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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2012-203-E
Case Tracking Number 2013-000529

South Carolina Energy Users Committee, Appellant-Respondent,.. ..... Appellant

v.

South Carolina Electric & Gas,
Office of Regulatory Staff,
Pamela Greenlaw, Respondents
and Sierra Club, is Respondent-Appellant.. .....Respondents

INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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STATEMENT OF THE CASE

This case involves the appeal of two orders issued by the Public Service Commission of South Carolina (the "Commission") in Docket No. 2012-203-E related to the South Carolina Base Load Review Act ("BLRA"). These orders, Order No. 2012-884 and Order No. 2013-5, were issued on November 15, 2012 and February 14, 2013, respectively, in response to the May 15, 2012, petition ("Petition") of South Carolina Electric & Gas Company ("SCE&G" or "Company") seeking approval of an updated construction schedule and updated capital costs for an additional $283 million for the construction of two (2) 1,117 net megawatt nuclear power units (the "Plant" or the "Units") SCE&G is building near Jenkinsville, South Carolina. SCE&G's Petition was filed pursuant to the provisions of the BLRA, specifically S.C. Code Ann. § 58-33-270(E). The Commission orders allowed SCE&G to update its construction schedule and approved approximately $278 million in additional and updated capital costs, $5 million less than the $283 million requested by SCE&G.

In accordance with S.C. Code Ann. § 58-4-10, the South Carolina Office of Regulatory Staff ("ORS") was a party to the proceeding on SCE&G's Petition. South Carolina Energy Users Committee ("SCEUC") and Sierra Club were intervenors in the proceeding along with *pro se* intervenor, Pamela Greenlaw.

The Commission hearing on the Petition was held October 2 and 3, 2012. On November 15, 2012, the Commission issued Order No. 2012-884 granting the relief requested in the Petition, less approximately $5 million dollars. Sierra Club filed a Petition for Rehearing or Reconsideration on November 26, 2012. SCEUC filed a Petition for Rehearing or Reconsideration on November 28, 2012. The Commission

denied both Petitions in Order No. 2013-5, dated February 14, 2013. This appeal of the Commission's orders ensued.

STATEMENT OF FACTS

On May 15, 2013, SCE&G filed a Petition with the Commission pursuant S.C. Code Ann. § 58-33-270(E) of the BLRA for an order approving an updated construction schedule and updated capital cost schedule for the construction of the Units. SCE&G's Petition sought to (1) revise the completion dates of the Units and (2) receive approval for approximately $283 million in additional capital costs for the construction. The $283 million in additional capital costs is composed of the following items:

- an Engineering, Procurement, and Construction Contract ("EPC") change order resulting from a settlement agreement for schedule changes and additional costs related to the time frame in which the Combined Operating License ("COL") was received from the Nuclear Regulatory Commission ("NRC"), the redesign and construction of certain components, and certain Unit 2 site conditions totaling $137.5 million;
- owner's cost of $131.6 million;
- transmission costs of $7.9 million; and,
- additional EPC change orders of approximately $5.9 million for cyber security, $135,573 for healthcare costs, and $8,250 for wastewater piping.

The BLRA's purpose is "to provide for the recovery of the prudently incurred costs associated with new base load plants ... while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent

financial obligations or costs." Act No. 16, §1(A), 2007 S.C. Acts 47. S.C. Code Ann. § 58-33-270(E) of the BLRA states:

> (E) As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:
>
> (1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility; and
>
> (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

This Petition was the fourth filing SCE&G made to the Commission requesting a modification to the Units' schedule and/or costs. The schedule and costs were originally approved on March 2, 2009 by the Commission in Base Load Review Order No. 2009-104(A) wherein the Commission approved SCE&G's request to build the Units under the provisions of the BLRA. SCEUC appealed Order 2009-104(A) and challenged the Commission's approval of contingency costs in that order. In its decision of that appeal, this Court reversed the inclusion of "contingency costs" in the capital costs approved for the project. *South Carolina Energy Users Committee v. South Carolina Public Service Comm'n,* 386 S.C. 486, 697 S.E. 2d 587 (2010). While the Court found that the General Assembly did not intend for a utility to recover contingency costs as construction costs in a base load review order, the Court recognized that the General Assembly anticipated that construction costs could increase during the life of a project. *S.C. Energy Users Comm.,* 386 S.C. at 496, 697 S.E. 2d at 592. Further, the Court acknowledged that the BLRA in

S.C. Code Ann § 58-33-270 contained a mechanism for a utility to seek modification of construction costs approved in a base load review order. *S.C. Energy Users Comm.*, 386 S.C. at 496, 697 S.E. 2d at 592-3.

Following the decision in *S.C. Energy Users Comm.*, SCE&G has filed updated construction cost schedules seeking approval of changes which have developed during the construction process. On January 21, 2010, the Commission approved the Company's first request to update milestones and capital cost schedules in Order No. 2010-12 in Docket No. 2009-293-E. On May 16, 2011, the Commission approved SCE&G's second Petition to update capital cost schedules in Order No. 2011-345 in Docket No. 2010-376-E. The third Petition was filed on February 29, 2012 in Docket No. 2012-90-E and subsequently was withdrawn by the Company two and a half months later on May 8, 2012 before testimony was filed. This Petition, the fourth Petition, was filed on May 15, 2012 in Docket No. 2012-203-E and approved on November 15, 2012 in Order No. 2012-884. It is this fourth Petition's approval that is the subject of this appeal.

Pursuant to S.C. Code Ann. § 58-4-10, ORS is a statutory party in all matters before the Commission. Under the terms of the BLRA, ORS is mandated to "safeguard the public interest in all matters arising under this article." S.C. Code Ann. § 58-33-230(F). The "public interest" is defined in S.C. Code Ann § 58-4-10(B) as a balancing of the:

> (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
> (2) economic development and job attraction and retention in South Carolina; and
> (3) preservation of the financial integrity of the state's public utilities and continued investment in and

> maintenance of utility facilities so as to provide reliable and high quality utility services.

Further, ORS is granted full audit rights related to all matters arising under the BLRA and is obligated to review the reasonableness and necessity of all costs to be recovered under the act. S.C. Code Ann. § 58-33-230(F).

In discharging its duties under the BLRA, the ORS presented witnesses, ORS Associate Program Manager Allyn Powell and consultant Gary Jones, to testify concerning ORS's review of SCE&G's Petition. Ms. Powell holds an advanced degree in physics and has research experience in nuclear and particle physics. (Tr. p. 1111- 1112). Mr. Jones is an independent consultant with over 40 years of experience in nuclear engineering, nuclear safety standards, power plant design, project management, and engineering management. (Tr. Hearing Exhibit No. 12).

Mr. Jones and Ms. Powell testified in support of ORS's statutory obligations and requirements under the BLRA and that the requests in SCE&G's Petition were reasonable with the exception of approximately $4.95 million related to cyber security. (Tr. p. 1124, ll. 13-16; p. 1050, l. 7; p. 1054, ll. 1-4l; p. 1063, ll. 18-22; p. 1064, ll. 1-2; p. 1072, ll. 1-3). The Commission agreed and granted SCE&G's request minus approximately $4.95 million related to cyber security.

STANDARD OF REVIEW

"This Court employs a deferential standard of review when reviewing a PSC decision and will affirm that decision when substantial evidence supports it." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E. 2d 328, 332 (1998); S.C. Code Ann. § 1-23-380 (Supp. 2012). This standard of review, as established in the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380, provides that this Court shall

not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2012); *Long Cove Home Owners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 138, 488 S.E. 2d 857, 860 (1997). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(A)(6)(e),(f) (Supp. 2012). Under this "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 603-4, 550 S.E. 2d 287, 292-3 (2001). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E. 2d 913, 917 (1996). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E. 2d 102, 105 (1999). "[T]he burden is on Appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters*, 321 S.C. at 226, 467 S.E. 2d at 917.

With regard to matters involving utility rate making, "[t]he PSC is considered the 'expert' designated by the legislature to make policy determinations regarding utility

rates; thus, the role of a court reviewing such decisions is very limited." *Kiawah Property Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 109, 597 S.E. 2d 145, 147 (2004); *Accord, Patton v. Pub. Serv. Comm'n*, 280 S.C. 288, 312 S.E. 2d 257 (1984).

On matters of statutory construction, "[t]his Court, although not bound by the decision, will ordinarily defer to the opinion of a state agency as to the interpretation of a statute it is charged with the duty of enforcing." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 362, 669 S.E. 2d 899, 906 (2008). "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507, 515, 560 S.E. 2d 410, 414 (2002)

ARGUMENT

I. THE COMMISSION APPLIED THE APPROPRIATE PRUDENCY STANDARD IN AUTHORIZING THE RECOVERY OF ADDITIONAL CAPITAL COSTS PURSUANT TO THE BASE LOAD REVIEW ACT.

SCEUC and Sierra Club argue the Commission failed to apply the relevant BLRA legal standard of prudency to the schedule changes and additional capital costs requested by the Company in its Petition. SCEUC Brief, p. 20 and Sierra Club Brief, p. 8.

A. The Plain Language of the BLRA Provides that S.C. Code Ann. § 58-33-270(E) is the statute by which to review SCE&G's Petition

SCEUC and Sierra Club argue the Commission should have applied a standard set forth in S.C. Code Ann. § 58-33-275(E) in lieu of S.C. Code Ann. § 58-33-270(E). They assert S.C. Code Ann. § 58-33-275(E) contains a different and higher standard which

should have been applied to SCE&G's Petition. ORS disagrees. The Commission appropriately reviewed SCE&G's Petition according to S.C. Code Ann. § 58-33-270(E).

S.C. Code Ann. § 58-33-270(E) reads:

> **SECTION 58-33-270.** Base load review orders; contents; petition for modification; settlement agreements between Office of Regulatory Staff and applicant.
> ...
> (E) As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:
> (1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility; and
> (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

S.C. Code Ann. § 58-33-275(E) reads:

> **SECTION 58-33-275.** Base load review orders; parameters; challenges; recovery of capital costs.
> ...
> (E) In cases where a party proves by a preponderance of the evidence that there has been a material and adverse deviation from the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), the commission may disallow the additional capital costs that result from the deviation, but only to the extent that the failure by the utility to anticipate or avoid the deviation, or to minimize the resulting expense, was imprudent considering the information available at the time that the utility could have acted to avoid the deviation or minimize its effect.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E. 2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (citing Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). "This Court may, of course, consider the title or caption of an act in determining the intent of the Legislature." *Beaufort County v. South Carolina State Election Comm'n,* 395 S.C. 366, 373 n.2, 718 S.E. 2d 432, 436 n.2 (2011) (citing *Joytime Distribs & Amusement Co. v. State,* 338 S.C. 634, 528 S.E. 2d 647 (1999)).

The title of S.C. Code Ann. § 58-33-270, "Base load review orders; contents; *petition for modification*; settlement agreements between Office of Regulatory Staff and applicant" contemplates modifications to a Base Load Review Order via a petition. (Emphasis added.) SCE&G filed its Petition pursuant to S.C. Code Ann. § 58-33-270(E) after it recognized a need for modifying its Base Load Review Order to allow for specific cost increases and schedule changes. *See* SCE&G Petition for Updates and Revisions to the Capital Cost Schedule and the Construction Schedule filed on May 15, 2012 with the Commission. The Supreme Court acknowledged a modification scenario pursuant to S.C. Code Ann. § 58-33-270(E) in its decision of the initial BLRA order in *S.C. Energy Users Comm.*, 388 S.C. at 496, 697 S.E. 2d at 592. "[T]he enactment of section 58-33-270(E) of the South Carolina Code (Supp. 2009) reveals that the General Assembly

anticipated that construction costs could increase during the life of the project." *Id.* Appropriately and following the *S.C. Energy Users Comm.* decision, the Commission also found that S.C. Code Ann. § 58-33-270(E) is the provision of the BLRA that permits utilities to seek modifications of cost forecasts that the Commission has previously approved under the BLRA. Commission Order No. 2013-5, pg. 9.

S.C. Code Ann. § 58-33-270(E) contains subsection (1) and (2) which recognize two separate scenarios where a modification to the Base Load Review Order may be needed. Subsection (1) addresses changes in the schedules, estimates, findings or conditions, and subsection (2) recognizes changes in class allocation factors or rate designs. By way of example in *S.C. Energy Users Comm.*, the Supreme Court cited the scenario in S.C. Code Ann. § 58-33-270(E)(2) stating, "[S]CE&G may petition the Commission for an order modifying rate design. Consistent with the ... objectives of the Base Load Review Act, section 58-33-270(E)(2) further states that the Commission should approve such a request, after a hearing, if the Commission finds the 'rate designs are just and reasonable.'" *S.C. Energy Users Comm.*, 388 S.C. at 496, 697 S.E. 2d at 592-3.

Here, SCE&G did not seek a modification to rate design as contemplated in S.C. Code Ann. § 58-33-270(E)(2). Instead, SCE&G sought a modification to its costs and schedules as referenced in S.C. Code Ann. § 58-33-270(E)(1). Subsection (E)(1) states the Commission "shall" grant the relief requested if, after a hearing, the Commission finds "that the changes are not the result of imprudence on the part of the utility." S.C. Code Ann. § 58-33-270(E)(1). The statute is not permissive. Further, in its *S.C. Energy Users Comm.* decision, this Court acknowledged that a modification is consistent with the

objectives of the Base Load Review Act. *S.C. Energy Users Comm.,* 388 S.C. at 496, 697 S.E. 2d at 592-3. Those objectives are two-fold: (1) to allow an investor-owned electric utility to recover its "prudently incurred costs" associated with the nuclear facility; and (2) to protect consumers "from responsibility for imprudent financial obligations or costs." *S.C. Energy Users Comm.,* 388 S.C. at 495-6, 697 S.E. 2d at 592 (citing S.C. Code Ann. § 58-33-210 (Editor's Note)).

In its extensive Order, the Commission thoroughly reviewed the changes sought by SCE&G and found them not to be the result of imprudence on the part of the utility. Commission Order No. 2012-884. "In accordance with the terms of S.C. Code Ann. §§ 58-33-270(E) and 58-33-270(G), the Commission finds that the revised cost (except for the Phase II costs of the cyber-security project) and construction schedules presented reflect prudent costs and schedules and should be approved." Commission Order No. 2012-884, pg. 69. The Commission appropriately relied on S.C. Code Ann. § 58-33-270(E) for the standard by which to review SCE&G's request.

B. SCEUC and Sierra Club misapply the statute they support

In its orders, the Commission applied and relied upon S.C. Code Ann. § 58-33-270 in reaching its decision. The title of § 58-33-270 is, "Base load review orders; contents; *petition for modification*; settlement agreements between Office of Regulatory Staff and applicant." S.C. Code Ann. § 58-33-270 (Emphasis added). The statute advocated by SCEUC and Sierra Club for the prudency standard is titled, "Base load review orders; parameters; challenges; recovery of capital costs." S.C. Code Ann. § 58-33-275. The title of S.C. Code Ann. § 58-33-270 indicates it is the appropriate statute.

"A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers." *Sloan v. S.C. Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 468, 636 S.E. 2d 598, 606 (2006). In determining legislative intent of an act, it is proper to consider the title and caption of an act. *See Joytime Distribs. and Amusement Co., Inc. v. State*, 338 S.C. 634, 649, 528 S.E. 2d 647, 655 (1999)(citing *Lindsay v. Southern Farm Bureau Cas. Ins. Co.*, 258 S.C. 272, 188 S.E. 2d 374 (1972).)

The statute supported by SCEUC and Sierra Club, S.C. Code Ann. § 58-33-275, addresses the currently approved Base Load Review Order and contains subsections (A) through (E). It notes that the Base Load Review Order is a final and binding determination and that its capital costs are prudent so long as the nuclear plant is being constructed within the parameters of the approved costs and schedules. S.C. Code Ann. § 58-33-275(A). Subsection (B) of this statute states that determinations under (A) may not be challenged. Subsection (C) provides if the plant is being constructed in accordance with the Base Load Review Order, then the Company must be allowed to recover its costs through revised rates filings or general rate proceedings. Subsection (D) states changes in fuel costs will not be considered in conducting any evaluation under this section. Lastly, subsection (E) states,

> In cases where a party proves by a preponderance of the evidence that there has been a material and adverse deviation from the approved schedules, estimates, and projections set forth in [in the base load review order], the commission may disallow the additional capital costs that result from the deviation, but only to the extent that the failure by the utility to anticipate or avoid the deviation, or to minimize the resulting expense, was imprudent considering the information available at the time that the

> utility could have acted to avoid the deviation or minimize its effect.

In ascertaining legislative intent, "statutes which are part of the same Act must be read together." *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 522, 377 S.E. 2d 569, 570 (1989). "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *S.C. State Ports Auth. v. Jasper County*, 368 S.C. 388, 398, 629 S.E. 2d 624, 629 (2006). As the Commission noted on page 8 of its Order No. 2013-5 denying SCEUC's and Sierra Club's Petitions for Reconsideration, the

> Court [of Appeals] has held that, in construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect, if it can be done by any reasonable statutory construction. *Tillotson v. Keith Smith Builders*, 357 S.C. 554, 593 S.E. 2d 621 (Ct. App. 2004); *Corbett v. The City of Myrtle Beach*, 336 S.C. 601, 521 S.E. 2d 276 (Ct. App. 1999).
>
> Order No. 2013-5, p. 8.

SCEUC and Sierra Club argue the Commission should have applied S.C. Code Ann. § 58-33-275(E) because the additional $278 million in costs requested in SCE&G's Petition are not only material and adverse deviations from the approved schedules, but are also costs the utility could have anticipated or avoided. SCEUC Brief p. 24 and Sierra Club Brief p.10, 12 and 16. They do not assert that SCE&G filed its Petition under the wrong statute. Instead, they assert SCE&G's Petition should be evaluated under a different statute than the one permitting the Petition. SCEUC and Sierra Club ignore that the modification statute has a prudency evaluation which allows costs that "are not the result of imprudence on the part of the utility." S.C. Code Ann. § 58-33-270(E). It is

nonsensical to ignore the evaluation in the permitting statute. Lastly, the effect of their argument is circular. If the Company's Petition requesting a modification of the Base Load Review Order can also be used as evidence of a material and adverse deviation to establish imprudency, then the modification statute (S.C. Code Ann. § 58-33-270(E)) is rendered useless.

C. The Commission considered and rejected SCEUC's and Sierra Club's argument that a prudency evaluation should be conducted utilizing S.C. Code § 58-33-275. Even so, the Commission found that the prudency evaluation is the same in both S.C. Code Ann. § 58-33-270(E) and S.C. Code Ann. § 58-33-275(E).

SCEUC and Sierra Club argue that S.C. Code Ann. § 58-33-275(E) creates a higher standard of prudency. SCEUC Brief p. 24 and Sierra Club Brief p. 9-10. The record in the underlying proceeding reflects that the Commission considered and expressly rejected SCEUC's and Sierra Club's argument that S.C. Code Ann. § 58-33-275(E) contains the appropriate standard:

> Petitioners assert that S.C. Code Ann. § 58-33-275(E) contains a different and higher standard than that contained in S.C. Code Ann. § 58-33-270(E). Petitioners assert that it was an error for the Commission to rely on S.C. Code Ann. § 58-33-270(E) and not on S.C. Code Ann. § 58-33-275(E) in deciding this matter. The statutory provision on which the Petitioners rely is found in a different section of the BLRA. The principal focus of that section is to establish the final and binding nature of a BLRA order in the context of requests for revised rates or other rate relief. See S.C. Code Ann. § 58-33-275(A), (B), (C); S.C. Code Ann. § 58-33-280(A), (B), (J)(1); S.C. Code Ann. § 58-27-860. This provision instructs the Commission on how to proceed in cases where a party demonstrates that a deviation from approved cost forecasts was caused by utility imprudence. In such cases, S.C. Code Ann. § 58-33-275(E) provides that the Commission "***may*** disallow the additional capital costs that result from the deviation but only to the extent that the failure by the utility

> to anticipate or avoid the deviation, or to minimize the resulting expense, was imprudent considering the information available at the time that the utility could have acted to avoid the deviation or minimize its effect." S.C. Code Ann. § 58-33-275(E) (emphasis supplied). Thus, where additional costs due to imprudence are shown, S.C. Code Ann. § 58-33-275(E) provides the Commission with discretion to isolate and remove the imprudent costs presented in a revised rates proceeding or general rate proceeding without otherwise jeopardizing the binding nature of the BLRA Order as to other costs.
>
> Contrary to Petitioners' suggestion however, S.C. Code Ann. § 58-33-275(E) does not impose a new, higher, or different standard for judging prudency than that contained in S.C. Code Ann. § 58-33-270(E). S.C. Code Ann. § 58-33-275(E) embodies the established rule that prudency is not to be judged by hindsight but must be judged based on the information available to the utility at the time that meaningful decisions can be made to avoid or minimize costs. Contrary to Petitioners' assertions, S.C. Code Ann. § 58-33-270(E) does not create a special duty to identify costs in initial BLRA proceedings that is different from the duty that exists under the standard prudency rule. As indicated above, in Order No. 2009-104(A), the Commission found after a hearing that the cost projections presented in Docket No. 2008-196-E were reasonable and prudent considering the information available to SCE&G at that time. Nothing in S.C. Code Ann. § 58-33-275 indicates that S.C. Code Ann. § 58-33-275(E) is intended to create a different standard of review to override the prudency standard contained in S.C. Code Ann. § 58-33-270(E).
>
> Commission Order No. 2013-5, pgs. 10-11.

ORS agrees that even if S.C. Code Ann. § 58-33-275(E) is determined to apply, the prudency evaluation is the same.

The Sierra Club alleges the Commission's ruling relieves SCE&G of any meaningful obligation to construct the new plant in accordance with the original capital cost budget and construction completion schedule, since the Company is relieved of any obligation to "anticipate, avoid or minimize" those plant construction costs when it first

seeks Commission approval to construct. Sierra Club Brief p. 11. ORS disagrees with this assertion. The stated purpose of the BLRA is to provide for recovery of the prudently incurred costs associated with new base load plants ... while at the same time protecting customers ... from responsibility for imprudent financial obligations or costs. *S.C. Energy Users Comm.*, 388 S.C. at 496, 697 at 592 (citing S.C. Code Ann. § 58-33-210 (Editor's Note)). ORS is a statutory party in all matters before the Commission and is charged with representing the public interest in utility matters. S.C. Code Ann. § 58-4-10(B). In addition, the BLRA expressly provides that ORS safeguards the public interest and has full audit rights. S.C. Code Ann. § 58-33-230(F). More specifically, the BLRA states that ORS shall conduct on-going monitoring of the construction of the plant and expenditure of capital through review and audit of the quarterly reports under this article, and shall have the right to inspect the books and records regarding the plant and the physical progress of construction upon reasonable notice to the utility." S.C. Code Ann. § 58-33-277(B). (See also Tr. p. 1113, ll. 12-17.) As ORS witness Allyn Powell testified, ORS's oversight activities primarily focus on the Company's ability to adhere to the approved construction schedule and the approved capital costs estimates. (Tr. p. 1114, ll. 1-4.) ORS evaluates the Company's required quarterly reports, compares the approved capital cost estimates and cash flow versus those in the quarterly reports, reviews and audits invoices, and visits the construction site regularly. (Tr. p. 1114, ll. 8, 19; p. 1115, ll. 10, 14-15; p. 1116, ll. 6-7, 16; p. 1117, ll. 13-18.) In addition, ORS voluntarily publishes a report, which is available to the public, detailing ORS's ongoing monitoring and review. (Tr. p. 1118, ll. 9-11.) Lastly, ORS also publishes its examination of SCE&G's annual revised rates filing which seeks rate recovery for the financing of

project expenditures. (Tr. p. 1118, ll. 14-20.) The regulatory review process ensures only prudently incurred costs may be passed to customers. There is no blank check to the Company as asserted by the Sierra Club. Sierra Club Brief p. 11.

The Commission's use of S.C. Code Ann. § 58-33-270(E) in lieu of S.C. Code Ann. § 58-33-275(E) should be affirmed.

II. THE COMMISSION CORRECTLY FOUND THAT THE ADDITIONAL CAPITAL COSTS ARE PRUDENT.

SCE&G requested approval for $283 million in additional capital costs composed of the following items:

- an EPC change order resulting from a settlement agreement for schedule changes and additional costs related to the time frame in which the COL was received from the NRC, the redesign and construction of certain components and certain Unit 2 site conditions totaling $137.5 million;
- owner's cost of $131.6 million;
- transmission costs of $7.9 million; and,
- additional EPC change orders of approximately $5.9 million for cyber security, $135,573 for healthcare costs, and $8,250 for wastewater piping.

ORS witnesses Powell and Jones provided testimony on each of the above items and found them all reasonable except for approximately $4.95 million for cyber security. (Tr. p. 1124, ll. 13-16; p. 1050, l. 7; p. 1054, ll. 1-4l; p. 1063, ll. 18-22; p. 1064, ll. 1-2; p. 1072, ll. 1-3). With respect to the cyber security, ORS witness Jones testified that the costs of phase I should be approved (costing approximately $1 million), but $4.95 million cost of phase II work should be deferred until a later filing when there is a better

definition of the scope and costs available and the issue of cost sharing among all AP-1000 plants has been more clearly defined. (Tr. P. 1063, ll. 9-15.) The Commission agreed.

SCEUC and Sierra Club argue it was error for the Commission to find the costs prudent. SCEUC and Sierra Club argue that the Company should not be allowed to recover the costs in its Petition, because the costs could have been anticipated at the time of the Company's 2008 base load review order. SCEUC Brief p. 26. Sierra Club Brief p. 9, 16. In essence, SCEUC argues costs that are not requested at the instant they are anticipated become imprudent by requesting them at a later date. Id. They assert that to allow otherwise incentivizes the Company to lowball its estimate for the cost of the plant. Sierra Club Brief p. 11. ORS disagrees and supports the Commission's order that the costs requested by SCE&G could not have been anticipated at the time of the original 2008 base load review application. SCEUC Brief p. 26. Sierra Club Brief p. 16. The Commission succinctly addressed this argument:

> Under Petitioners' approach, the Commission is invited to rule, among other things, that SCE&G should have included in its 2008 cost forecasts the following:
>
> i. the effects on contractors' labor costs of the 2010 federal Health Care and Education Reconciliation Act (Change Order 12),
> ii. the impact on nuclear staffing and emergency planning requirements of the 2011 Fukushima event (Emergency Planning/Health Physics),
> iii. the impact on equipment and software costs of the recent emergence of cyber-security threats to the electric system (Change Order 14),
> iv. the possibility that, in the period 2008-2012, the Nuclear Regulatory Commission (NRC) and the industry might increase standards for the licensing and training of nuclear operators and craft workers

(Operator/Training Margin, Timing Variance to Support Craft),

v. the possibility that the economic recession that began in late 2008 would result in other utilities not proceeding with new units and so not sharing common engineering costs for AP1000 projects (APOG/Plant Programs/Procedures),
vi. the costs and time required for complying with NRC aircraft impact standards for nuclear reactors that were not issued until 2009 (Change Order 16),
vii. the fact that, in 2011-2012, Westinghouse Electric Company, LLC and the Shaw Group decided that stronger steel was required for certain modules used in the Units (Change Order 16), and
viii. the fact that, after excavation conducted during 2009-2011, rock conditions at the site might be found to be different from what pre-excavation drilling showed (Change Order 16).

The Petitioners' approach would require the Commission to engage in a level of speculation that is incompatible with the purposes and intent of the BLRA. Furthermore, given the speculative nature of the analysis that would be required, Petitioners' interpretation of the BLRA would make the statute very difficult for this Commission to apply in practice.

Commission Order No. 2013-5, pgs. 6-8.

Not only does the approach asserted by SCEUC and the Sierra Club require speculation, the effect of their arguments is that the Company must petition the Commission for a base load order modification each time a new and previously unanticipated cost becomes known. The result of this could be several modification petitions pending concurrently before Commission. This would not serve judicial economy. Instead, unnecessary legal costs and other costs of administering the petitions would be incurred. Further, costs that are anticipated sometimes do not come to fruition. ORS disagrees that the costs were anticipated in 2008 and also disagrees that costs are automatically imprudent if not requested when anticipated.

For these reasons, the Commission's decision regarding the prudency of the costs should be affirmed.

III. THERE IS NO NEED FOR A DECISION ON WHETHER A PRUDENCY EVALUATION SHOULD BE CONDUCTED FOR THE ENTIRE PROJECT OR FOR THE CONTINUED CONSTRUCTION OF THE UNITS.

SCEUC and Sierra Club maintain a prudency evaluation should be done for the entire project. (SCEUC Brief p. 31 and Sierra Club Brief p. 26.) This Court does not need to determine whether or not the entire project should be subjected to a prudency evaluation because the Company supplied an analysis showing the project remains prudent. The Commission reviewed the analysis with the same care and attention that would have been given if there was an express statutory requirement for SCE&G to present such information. Commission Order No. 2013-5, p. 13. The Commission found the preponderance of evidence fully supports the prudence of continuing to build the Units. *Id.* The relief requested by SCEUC and Sierra Club has been obtained. *Id.*

CONCLUSION

For the foregoing reasons, Commission Order Nos. 2012-884 and 2013-5 should be affirmed in their entirety.

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2012-203-E
Case Tracking Number 2013-000529

South Carolina Energy Users Committee, Appellant-Respondent,..... Appellant

v.

South Carolina Electric & Gas,
Office of Regulatory Staff,
Pamela Greenlaw, Respondents
and Sierra Club, is Respondent-Appellant.. ..... Respondents

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of **the Office of Regulatory Staff's Initial Brief and Designation of Matter** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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