribution, demand, and customer service costs. But since a portion of the utility's fixed costs are recovered through the variable kWh charge, a partial consumer purchases fewer kilowatt hours from the utility at the variable rate, and the utility fails to recover as much of its fixed costs.

Second, under a net metering contract, the utility potentially loses recovery of all of its fixed costs for energy consumed by a self-generator that has exported an equivalent amount of energy to the electric grid. In a net metering arrangement, a self-generator who produces more energy than he or she needs and exports it to the grid obtains a kWh credit on his or her meter for each kWh "sold" to the utility, i.e., the meter runs backward. Since the kWh variable charge includes some of those fixed costs, the energy credit to the self-generator deprives the utility of those fixed costs for each kWh consumed by a self-generator but offset by a similar number of kWh exported by the self-generator.

In March 2016, KCC Staff filed a motion with the Commission to open an investigation into rate design for RS-DG customers. The Commission issued an order opening the investigation on July 12, 2016. The Alliance for Solar Choice and the Climate and Energy Project were permitted to intervene in the proceedings.

We will not set forth the Commission's findings from the investigation in detail. But in summary, the Commission established that a separate rate class was permissible for RS-DG customers (such as those with solar power), but that the reasonableness of the specific rate structure would depend on evidence provided through a class cost of service study or other evidence justifying the actual rates imposed.

Procedural history of this case

During 2016-2017, Westar conducted a RS-DG class cost of service study and, on February 1, 2018, filed a petition with the Commission for approval of a utility rate change. Westar sought a two-step rate change for a net rate increase of $52.6 million. Pertinent to this appeal, Westar also sought to implement a three-part rate design for RS-DG customers. The Commission suspended the proceedings for 240 days.

Many parties sought to intervene in the case, but, for purposes of this appeal, the important intervenors were Sierra Club, Vote Solar, and Climate and Energy Project. The Commission permitted the interventions but consolidated the three parties because they were united in interest.

***3** On May 24, 2018, the Commission approved the merger of Westar and Great Plains Energy. In the settlement paving the way for the Commission's approval

of the merger, Westar made certain agreements that affected the revenue requirements in this rate proceeding.

After many of the parties submitted prefiled direct testimony in support of their various positions on Westar's rate application, several parties entered settlement negotiations, ultimately arriving at a "black box settlement." The non-unanimous stipulation and agreement considered the merger settlement and provided for a revenue reduction of roughly $66 million, offset by a $15.7 million property tax surcharge, for a net revenue reduction of about $50.3 million.

As for rate design, the parties to the settlement agreement agreed to maintain the existing monthly basic service fee ($14.50) for all residential classes. Westar had introduced two new optional tariffs for standard residential customers—Residential Peak Efficiency Rate (RPER) and Residential Electric Vehicle (REV)—that implement the same rate as the RS-DG class, i.e., a three-part rate with a $14.50/basic service charge, a per kWh charge, and a demand charge of $3.00 in the winter and $9.00 in the summer. The settlement agreement maintained the optional nature of the RPER and REV rate designs. Under these optional plans, customers who voluntarily switch to either the RPER or REV rate designs may opt out of the program within a year and return to the default rate for standard residential customers. In contrast, the proposed rate design for the RS-DG class was not optional but mandatory.

The rate design for the four pertinent classes [residential standard (RS), residential standard distributed generation (RS-DG), residential peak efficiency (RPER), and residential electric vehicle (REV)], as proposed within the settlement agreement, are illustrated in the table below:

Class	Basic Service Fee	Energy Charge ($/kWh)	Demand Charge
RS	$14.50	Winter Block 1 $0.073512 Winter Block 2 $0.073512 Winter Block 3 $0.060089 Summer Block 1 $0.073512 Summer Block 2 $0.073512 Summer Block 3 $0.081088	N/A
RS-DG	$14.50	$0.045840	Winter $3.00 Summer $9.00
RPER	$14.50	$0.045840	Winter $3.00 Summer $9.00
REV	$14.50	$0.045840	Winter $3.00 Summer $9.00

As part of the settlement agreement, Westar also agreed to submit an annual report to the KCC Staff and to the Citizens' Utility Ratepayer Board (CURB), identifying the number of RS-DG customers, the demand charge and energy charges during the year, an analysis of customers' change in energy consumption, and a report of the impact upon each RS-DG customer.

Sierra Club objected to the settlement agreement, challenging the perceived discriminatory effect of the new rate design for RS-DG customers and the efficiency of Westar's continued use of coal-based generation plants. After receiving prefiled testimony in support of, and in opposition to, the proposed settlement agreement, the Commission held a two-day hearing on July 24-25, 2018. The parties submitted prefiled testimony from their own witnesses, who were then subject to cross-examination. Instead of closing arguments, the parties submitted written briefs arguing their various positions on the settlement agreement.

On September 27, 2018, the Commission issued an order approving the non-unanimous settlement agreement. Sierra Club filed a petition for reconsideration. Kansas Industrial Consumers Group, Inc. (KIC), Westar, and the KCC Staff filed responses to the petition for reconsideration. Sierra Club filed a reply.

On November 8, 2018, the Commission issued its order denying the petition for reconsideration. Sierra Club filed a petition for judicial review on December 13, 2018. While the petition appeared untimely, this court issued an order accepting the petition because of an inadvertent rejection of an earlier and timely electronic filing.

Claims on appeal and standard of review

***4** Sierra Club makes three claims on appeal. First, Sierra Club claims that the "higher overall rates and charges for solar customers than they would pay under the rates for non-solar customers violates K.S.A. 66-117d." Second, Sierra Club claims that "[m]aking an unknown and more complicated 'demand' charge mandatory for solar customers and optional for other customers constitutes a prejudice or disadvantage in violation of K.S.A. 66-117d." Third, Sierra Club claims that the "different rates for solar customers discriminate compared to rates for sales to other customers, in violation of 18 C.F.R. § 292.305, because they are not justified by systemwide costing principles applied without regard to whether a customer generates."

In response, Westar asserts that the rates and charges RS-DG customers pay for utility-supplied electricity do not violate the provisions of K.S.A. 66-117d. Westar maintains that implementing a mandatory rate for RS-DG

customers that includes a demand charge while not implementing such a mandatory rate for RS customers does not subject RS-DG customers to any prejudice or disadvantage because of the use of any such renewable energy source. Finally, Westar contends that the difference between the RS-DG rate and the RS rate is consistent with the language of 18 C.F.R. § 292.305 (2017).

The Commission asserts that it correctly approved the RS-DG rate as nondiscriminatory because the rate is based on the RS-DG customers' status as partial requirements customers who have distinct electricity usage patterns. The Commission also contends that its finding that RS-DG customers are not prejudiced or disadvantaged by the RS-DG rate is reasonable and supported by substantial competent evidence. Finally, the Commission asserts that its finding that the RS-DG rate is just and reasonable comports with federal law.

Sierra Club properly filed its petition for judicial review with this court instead of the district court. See K.S.A. 66-118a(b). The Kansas Judicial Review Act, K.S.A. 77-601 et seq., governs judicial review of the Commission's decision. K.S.A. 66-118c. The party asserting the invalidity of the Commission's decision, here Sierra Club, bears the burden of establishing error. K.S.A. 2018 Supp. 77-621(a)(1); *In re Equalization Appeal of Wagner*, 304 Kan. 587, 597, 372 P.3d 1226 (2016); *Kansas City Power & Light v. Kansas Corporation Comm'n*, 52 Kan. App. 2d 514, 520, 371 P.3d 923 (2016).

Appeals from the Commission's approval or establishment of utility rates differ from the typical administrative appeals, and the Commission's unique role affects the scope of appellate review. Public utility rate making is essentially a legislative function, delegated to the Commission by the Kansas Legislature. When acting under its authority to supervise, control, and regulate a public utility, the Commission is not acting as a quasi-judicial body, but it is acting as a quasi-legislative one. *Kansas Gas & Electric Co. v. Kansas Corporation Comm'n*, 239 Kan. 483, 491, 720 P.2d 1063 (1986). The Commission thus has broad authority to determine just and reasonable rates. K.S.A. 66-101b; *Kansas Gas & Electric Co.*, 239 Kan. at 496-97. The fact that a rate stems from an approved non-unanimous settlement agreement does not diminish this authority. See *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 312-14, 94 S. Ct. 2328, 41 L.Ed.2d 72 (1974); *Farmland Industries, Inc. v. Kansas Corporation Comm'n*, 24 Kan. App. 2d 172, 186-87, 943 P.2d 470 (1997).

To the extent the issues raised in this appeal involve statutory interpretation or application, the Commission is not entitled to any deference. *Mera-Hernandez v. U.S.D. 233*, 305 Kan. 1182, 1185, 390 P.3d 875 (2017). But where the resolution of the issues hinge on fact determinations, the Commission is entitled to significant deference. A court may reverse the Commission's fact determination but only when the determination "is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole." K.S.A. 2018 Supp. 77-621(c)(7). Although the court reviews the evidence in the record as a whole, it does not infringe upon the Commission's authority to weigh conflicting evidence or judge the credibility of witnesses. See K.S.A. 2018 Supp. 77-621(d); *Mobil Exploration & Producing U.S. Inc. v. Kansas Corporation Comm'n*, 258 Kan. 796, 815, 908 P.2d 1276 (1995).

DOES THE RATE DESIGN FOR THE RS-DG CLASS VIOLATE KANSAS LAW?

***5** Sierra Club first claims that the imposition of the three-part rate design on the RS-DG consumer class constitutes improper discrimination in violation of Kansas law. Sierra Club frames the issue as one of statutory interpretation, arguing that the plain language of K.S.A. 66-117d prohibits the Commission from approving a different rate for the RS-DG consumer class than applied to the standard residential class. Sierra Club argues that the new rate is discriminatory in violation of K.S.A. 66-117d because (a) it imposes higher charges on RS-DG customers than on standard residential customers, and (b) because the new rate is harder to understand and apply, prejudicing members of the RS-DG class.

K.S.A. 66-117d states:

> "No electric or gas utility providing electricity or gas service in this state shall consider the use of any renewable energy source other than nuclear by a customer as a basis for establishing higher rates or charges for any service or commodity sold to such customer nor shall any such utility subject any customer utilizing any renewable energy source other than nuclear to any other prejudice or disadvantage on account of the use of any such renewable energy source."

Sierra Club contends that the only distinguishing

characteristic of the RS-DG class is the customers' use of renewable energy to supply some of their demand for electricity. As a result, Sierra Club argues that the rate structure discriminates against customers using renewal energy sources in violation of K.S.A. 66-117d. The KCC contends that the use of renewable energy is not the determining factor for inclusion in the class. Instead, the KCC argues that RS-DG customers pay a different rate in compliance with K.S.A. 66-117d because they are partial requirements customers with distinct electricity usage patterns. Westar takes a different approach, arguing that the different charges for RS-DG customers is expressly authorized by Kansas law under K.S.A. 66-1265(e).

As the evidence presented here shows, users of renewable energy, mainly solar power, constitute the entire RS-DG class. As a result, we find that the KCC's attempt to distinguish between customers using renewable energy sources and "partial requirements customers" is disingenuous. If K.S.A. 66-117d—enacted in 1980—was the only law on the books on this subject, we might find merit in Sierra Club's claim that the imposition of the separate rate design on the RS-DG consumer class constitutes improper discrimination in violation of Kansas law.

But as Westar points out, in 2014—34 years after the Kansas Legislature adopted K.S.A. 66-117d—the Legislature amended the Net Metering and Easy Connection Act, K.S.A. 66-1263 et seq., initially enacted in 2009. For customer-generators who began using renewable energy on or after July 1, 2014, K.S.A. 66-1265(e) now provides:

> "(e) for any customer-generator which began operating its renewable energy resource under an interconnect agreement with the utility on or after July 1, 2014, have the option to propose, within an appropriate rate proceeding, the application of time-of-use rates, minimum bills or other rate structures that would apply to all such customer-generators prospectively."

Thus, in 2014, the Kansas Legislature adopted legislation giving utilities the option to propose rates for "customer-generators"—which by definition includes customers using a renewable energy resource—based on different rate structures than those applied to other customers. See K.S.A. 66-1264(b)(1) (defining "customer-generator" as the "owner or operator of a net metered facility which ... [i]s powered by a renewable energy resource"). K.S.A. 66-1265(d) basically serves as a "grandfather clause" for any customer-generator who began using renewable energy before July 1, 2014.

***6** Interpretation of a statute is a question of law over which appellate courts have unlimited review. See *Hoesli v. Triplett, Inc.*, 303 Kan. 358, 362, 361 P.3d 504 (2015). The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained. 303 Kan. at 362. An appellate court must first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings. *Ullery v. Othick*, 304 Kan. 405, 409, 372 P.3d 1135 (2016). When a statute is plain and unambiguous, an appellate court should not speculate about the legislative intent behind that clear language, and it should refrain from reading something into the statute that is not readily found therein. 304 Kan. at 409.

Based on the plain language of the two statutes, we find it almost impossible to reconcile the conflicting provisions of K.S.A. 66-117d and K.S.A. 66-1265(e). The two statutes seem to be saying the opposite. But the Kansas Legislature was presumably aware of K.S.A. 66-117d when it enacted K.S.A. 66-1265(e). See *Ed DeWitte Ins. Agency v. Financial Assocs. Midwest*, 308 Kan. 1065, 1071, 427 P.3d 25 (2018). "When there is a conflict between two statutes the latest legislative expression generally controls. But when the conflict is between a general principle of law and a more specific enactment, the more specific statute controls." *State v. Englund*, 50 Kan. App. 2d 123, Syl. ¶ 3, 329 P.3d 502 (2014).

K.S.A. 66-1265(e) controls the issue presented here. It is both the latest pronouncement of the Legislature on rates for customer-generators and addresses the specific issue of rate design, while K.S.A. 66-117d is both an earlier enactment and addresses rates more generally. The language of K.S.A. 66-1265(e) expressly applies to customer-generators who began using renewable energy on or after July 1, 2014, and the Kansas Legislature authorized utilities to design a rate structure specific to this class of customer-generators, even though the rates might otherwise violate K.S.A. 66-117d. As a result, Sierra Club's arguments regarding the higher charges on RS-DG customers and the prejudice caused by the difficulty in understanding the rate become immaterial.

Under the authority provided by K.S.A. 66-1265(e), the only restraint on the utility's rate design for RS-DG customers is the restraint generally imposed on rates, which is that they cannot be discriminatory. In the context

of rate design, this generally means that the rate design is reasonably calculated to recover the costs of providing service to a particular class plus a reasonable return. In other words, a rate design is generally not discriminatory if it is cost-based. See *Mitchell v. City of Wichita*, 270 Kan. 56, 62, 12 P.3d 402 (2000) ("Rates must be reasonable in the sense that they are not excessive or confiscatory."); *Jones v. Kansas Gas and Electric Co.*, 222 Kan. 390, 401, 565 P.2d 597 (1977) ("The touchstone of public utility law is the rule that one class of consumers shall not be burdened with costs created by another class.").

Although the parties presented conflicting evidence on the reasonableness of the new RS-DG rate design, there was substantial competent evidence supporting the Commission's finding that the new rate design was based on a neutral cost-based rationale. Westar's witness, Ahmad Faruqui, explained that the expected higher billing was to recover fixed costs that RS-DG customers previously avoided by reducing their consumption. Both Faruqui and KCC Staff witness, Robert Glass, indicated that the new rate structure would not impose greater costs on RS-DG customers as a class because the RS-DG customer rate design was revenue neutral as to the class. Faruqui testified:

> ***7** "Westar's proposed three-part rate design is revenue neutral. In other words, in the absence of any change in customer load shapes, the three-part rate would collect the same revenue as a two-part rate that is based on the DG customer-specific revenue requirement. Some customer bills will increase by less than the class average as a result of the change in rate design, and some will increase by more. On average, the rate design change will not lead to a change in revenues (*i.e.*, average rates)."

Madeline Yozwiak, on behalf of Sierra Club, objected to the proposed three-part rate design change for the RS-DG class. She contended that the proposed rate was disproportionate to the rate changes proposed for other residential customers and argued that the rate change was unjustified because RS-DG customers were paying a larger proportional share of Westar's costs than other customers. In support of her conclusion, Yozwiak stated that she calculated the average monthly increase for the RS-DG class as compared to the standard residential class, using the billing determinants from Westar's submissions and Westar's proof of revenue analysis.

During the hearing on the motion to approve the settlement agreement, Glass provided the most detailed testimony on the calculation of the rates imposed on the RS-DG class as a result of the settlement agreement. We need not summarize Glass' detailed testimony in this opinion. But based on Glass' calculation of the rates imposed on the RS-DG class, including the demand charge implemented in the three-part rate design, he found that the new rate imposed on the RS-DG class is reasonably related to how the customers in that class use the utility without disproportionately burdening the RS-DG class in favor of the standard residential class. On whether the three-part rate design was just and reasonable to members of the RS-DG class, Glass concluded that "their rate structure is going to fit their behavior, their unique behavior, better than the current rate structure. So I would argue that the rates, if not just and reasonable, are more just and reasonable than they were" under the prior rate structure.

In this proceeding, the Commission specifically adopted the testimony of Faruqui and Glass in support of the proposed rate design for the RS-DG class. The Commission need not render its findings with minute specificity, so long as the explanation is specific enough to permit judicial review of the reasonableness of its order. *Zinke & Trumbo, Ltd. v. Kansas Corporation Comm'n*, 242 Kan. 470, 475, 749 P.2d 21 (1988). As we understand the argument, Sierra Club does not challenge the evidence supporting a three-part rate design but contends that any rate design that differs from the rate imposed on the standard residential class violates K.S.A. 66-117d. Nevertheless, substantial competent evidence in the record supports the Commission's approval of the new RS-DG rate design based on actual (if averaged) costs to the utility. Because the rate design bears a rational relationship to the utility's cost recovery and does not impose a disproportionate burden on the RS-DG class, the new rate is not discriminatory simply because it imposes higher charges on the RS-DG class than they would receive under the standard residential rate.

DOES THE RATE DESIGN FOR THE RS-DG CLASS VIOLATE FEDERAL LAW?

Alternatively, Sierra Club contends that the new rate design for the RS-DG class violates 18 C.F.R. § 292.305. The Federal Energy Regulatory Commission (FERC) implemented regulations to effect the congressional mandate within the Public Utility Regulatory Policies Act of 1978. The purpose of the Act, in turn, was to encourage the development of cogeneration facilities and small power production facilities. See *American Paper Inst. v.*

American Elec. Power Serv. Corp., 461 U.S. 402, 404-05, 103 S. Ct. 1921, 76 L.Ed.2d 22 (1983). To encourage this development, Congress directed FERC to pass regulations governing the sale of and purchase from a qualified facility by a traditional, regulated utility. 18 C.F.R. § 292.305(a) provides:

***8** "(a) General rules.

(1) Rates for sales:

(i) Shall be just and reasonable and in the public interest; and

(ii) Shall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility.

(2) Rates for sales which are based on accurate data and consistent systemwide costing principles shall not be considered to discriminate against any qualifying facility to the extent that such rates apply to the utility's other customers with similar load or other cost-related characteristics."

"Qualifying facility" is defined as "a cogeneration facility or a small power production facility that is a qualifying facility under Subpart B of this part." 18 C.F.R. § 292.101(b)(1) (2017). Residences with solar panels constitute cogeneration facilities because they meet the requirements of 18 C.F.R. §§ 292.205(a), (b), and (d) (2017) and do not require a notice of self-certification because they possess a net power production of less than 1 megawatt (MW) or 1,000,000 watts of electricity. 18 C.F.R. §§ 292.203(b) and (d)(1) (2017).

The rates imposed by a traditional utility on a qualifying facility must be "just and reasonable." 18 C.F.R. § 292.305(a)(1)(i). Those terms are accorded their traditional meaning within the rate-making context. See *American Paper Institute, Inc.*, 461 U.S. at 415. 18 C.F.R. § 292.305(a)(2) defines discriminatory practices under the regulation and excludes rates based on systemwide costing principles and accurate data related to relative load and other "cost-related characteristics." In this context, the present proceeding is distinguishable from *Swecker v. Midland Power Cooperative*, Docket No. FCU-99-3, 2000 WL 477524 (Iowa U.B. 2000). In *Swecker*, the different rate structures were not cost-based because, before implementing the rate structures, the utility had no co-generators in the customer class. The difference in rates was based on the cost data applicable to three-phase class customers who were not co-generators and on assumptions about co-generators' use of energy. 2000 WL 477524 at Section B.

In contrast, the proposed rate design presented by Westar was based on a cost study of the RS-DG class. The study was taken from a small sample (because only a few customers were initially in the class) and projected on the class as a whole. This practice was reasonable given the exponential growth of the class in the test year and the comparative similarities to the class members' use of electricity. Westar's study showed that revenue received from the RS-DG class was not covering the costs of service to that class. While the rates approved by the Commission in the settlement agreement were different from those prepared by Westar, the approved rates were more favorable to the class than Westar's proposed rates. As shown before, Sierra Club cannot establish that the approved rates prejudiced the RS-DG class.

Sierra Club's reliance on *In the Matter of the Proposed Adoption of Rules of the Minnesota Public Utilities Commission Governing Cogeneration and Small Power Production*, Docket No. E-999, 1983 WL 908113, at *63-64 (Minn. P.U.C. 1983), is similarly misplaced. The Minnesota Commission was concerned with rules about payment to qualifying facilities for energy provided to a regulated utility. See 1983 WL 908113, at *63. In conducting its inquiry under Minn. Stat. § 216B.164.3, the Minnesota utility commission balanced the utility's need to recover its fixed distribution costs and the qualifying facility's interest in not suffering discrimination. The commission acknowledged that, if it set the price of energy from the qualifying facility at the per kilowatt hour charge used by the utility—essentially off-setting the charges the utility required from the qualifying facility—it would not provide the utility with its demand charges encompassed within the energy charge. See 1983 WL 908113, at *64.

***9** In essence, the Minnesota utility commission made a policy decision that, in assessing the rates by which qualifying facilities would be paid for energy provided to the utility, the rate should be based on the lowest avoided cost of the utility. 1983 WL 908113, at *64. While the reasoning of the Minnesota utility commission provides persuasive authority for Sierra Club's position, nothing in the decision suggests that an alternative decision by the commission, accounting for the demand charge within the energy charge, would have been declared discriminatory. In short, the Minnesota utility commission made a policy decision about the rules governing rates based on the governing law. The fact that it made a policy decision in favor of the qualifying facilities does not mean that a contrary decision would constitute improper

discrimination under 18 C.F.R. § 292.305(a) if the decision were properly based on appropriate cost principles.

As discussed, the new RS-DG rate structure implemented in this proceeding was designed to impose more of the demand costs incurred by the RS-DG customers that were unrecovered through an energy charge based on the RS-DG customer's lower usage. Because the rate design properly recovers costs to the utility based on the RS-DG class' unique load and demand requirements, it does not violate 18 C.F.R. § 292.305(a)(1)(ii). See *Albert Einstein Healthcare Foundation/University of Pennsylvania v. Pennsylvania Public Utility Comm'n*, 119 Pa. Commw. 608, 619, 548 A.2d 339 (1988) ("[B]ecause the rate was cost-based, there is no merit to Petitioners' contention that the rate violates federal and state law.").

Finally, contrary to Sierra Club's argument, systemwide costing principles do not require the Commission to apply similar rate designs to standard residential customers who use lower amounts of energy than the class average and thus potentially cause the utility to under-recover its costs through a rate design that embeds the demand charge in the energy charge. This argument would require the utility to consider each individual customer's use characteristics rather than identifying a class based on use characteristics and designing a rate to recover the class costs. It is not feasible to create a rate structure governing each individual consumer's use of utility-provided energy. The rate design must be based on the average characteristics of the class. And as discussed, standard residential customers use Wester's electric grid differently than the RS-DG customers.

Anomalies in patterns of electricity use may likely be found in both the standard residential class and in the RS-DG class. But with respect to the typical standard residential consumer who uses less than average energy, that customer's demand on the system is also lessened. This is not the case for the typical RS-DG customer, whose demand on the system is usually equivalent to the standard residential customer while his or her energy consumption is lessened by self-generation of electricity. These differences justify applying the new demand-based rate design to the RS-DG class without applying the same mandatory rate to low-energy consumers within the standard residential class.

In sum, the rate design approved by the Commission for the RS-DG class does not violate federal law. The Commission received substantial competent evidence supporting its conclusion that the three-part rate design for the RS-DG class is just and reasonable based on unique usage patterns of members of the RS-DG class and based on costs incurred by the utilities to provide service to the class. Applying our standard of review, we have no basis to set aside the Commission's decision.

Affirmed.

All Citations

438 P.3d 312 (Table), 2019 WL 1575480, Util. L. Rep. P 27,463

End of Document

Appendix B

460 P.3d 821
Supreme Court of Kansas.

In the MATTER OF the Joint Application of
WESTAR ENERGY, INC.
and
Kansas Gas and Electric Company.

No. 120,436
|
Opinion filed April 3, 2020.

Synopsis

Background: Environmental organizations appealed from decision of the Kansas State Corporation Commission, 2018 WL 4739757, which approved settlement agreement resolving utilities' rate application, implementing new rate structure for class of residential customers who generated some of their own electricity needs from renewable sources. The Court of Appeals, 438 P.3d 312, affirmed. Organizations appealed.

[Holding:] The Supreme Court, Stegall, J., held that rate structure charging customers who generated portion of their own energy from renewable sources more for same services than other customers violated antidiscrimination statute.

Reversed and remanded.

Procedural Posture(s): Review of Administrative Decision.

West Headnotes (7)

[1] **Appeal and Error** Statutory or legislative law

Interpretation of a statute is a question of law over which the Supreme Court exercises plenary review.

[2] **Statutes** Intent

In statutory interpretation, the intent of the Legislature governs if that intent can be ascertained.

[3] **Statutes** Language and intent, will, purpose, or policy
Statutes Plain Language; Plain, Ordinary, or Common Meaning

In ascertaining the Legislature's intent, courts interpreting a statute begin with the plain language of the statute, giving common words their ordinary meaning.

[4] **Statutes** In general; factors considered
Statutes Plain, literal, or clear meaning; ambiguity

Courts interpreting a statute will only review legislative history or use canons of construction if the statute's language or text is unclear or ambiguous.

[5] **Electricity** Discrimination and Overcharge

Antidiscrimination statute that prohibited utilities from charging customers who produced portion of their own energy from renewable source a higher price than other customers for same service did not conflict with later-enacted statute allowing utilities to use different rate structure for customers producing portion of their own energy, and, thus, Kansas State Corporation Commission's approval of utilities' rate application, implementing rate structure charging customers who generated some of their

own electricity needs more for same services than other customers, violated antidiscrimination statute, where antidiscrimination statute focused on price of services sold by utilities, while later-enacted statute addressed rate structure rather than price, and there was nothing in later-enacted statute suggesting that such a rate structure did not also have to comply with antidiscrimination statute. Kan. Stat. Ann. §§ 66-117d, 66-1265(e).

[6] **Statutes** Implied Repeal

Repeal by implication is not favored.

[7] **Statutes** Other Statutes

Statutes should be read as consistent with one another so that both statutes can be given effect.

Syllabus by the Court

1. K.S.A. 66-117d and K.S.A. 66-1265(e) do not conflict. K.S.A. 66-117d addresses the raw price utilities may permissibly charge for the sale of energy to customers producing a portion of their own energy while K.S.A. 66-1265(e) addresses the rate structure utilities may use when selling energy to customers who began producing energy after 2014.

2. Under K.S.A. 66-117d, utilities cannot charge customers producing their own energy more than they charge other customers based on that distinction.

3. K.S.A. 66-1265(e) allows utilities to use a different rate structure for certain customers producing a portion of their own energy. But for the different rate structure to be valid under Kansas law, the ultimate cost to the customer remains subject to the requirements of K.S.A. 66-117d.

Review of the judgment of the Court of Appeals in an unpublished opinion filed April 12, 2019. Appeal from Kansas Corporation Commission.

Attorneys and Law Firms

David C. Bender, pro hac vice, of Earthjustice, of Madison, Wisconsin, argued the cause, and Robert V. Eye, of Robert V. Eye Law Office, LLC, of Lawrence, and Sunil Bector, pro hac vice, of Sierra Club, of Oakland, California, were with him on the briefs for petitioners/appellants Sierra Club and Vote Solar.

Martin J. Bregman, of Bregman Law Office, L.L.C., of Lawrence, argued the cause, and Cathryn J. Dinges, of Westar Energy, Inc., was with him on the briefs for respondent/appellees Westar, Inc. and Kansas Gas and Electric Company.

Brian G. Fedotin, general counsel, argued the cause, and Michael J. Duenes, assistant general counsel, was with him on the briefs for respondent/appellee Kansas Corporation Commission.

Opinion

The opinion of the court was delivered by Stegall, J.:

***822** In 2018, claiming declining sales and rising costs, Westar Energy, Inc. and Kansas Gas and Electric Company (Utilities) applied to the Kansas Corporation Commission (Commission) for a rate increase. The application included a proposed net rate increase of $52.6 million a year, as well as changes in the residential rate design. The Commission permitted numerous interested parties to intervene.

Eventually, most of the parties reached a settlement agreement that included the rate design changes still at issue here. As the lower court explained, the Utilities have traditionally "recovered the costs of providing electricity through a two-part rate involving a flat service charge and a variable energy charge based on the number of kilowatt hours (kWh) used in a monthly billing period." *In re Joint Application of Westar Energy and Kansas Gas and Electric Co.*, No. 120,436, 2019 WL 1575480, at *2 (Kan.

App. 2019) (unpublished opinion). The Utilities, however, don't recover all their fixed costs through the flat service charge and have opted instead to fold some of those fixed costs into the variable energy charge. "A utility company could apportion its fixed costs among its customers at a flat rate and limit the variable rate to the recovery of actual generation costs, but utilities have traditionally sought to recover fixed costs through the variable rate as an incentive for customers to exercise prudent energy consumption." 2019 WL 1575480, at *2.

This same interplay between designing a sound economic model of electricity generation and delivery, on the one hand, and promoting a policy of responsible energy production and use, on the other, is at the heart of today's dispute. This is because some of the Utilities' customers are less dependent than others on the primarily fossil-fueled electricity sold by the Utilities. These customers are known as "partial requirements customers" or "residential distributed generation customers" (DG customers) because they generate their own electricity from a renewable source such as wind or the sun.

Still connected to the utility grid, so-called DG customers have always paid the flat service charge, just like everyone else. But as a class, they use less utility generated electricity and thus the variable energy portion of their utility bills is lower. In fact, in some cases, if the DG customer is generating more electricity than they use and selling the excess back to the grid, the variable energy portion of the bill may amount to a net-zero.

According to the Utilities, this has created what is sometimes referred to in economic parlance as a "free rider" problem. Malm, *An Actions-Based Estimate of the Free Rider Fraction in Electric Utility DSM Programs*, 17 The Energy Journal No. 3, 41 (1996) (defining free riders as individuals who impose costs on the system without providing benefits such as payment). As one study, procured by the Utilities and made part of the record before the Commission, put it:

> "When a customer conserves energy, the utility produces less energy, and thus incurs less energy production cost (e.g. fuel ***823** or purchased power). This should amount to a dollar-for-dollar savings for both the customer and the utility. However, when a customer conserves energy, the utility does not incur lower fixed costs, like capital investments in power plants (production demand), or substations and poles (distribution demand), or meters, billing, or customer service representatives (customer). When some customers are able to reduce their energy consumption by installing DG they avoid paying fixed costs that the utility continues to incur to provide the customer with needed services. Ultimately, those costs will be shifted to customers that do not have DG, resulting in a hidden subsidy from non-DG to DG customers."

To remedy this alleged economic imbalance, the Utilities sought and obtained approval of a new rate structure applicable only to DG customers—the residential distributed generation (RS-DG) rate design. And even though most of the intervenors joined the settlement agreement approving the new rate structure, some objected. For reasons that will become apparent, we need not recite the long procedural history before the Commission or summarize the substantial factual record below. It will suffice to note that the Commission ultimately issued its decision to approve the non-unanimous settlement agreement. Two of the objecting intervenors—the Sierra Club and Vote Solar (Renewable Energy Advocates)—appealed the Commission's action to the Court of Appeals.

All along, the Utilities' arguments have been driven by their view that the ongoing viability of their economic model depends on fixing the inequities created by DG customers not paying their "fair share." Of course, the overall rate structure chosen by the Utilities—which puts a portion of fixed costs into the variable energy charge—is itself designed to incentivize reduced energy consumption. As such, one would be justified in wondering whether the free rider problem identified by the Utilities is a feature of the system rather than a bug (because lower energy users will necessarily pay a smaller per-unit share of the fixed costs).

In any event, though we are not insensible to the economic arguments, we find that in this particular case we can move past them with relative ease. This is because the policy favoring customers who generate a portion of their own energy from renewable sources was chosen by the policy makers in our Legislature and is cemented in Kansas law. And interpreting and enforcing statutes as they are written is the job of this court, not deciding whether those statutes effect good or bad policy.

ANALYSIS

Distributed generation systems are not new. On the heels of several energy and oil shortages in the 1970s, President Jimmy Carter and his administration confronted America's crisis relationship with fossil fuels. President

Carter addressed the nation several times reiterating the need for "strict conservation" and the use of "permanent renewable energy sources like solar power" to protect the environment, achieve economic growth, and gain independence as a country. Carter, *The Energy Problem*, Address to the Nation (April 18, 1977), *in* 1 Public Papers of the Presidents of the United States: Jimmy Carter 656, 657 (1977); see also Tomain, *The Dominant Model of United States Energy Policy*, 61 U. Colo. L. Rev. 355, 369-72 (1990) (highlighting President Carter's energy addresses and legislative developments). President Carter described these efforts as the " 'moral equivalent of war.' " Carter, at 656. To show dedication to the cause, he even installed solar panels on the White House. See Outka, *Environmental Law and Fossil Fuels: Barriers to Renewable Energy*, 65 Vand. L. Rev. 1679, 1691 (2012).

At the same time, growing concerns that fossil fuels were contributing to global climate change also began to drive efforts to incentivize conservation and alternative-source energy generation. "In general, the process of balancing energy and environmental objectives has been a common theme underlying many of the major actions of Congress, the courts, the executive branch, and the independent agencies during the past year." *Report of Committee on the Environment*, 1 Energy L.J. 119 (1980). Many worried that "the continued burning of fossil fuels will increase the level of carbon dioxide ***824** in the air. Some scientists believe that this increase could create a so-called 'greenhouse effect', increasing the temperatures at the earth's surface and causing dramatic changes in the climate." 1 Energy L.J. at 121.

For example, in 1981 the International Council of Scientific Unions (ICSU) issued a statement warning that "growth in fossil fuel consumption, particularly by drawing upon the earth's very large coal resources" could create "increases in carbon dioxide concentrations and climate changes in the future" resulting in "temperature rise at the earth's surface." The ICSU noted that the "more vigorous the growth in energy and fossil fuel use, the more accelerated this process would be." Joint WMO/ICSU/UNEP Meeting of Experts: On the Assessment of the role of CO_2 on Climate Variations and their Impact 1-2 (January 1981). David Rose—a nuclear engineer and professor at the Massachusetts Institute of Technology who became an early advocate of fossil fuel alternatives—wrote during this time that "coal and other fossil fuels will in about fifty years bring about the conditions for unavoidable temperature and climate changes." Rose, *Energy Prospects for the Long Term*, 125 Proceedings of the American Philosophical Society 269, 271 (1981).

Professor Rose and others in this period of history began to suggest that based on their "current understanding of the effect of CO_2 on climate and trends in global energy use, a significant CO_2 warming in the next century probably cannot be avoided." But the "rate of increases of atmosphere CO_2 due to fossil fuel consumption can be significantly reduced" if governments and other actors incentivized the adoption of "energy strategies that are relatively 'CO_2-benign.' " Rose et al., *Global Energy Futures and CO_2-Induced Climate Change: Report Prepared for Division of Policy Research and Analysis, National Science Foundation* 6-7, 11-12 (Energy Laboratory, Massachusetts Institute of Technology 1983).

As promised, President Carter signed a package of legislation into law designed to combat the nationwide energy crisis, including the Public Utilities Regulatory Policies Act of 1978, Pub. L. 95-617, 92 Stat. 3117 (PURPA). *FERC v. Mississippi*, 456 U.S. 742, 745, 102 S. Ct. 2126, 72 L. Ed. 2d 532 (1982). As described by this court, "PURPA was designed to encourage increased conservation of electric energy, increased efficiency in the use of facilities and resources by electric utilities, and equitable retail rates for electric consumers." *Kansas City Power & Light Co. v. Kansas Corporation Comm'n*, 238 Kan. 842, 854-55, 715 P.2d 19 (1986). PURPA directed the Federal Regulatory Energy Commission (FERC) to consult with state regulatory agencies and promulgate rules " 'to encourage cogeneration and small power production.' " *FERC*, 456 U.S. at 751, 102 S.Ct. 2126 (quoting 16 U.S.C. § 824a-3[a]). This included an instruction to create a rule that prohibited utilities from "discriminat[ing] against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(c)(2) (2018). This category of small power producers included residential customers producing solar power. See 16 U.S.C. § 796 (17)(A) (2018) (defining a small power production facility as a facility that produces fewer than 80 megawatts of renewable energy); see also 18 C.F.R. §§ 292.101(b)(1); 292.203(a), (d); 292.204 (2019) (defining a qualifying small power production facility as a facility that produces fewer than 80 megawatts of energy and exempting facilities with a net power production capacity of 1 MW or less from filing requirements).

As a result, FERC adopted regulations relating to purchases and sales of electricity to and from cogeneration and small power facilities in 1980. The regulations included an antidiscrimination provision providing that "rates for sales ... [s]hall not discriminate against any qualifying facility in comparison to rates for sales to other customers served by the electric utility." 18

C.F.R. § 292.305(a)(1)(ii) (2019).

This history is significant not because it is (or is not) dispositive of the underlying claims about fossil fuels and their relative benefit or harm to society, but because it describes the political, economic, and cultural context within which Kansas law developed. States such as Kansas responded in this historical moment by developing their own conservation programs. See Scott, ***825** *Teaching An Old Dog New Tricks: Adapting Public Utility Commissions To Meet Twenty-first Century Climate Challenges*, 38 Harv. Envtl. L. Rev. 371, 388 (2014) ("In the 1980s, a number of states began following the federal example and developing their own conservation programs."); see also *Kansas City Power & Light Co. v. Kansas Corporation. Comm'n*, 234 Kan. 1052, 1054, 676 P.2d 764 (1984) (stating that the Kansas Legislature "recognize[ed] the need for energy conservation and cogeneration" in 1979 after PURPA's enactment). Thus, in 1980, the Kansas Legislature enacted K.S.A. 66-117d, L. 1980, ch. 201, § 1:

> "No electric or gas utility providing electrical or gas service in this state shall consider the use of any renewable energy source other than nuclear by a customer as a basis for establishing higher rates or charges for any service or commodity sold to such customer nor shall any such utility subject any customer utilizing any renewable energy source other than nuclear to any other prejudice or disadvantage on account of the use of any such renewable energy source."

Contrary to the Utilities' current economic arguments, at least at the time K.S.A. 66-117d was enacted, there was a widely held belief that incentivizing consumer generation of electricity was economically beneficial to the entire electric generation system. The basic idea was that "[p]roperly designed and integrated solar devices" would "reduce consumers' need for electricity during peak demand periods" which would in turn allow "utilities to achieve load management control." Lawrence & Minan, *Financing Solar Energy Development Through Public Utilities*, 50 Geo. Wash. L. Rev. 371, 378 (1982). The energy crises of the 1970s led to rocketing fixed costs and "adversely affected the economics of public utility operations." To deal with this problem, "many electric companies changed their marketing objectives from promoting greater power consumption to encouraging greater diversification of consumer demand." By "spreading customer demand more evenly over a given time period" utilities hoped to "use existing plant capacity more efficiently" and avoid the economic losses associated with the "increase[d] generating capacity" sitting idle "during off-peak hours." This kind of load management was believed to be achievable at least in part through customer owned solar power-plants. "These economic considerations explain electric utilities' self-interest in integrating solar energy applications with their services." 50 Geo. Wash L. Rev. at 377, 379.

The Utilities in this case appear to have given up on the economic promise once attached to the private generation of electricity from renewable resources. Indeed, the Utilities admitted at oral argument that under their proposed RS-DG rate design, DG customers will pay more for their electricity than other customers and that, considered in isolation, this violates K.S.A. 66-117d. But the Utilities argue K.S.A. 66-117d is invalid and cannot be applied to the RS-DG rate design because it conflicts with a more recent statute— K.S.A. 66-1265(e). And, being the more recent statute, the Utilities argue that K.S.A. 66-1265(e) preempts K.S.A. 66-117d and allows the Utilities to charge more to DG customers than they do to non-DG customers—all for providing the same services and selling the same energy.

Under K.S.A. 66-1265(e):

> "Each utility shall:
>
> ....
>
> "(e) for any customer-generator which began operating its renewable energy resource under an interconnect agreement with the utility on or after July 1, 2014, have the option to propose, within an appropriate rate proceeding, the application of time-of-use rates, minimum bills or other rate structures that would apply to all such customer-generators prospectively."

The Court of Appeals agreed with the Utilities, finding that the two statutes conflicted because K.S.A. 66-1265(e) authorized utilities to charge DG customers higher rates. *Westar Energy*, 2019 WL 1575480, at *6. Thus, the panel concluded that K.S.A. 66-1265(e) must control because it is the latest pronouncement from

the Legislature and the more specific statute. 2019 WL 1575480, at *6 (quoting *State v. Englund*, 50 Kan. App. 2d 123, Syl. ¶ 3, 329 P.3d 502 (2014)) (" 'When there is a conflict between two statutes the ***826** latest legislative expression generally controls. But when the conflict is between a general principle of law and a more specific enactment, the more specific statute controls.' ").

[1]We must now determine whether the RS-DG rate design violates Kansas law. K.S.A. 66-118a(b) gives jurisdiction over Commission actions to the Kansas Court of Appeals, and we have unlimited jurisdiction to review decisions of that intermediate court. K.S.A. 66-118a(b) ("The court of appeals shall have exclusive jurisdiction to review any agency action of the state corporation commission arising from a rate hearing ...."); K.S.A. 60-2101 ("The supreme court shall have jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court or court of appeals ...."); see also *GFTLenexa, LLC v. City of Lenexa*, 310 Kan. 976, 981, 453 P.3d 304 (2019) ("This court exercises concurrent jurisdiction with the Court of Appeals over all appeals over which the Court of Appeals has jurisdiction ...."). The Kansas Judicial Review Act (KJRA), K.S.A. 77-601 et seq., governs our review of this issue. K.S.A. 66-118c. Under the KJRA, an appellate court may grant relief when the Commission has erroneously interpreted or applied the law. K.S.A. 77-621(c)(4). Our review of the Commission's actions requires us to interpret both K.S.A. 66-117d and K.S.A. 66-1265(e). Interpretation of a statute is a question of law over which we exercise plenary review. *Midwest Crane & Rigging, LLC v. Kansas Corporation Comm'n*, 306 Kan. 845, 848, 397 P.3d 1205 (2017).

[2] [3] [4]In short, we disagree with the lower court's holding that the statutes conflict. When interpreting and comparing K.S.A. 66-117d and K.S.A. 66-1265(e), we abide by the most fundamental rule of statutory interpretation—that the intent of the Legislature governs if that intent can be ascertained. *Harsay v. University of Kansas*, 308 Kan. 1371, 1381, 430 P.3d 30 (2018). In ascertaining this intent, we begin with the plain language of the statute, giving common words their ordinary meaning. *Nauheim v. City of Topeka*, 309 Kan. 145, 149, 432 P.3d 647 (2019). We will only review legislative history or use canons of construction if the statute's language or text is unclear or ambiguous. 309 Kan. at 150, 432 P.3d 647.

[5]Under this plain language analysis, we can discern no conflict between the statutes. On the one hand, K.S.A. 66-117d is an antidiscrimination provision that prohibits utilities from charging DG customers a higher price than non-DG customers for the same service. K.S.A. 66-117d focuses on the price of the goods and services sold by the Utilities. On the other hand, K.S.A. 66-1265(e) addresses rate structure rather than price. K.S.A. 66-1265(e) allows utilities to propose separate rate structures that would apply to all DG customers that began generating their own electricity after 2014. The Utilities argue that K.S.A. 66-1265(e)'s language permits utilities to charge DG customers a higher price than they charge to non-DG customers, reasoning that a change in rate structure necessarily impacts price. And this means the two statutes conflict, evincing a legislative desire to repeal K.S.A. 66-117d.

But while it is clearly true that a change in rate structure could impact the ultimate price charged by Utilities for providing their goods and services, we can imagine a rate structure change that would not result in price discrimination against DG customers. The two statutes can coexist. To adopt the position advocated by the Utilities, however, would require us to read something into K.S.A. 66-1265(e) not found in its text—something we routinely refuse to do. See, e.g., *State v. Ayers*, 309 Kan. 162, 164, 432 P.3d 663 (2019) (" '[W]hen a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.' ").

[6] [7]By glossing over this price versus structure distinction, both the Utilities and the Court of Appeals effectively write K.S.A. 66-117d out of the books. This runs contrary to a bedrock principle of statutory interpretation that " '[r]epeal by implication is not favored.' " *In re City of Wichita*, 274 Kan. 915, 929, 59 P.3d 336 (2002) (quoting ***827** *State v. Roderick*, 259 Kan. 107, 111, 911 P.2d 159 [1996]). We have long resisted repealing statutes without either express language to that effect or "a later enactment [that] is so repugnant to the provisions of the first act that both cannot be given force and effect." *In re City of Wichita*, 274 Kan. at 929, 59 P.3d 336; see also *State v. Holcomb*, 93 Kan. 424, 425, 144 P. 266 (1914) ("where the legislature intends to repeal a statute it is done in express terms, and so it is said that 'the presumption is always against the intention to repeal where express terms are not used' "). Instead, "[s]tatutes should be read as consistent with one another" so that both statutes can be given effect. *Stanley v. Sullivan*, 300 Kan. 1015, 1021, 336 P.3d 870 (2014).

By its plain text, K.S.A. 66-117d clearly prohibits the Utilities from price discrimination against DG customers,

something the Utilities admit they are trying to do. By its plain text, K.S.A. 66-1265(e) authorizes the Utilities to apply alternative rate structures to DG customers. Examples of such rate structures given in the statute are "time-of-use rates" or "minimum bills." But there is nothing in K.S.A. 66-1265(e) suggesting that such a rate structure does not also have to comply with the price nondiscrimination provisions of K.S.A. 66-117d. In other words, while utilities may try to alter the rate structure applicable to DG customers, they must do so within the larger context of a nondiscriminatory price regime. We find the Utilities' arguments that this reading would prohibit utilities from recovering the cost of serving DG customers unpersuasive.

Here, the proposed rate does not reflect an added service justifying a higher cost. The Utilities want to impose a mandatory three-part rate design for DG customers as opposed to the two-part rate design applied to non-DG customers. Both rate designs include a basic service fee and a kilowatt hour energy charge. The three-part rate design, however, adds an additional "demand charge" for DG customers. This demand charge includes a flat fee of $3 in the winter and $9 in the summer. There is no question that the RS-DG rate at issue here is not built on a time-of-use rate or a minimum bill. It is simply price discrimination. And this price discrimination undermines the policy preferences of our Legislature—as expressed in K.S.A. 66-117d—which has codified the goal of incentivizing renewable energy production by private parties as we have already described.

We can think of several ways the Utilities could attempt to reduce or eliminate their economic "free rider" problem without creating a regime of price discrimination. For example, the Utilities could simply restructure their rates so that their fixed costs are fully recovered by the flat fee charged to each customer hooked to the grid. Alternatively, the Utilities could impose a nondiscriminatory time-of-use rate, or a sliding scale rate that decreased the per-unit price as the customer purchased a higher volume of energy—thus rewarding high volume purchasers. Of course it is beyond the scope of this opinion to predict whether these alternative price schemes would clear either the political or legal hurdles they might face. These examples simply illustrate that price discrimination is not the only way to achieve an equitable market for the sale of electricity within statutory parameters. Our decision today does not impose any restrictions on the Utilities' and Commission's economic judgments concerning how best to structure the generation and sale of electricity other than the restriction imposed by the Kansas Legislature in K.S.A. 66-117d.

The proposed RS-DG rate design violates K.S.A. 66-117d because it uses a customer's DG status as a basis for charging more for the same goods and services than the Utilities charge to non-DG customers. And the requirements of K.S.A. 66-117d remain valid and enforceable against the Utilities. Therefore, the RS-DG rate design is unlawful and the Commission erred by approving a discriminatory rate in violation of K.S.A. 66-117d.

The judgment of the Court of Appeals is reversed. The judgment of the Kansas Corporation Commission is reversed, and this matter is remanded to the Commission for further proceedings consistent with this opinion.

Beier, J., not participating.

Henry W. Green, Jr., J., assigned.[1]

Steve Leben, J., assigned.[2]

Neil B. Foth, District Judge, assigned.[3]

All Citations

460 P.3d 821

Footnotes

1 REPORTER'S NOTE: Judge Green, of the Kansas Court of Appeals, was appointed to hear case No. 120,436 under the authority vested in the Supreme Court by K.S.A. 2019 Supp. 20-3002(c) to fill the vacancy on the court by the retirement of Justice Lee A. Johnson.

2 REPORTER'S NOTE: Judge Leben, of the Kansas Court of Appeals, was appointed to hear case No. 120,436 under the authority vested in the Supreme Court by K.S.A. 2019 Supp. 20-3002(c) to fill the

vacancy on the court by the retirement of Chief Justice Lawton R. Nuss.

[3] REPORTER'S NOTE: District Judge Foth was appointed to hear case No. 120,436 vice Justice Beier under the authority vested in the Supreme Court by art. 3, § 6(f) of the Kansas Constitution.

Appendix C

2008 Alabama Laws Act 2008-275 (H.B. 234)

ALABAMA 2008 SESSION LAW SERVICE

2008 REGULAR SESSION

Additions and deletions are identified in House Bills.

Act 2008–275

H.B. No. 234
REVENUE AND TAXATION—ELECTRICITY—PURCHASING—SERVICE SUPPLIERS

By: Representatives Thigpen, McDaniel, Warren, Wren, Jackson and Hill

Enrolled, An Act, To enact the Alternative and Renewable Energy Act of 2008; to amend and renumber Sections 40–17–100, 40–17–101, 40–17–102, 40–17–103, 40–17–104, 40–17–105, 40–17–106, 40–17–107, and 40–17–108, and to amend Sections 40–9B–3, 40–9B–4, 40–18–1, 40–18–70, 40–18–190, and 40–18–194, Code of Alabama 1975, to make legislative findings and define terms; to provide requirements relating to the Alabama Public Service Commission's approval of utility programs for the purchase of electricity from distributed generation facilities; to provide similar rules for the governing boards of certain other electric service suppliers; to provide for tax credits and abatements for various energy-related expenditures; to provide for the review by the Department of Revenue of payroll filings and withholdings for wages paid to certain construction workers; and to provide effective dates.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known, and may be cited as, the "Alternative and Renewable Energy Act of 2008."
Section 2. The Legislature makes the following findings:
(1) As Alabama's industrial and commercial bases grow, stable, affordable energy is becoming even more vital to the economy and security of the state's citizens.
(2) Advancing the development of alternative and renewable energy resources is important for the future of the State of Alabama, including the stability of the energy supply for the state's citizens, the health of the state's citizens, the state's environment, and the state's economic development.
(3) Clean fossil fuel technologies, nuclear power, and hydropower are alternative energy resources which are viable means of producing electricity with reduced carbon emissions.
(4) New technologies are enabling the use of alternative and renewable energy resources as a reliable means of providing energy to the state's citizens.
(5) The development of alternative and renewable energy resources will help to reduce the demand for foreign fuels, promote energy diversity, enhance system reliability, and reduce air emissions.
(6) There is a need to assist in the development of market demand that will help expand the use of alternative and renewable energy resources.
Section 3. The following new Article 6, comprised of Section 37–4–140, is added to Chapter 4 of Title 37 of the Code of Alabama 1975, to read as follows:

<< AL ST § 37–4–140 >>

§ 37–4–140.

(a) For purposes of this section only, the following terms shall have the following meanings:
(1) AVOIDED COSTS. Costs that a utility or a commission non-jurisdictional electric supplier which purchases electrical

energy from a distributed generation facility would have been required to incur but for the distributed generation facility's provision of electrical energy during the same period of time. To the extent such costs are actually avoided, the term may include incremental fuel costs, incremental energy losses, incremental emission allowance costs, and incremental fuel-related operation and maintenance expenses. The term does not include, among other things, costs associated with capacity, the transmission and distribution system, administrative and general costs, customer accounting costs, and general plant in service costs.

(2) COMMISSION. The Alabama Public Service Commission.

(3) COMMISSION NON–JURISDICTIONAL ELECTRIC SUPPLIER.

a. A municipality that owns or operates an electric system.

b. Any public corporation, cooperative corporation, membership corporation, agency, authority, board, or other entity or body which is engaged in the business of selling electricity to its members at wholesale, or purchasing electricity from, or distributing or selling electricity to, retail electric consumers in the state, which is not subject to the jurisdiction of the commission, and which is organized and existing pursuant to the provisions of any of the following:

1. A local act providing that the governing body of the entity is to be appointed by the governing body of a municipality and is authorized to furnish electricity to the public in the municipality or in the municipality and the surrounding territory.
2. Article 9 of Chapter 50 of Title 11.
3. Chapter 50A of Title 11.
4. Article 15 of Chapter 50 of Title 11.
5. Article 16 of Chapter 50 of Title 11.
6. Chapter 5 of Title 37.
7. Chapter 6 of Title 37.
8. Chapter 7 of Title 37.
9. Chapter 7 of Title 39.

(4) DISTRIBUTED GENERATION FACILITY. A facility owned and operated by a customer of the utility or a commission non-jurisdictional electric supplier for the production of electrical energy that is located on the customer's premises, that may transmit electrical energy to distribution facilities at any time, that has a peak generating capacity of not more than 100 kW, and that is intended primarily to offset part or all of the customer's requirements for electricity.

(5) RENEWABLE ENERGY RESOURCE. The meaning given in Section 40–18–1.

(6) UTILITY. A utility as defined by Section 37–4–1(7)a., that is subject to the jurisdiction of the commission.

(b)(1) The commission shall not require a utility to purchase electrical energy from any distributed generation facility at a price that exceeds the utility's avoided costs.

(2) Notwithstanding subdivision (1), the commission may approve a utility proposal to establish a renewable energy program whereby the utility purchases energy from a distributed generation facility that generates electrical energy from a renewable energy resource.

(c) To the extent a utility purchases electrical energy from any distributed generation facility under subsection (b), all of the following requirements shall also apply:

(1) The commission shall approve the utility's rates, fees, and charges for services to a distributed generation facility including, but not limited to, metering service, administering metering service, standby power, supplementary power, back-up power, and maintenance power. The utility shall also be allowed to recover the costs associated with interconnecting a distributed generation facility from the applicable customer. The commission may not require the utility to allocate such costs to the utility's entire customer base. The commission shall require that a customer with a distributed generation facility pay for all such applicable costs.

(2) The commission may adopt or approve any safety, power quality, reliability, and interconnection requirements for a distributed generation facility that the commission determines are necessary to protect public safety, power quality, and system reliability. ~~No utility shall be liable to any person, group of persons, or legal entity, directly or indirectly, for damage to or loss of property, injury, or death that arises in any way from the interconnection or operation of a distributed generation facility.~~

The customer shall at all times be responsible for the proper installation, maintenance, and operation of the distributed generation facility and all related wiring, equipment, and apparatus. The utility shall have no obligation to install, maintain, operate, or inspect any electrical facilities owned or operated by the customer and shall not be liable to any person, group of persons, or legal entity for damage to or loss of property, injury, or death that arises in any way from the improper installation, maintenance, or operation of the customer's electrical facilities or the failure of the customer to satisfy all applicable interconnection requirements.

(d)(1) A commission non-jurisdictional electric supplier shall not purchase electrical energy from any distributed generation

facility at a price that exceeds the commission non-jurisdictional electric supplier's avoided costs.

(2) Subdivision (1) shall not apply to a renewable energy program established by a commission non-jurisdictional electric supplier whereby the supplier purchases energy from a distributed generation facility that generates electrical energy from a renewable energy resource.

(3) To the extent that the governing board of a commission non-jurisdictional electric supplier determines that it will establish a program to purchase electrical energy from any distributed generation facility, then all of the following requirements shall also apply:

a. The governing board of a commission non-jurisdictional electric supplier shall establish rates, fees, and charges for services to a distributed generation facility including, but not limited to, metering service, administering metering service, standby power, supplementary power, back-up power, and maintenance power. The commission non-jurisdictional electric supplier shall also be allowed to recover the costs associated with interconnecting a distributed generation facility from the applicable customer. The applicable governing board may not allocate such costs to its entire customer base and shall require that a customer with a distributed generation facility pay for all such applicable costs.

b. The governing board of a commission non-jurisdictional electric supplier may adopt any safety, power quality, reliability, and interconnection requirements for a distributed generation facility that it determines are necessary to protect public safety, power quality, and system reliability. ~~No commission non-jurisdictional electric supplier shall be liable to any person, group of persons, or legal entity, directly or indirectly, for damage to or loss of property, injury, or death that arises in any way from the interconnection or operation of a distributed generation facility.~~

The customer shall at all times be responsible for the proper installation, maintenance, and operation of the distributed generation facility and all related wiring, equipment, and apparatus. The commission non-jurisdictional electric supplier shall have no obligation to install, maintain, operate, or inspect any electrical facilities owned or operated by the customer and shall not be liable to any person, group of persons, or legal entity for damage to or loss of property, injury, or death that arises in any way from the improper installation, maintenance, or operation of the customer's electrical facilities or the failure of the customer to satisfy all applicable interconnection requirements.

(4) Nothing in this section shall:

a. Subject any commission non-jurisdictional electric supplier to the jurisdiction or control of the commission.

b. Affect the authority of the governing board of each commission non-jurisdictional electric supplier to determine whether it will establish a program to purchase electrical energy from a distributed generation facility.

c. Apply to any commission non-jurisdictional electric supplier, which is a party to a wholesale power supply contract with a federal agency or instrumentality of the United States Government under which it purchases electricity for resale to its customers, in any manner which would be inconsistent with the terms and conditions of any of its contracts with said federal agency or instrumentality of the United States Government.

d. Apply to any commission non-jurisdictional electric supplier which is a party to a contract entered into pursuant to the provisions of Section 11–50A–17, Code of Alabama 1975, in any manner that would be inconsistent with the terms and conditions of this contract.

e. Apply to any contract, agreement or arrangement that is in existence on the effective date of this act pursuant to which a commission non-jurisdictional electric supplier purchases or is entitled to purchase electrical energy, electrical capacity, or both, from a distributed generation facility, including without limitation, renewals and extensions of such contracts, agreements or arrangements whether containing the same or different terms and conditions as is effect on the date of enactment of this act.

Section 4. Sections 40–9B–3 and 40–9B–4, Code of Alabama 1975, are amended to read as follows:

<< AL ST § 40–9B–3 >>

"§ 40–9B–3.

"(a) For purposes of this chapter, the following words and phrases mean:

(1) ABATE, ABATEMENT. A reduction or elimination of a taxpayer's liability for tax or payments required to be made in lieu thereof. An abatement of transaction taxes imposed under Chapter 23 of this title, or payments required to be made in lieu thereof, shall relieve the seller from the obligation to collect and pay over the transaction tax as if the sale were to a person exempt, to the extent of the abatement, from the transaction tax.

(2) ALTERNATIVE ENERGY RESOURCES. The definition given in Section 40–18–1.

~~(2)~~(3) CONSTRUCTION RELATED TRANSACTION TAXES. The transaction taxes imposed by Chapter 23 of this title, or payments required to be made in lieu thereof, on tangible personal property and taxable services incorporated into an

industrial development property, the cost of which may be added to capital account with respect to the property, determined without regard to any rule which permits expenditures properly chargeable to capital account to be treated as current expenses.

~~(3)~~(4) EDUCATION TAXES. Ad valorem taxes, or payments required to be made in lieu thereof, that must, pursuant to the Constitution of Alabama of 1901, as amended, legislative act, or the resolution or other action of the governing board authorizing the tax, be used for educational purposes or for capital improvements for education and local construction related transaction taxes levied for educational purposes or for capital improvements for education.

(5) HYDROPOWER PRODUCTION. The definition given in Section 40–18–1.

~~(4)~~(6) INDUCEMENT. Refers to an agreement, or an "inducement agreement," entered into between a private user and a public authority or county or municipal government and/or a resolution or other official action, an "inducement resolution," "inducement letter," or "official action" adopted by a public authority or county or municipal government, in each case expressing, among other things, the present intent of such public authority or county or municipal government to issue bonds in connection with the private use property therein described.

~~(5)~~(7) INDUSTRIAL DEVELOPMENT PROPERTY. Real and/or personal property acquired in connection with establishing or expanding an industrial or research enterprise in Alabama.

~~(6)~~(8) INDUSTRIAL OR RESEARCH ENTERPRISE. a. Any trade or business described in 1987 Standard Industrial Classification Industry Group Number 0724, Major Groups 20 to 39, inclusive, 50 and 51, Industrial Group Number 737, and Industry Numbers 4613, 8731, 8733, and 8734, as set forth in the Standard Industrial Classification Manual published by the United States Government Office of Management and Budget.

b. With respect to abatements granted in accordance with Section 40–9B–9, and only with respect to such abatements, "industrial or research enterprise" means any trade or business described in the 1997 North American Industry Classification System within Subsector 493 (Warehousing and Storage), Industry Number 488310 (Port and Harbor Operations), or Industry Number 488320 (Marine Cargo Handling), when such trade or business is conducted on premises in which the Alabama State Port Authority has an ownership, leasehold, or other possessory interest and such premises are used as part of the operations of the Alabama State Port Authority.

c. "Industrial or research enterprise" includes the above-described trades and business and any others as may hereafter be reclassified in any subsequent publication of the NAICS or similar industry classification system developed in conjunction with the United States Department of Commerce or Office of Management and Budget.

d. "Industrial or research enterprise" also includes any underground natural gas storage facility which is located in the Gulf Opportunity Zone, as that phrase is defined in the Gulf Opportunity Zone Act of 2005, developed from existing geologic reservoirs, including, without limitation, salt domes, and placed in service on or before December 31, 2013.

e. "Industrial or research enterprise" also includes any plant, property, or facility that meets both of the following:

1. It produces electricity from:

(i) Alternative energy resources and has capital costs of at least one hundred million dollars ($100,000,000); or

(ii) Hydropower production and has capital costs of at least five million dollars ($5,000,000).

2. All or a portion of the plant, property, or facility is owned by one or more of the following: a utility described in Section 37–4–1(7)a., an entity organized under the provisions of Chapter 6 of Title 37, or an authority both organized and existing pursuant to the provisions of Chapter 50A of Title 11 and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, or an entity in which one or more of the foregoing owns an interest.

~~(7)~~(9) MAJOR ADDITION. Any addition to an existing industrial development property that equals the lesser of: 30 percent of the original cost of the industrial development property or two million dollars ($2,000,000). For purposes of this subsection, the original cost of existing industrial development property shall be the amount of industrial development property with respect to which an abatement was granted under this chapter when the property was constructed, or if the existing industrial development property was constructed before January 1, 1993, the maximum amount that would have been allowed if the provisions of this chapter had applied at the time it was constructed. Only property that constitutes industrial development property shall be taken into account in making the determination in the previous sentence.

~~(8)~~(10) MAXIMUM EXEMPTION PERIOD. ~~A~~ Except as provided in Section 40–9B–11, a period equal to the shorter of:

a. Ten years from and after: 1. The date of initial issuance by a county, city, or public authority of bonds to finance any costs of a private use property, or 2. If no such bonds are ever issued, the later of: (i) The date on which title to ~~such~~ the property was acquired by or vested in ~~such~~ the county, city, or public authority, or (ii) The date on which ~~such~~ the property is or becomes owned, for federal income tax purposes, by a private user; or b. The weighted average economic life of the assets comprising such property, determined consistently with the provisions of 26 U.S.C. § 147(b) and measured from the date such property is placed in service.

~~(9)~~(11) MORTGAGE AND RECORDING TAXES. The taxes imposed by Chapter 22 of this title.
~~(10)~~(12) NONEDUCATIONAL AD VALOREM TAXES. Ad valorem taxes, or payments required to be made in lieu thereof, imposed by the state, counties, municipalities, and other taxing jurisdictions of Alabama that are not required to be used for educational purposes or for capital improvements for education.
~~(11)~~(13) PERSON. Includes any individual, partnership, trust, estate, or corporation.
~~(12)~~(14) PRIVATE USER. Any individual, partnership, or corporation organized for profit that is or will be treated as the owner of private use property for federal income tax purposes, any entity organized under Chapter 6 of Title 37, and any authority both organized and existing pursuant to Chapter 50A of Title 11 and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7.
~~(13)~~(15) PRIVATE USE INDUSTRIAL PROPERTY. Private use property that also constitutes industrial development property.
~~(14)~~(16) PRIVATE USE PROPERTY. Any real and/or personal property which is or will be treated as owned by a private user for federal income tax purposes even though title may be held by a public authority or municipal or county government; any real and/or personal property which is owned by any entity organized under Chapter 6 of Title 37; and any real and/or personal property which is owned by any authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7.
~~(15)~~(17) PUBLIC AUTHORITY. A corporation created for public purposes pursuant to a provision of the Constitution of Alabama of 1901, or a general or local law that authorized it to issue bonds, the interest on which is exempt from the Alabama income tax, as in effect on May 21, 1992.
~~(16)~~(18) PUBLIC INDUSTRIAL AUTHORITY. A public authority authorized to issue bonds to acquire, construct, equip, or finance industrial development property.
(19) STATEMENT OF INTENT. A written statement of intent to claim an abatement provided in this chapter, or to petition for local tax abatement, relating to an industrial or research enterprise described in Section 40–9B–3(a)(8)e. that is filed with the Department of Revenue at any time prior to the date on which the industrial or research enterprise described in Section 40–9B–3(a)(8)e. is placed in service in accordance with such procedures and on such form or forms as may be prescribed by the Department of Revenue. Such statement of intent shall contain a description of the industrial or research enterprise described in Section 40–9B–3(a)(8)e.; the date on which the acquisition, construction, installation or equipping of the industrial or research enterprise described in Section 40–9B–3(a)(8)e. was commenced or is expected to commence; the actual or, if not known, the estimated capital costs of the industrial or research enterprise described in Section 40–9B–3(a)(8)e.; the number of new employees to be employed at the industrial or research enterprise described in Section 40–9B–3(a)(8)e.; and any other information required by the Department of Revenue.
(b) The abatements of ad valorem taxes, and payments in lieu thereof, allowed by amendments to this section by the act adding this subsection shall become effective for projects for which statements of intent are filed after December 31, 2011. No ad valorem taxes, or payments in lieu thereof, shall be abated for periods prior to January 1, 2012. The other abatements allowed by amendments made to this section by the act adding this subsection shall become effective after December 31, 2011."

<< AL ST § 40–9B–4 >>

"§ 40–9B–4.

"(a) Noneducational ad valorem taxes, construction related transaction taxes, except those local construction related transaction taxes levied for educational purposes or for capital improvements for education, and mortgage and recording taxes, or payments required to be made in lieu thereof, and in the case of a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e. which is owned by an entity organized under Chapter 6 of Title 37, or by an authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, in addition to the foregoing, all other ad valorem taxes, or payments required to be made in lieu thereof, imposed by the state, counties, municipalities, and other taxing jurisdictions of Alabama, may be abated with respect to private use industrial property and security documents and other recordable documents associated therewith as provided in this chapter.
(b) No abatement of noneducational ad valorem taxes, other ad valorem taxes, or payments required to be made in lieu of the foregoing, may exceed the maximum exemption period. No further abatement with respect to the same private use industrial property may be granted unless there is a major addition to the property, in which event abatement may be granted only with

respect to the noneducational ad valorem taxes, and in the case of a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e. which is owned by an entity organized under Chapter 6 of Title 37, or by an authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, in addition to the noneducational ad valorem taxes, with respect to all other ad valorem taxes, or payments required to be made in lieu thereof, imposed by the state, counties, municipalities, and other taxing jurisdictions of Alabama, on the major addition by complying with the procedures set forth in this chapter.

(c) An abatement of construction related transaction taxes, or payments required to be made in lieu thereof, shall apply only to tangible personal property and taxable services incorporated into a private use industrial property, the cost of which may be added to capital account with respect to the property, determined without regard to any rule which permits expenditures properly chargeable to capital account to be treated as current expenses. No abatement of construction related transaction taxes, or payments required to be made in lieu thereof, shall extend beyond the date the private use industrial property is placed in service. No further abatement may be granted for construction related transaction taxes, or payments required to be made in lieu thereof, with respect to the private use industrial property unless incurred in connection with a major addition, in which event only construction related transaction taxes, or payments required to be made in lieu thereof, that may be added to capital account with respect to the major addition, determined without regard to any rule which permits expenditures properly chargeable to capital account to be treated as current expenses, may be abated by complying with the procedures set forth in Act 92–599~~. No~~ as amended, and as amended by this act. Except in the case of a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e. which is owned by an entity organized under Chapter 6 of Title 37, or by an authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, no local construction related transaction taxes levied for educational purposes or capital improvements for education, or payments required to be made in lieu thereof, may be abated.

(d) Mortgage and recording taxes with respect to mortgages, deeds, and documents relating to issuing or securing obligations and conveying title into or out of the public authority or county or municipal government with respect to a private use industrial property may be abated by complying with the procedures set forth in this chapter.

(e) An abatement under this section may be granted only with respect to private use industrial property that has not previously been placed in service by the private user who is applying for the abatement or by a person who is a related party, as defined in 26 U.S.C. § 267, with respect to such private user.

(f)(1) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., which is owned by a utility described in Section 37–4–1(7)a., and which is a coal gasification or liquefaction project or an advanced fossil-based generation project, as such terms are defined in Section 40–18–1, or which utilizes hydropower production, an abatement under this section shall be in an amount equal to ~~80~~ 100 percent of the state noneducational ad valorem taxes owed for plant, property, and facilities for the maximum exemption period, and in an amount equal to ~~60~~ 50 percent of the state construction related transaction taxes. The abatement shall not be subject to the procedures in Section 40–9B–5 or 40–9B–6.

(2) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., which is owned by a utility described in Section 37–4–1(7)a., and which is a project using an alternative energy resource the abatements for which are not provided in subdivision (1), an abatement under this section shall be in an amount equal to ~~90~~ 100 percent of the state noneducational ad valorem taxes owed for plant, property, and facilities for the maximum exemption period, and in an amount equal to ~~75~~ 50 percent of the state construction related transaction taxes. The abatement shall not be subject to the procedures in Section 40–9B–5 or 40–9B–6.

(3) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., which is owned by an entity organized under Chapter 6 of Title 37, an abatement under this section shall be in an amount equal to 100 percent of the ad valorem taxes owed for plant, property, and facilities for the maximum exemption period, and in an amount equal to 100 percent of the construction related transaction taxes~~, including, without limitation, all~~. An abatement of ad valorem taxes levied or imposed by counties or municipalities may be granted as provided in subsection (h) below. An abatement of the construction related transaction taxes imposed by the governing body of a county pursuant to authority conferred under Article 1 of Chapter 12 of Title 40, or any general, special or local act of the Legislature, ~~all~~ and such transaction taxes imposed by the governing body of a municipality pursuant to authority conferred under Article 3 of Chapter 51 of Title 11, or any general, special, or local act of the Legislature, and all transaction taxes imposed by any other local taxing jurisdiction of Alabama may be granted as provided in subsection (h) below. The abatement shall not be subject to the procedures in Section 40–9B–5 or 40–9B–6.

(4) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., which is owned by an authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of

ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, an abatement under this section against the payments required to be made in lieu of taxes imposed by Section 11–50A–7, shall be allowed in an amount equal to 100 percent of the payments required to be made in lieu of ad valorem taxes owed for plant, property, and facilities for the maximum exemption period, and in an amount equal to 100 percent of the payments required to be made in lieu of the construction related transaction taxes, including, without limitation, payments required to be made in lieu of all transaction taxes imposed by the governing body of a county pursuant to authority conferred under Article 1 of Chapter 12 of Title 40, or any general, special or local act of the Legislature, all transaction taxes imposed by the governing body of a municipality pursuant to authority conferred under Article 3 of Chapter 51 of Title 11, or any general, special, or local act of the Legislature, and payments required to be made in lieu of all transaction taxes imposed by any other taxing jurisdiction of Alabama. The abatement of such payments required to be made in lieu of local taxes may be granted as provided in subsection (h) below. The abatement shall not be subject to the procedures in Section 40–9B–5 or 40–9B–6.

(5) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., which is owned by a utility described in Section 37–4–1(7)a., the abatement for state noneducational ad valorem taxes provided in subdivision (1) or (2) of this subsection, shall be equal to 100 percent of the state noneducational ad valorem taxes owed for plant, property, and facilities for the maximum exemption period if the industrial or research enterprise is located in either of the following:

a. Any area designated or created as an enterprise zone by law or that is governed by the Alabama Enterprise Zone Act.

b. 1. Any Alabama county which is considered to be less developed. A county is considered to be less developed if it has been found to be less developed by the Alabama Department of Industrial Relations using the most current data available from the United States Departments of Labor or Commerce, the United States Bureau of the Census, or any other federal or state agency, and which finding shall be made not later than January 1 of each year thereafter.

2. A county shall be found to be less developed if it is ranked as the forty-fifth through sixty-seventh county, inclusive, using the following factors:

(i) Percent change in population over the most recent five-year period.

(ii) Personal per capita income in the last calendar year for which data are available.

(iii) The average percent employed over the last 12 months for which data are available.

3. The factors used in ranking counties shall be weighted in the following manner:

(i) Percent change in population (25 percent).

(ii) Personal per capita income (25 percent).

(iii) Average percent employed (50 percent).

(6) a. To the extent that a plant, property, or facility described in Section 40–9B–3(a)(8)e., is owned in whole or in part by one or more private users listed hereinafter in subparagraph c., including, but not limited to, ownership as tenants in common, joint tenants, or owners of an undivided interest, then each private user shall be entitled to the abatement allowed under this section with a percentage limitation equal to the ownership interest percentage of the private user multiplied by the percentage limitation found in this subsection (f) applicable to the private user for the tax, or payment in lieu of tax, in question.

b. To the extent that a plant, property, or facility described in Section 40–9B–3(a)(8)e. is owned by a private user which is itself owned in whole or in part by one or more of the entities listed hereinafter in subparagraph c., then the private user shall be entitled to the abatement allowed under this section with a percentage limitation equal to the sum, for all owners, of the ownership interest percentage of each owner multiplied by the percentage limitation found in this subsection (f) applicable to the owner for the tax, or payment in lieu of tax, in question.

c. The entities listed in this subparagraph c. are:

1. A utility described in Section 37–4–1(7)a.

2. An entity organized under Chapter 6 of Title 37.

3. An authority both organized and existing pursuant to Chapter 50A of Title 11 and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7.

(7) No abatement for mortgage and recording taxes, local noneducational ad valorem, or local noneducational construction related transaction taxes shall be granted to a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., owned by a utility described in Section 37–4–1(7)a, except upon the approval of the abatement by the governing body of the county or municipality as provided in subsection (b) of Section 40–9B–5.

(g) The abatements of ad valorem taxes, and payments in lieu thereof, allowed by amendments to this section by the act adding this subsection shall become effective for projects for which statements of intent are filed after December 31, 2011. No ad valorem taxes, or payments in lieu thereof, shall be abated for periods prior to January 1, 2012. The other abatements allowed by amendments made to this section by the act adding this subsection shall become effective after December 31, 2011.

(h) For a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e., the approval of the abatement of a specific ad valorem tax or construction related tax levied or imposed by a county or municipality, or payments required to be made in lieu thereof, shall take effect only upon adoption of a resolution by the governing body of that county or municipality approving such abatement or abatements.

Section 5. Section 40–9B–11 is added to the Code of Alabama 1975, to read as follows:

<< AL ST § 40–9B–11 >>

§ 40–9B–11.

(a) Effective October 1, 2011, the maximum exemption period for a qualifying industrial or research enterprise described in paragraph e. of subdivision (8) of subsection (a) of Section 40–9B–3, which is owned by a utility described in Section 37–~~4~~–1(7)a., shall be 10 years applied as follows:

(1) With respect to land, the abatement shall begin with the first October 1 lien date following commencement of the project, and the abatement shall be for a total of 10 years.

(2) With respect to each portion of real property construction work in progress which was not taxable on the prior October 1 lien date, the abatement for the portion shall begin with the first October 1 lien date on which the construction work in progress becomes taxable, and the abatement shall be for a total of 10 years.

(3) With respect to each item of tangible personal property, the abatement shall begin with the first October 1 lien date on which the item of tangible personal property becomes taxable, and the abatement shall be for a total of 10 years.

(b) Effective October 1, 2011, the maximum exemption period for a qualifying industrial or research enterprise described in paragraph e. of subdivision (8) of subsection (a) of Section 40–9B–3 which is owned by an entity organized under Chapter 6 of Title 37, or by an authority both organized and existing pursuant to Chapter 50A of Title 11, and subject to the payments required to be made in lieu of ad valorem, sales, use, license, and severance taxes imposed by Section 11–50A–7, shall be 20 years applied as follows:

(1) With respect to land, the abatement shall begin with the first October 1 lien date following commencement of the project, and the abatement shall be for a total of 20 years.

(2) With respect to each portion of real property construction work in progress which was not taxable on the prior October 1 lien date, the abatement for that portion shall begin with the first October 1 lien date on which the construction work in progress becomes taxable or subject to payments required to be made in lieu of taxes, and the abatement shall be for a total of 20 years.

(3) With respect to each item of tangible personal property, the abatement shall begin with the first October 1 lien date on which the item of tangible personal property becomes taxable or subject to payments required to be made in lieu of taxes, and the abatement shall be for a total of 20 years.

(c) The abatements of ad valorem taxes, and payments in lieu thereof, allowed by the act shall become effective for projects for which statements of intent are filed after December 31, 2011, and any such abatements shall be granted for ten years. No ad valorem taxes, or payments in lieu thereof, shall be abated for periods prior to January 1, 2012. The other abatements allowed by the act shall become effective after December 31, 2011.

Section 6. Division 3 of Article 2 of Chapter 17 of Title 40 consisting of Sections 40–17–100, 40–17–101, 40–17–102, 40–17–103, 40–17–104, 40–17–105, 40–17–106, 40–17–107, and 40–17–108 of the Code of Alabama 1975, is amended and renumbered as Article 11 of Chapter 17 of Title 40, Sections 40–17–300, 40–17–301, 40–17–302, 40–17–303, 40–17–304, 40–17–305, 40–17–306, 40–17–307, and 40–17–308 of the Code of Alabama 1975, to read as follows:

<< AL ST § 40–17–100 >>

<< AL ST § 40–17–300 >>

"§ 40–17–~~100~~–300.

"When used in this ~~division~~ article, the words "~~gasoline~~ motor fuel used ~~on the farm~~ for agricultural purposes" means any ~~gasoline~~ fuel subject to taxation under Articles 1, 2, or 6 of this chapter when used by the owner, tenant, or operator of a farm in ~~propelling~~ either or both of the following:

(1) Propelling or operating tractors which are used exclusively in preparing and cultivating land, harvesting any agricultural

commodity, or for other such agricultural purposes, or which is used in operating any auxiliary engine attached to and made a part of any farm machinery which is used on the farm in preparing and cultivating land or harvesting any agricultural crop or commodity; provided, that the term "farm machinery," as used herein, shall not include automobiles, trucks, pick-ups, trailers, semitrailers, or other such vehicles.
(2) Propelling or operating any automobile, truck, pick-up, trailer, semitrailer, tractor, or other vehicle when used to transport any biomass as defined in Section 40–18–1, from a farm to a facility at which the biomass is used in the generation of electricity, in whole or in part, from renewable energy resources as defined in Section 40–18–1."

<< AL ST § 40–17–101 >>

<< AL ST § 40–17–301 >>

"§ 40–17~~–101~~–301.

"The purpose of this ~~division~~ article is to promote agriculture in Alabama and to encourage and foster the progress of the farmers of this state by providing for a refund of a portion of the state tax paid on ~~gasoline~~ motor fuel which is used in propelling or operating tractors used exclusively for agricultural purposes, or which is used in operating certain auxiliary engines attached to and made a part of certain farm machinery, or which is used in propelling any vehicle when used to transport farm products to be used in the generation of electricity from renewable energy resources, thereby making it possible for Alabama farmers to use extensively mechanized equipment in competition with the farmers and agricultural interests of surrounding states."

<< AL ST § 40–17–102 >>

<< AL ST § 40–17–302 >>

"§ 40–17~~–102~~–302.

"(a) If ~~gasoline~~ motor fuel is used ~~on the farm~~ for agricultural purposes, as defined ~~by this division~~ in subsection (1) of Section 40–17–300, the ultimate purchaser of ~~such gasoline~~ motor fuel shall be entitled to receive a refund of a portion of the state tax paid on ~~such gasoline~~ motor fuel pursuant to Articles 1, 2, or 6 of this chapter. The amount of ~~such~~ the refund shall be equal to ~~$.11~~ eleven cents ($.11) per gallon for each gallon of ~~gasoline~~ motor fuel which is purchased and used for ~~such~~ these purposes.
(b) If motor fuel is used for agricultural purposes, as defined in subsection (2) of Section 40–17–300, the ultimate purchaser of the motor fuel shall be entitled to receive a refund of a portion of the state tax paid on the motor fuel. The amount of the refund shall be equal to eleven cents ($.11) per gallon for each gallon of motor fuel which is purchased and used for such purposes. The aggregate amount refunded pursuant to this subsection shall not exceed one thousand dollars ($1,000) during each 12–month period ending on December 31 of each year."

<< AL ST § 40–17–103 >>

<< AL ST § 40–17–303 >>

"§ 40–17~~–103~~–303.

"Claims for state ~~gasoline~~ motor fuel tax refunds ~~must~~ shall be sworn to and be filed with the Commissioner of Revenue on forms to be prepared and distributed by the commissioner. ~~Such~~ The forms ~~must~~ shall be substantially as follows:
CLAIM FOR REFUND OF STATE TAX ON ~~GASOLINE~~ MOTOR FUEL USED ON A FARM FOR AGRICULTURAL PURPOSES.
1. Name _____
Address (Number and street or rural route) _____

(City, town, or post office) _____ (Zone)
_____ (State) _____.
2. Total number of gallons of ~~gasoline~~ motor fuel purchased after December 31, 2__, and before January 1, 22__, for farming purposes, and for which a claim has been filed for a refund of the federal tax on ~~gasoline~~ motor fuel under Public Law 466, H.R. 8780, 84th Congress, Chapter 160, 2nd Session _____ gallons.
3. Total number of gallons of ~~gasoline~~ motor fuel purchased after December 31, 2__, and before January 1, 2__, for ~~propelling tractors which are used exclusively~~ use for agricultural purposes ~~or for operating auxiliary engines attached to and made a part of any farm machinery~~ _____ gallons.
4. Rate of refund of state tax (per gallon), _____ $.11.
5. Subtotal of refund claimed (line 3 multiplied by line 4) $_____.
6. Total number of gallons of motor fuel purchased after December 31, 2___, and before January 1, 2_____, to transport any biomass from a farm to a facility at which the biomass is used in the generation of electricity from renewable energy resources _____ gallons.
7. Rate of refund of state tax (per gallon) _____ $.11.
8. Subtotal of refund claimed (line 6 multiplied by line 7) $_____.
9. Enter the lesser of line 8 or $1,000 $_____.
10. Total refund claimed (line 5 plus line 9) $_____.
~~4.~~11. The names and addresses of all retailers, refiners, or distributors from whom the ~~gasoline~~ motor fuel for which the refund is being claimed was purchased, together with the dates and number of the invoices covering the total number of gallons of ~~gasoline~~ motor fuel on which ~~such~~ the refund is being claimed (attach sheet or enter on reverse side of this form).
~~5. Rate of refund of state tax (per gallon) _____ $.11.~~
~~6. Amount of refund claimed (line 3 multiplied by line 5) $_____~~
I declare under the penalties of perjury that this claim has been examined by me and to the best of my knowledge and belief is true and correct, and that the number of gallons shown in ~~item 5 does~~ items 3 and 6 do not exceed the total number of gallons of ~~gasoline~~ motor fuel on which I am legally entitled, under the laws of this state, to a refund of a portion of the state tax paid.
Signed: _____
Date: _____
Sworn and subscribed before me this the _____ day of _____, 2__."

<< AL ST § 40–17–104 >>

<< AL ST § 40–17–304 >>

"§ 40–17–~~104~~–304.

"Not more than one claim for a refund of the state tax paid on ~~gasoline~~ motor fuel may be filed by any person under the provisions of this article with respect to ~~gasoline~~ motor fuel purchased during the 12–month period ending on December 31 each year; and no claim shall be allowed with respect to any such 12–month period unless ~~such~~ the claim is filed on or before March 31 of the year following ~~such~~ the 12–month period.~~; provided, that claims for state gasoline tax refunds on gasoline purchased after June 30, 1969, and before January 1, 1970, must be sworn to and be filed with the Commissioner of Revenue on forms substantially the same as provided for in Section 40–17–103; except, that the prescribed dates in items 2 and 3 of said form shall read "June 30, 1969" and "January 1, 1970," respectively. Not more than one claim for a refund of the state gasoline tax may be filed by any person under the provisions of this division with respect to gasoline purchased during the six month period ending on December 31, 1969; and no claim shall be allowed with respect to any such six month period unless such claim is filed on or before February 15, 1970.~~"

<< AL ST § 40–17–105 >>

<< AL ST § 40–17–305 >>

"§ 40–17–~~105~~–305.

"Upon approval of a claim by the Commissioner of Revenue, the state Comptroller is authorized and directed to draw a warrant for payment thereof. There is hereby appropriated out of the proceeds of the state ~~tax on gasoline~~ taxes on motor fuels levied pursuant to Articles 1, 2, or 6 of this chapter, so much thereof as may be necessary to make refunds from time to time as provided for by this ~~division~~ article. The amount appropriated shall be credited pro rata against each fund which is a recipient of the taxes levied pursuant to Articles 1, 2, or 6 of this chapter, excluding any fund which is entitled to receive a dollar certain solely for the payment of a bond issue; provided, however, no refund shall be appropriated from the portion earmarked for the county or municipal governing body unless a resolution approving participation in the refund procedure has been adopted by the governing body of the appropriate county or municipality."

<< AL ST § 40–17–106 >>

<< AL ST § 40–17–306 >>

"§ 40–17~~–106~~–306.

"For the purpose of ascertaining the correctness of any claim made under the provisions of this ~~division~~ article, the Commissioner of Revenue, or his or her especially authorized representative, shall have the power to administer oaths, take depositions, and issue subpoenas to compel the attendance of witnesses and the production of books, papers, or documents necessary as evidence in connection with the enforcement of this ~~division~~ article. In case a person refuses to obey ~~such~~ the subpoena, the commissioner, or his or her representative, may invoke the aid of any circuit court in order that the testimony or evidence be produced. Upon proper showing, ~~such~~ the court shall issue a subpoena or order requiring ~~such~~ the person to appear before the commissioner or his or her representative and produce all evidence and give testimony relating to the matter at issue."

<< AL ST § 40–17–107 >>

<< AL ST § 40–17–307 >>

"§ 40–17~~–107~~–307.

"Before any refund of state ~~gasoline~~ motor fuel tax can be made to any applicant, all tractors owned by the applicant ~~must~~ shall first be assessed for ad valorem tax purposes."

<< AL ST § 40–17–108 >>

<< AL ST § 40–17–308 >>

"§ 40–17~~–108~~–308.
"Any person who knowingly files a false or fraudulent claim for a ~~gasoline~~ motor fuel tax refund under the provisions of this ~~division~~ article shall be guilty of perjury, and upon conviction shall be imprisoned in the penitentiary for not less than two nor more than five years."
Section 7. Section 40–18–1, Code of Alabama 1975, is amended to read as follows:

<< AL ST § 40–18–1 >>

"§ 40–18–1.

"For the purpose of this chapter, the following terms shall have the respective meanings ascribed by this section:
(1) ADVANCED FOSSIL–BASED GENERATION. The production of electricity from fossil-based generation with the use of technology or efficiency improvements to control or reduce carbon emissions, including but not limited to technologies described in 26 U.S.C. § 48A(f), as such provision existed on December 31, 2007.

(2) ALTERNATIVE ENERGY RESOURCES. Coal gasification or liquefaction, nuclear, and advanced fossil-based generation.
(3) BIOMASS. Animals and plants, and the waste, by-products, or derivatives of either, including but not limited to the materials described in 26 U.S.C. §§ 45(c)(2), 45(c)(3), 45K(c)(3), or 48B(c)(4).
~~(1)~~(4) BUSINESS TRUST. Any entity which is a business trust for federal income tax purposes.
~~(2)~~(5) CASH. Any legal tender, negotiable paper, or solvent credit.
(6) COAL GASIFICATION OR LIQUEFACTION. Liquid or gaseous fuels which are produced from coal, including lignite and including but not limited to fuels described in 26 U.S.C. §§ 45(c)(7)(A)(i), 45K(c)(1)(C), 48A(c)(7), or 48B(c)(2) as to coal, as such provisions existed on December 31, 2007.
~~(3)~~(7) CORPORATION. The term includes associations, joint stock companies, and any other entity classified as an association taxable as a corporation for federal income tax purposes.
~~(4)~~(8) DISREGARDED ENTITY. Any entity which is disregarded for federal income tax purposes.
~~(5)~~(9) DOMESTIC. When applied to a corporation or subchapter K entity means created or organized under the laws of the State of Alabama.
~~(6)~~(10) FIDUCIARY. A guardian, trustee, executor, administrator, personal representative, receiver, conservator, or any person acting in any fiduciary capacity for any person.
~~(7)~~(11) FISCAL YEAR. An accounting period of twelve months ending on the last day of any month other than December.
~~(8)~~(12) FOREIGN. When applied to a corporation or a subchapter K entity means created or organized under a jurisdiction other than the State of Alabama.
(13) GEOTHERMAL. Any geothermal reservoir in Alabama consisting of natural heat which is stored in rocks or in an aqueous liquid or vapor, whether or not under pressure.
~~(9)~~(14) HEAD OF FAMILY. As used in this chapter, the term “head of family” has the same meaning as the term “head of household” as defined in 26 U.S.C. § 2(b).
(15) HYDROPOWER PRODUCTION. The hydropower production of any hydroelectric dam or pumped hydro facility in Alabama, including but not limited to the hydropower production described in 26 U.S.C. § 45(c)(8), as such provision existed on December 31, 2007.
~~(10)~~(16) INTANGIBLE EXPENSES AND COSTS. Any expenses, losses, and costs for, related to, or in connection directly or indirectly with the acquisition, use, maintenance, management, ownership, sale, exchange, or disposition of intangible property to the extent such amounts are allowed as deductions in determining taxable income before operating loss deduction and special deductions for the taxable year including, without limitation, expenses or losses related to or incurred in connection directly or indirectly with factoring transactions or discounting transactions, royalties, patents, technical and copyright licensing fees, and other similar expenses and costs. Intangible expenses and costs paid for the use of intangible property in this state are, to the recipient, income derived from sources within Alabama.
~~(11)~~(17) INTANGIBLE PROPERTY. Patents, patent applications, trade names, trademarks, service marks, franchises, know-how, formulas, designs, patterns, processes, formats, copyrights and similar types of intangible assets, choses in action, and accounts receivable.
~~(12)~~(18) INTEREST EXPENSES AND COSTS. Amounts directly or indirectly allowed as deductions under 26 U.S.C. § 163 for purposes of determining taxable income under the Internal Revenue Code. Interest expenses and costs paid to a related member by a subchapter K entity or a corporation, to the extent apportioned to Alabama by the payor, are to the recipient related member income derived from sources within Alabama.
(19) MUNICIPAL SOLID WASTE. The definition given in 26 U.S.C. § 45(c)(6), if located in Alabama.
~~(13)~~(20) NONRESIDENT ESTATE. An estate other than a resident estate of this state.
~~(14)~~(21) NONRESIDENT TRUST. A trust other than a resident trust of this state.
(22) NUCLEAR. Any nuclear facility the reactor design for which is approved after December 31, 1993, by the Nuclear Regulatory Commission, including but not limited to the facilities described in 26 U.S.C. § 45J(d), as such provision existed on December 31, 2007.
~~(15)~~(23) PAID. For the purpose of deductions and credits hereinafter provided for with respect to income tax means paid or accrued or paid or incurred, and the terms “paid or accrued” and “paid or incurred” shall be construed according to the method of accounting on the basis of which the net income is computed under this chapter.
~~(16)~~(24) PERSON. Any individual, trust, estate, corporation, association, disregarded entity, or subchapter K entity.
~~(17)~~(25) RELATED ENTITY. A stockholder who is an individual, or a member of the stockholder’s family enumerated in 26 U.S.C. § 318, if the stockholder and the members of the stockholder’s family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty percent of the value of the taxpayer’s outstanding stock; a stockholder, or a stockholder’s partnership, limited liability company, estate, trust or corporation, if the stockholder and the stockholder’s

partnerships, limited liability companies, estates, trusts, and corporations own directly, indirectly, beneficially or constructively, in the aggregate, at least fifty percent of the value of the taxpayer's outstanding stock; or a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of 26 U.S.C. § 318, if the taxpayer owns, directly, indirectly, beneficially, or constructively, at least fifty percent of the value of the corporation's outstanding stock. The attribution rules of 26 U.S.C. § 318 shall apply for purposes of determining whether the ownership requirements of this subdivision have been met.

~~(18)~~(26) RELATED MEMBER. A person that, with respect to the taxpayer any time during the taxable year, is a related entity as defined in this section, a component member as defined in 26 U.S.C. § 1563(b) of a controlled group of which the taxpayer is also a component, or is a person to or from whom there is attribution of stock ownership in accordance with 26 U.S.C. § 1563(e).

~~(19)~~(27) REPORT FROM SOURCE. All individuals, corporations, associations, and partnerships, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and all other officers and employees of the state or of any municipal corporation or political subdivision of the state having control, receipt, custody, or payment of interest, rent, salaries, wages, premiums, annuities, compensation, remunerations, emoluments, barter income, or other fixed or determinable annual or periodical gains, profits, and income taxable under this chapter.

(28) RENEWABLE ENERGY RESOURCES. Wind, biomass, black liquor, tidal or ocean current, geothermal, solar energy, small irrigation, municipal solid waste, and hydropower production, and such term also includes hydrogen when derived or produced from some other renewable energy resource.

~~(20)~~(29) RESIDENT ESTATE. The estate of any person who was a resident of Alabama at the time of his or her death.

~~(21)~~(30) RESIDENT TRUST. A trust is a resident trust for a taxable year if it is a trust which meets both a. and b.:

a. The trust is created by the will of a decedent who was an Alabama resident at death or by a person who was an Alabama resident at the time such trust became irrevocable; and

b. For more than seven months during such taxable year, a person, as defined in this section, who either resides in or is domiciled in Alabama is either a fiduciary of the trust or a beneficiary of the trust to whom distributions currently may be made.

(31) SMALL IRRIGATION. An irrigation system canal or ditch in Alabama which does not include a dam or impoundment of water, including but not limited to facilities in Alabama described in 26 U.S.C. § 45(c)(5).

~~(22)~~(32) SUBCHAPTER K ENTITY. A partnership, including a limited partnership or limited liability partnership, limited liability company, or any other entity subject to subchapter K of the Internal Revenue Code, 26 U.S.C. §§ 701 to 761, for federal income tax purposes, not including a single member limited liability company.

~~(23)~~(33) TAXABLE YEAR. The calendar year or the fiscal year ending during the calendar year upon the basis of which net income is computed, or a period of less than twelve months resulting from a change in accounting period as provided in Section 40–18–30.

~~(24)~~(34) TAXPAYER. Any person subject to a tax imposed by this chapter, or whose income is, in whole or in part, subject to a tax imposed by this chapter.

~~(25)~~(35) TRUST. Any entity which is a trust for federal income tax purposes."

Section 8. ~~A new section 40–18–21.1 is added to the Code of Alabama 1975, to read as follows:~~

<< AL ST § 40–18–21.1 >>

~~§ 40–18–21.1~~

~~(a) For tax years and periods beginning after December 31, 2008, there shall be allowed as a credit against the amount of tax found to be owed under this chapter an amount equal to twenty-five cents ($0.25) multiplied by the number of kilowatt hours of electricity produced by a photovoltaic system owned by the taxpayer during the taxable year.~~

~~(b) As used in this section, "photovoltaic system" means devices that convert light directly into electricity through a solid-state, semiconductor process.~~

~~(c) The credit allowed under subsection (a) shall not be claimed beginning in the eleventh year after the date a credit is claimed under this section for the photovoltaic system.~~

~~(d) The basis of any photovoltaic system for which a credit is allowable under this section shall be reduced by the amount of such credit claimed.~~

Section 9. Section 40–18–70, Code of Alabama 1975, is amended to read as follows:

<< AL ST § 40–18–70 >>

"§ 40–18–70. Definitions.

For the purpose of this article, the following terms shall have the respective meanings ascribed by this section:

(1) EMPLOYEE. "Employee" as defined in the Internal Revenue Code, as amended from time to time.

(2) EMPLOYER. "Employer" as defined in the Internal Revenue Code, as amended from time to time. An employer is required to withhold tax from the wages of employees to the extent that such wages are earned in Alabama, whether the employee is a resident or a nonresident of the state.

(3) INTERNAL REVENUE CODE. The Internal Revenue Code of the United States, as amended from time to time.

(4) PROVISIONAL CONSTRUCTION EMPLOYERS. A provisional construction employer is any employer, including members of its affiliated group as that term is defined in the Internal Revenue Code, that (i) employs 50 or more employees in a construction project for a qualifying industrial or research enterprise described in Section 40–9B–3(a)(8)e, or a construction project, the cost of which is part of a qualifying entity's capital cost, as these terms are defined in Section 40–9D–3, and (ii) has not registered in the tax year preceding the current tax year with the Alabama Department of Revenue for withholding tax purposes. If the provisional construction employer reports and pays all past withholding taxes due the state and continues to report and pay for a one-year period all withholding taxes due to Alabama, the employer will no longer be deemed to be a provisional construction employer.

(5) WAGES. "Wages" as defined in the Internal Revenue Code, as amended from time to time. However, Alabama does differentiate from federal requirements for certain classes and amounts pursuant to departmental rules adopted via the procedures in Title 41.

Section 10. Sections 40–18–190 and 40–18–194, Code of Alabama 1975, are amended to read as follows:

<< AL ST § 40–18–190 >>

"§ 40–18–190.

"(a) The following terms shall have the following meanings, respectively, when used in this article unless the context clearly requires otherwise:

(1) BASE WAGE REQUIREMENT. Either an average hourly wage of not less than eight dollars ($8) per hour or an average total compensation of not less than ten dollars ($10) per hour, including benefits. Notwithstanding the foregoing, wages of direct processors of agriculture food products shall be subject to the local labor market. In the event that reliable local labor market statistics are not available, the department shall, by regulation or ruling, establish a source of wage information that best represents the average hourly wage rate in Alabama for direct processors of agriculture food products.

(2) CAPITAL COSTS. All costs and expenses incurred by one or more investing companies in connection with the acquisition, construction, installation and equipping of a qualifying project during the period commencing with the date on which such acquisition, construction, installation and equipping commences and ending on the date on which the qualifying project is placed in service, including, without limitation all of the following:

a. The costs of acquiring, constructing, installing, equipping and financing a qualifying project, including all obligations incurred for labor and to contractors, subcontractors, builders, and materialmen.

b. The costs of acquiring land or rights in land and any cost incidental thereto, including recording fees.

c. The costs of contract bonds and of insurance of all kinds that may be required or necessary during the acquisition, construction or installation of a qualifying project.

d. The costs of architectural and engineering services, including test borings, surveys, estimates, plans and specifications, preliminary investigations, environmental mitigation and supervision of construction, as well as for the performance of all the duties required by or consequent upon the acquisition, construction and installation of a qualifying project.

e. The costs associated with installation of fixtures and equipment; surveys, including archaeological and environmental surveys; site tests and inspections; subsurface site work; excavation; removal of structures, roadways, cemeteries, and other surface obstructions; filling, grading, paving and provisions for drainage, storm water retention, installation of utilities, including water, sewer, sewage treatment, gas, electricity, communications, and similar facilities; off–site construction of utility extensions to the boundaries of the property.

f. All other costs of a nature comparable to those described, including, without limitation, all project costs which are required to be capitalized for federal income tax purposes pursuant to 26 U.S.C. § 263A.

g. Costs otherwise defined as capital costs that are incurred by the investing company where the investing company is the lessee under a lease that: (1) has a term of not less than five years, and (2) is characterized as a capital lease for federal income tax purposes; provided, that if the project is a headquarters facility, the lease may be characterized as an operating lease for federal income tax purposes in which event capital costs shall include the net present value of the payments made by the investing company under the lease computed using the applicable federal rate for the month in which the qualifying project is placed in service and for the term most closely approximating the term of the lease. Capital costs shall not include property owned or leased by the investing company or a related party before the commencement of the acquisition, construction, installation or equipping of the qualifying project unless such property was physically located outside the state for a period of at least one year prior to the date on which the qualifying project was placed in service.

h. Costs either paid or incurred by (i) a public industrial development board or authority, city, or county, or other public corporation or political subdivision (a "public entity") for the benefit of a qualifying project where such costs are treated as costs paid by an investing company with respect to the qualifying project for federal income tax purposes (such costs shall not include amounts contributed by a public entity to a qualifying project as a capital contribution or gift except to the extent that an investing company has cost basis in the contribution or gift for federal income tax purposes); or (ii) a related party to an investing company to the extent such costs are included in or taken into account in determining the investing company's federal income tax basis in the qualifying project, whether or not incurred by an investing company.

(3) CAPITAL CREDIT. An annual amount equal to five percent of the capital costs of the qualifying project, such amount to be credited or allowed in accordance with Section 40–18–194 hereof and other provisions of law, against the state income tax liability generated by or arising out of the qualifying project in each of the 20 years commencing with the year during which the qualifying project is placed in service and continuing for 19 consecutive years thereafter.

(4) DEPARTMENT. The Alabama Department of Revenue.

(5) FAVORED GEOGRAPHIC AREA. Either of the following:

a. Any area designated or created as an enterprise zone by law or that is governed by the Alabama Enterprise Zone Act.

b. 1. Any Alabama county which is considered to be less developed. A county is considered to be less developed if it has been found to be less developed by the Alabama Department of Industrial Relations using the most current data available from the United States Departments of Labor or Commerce, the United States Bureau of the Census, or any other federal or state agency, and which finding shall be made immediately upon passage of Act 2001–965 and not later than January 1 of each year thereafter.

2. A county shall be found to be less developed if it is ranked as the forty-fifth through sixty-seventh county, inclusive, using the following factors:

(i) Percent change in population over the most recent five-year period.

(ii) Personal per capita income in the last calendar year for which data are available.

(iii) The average percent employed over the last 12 months for which data are available.

3. The factors used in ranking counties will be weighted in the following manner:

(i) Percent change in population (25 percent).

(ii) Personal per capita income (25 percent).

(iii) Average percent employed (50 percent).

(6) HEADQUARTERS FACILITIES. A facility which will serve as the national, regional or state headquarters for an investing company that conducts significant business operations outside the state and will serve as the principal office of the principal operating officer of the qualifying project. For purposes of this Article 7, the term "principal operating officer" is defined as the person with chief responsibility for the daily business operations of the qualifying project.

(7) INDUSTRIAL, WAREHOUSING OR RESEARCH ACTIVITY. Any trade or business described in the 1997 North American Industry Classification System, promulgated by the Executive Office of the President of the United States, Office of Management and Budget, Sectors 31 (other than National Industry 311811), 32, 33, and 42; subsector 511; Industry Groups 5142 and 5415; Industries 54138, 54171; and National Industry 514191 and includes such trades and businesses as may be hereafter reclassified in any subsequent publication of the North American Industry Classification System or other industry classification system developed in conjunction with the United States Department of Commerce, or any process or treatment facility which recycles, reclaims, or converts materials, which include solids, liquids, or gases, to a reusable product.

(8) INVESTING COMPANY. Any corporation, partnership, limited liability company, proprietorship, trust or other business entity, regardless of form, making a qualified investment.

(9) NEW EMPLOYEES. Those persons who have not been previously employed at the site on which the qualifying project is or will be located or by an investing company or companies in the state; will be employed full-time at the qualifying project; and will be subject to the personal income tax imposed by Section 40–18–2, upon commencement of employment at

the qualifying project.
(10) PROJECT. Any land, building or other improvement, and all real and personal properties deemed necessary or useful in connection therewith, whether or not previously in existence, located or to be located in the state.
(11) QUALIFYING INVESTMENT. The undertaking by one or more investing companies of a qualifying project.
(12) QUALIFYING PROJECT. A project to be sponsored or undertaken by one or more investing companies meeting any one of the following requirements:
a. A project the capital costs of which are not less than two million dollars ($2,000,000), and at which the predominant trade or business activity conducted will constitute industrial, warehousing or research activity.
b. A small business addition the capital costs of which are not less than one million dollars ($1,000,000), and at which the predominant trade or business activity conducted will constitute industrial, warehousing or research activity.
c. A headquarters facility the capital costs of which are not less than ~~$2,000,000~~ two million dollars ($2,000,000) at which the predominant trade or business activity conducted will not be the production of electricity.
d. A project located in a favored geographic area the capital costs of which are not less than five hundred thousand dollars ($500,000), and at which the predominant trade or business activity conducted will constitute industrial, warehousing, or research activity.
e. A project owned by a utility described in Section 37–4–1(7)a., or owned by an investing company which is itself owned by a utility, the capital costs of which are not less than the following:
1. One hundred million dollars ($100,000,000), if the predominant trade or business activity conducted will be the production of electricity from alternative energy resources.
2. Five million dollars ($5,000,000), if the predominant trade or business activity conducted will be the production of electricity from hydropower production.
(13) RELATED PARTY. A person or entity that bears a relationship to an investing company described in Section 267(b), (c), or (e) of the Internal Revenue Code of 1986, as amended.
(14) SMALL BUSINESS ADDITION. Any land, building or other improvement, and all real and personal properties deemed necessary or useful in connection therewith, whether or not previously in existence, to be used as a part of any existing facility of a business located in the state that, prior to the date on which the addition is placed in service, had 100 or fewer full-time employees.
(15) TAX YEAR. The applicable taxable year as the term is defined in Section 40–18–1(~~12~~ 33).
(16) 1993 ACT. Act No. 93–851, H. 27 and Act No. 93–852, H. 83 adopted at the 1993 First Special Session of the Legislature of Alabama, as amended by Act No. 94–370, S. 559 adopted at the 1994 Regular Session of the Legislature of Alabama.
(b) The amendments made to this section by the act adding this subsection shall be effective for tax years and periods beginning after December 31, 2011."

<< AL ST § 40–18–194 >>

"§ 40–18–194.

"(a) The Legislature recognizes that a substantial number of businesses are organized as limited liability companies, partnerships, and other types of business entities and that certain business entities, organized as corporations, elect to be treated as "S" corporations under federal and state tax laws, and that it is essential that the capital credit amount shall be available on a pass-through basis in the manner hereinafter provided.
(b) Each investing company, or its shareholders, partners, members, owners, or beneficiaries shall be entitled to the capital credit for each tax year of an investing company with respect to which a capital credit is provided pursuant to this article. The capital credit shall be allowed as follows:
(1) The owner of an investing company which is a proprietorship shall receive a credit against the individual income tax levied by Section 40–18–5 that otherwise would be owed to the state in any year by the owner with respect to the income of the investing company generated by or arising out of the qualifying project.
(2) An investing company which is an Alabama C corporation as defined in Section 40–18–160, or which is an Alabama S corporation and which is subject to taxation under Section 40–18–174, or Section 40–18–175, shall receive a credit against the corporate income tax levied by Section 40–18–31 or by Section 40–18–174 or Section 40–18–175, that otherwise would be owed to the state in any year by the investing company with respect to the income generated by or arising out of the qualifying project.
(3) The shareholders of an investing company which is an Alabama S corporation as defined in Section 40–18–160, and

whose taxable income is subject to determination under Section 40–18–161, each shall receive a credit against the individual income tax levied by Section 40–18–5 that otherwise would be owed to the state in any year by each shareholder of the investing company with respect to income of the investing company generated by or arising out of the qualifying project.
(4) The partners, members, or owners of an investing company, the income of which is subject to taxation under Section 40–18–24, each shall receive a credit against the corporate income tax levied by Section 40–18–31, or against the individual income tax levied by Section 40–18–5, whichever is applicable to each such partner, member, or owner that otherwise would be owed to the state in any year by each partner, member, or owner of the investing company with respect to income of the investing company generated by or arising out of the qualifying project.
(5) An investing company which is a trust or estate having income subject to taxation under Section 40–18–25(c) shall receive a credit against the income tax levied by Section 40–18–5 that otherwise would be owed to the state in any year by the investing company on the income generated by or arising out of the qualifying project.
(6) The beneficiaries of an investing company which is a trust or estate the income of which is subject to taxation under Section 40–18–25(d) each shall receive a credit against the corporate income tax levied by Section 40–18–31, or against the individual income tax levied by Section 40–18–5, whichever is applicable to each such beneficiary, that otherwise would be owed to the state in any year by each beneficiary of the investing company with respect to income of the investing company generated by or arising out of the qualifying project.
(7) A shareholder, partner, member, owner or beneficiary which is eligible to receive a credit under subdivision (3), (4) or (6) of this subsection and which is an Alabama S corporation, or which has income which is subject to taxation under Section 40–18–24 or Section 40–18–25(d), solely for purposes of the application of this subsection, shall be treated as though the shareholder, partner, member, owner, or beneficiary were also an investing company.
(8) The capital credit allowed under this subsection for any tax year of an investing company shall not exceed the aggregate amount which otherwise would be due from the investing company, its shareholders, partners, members, owners, or beneficiaries to the state in tax with respect to the income of the investing company generated by or arising out of the qualifying project, determined after the application of all other deductions, losses, or credits permitted under Titles 40 and 41, for the taxable year, and determined by applying the maximum rate applicable to individuals under Section 40–18–5, or the rate applicable to corporations under Section 40–18–31, as the case may be. Notwithstanding the foregoing, the capital credit allowed under this subsection shall not exceed 60 percent of the aggregate amount which would otherwise be due from the investing company, in the case of a qualifying project for the production of electricity from coal gasification or liquefaction or advanced fossil-based generation, as such terms are defined in Section 40–18–1, or hydropower production, or 80 percent of the aggregate amount which would otherwise be due, in the case of a qualifying project for the production of electricity from any other type of alternative energy resource.
(9) In no event may any amount described in this subsection be carried forward or back by any investing company, shareholders, partners, members, owners, or beneficiaries with respect to a prior or subsequent year.
(10) Any shareholder, partner, member, owner, or beneficiary of an investing company may elect annually to use his or her allowable portion of the income tax credit created by this article as a nonrefundable estimated tax payment against his or her individual income tax liability. If a taxpayer makes an annual election to use the aforementioned credit as a nonrefundable estimated payment, the taxpayer shall compute the amount of the credit as though it were a credit, subject to all the requirements and limitations provided by law for the credit, but shall use the amount computed as a nonrefundable estimated payment and shall not use the same amount as a credit. In no event shall this provision be construed to allow the credit or nonrefundable estimated tax payment to expand the 20–year limitation of the credit or estimated tax payment. In no event shall a credit used as nonrefundable estimated payment exceed the amount that would be available if the credit were not used as a nonrefundable estimate payment.
(c) The amendments made to this section by the act adding this subsection shall be effective for tax years and periods beginning after December 31, 2011."
Section 11. The capital credits authorized by the amendments to Sections 40–18–190 and 40–18–194, Code of Alabama 1975, shall not be subject to Section 40–18–202, Code of Alabama 1975. Instead, the capital credits authorized by these amendments shall not be available for new qualifying projects after December 31, 2018, unless the Legislature~~, by joint resolution,~~ votes to continue or reinstate the capital credit for new projects after that date. No action or inaction on the part of the Legislature shall reduce, suspend, or disqualify any capital credit in any past or future year with respect to any investing company which files a statement of intent pursuant to Section 40–18–191, Code of Alabama 1975, on or before December 31, 2018, it being the sole intention of this section that the failure of the Legislature to ~~adopt the joint resolution~~ vote to continue or reinstate the capital credit for new projects after December ~~18~~ 31, 2018 shall affect only the availability of the capital credit to new qualifying projects after that date and shall not affect either the qualifying projects which have established their eligibility to receive capital credits under Section 40–18–191, Code of Alabama 1975, on or before

December 31, 2018, or any future qualifying expansions to the qualifying projects. For projects placed in service after the effective date of this act, no amount shall be allowed or credited in accordance with Article 7 of Chapter 18 of Title 40, or Chapter 9B of Title 40, Code of Alabama 1975, to the extent that the capital costs are incurred for the production of electricity unless the predominant trade or business activity conducted will be the production of electricity from alternative energy resources or hydropower production.

Section 12. The tax abatements and abatements of payments in lieu of taxes authorized by the amendments to Sections 40–9B–3, 40–9B–4, and 40–9B–11, Code of Alabama 1975, shall not be available for new industrial or research enterprises described in Section 40–9B–3(a)(8)e. after December 31, 2018, unless the Legislature~~, by joint resolution,~~ votes to continue or reinstate the abatements of state taxes for new industrial or research enterprises described in Section 40–9B–3(a)(8)e. after that date. No action or inaction on the part of the Legislature shall reduce, suspend, or disqualify any abatement in any past or future year with respect to any qualifying industrial or research enterprises described in Section 40–9B–3(a)(8)e. which files with the Department of Revenue, on or before December 31, 2018, a statement of intent as defined in Section 40–9B–3(a)(19). The failure of the Legislature to ~~adopt the joint resolution~~ vote to continue or reinstate the capital credit for new projects after December ~~18~~ 31, 2018 shall affect only the availability of the abatements to new qualifying industrial or research enterprises described in Section 40–9B–3(a)(8)e. after that date and shall not affect either the qualifying industrial or research enterprises described in Section 40–9B–3(a)(8)e. which have established their eligibility to receive abatements by filing the statement of intent, on or before December 31, 2018, or any future qualifying major additions to such qualifying industrial or research enterprises described in Section 40–9B–3(a)(8)e.

Section 13. The department shall perform such necessary audits and examinations of the payroll tax records and returns of all contractors performing construction services for projects allowed the tax abatements or qualified for capital credits authorized or provided by the amendments to Sections 40–18–190, 40–18–194, 40–9B–3, 40–9B–4, and 40–9B–11, Code of Alabama 1975, to determine that Alabama income taxes are being correctly withheld on construction wages paid to employees working in Alabama and that appropriate withholding allowances are being claimed.

Section 14. All laws or parts of laws which conflict with this act are repealed.

Section 15. Except as otherwise provided in the act, the act shall become effective immediately upon its passage and approval by the Governor or upon its otherwise becoming law. Section 6 shall become effective 90 days after its passage and approval by the Governor or upon its otherwise becoming law.

Approved May 8, 2008.

AL LEGIS 2008-275