THE SUPREME COURT OF SOUTH CAROLINA

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S.C. Supreme Court

Appellate Case No. 2013-000529

South Carolina Energy Users Committee,

Appellant-Respondent,

v.

South Carolina Electric & Gas, Office of Regulatory Staff, Pamela Greenlaw,

Respondents,

and Sierra Club, is Respondent-Appellant.

BRIEF OF APPELLANT-RESPONDENT SOUTH CAROLINA ENERGY USERS COMMITTEE

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STATEMENT OF THE ISSUES ON APPEAL

I. **Did the South Carolina Public Service Commission err as a matter of law in authorizing Respondent SCE&G to recover capital costs which are imprudent under the Base Load Review Act?**

II. **Did the South Carolina Public Service Commission err in finding that the additional capital costs granted to Respondent SCE&G were prudent, the error being that the evidence of record compels the finding that SCE&G's failure to anticipate or avoid the additional costs was imprudent under the Base Load Review Act?**

III. **Did the South Carolina Public Service Commission err in failing to require Respondent SCE&G to undertake an evaluation of the prudency of the need for additional generating capacity, pursuant to the Base Load Review Act requirement that all capital cost expenditures in the construction of the nuclear generating plants be prudent?**

STATEMENT OF THE CASE

South Carolina Electric & Gas ("SCE&G") filed a Petition May 15, 2012, for an order approving an updated capital cost schedule and updated construction schedule for the construction of two 1,117 net megawatt nuclear power units (the "units") located at the V.C. Summer Nuclear Station near Jenkinsville, South Carolina. SCE&G Petitioned the South Carolina Public Service Commission ("Commission") for authority to recover an additional $283 million in capital costs associated with its construction of the units pursuant to S. C. Code Ann. §§ 58-33- 210, *et seq.,* commonly known as the Base Load Review Act ("BLRA" or "the Act").

The matter came to be heard by the Commission October 2-3, 2012. The Office of Regulatory Staff ("ORS") appeared and participated in the proceedings. The Appellant, South Carolina Energy Users Committee ("SCEUC"), appeared and participated in the proceedings. The South Carolina Energy Users Committee is an association consisting of large industrial consumers of energy, which are engaged in various manufacturing enterprises throughout the state who take electric service from SCE&G. The Sierra Club and Pamela Greenlaw appeared and participated in the proceedings. In addition, the Commission heard from twenty-two (22) public witnesses during the proceedings.

The Commission issued Order No. 2012-884 granting SCE&G certain relief under the Base Load Review Act on November 15, 2012. Subsequently, the South Carolina Energy Users Committee timely filed and served its Petition for Reconsideration on November 28, 2012. The Commission issued Order No. 2013-5 denying the South Carolina Energy Users Committee's Petition for Reconsideration on February 14, 2013. The South Carolina Energy Users Committee received written notice of the entry of the Commission's Order denying its Petition

for Reconsideration on February 15, 2013, and filed and served its Notice of Appeal on March 14, 2013.

STATEMENT OF FACTS

Styling its petition as that for "Updates and Revisions to Schedules Related to the Construction of a Nuclear Base Load Generation Facility," SCE&G requested that the Commission approve an additional $283 million in capital costs to be recovered from its customers in rates pursuant to the BLRA. SCE&G's petition included costs which SCE&G had already incurred, as well as costs that it anticipates it will incur in the future. The costs include those associated with a settlement between SCE&G and Westinghouse Electric Company ("Westinghouse") with respect to certain cost overruns and additional costs, such as personnel costs and facilities costs. The Commission granted SCE&G's petition in large measure approving an additional $278 million in capital costs to be recovered from customers as authorized by the BLRA. (R. pp. 75-77; Order No. 2012-884, pp. 71-73).

Procedural History

The Commission issued its base load review order pursuant to the BLRA in March of 2009 approving SCE&G's 2008 petition for the authority to construct the AP1000 nuclear generating plants and to recover its costs under the BLRA. Commission Order No. 2009-104(A) approved a capital cost schedule for the units totaling $4.5 billion in 2007 dollars.

In Order No. 2010-12, dated January 22, 2010, the Commission approved an updated construction schedule for the project and an updated capital cost schedule. The capital cost schedule approved in Order No. 2010-12, however, did not alter the total estimated capital cost for the units of $4.5 billion in 2007 dollars.

In Order No. 2011-345, dated May 16, 2011, the Commission modified the capital cost schedule for the project established in Order No. 2009-104A by authorizing an additional $174 million in capital costs to be recovered in rates under the BLRA. (R. pp. 6-7; Order No. 2012-884, pp. 2-4; R. p. 198, l. 19 – p. 200, l. 5; Tr. p. 46, l. 19 – p. 48, l. 5, Marsh prefiled direct testimony p. 7, l. 19 - p. 8, l. 5: R. p. 552, l. 19 – p. 553, l. 4; Tr. p. 733, l. 19 - p. 734, l. 4, Walker April 4, 2011 hearing testimony, Docket No. 2010-376-E, p. 4, l. 19 – p. 5, l. 4).

In Order No. 2012-884, the Commission held that approximately $278 million of SCE&G's request in Docket No. 2012-203-E was not the result of imprudence on the part of the utility and approved these costs as a part of the capital cost schedule for the units. The Commission below found and concluded that the following cost overruns proposed by SCE&G were reasonable and not the result of imprudence:

Change Order No. 16	$137.5 million
Owner's Costs:	$131.6 million
Transmission Costs:	$ 7.9 million
Cyber Security:	$ 0.9 million
Healthcare and Wastewater Piping:	$ 0.1 million
TOTAL (approximate amounts)	$278.0 million

The Commission approved a change in the construction schedule delaying completion of Unit 2 by 11 months to March 15, 2017 and completion of the entire project by 7 1/2 months to May 15, 2018.

Additional Capital Costs

Change Order No. 16.

In 2008, SCE&G sought and obtained a base load review order authorizing its construction of two Westinghouse AP1000 nuclear generating units which were still under design and not permitted for construction by the Nuclear Regulatory Commission ("NRC"). Notwithstanding the fact that the units' design had not been approved by the NRC, the

Commission approved SCE&G's capital cost estimates for the construction of the units. In approving SCE&G's BLRA application, the Commission issued a base load review order approving a construction schedule in which SCE&G would obtain a Combined Operating License ("COL") to construct and operate the units from the NRC by July. (R. p. 259, l. 18 – p. 261, l. 12; Tr. p. 125, l. 18-p. 127, l. 12; R. p. 371, ll. 7-10; Tr. p. 335, ll. 7-10; R. p. 384, ll. 3-6; Tr. p. 350, ll. 3-6). The COL was issued nine months behind schedule on March 30, 2012. (R. p. 322, ll. 17-21; Tr. p. 195, ll. 17-21; Byrne prefiled direct testimony, p. 26, ll. 17-21).

In this docket, SCE&G sought recovery of the additional capital costs associated with the delay in the issuance of the COL in the approximate amount of $137.5 million. Change Order 16 formalized an agreement entered into among SCE&G, Santee Cooper (a 45% owner of the units), and Westinghouse that resolved claims by Westinghouse for additional construction costs as follows:

> 1. The shield building for the AP1000 unit redesign to increase its resistance to aircraft impacts;
>
> 2. Rescheduling the construction plan for the units to take into account the approximately nine month delay in the issuance of the COL issued by the NRC;
>
> 3. The structural modules for the project, as redesigned, using higher strength steel than was originally specified, among other changes; and
>
> 4. Responding to unanticipated rock conditions at the foundation of Unit 2.

(R. p. 314, ll. 1-17; Tr. p. 187, ll. 1-17; Byrne prefiled direct testimony, p. 18, ll. 1-17; R. p. 316, l. 1 – p. 317, l. 11; Tr. p. 189, l. 1- p. 190, l. 11; Byrne prefiled direct testimony, p. 20, l. 1- p. 21, l. 11).

The largest single item of cost contained in Change Order No. 16 was the additional cost of constructing the shield building as redesigned to increase its resistance to aircraft impacts. (R. p. 318, ll. 17-19; Tr. p. 191, ll. 17-19, Byrne prefiled direct testimony, p. 22, ll. 17-19). The redesign of the structural modules required a higher strength steel to improve constructability. (R. p. 332, ll. 1-12; Tr. p. 205, ll. 1-12). The delay in obtaining the COL would delay the completion of the first unit by nine months giving rise to additional construction costs. (R. p. 322, l. 17 – p. 323, l. 2; Tr. p. 195, l. 17 – p. 196, l. 2).

At the time of SCE&G's 2008 BLRA application, the design of the Westinghouse AP1000 nuclear generators which SCE&G proposed to build had not been approved by the NRC. Under the Engineering, Procurement and Construction contract ("EPC contract"), it was Westinghouse's responsibility to obtain approval of the design of its AP1000 units from the NRC. SCE&G was responsible for obtaining approval of the COL. Two of the prerequisites for obtaining the COL were approval of the final design of the AP1000 and approval of the wetlands certification. (R. p. 494, ll. 13-22; Tr. p. 667, ll. 13-22). SCE&G received its Clean Water Act Section 401 certification on December 16, 2011. Westinghouse received approval of its AP1000 design from the NRC on December 30, 2011, SCE&G received its COL from the NRC on March 30, 2012, and its Clean Water Act Section 404 wetland permit on the same day. (R. p. 300, ll. 1-5; Tr. p. 173, ll. 1-5; R. p. 319, ll. 1-3; Tr. p. 192, ll. 1-3).

By December 2008, the date of the hearing on SCE&G's BLRA application, Westinghouse had submitted 15 design revisions for the AP1000 reactors to the NRC for approval. At that time, the NRC had informed Westinghouse that it was not satisfied with the strength of the shield building design and would require a 16th revision demonstrating that the

shield building was sufficiently strong to withstand the impact of an airplane crash. Westinghouse had submitted a draft of the 16th revision to SCE&G as a basis for its use in determining the cost of constructing the units for the purpose of making its BLRA application. SCE&G informed the Commission in support of its 2008 BLRA application that the COL approval was expected by July 2011. (R. p. 259, l. 18 – p. 261, l. 12; Tr. p. 125, l. 18-p. 127, l.12; R. p. 319, ll. 4-13; Tr. p. 192, ll. 4-13; R. p. 322, ll. 17-21; Tr. p. 195, ll. 17-21; R. p. 364, l. 19 – p. 367, l. 22; Tr. p. 326, l. 19 - p. 329, l. 22.) Stephen A. Byrne, President for Generation and Transmission, testified that SCE&G had addressed the risk that the NRC would refuse to approve the AP1000 design that SCE&G submitted to the Commission in its 2008 BLRA application by including additional amounts in its anticipated cost estimates to pay for increased costs associated with future improvements to the AP1000 design ultimately required by the NRC. (R. p. 368, ll. 19-23; Tr. p. 330, ll. 19-23). In addition, SCE&G represented to the Commission that it had adequate contractual safeguards to protect it and its customers in the case of delays in approval of the AP1000 designs. Mr. Byrne testified in the 2008 docket that SCE&G had negotiated contractual provisions in its EPC contract subjecting Westinghouse to certain penalties in the event the COL was delayed due to Westinghouse's inability to have its AP1000 design approved timely. (R. p. 368, l. 24 – p. 369, l. 21; Tr. p. 330, l. 24 – p. 331, l. 21).

One of the reasons given by SCE&G for the delay in the issuance of the COL was the delay in Westinghouse/Shaw obtaining approval of its final plans for the AP1000. (R. p. 323, ll. 8-12; Tr. p. 196, ll. 8-12; Byrne prefiled direct testimony, p. 27, ll. 8-12.) The delay in approval of the design of the AP1000 units was Westinghouse's inability to satisfy the NRC that the shield buildings would be sufficiently hardened to withstand aircraft impacts. (R. p. 316, ll. 8-9; Tr. p.

189, ll. 8-9; Byrne prefiled direct testimony, p. 20, ll. 8-9; R. p. 324, l. 1 – p. 325, l. 13; Tr. p. 197, l. 1 -198, l. 13; Byrne prefiled direct testimony, p. 28, l. 1 – p. 29, l. 13).

To satisfy the NRC of the strength of the AP1000 shield design, Westinghouse proposed to use a shield design which had never been approved for use in the United States. Consequently, the NRC required Westinghouse to test and verify the design performance of the shield design as if it were being proposed for the first time. (R. p. 319, l. 14 – p. 321, l. 2; Tr. p. 192, l. 14 - p. 194, l. 2; Byrne prefiled direct p. 23, l. 14 – p. 25, l. 2). Westinghouse submitted a total of 19 revisions before it received final approval of its AP1000 nuclear reactors by the NRC in December of 2011. SCE&G received its COL on March 30, 2012, approximately nine months after approval was expected. (R. p. 322, ll. 17-21; Tr. p. 195, ll. 17-21; Byrne prefiled direct testimony, p. 26, ll. 17-21; R. p. 370, ll. 22-24; Tr. p. 332, ll. 22-24; R. p. 364, l. 25 – p. 366, l. 21; Tr. p. 326, l. 25 – p. 328, l. 21).

Mr. Byrne acknowledges that at the time the EPC contract was negotiated it was anticipated that the NRC would require additional measures to be incorporated into the AP1000 design to strengthen its resistance to aircraft impacts. However, SCE&G failed to anticipate the actual costs of the final AP1000 design and, consequently, the NRC requirements for hardening the shield buildings involved more cost than SCE&G anticipated in its 2008 BLRA application. (R. p. 319, ll. 4-13; Tr. p. 192, ll. 4-13; Byrne prefiled direct testimony, p. 23, ll. 4-13; R. p. 366, ll. 14-21; Tr. p. 328, ll. 14-21; R. p. 368, l. 6 – p. 369, l. 25; Tr. p. 330, l. 6 – p. 331, l. 25).

Further, Mr. Byrne testified that the parties' EPC contract provided for change orders where cost increases are due to "uncontrollable circumstances." Westinghouse construed this term broadly enough to protect it from the uncertainties of regulatory approval of its AP1000 design, excusing it from liability for the delay costs and the additional costs associated with

hardening of the shield buildings. (R. p. 321, ll. 3-18; Tr. p. 194, ll. 3-18; Byrne prefiled direct testimony, p. 25, ll. 3-18). Mr. Byrne acknowledges that the EPC contract presented to the Commission as a part of the 2008 BLRA application defines the term more narrowly. In the 2008 BLRA application, SCE&G informed the Commission that the EPC contract provision defined uncontrollable circumstances as "severe weather, war/sabotage/terrorist attack." (R. p. 374, l. 9; Tr. p. 339, l. 9; R. p. 373, l. 5 – p. 374, l. 19; Tr. p. 338, l. 5 - p. 339, l. 19; R. p. 921 –p. 936; Ex No. 1; SAB 4, Exhibit J, Chart A). SCE&G chose not to contest and litigate Westinghouse's position but chose instead to settle Westinghouse's claim for $137.5 million.

Mr. Byrne testified that SCE&G's failure to obtain its wetlands certification and permits under the National Environmental Policy Act ("NEPA") contributed to the delay in the approval of the COL by the NRC. By law, the COL could not be issued for the AP1000 units until SCE&G proved to the Corps of Engineers and the Environmental Protection Agency ("EPA") that the project complied with Clean Water Act standards and SCE&G received its Clean Water Act Section 401 Certification. Here, the water quality certification was not issued for the nuclear project until December 16, 2011, about the same time as final design of the AP1000 was approved by the NRC. (R. p. 325, l. 14 – p. 326, l. 10; Tr. p. 198, l. 14 – p. 199, l. 10; Byrne prefiled direct testimony, p. 29, l. 14 - p. 30, l. 10).

The delay in receiving the Clean Water Act Section 401 certification arose from the fact that instead of locating the necessary transmission lines for this project in existing rights-of-way, SCE&G chose instead to attempt to route the transmission lines in new corridors. Employing a macro-corridor approach to transmission siting, SCE&G sited its transmission lines in county-by-county corridors and quantified the environmental impacts of placing the lines in these corridors. The specific location of the lines was left until detailed engineering and siting studies

were completed later in the process. (R. p. 326, l. 11 – p. 327, l. 4; Tr. p. 199, 1. 11 – p. 200, l. 4; Byrne prefiled direct testimony p. 30, l. 11 - p. 31, l. 4). The macro corridor approach does not identify the specific wetlands issues to be addressed by the transmission siting. (R. p. 377, ll. 9-18; Tr. p. 343, ll. 9-18). There was considerable public concern and comment about the proposed transmission siting which, SCE&G anticipated at the time it filed its BLRA application. (R. p. 379, ll. 5-10; Tr. p. 345, ll. 5-10). Refusing to accept the less certain macro corridor approach, the EPA and Army Corps of Engineers took the position that specific transmission line routes had to be identified and the environmental impacts of the specific routes had to be assessed before the environmental review could proceed. SCE&G fell behind with respect to its transmission siting schedule. (R. p. 328, ll. 10-17; Tr. p. 201, ll. 10-17; Byrne prefiled direct testimony p. 32, ll. 10-17; R. p. 474, l. 18 – p. 475, l. 1; Tr. p. 647, l. 18 – p. 648, l. 1; Young prefiled direct testimony, p. 10, l. 18 - p. 11, l. 1).

In response, SCE&G decided to route its new transmission lines in existing corridors (with a single six mile exception). This approach allowed the routes to be established quickly and the environmental impacts from them to be assessed on an expedited basis. Mr. Byrne testified that it would have been prudent for SCE&G to have determined initially to use its existing easements and right-of-ways for the transmission lines. (R. p. 382, ll. 14-22; Tr. p. 348, ll. 14-22). It can be inferred from this record that had SCE&G determined from the outset to use existing transmission lines, the water quality certification would not have been delayed past the July 2011 milestone. (R. p. 500, ll. 5-16; Tr. p. 673, ll. 5-16; R. p. 501, ll. 1-2; p. 674, ll. 1-2). Had the Clean Water Act Section 401 certification and Section 404 wetlands permit been granted prior to the July 2011, the date SCE&G forecast to receive its COL, SCE&G would not have been seen to contribute to the delay in obtaining the COL.

The delay in the issuance of the COL gives rise to the dispute concerning the first three matters of Change Order 16 set out at page 5, supra. While Westinghouse's delay in obtaining approval of the design of the AP1000 from the NRC contributed to the delay in obtaining the COL, SCE&G's delay in obtaining its Clean Water Act certification and permit from the Corps of Engineers contributed equally to the issuance of the COL. (R. p. 329, l. 13 – p. 330, l. 9; Tr. p. 202, l. 13 – p. 203, l. 9; Byrne prefiled direct testimony, p. 33, l. 13 – p. 34, l. 9). After negotiations, SCE&G and the remaining parties settled Westinghouse's claim for an amount of $137.5 million (the utility was not before the Commission seeking approval of the settlement agreement with Westinghouse; the matter had been settled for $137.5 million and SCE&G was liable for payment of the agreed upon amount). On this record, the reasonableness of the settlement is far from clear. Mr. Byrne does describe a process whereby SCE&G negotiated settlement from $213.6 million to $137.5 million. There is no other evidence of record as to the reasons for the settlement. However, based on the testimony of record, SCE&G was bargaining from a weakened position and agreed to settle its claim against Westinghouse by paying Westinghouse $137.5 million. (R. p. 316, l. 5 – p. 317, l. 11; Tr. p. 189, l. 5 - p. 190, l. 11; Byrne prefiled direct testimony, p. 20, l. 15 – p. 21, l. 11).

The fourth matter of Change Order 16 involved the cost of addressing rock conditions at the foundation of Unit 2. Mr. Byrne testified that because the unexpected condition was below the surface, SCE&G could not have anticipated encountering unexpected rock conditions. However, Mr. Byrne testified that it was not "unusual" to find rock variations after full excavation. (R. p. 333, l. 11 – p. 334, l. 5; Tr. p. 206, l. 11 – p. 207, l. 5).

Owner's costs.

SCE&G seeks to recover an additional $131.6 million in owner's costs in its base load review order in this petition. Owner's costs are the direct responsibility of SCE&G. The additional owner's costs requested to be recovered in rates in this docket include increased IT infrastructure including licenses, hardware, software and implementation costs, additional labor or employment costs and additional facilities costs. (R. p. 532, l. 6; Tr. p. 713, l. 6; Walker prefiled direct testimony, p. 12, l. 6; Chart B, Summary of Owners Cost Adjustments).

Justifying SCE&G's request for additional owner's costs in this docket, Carlette. L. Walker, Vice President for Nuclear Finance Administration, explained that SCE&G created the owner's cost estimates in its 2008 BLRA application while it was evaluating nuclear generation options and negotiating the terms of the EPC contract and SCE&G did not allow itself adequate time to determine its actual owner's costs prior to filing its BLRA application. Instead, SCE&G submitted only a high level estimate of its owner's costs in 2008 in its BLRA application and evidence. (R. p. 625, l. 21 – p. 626, l. 8; Tr. p. 807, l. 21 - p. 808, l. 8; Walker April 4, 2011 hearing testimony, Docket No. 2010-376-E, p. 295, l. 21 - p. 296, l. 8); (R. p. 627, ll. 6-15; Tr. p. 809, ll. 6-15; Tr. Docket No. 2010-376-E, p. 297, ll. 6-15); (R. p. 634, ll. 16-22; Tr. p. 816, ll. 16-22; Tr. Docket No. 2010-376-E, p. 304; ll.16-22); (R. p. 633, l. 14 – p. 634, l. 2; Tr. p. 815, ll. 14 – p. 816, l. 2). Although Ms. Walker testified that in 2008, SCE&G's owner's costs could not be accurately forecast until Westinghouse completed its site specific construction schedule (R. p. 619, ll. 6-24; Tr. p, 801, ll. 6-24; R. p. 623, l. 22 – p. 624, l. 5; p. 805, l. 22 – p. 806, l. 5), Ms. Walker testified in Docket No. 2009-293-E that the proposed schedule changes were timing-related changes only and would not affect the cost of the project in 2007 dollars. (R. p. 621, l. 6 –

p. 623, l.1; Tr. p. 803, l. 6 – p. 805, l.1). Based on Ms. Walker's testimony in Docket No. 2009-293-E, the Commission found in issuing Order No. 2010-12 that the site specific changes requested by SCE&G did not alter the cost of the project. (R. p. 621, l. 6 – p. 623, l. 1; Tr. p. 803, l. 6 – p. 805, l.1). Ms. Walker testified that in 2008, it was impractical for SCE&G to canvass across all of the different areas of SCANA to ascertain its owner's costs prior to filing its Base Load Review Application. The requirement that a utility determine its anticipated actual owner's costs before filing for a base load review order would "put the cart before the horse." (R. p. 625, l. 21 – p. 626, l. 8; Tr. p. 807, l. 21 – p. 808, l. 8; R. p. 627, ll. 6-15; Tr. p. 809, ll. 6-15).

In addition to her testimony below, Ms. Walker's testimony in Docket No. 2010-376-E was admitted into this record by SCE&G as in support of its request for recovery of an additional $131 million in owner's costs. (R. pp. 545-647; 4/4/11 2010-376-E Hearing Testimony; Tr. pp. 726-829). According to Ms. Walker, the request in Docket No. 2010-376-E of an additional $145 million in owner's costs was required because SCE&G had lost the use of the contingency fund approved in Order No. 2009-104A, which was disallowed by the South Carolina Supreme Court in *South Carolina Energy Users Committee vs. The South Carolina Public Service Commission, infra.* (R. p. 529, ll. 8-14; Tr. p. 710, ll. 8-14; Walker prefiled direct testimony, p. 9, ll. 8-14; R. p. 552, ll. 1-8; Tr. p. 733, ll. 1-8; Walker April 4, 2011 hearing testimony, Docket No. 2010-376-E, p. 4, ll. 1-8; R. p. 566, ll. 9-15; Tr. p. 747, ll. 9-15; Walker April 4, 2011 hearing testimony, Docket No. 2010-376-E, p. 18, 11. 9-15). Ms. Walker testified that the owner's cost figures approved by the Commission in Docket No. 2010- 376-E were based on a "detailed staffing plan, the project budget and a cost-center by cost-center review of the cost of the project that had been compiled during the period 2008-2010." (R. p. 526, l. 19 – p. 592, l. 7; Tr. p. 709, l. 19 – p. 710, l. 7; Walker prefiled direct testimony, p. 8, l. 19 - p. 9, l. 7). Ms. Walker testified

that SCE&G was not surprised that the capital costs proved to be expensive; they simply exceeded SCE&G's admittedly high level estimates in its BLRA application. (R. p. 629, l. 13 – p. 631, l. 10; Tr. p. 811, l. 13 – p. 813, l. 10). Ms. Walker further testified that since Order No. 2011-345, SCE&G has continued to "review, refine and update these owner's cost projections" and consequently the utility identified an additional $131.6 million in owner's costs for which it sought recovery in this docket. (R. p. 529, l. 8 – p. 531, l. 12; Tr. p. 710, l. 8 - p. 712, l. 12; Walker prefiled direct testimony p. 9, l. 8 - p. 11, l. 12). In fact, Mr. Byrne testified that SCE&G anticipates that its annual review of owner's costs for the nuclear generating plants will require SCE&G to petition the Commission annually to provide the Commission a cost update. (R. p. 364, ll. 14-18; Tr. p. 326, ll. 14-18).

David A. Lavigne, General Manager of Operational Readiness for New Nuclear Deployment, testified that SCE&G expected to use the contingency fund struck down by the Court in *South Carolina Energy Users Committee v. The South Carolina Public Service Commission, infra,* to cover costs it failed to include in its 2008 BLRA application (R. p. 431, l. 1 – p. 433, l. 20; Tr. p. 590, l. 1 – p. 592, l. 20). While Mr. Lavigne testified that SCE&G had based its 2008 estimates on benchmarks provided by Westinghouse and other organizations, he acknowledged that in 2008, the staffing needs anticipated for the units were the result of "general estimates and preliminary design information." (R. p. 427, l. 3 – p. 429, l. 24; Tr. p. 586, l. 3 – p. 588, l. 24; R. p. 430, ll. 1-16; Tr. p. 589, ll. 1-16).

Hubert Young, Manager of Transmission Planning, testified that SCE&G's transmission construction costs anticipated in its 2008 BLRA application were based on estimates supported by "early, conceptual designs." (R. p. 473, ll. 4-7; Tr. p. 646, ll. 4-7). At the time of SCE&G's COL application, the Southern Company had filed a similar application. Mr. Young testified

that SCE&G simply copied the Southern Company's example with respect to its wetlands certification and relied on the Southern Company's decision to site its transmission lines using the macro-corridor approach, in spite of the fact that obtaining the Clean Water Act certification and permitting and COL was SCE&G's responsibility. (R. p. 493, l. 20 – p. 494, l. 22; Tr. p. 666, l. 20 – p. 667, l. 22). Mr. Young acknowledged that the Southern Company's transmission routes in Georgia traveled over different land routes than SCE&G's. Mr. Young testified further that using its existing rights-of-way was an acceptable method of siting its transmission lines and that once SCE&G decided in June of 2010 to use its existing right-of-ways, it obtained its wetlands certificate 18 months later (R. p. 500, ll. 5-16; Tr. p. 673, ll. 5-16; R. p. 501, ll. 1-22; p. 674, ll. 1-22).

Cyber security, healthcare and wastewater piping.

SCE&G requested recovery of an additional $5.9 million for cyber security measures. SCE&G had expended $.9 million to review its needs and requested another $5 million to implement the upgrades recommended by its review of its security needs. ORS witness, Gary C. Jones, testified that the costs estimate of the future upgrades were insufficiently determined and informed. (R. p. 813, l. 3 – p. 814, l. 15; Tr. p. 1062, l. 3 – p. 1063, l. 15; Gary C. Jones prefiled direct testimony, p. 18, 1.3 – p. 19, l. 15). Based upon Mr. Jones' testimony, the Commission refused to authorize the additional $5 million request. (R. pp. 69, 71; Order No. 2012-884, pp. 65, 67). The Commission also authorized recovery of health care costs of $135, 573 and wastewater piping costs of $8,250. (R. pp. 70-71; Order No. 2012-884, pp. 66-67).

Mark N. Cooper, Ph.D., who testified on behalf of the Sierra Club, testified "[r]ushing to be among the first in line, for a design that had not been approved or implemented in the U.S.,, the utility took on extraordinary risk, that it failed to include in its initial cost estimate. It now

seeks to impose the costs of its imprudently rosy initial cost projection with approval of cost overruns." (R. p. 760; Tr. p. 973; Cooper prefiled direct testimony, p. 25). Dr. Cooper testified that the fact that SCE&G identified a series of risks associated with the construction of the two nuclear reactors in Jenkinsville, South Carolina, does not exempt it from bearing some of the costs of those risks. (R. p. 757; Tr. p. 970; Cooper prefiled direct testimony, p. 22). In particular, Dr. Cooper testified:

- The fact that there would be difficulties in finding adequately qualified and trained personnel was widely recognized.
- The fact that the supply chain was stretched thin was widely recognized.
- The fact that there would be bumps in the road of regulatory approval was also certainly predictable. The failure to comply with NRC requirements is the responsibility of the utility, not the ratepayers or the NRC.
- Given the history of nuclear reactor construction in the U.S. and around the world, the fact that requirements would evolve over time should have been foreseen and included in the cost estimate.

(R. pp. 757-758; Tr. pp. 970-971; Cooper prefiled direct testimony, pp. 22-23).

Dr. Cooper testified to the fact that SCE&G's hope that other utilities would help defray the cost of developing a completed AP1000 Westinghouse design was poor judgment on its part. SCE&G's cost estimates should have reflected the possibility that SCE&G would need to complete the project on its own and that it was unreasonable for SCE&G to hope that four other utilities would share the costs in finishing the design work, a risk SCE&G chose to take. (R. p. 758; Tr. p. 971; Cooper prefiled direct testimony, p. 23). SCE&G had discovered that its IT systems are outdated and need updating. Dr. Cooper testified that it was in fact Unit I which required the upgrade which would be reviewed in a general rate case. Instead, the utility seeks to shift the cost of upgrading its IT system at Unit I to its BLRA order which is not permitted by the BLRA. (R. p. 758; Tr. p. 971; Cooper prefiled direct testimony, p. 23).

Dr. Cooper testified that given his extensive analysis of both the long-term history of nuclear construction and the development of recent nuclear construction proposals, he was of the opinion that every one of the causes of the cost overruns for which SCE&G was seeking recovery here should have been evident to a prudent utility at the time it filed its BLRA application. Indeed, SCE&G charged ahead with a low-ball estimate of its capital costs in spite of this clear evidence of risk, underestimating the costs, for which it now seeks recovery through a third bite of the apple under the BLRA. (R. p. 759; Tr. p. 972; Cooper prefiled direct testimony, p. 24).

Dr. Cooper testified that "[t]his cost overrun proceeding signals to the commission that the utility has failed to continue to practice the cost vigilance it is obligated to exercise" under the BLRA. Dr. Cooper pointed out that when the contingency cost pool that SCE&G proposed in the 2008 BLRA application was rejected by this Court, the utility quickly updated its cost estimate taking "a second bite at the apple" and sought and obtained an additional $174 million in Order No. 2011-345. Dr. Cooper explained that SCE&G's request here of an additional $283 million constitutes a 6.6% cost increase and that with this request, the cost overruns have now driven the total cost of the project above the original cost estimate plus the contingency cost pool. In Dr. Cooper's opinion, the BLRA requires a prudence review of the additional capital costs and a thorough review of the cost and economic viability of the units. (R. pp. 744-745; Tr. pp. 951-952; Cooper prefiled direct testimony, pp. 3-4).

Dr. Cooper testified that SCE&G has not shouldered any of the costs associated with the risks of its nuclear construction. Dr. Cooper compiled the following table reflecting the allocation of cost overruns:

Table 1: Allocation of Cost Overruns

	Change Orders	Owner Cost	Transmission	Total
Vendor	$76	0	0	76
Ratepayers	$156	276	21	453
Owner	$0	0	0	0

(R. p. 759; Tr. p. 972; Cooper prefiled direct testimony, p. 24).

With respect to the cost recovery system of the BLRA, Dr. Cooper testified as follows:

> While the BLRA represented a dramatic change in the way rates are set for new nuclear reactors built in South Carolina, it did not abandon the fundamental concepts of just, reasonable and prudent that govern the setting of utility rates. Advanced cost recovery under the BLRA gives nuclear costs very special treatment, but it is not a blank check and it does not diminish the obligation of the utility to ensure that it delivers the least cost electricity to ratepayers.

(R. p. 744; Tr. p. 951; Cooper prefiled direct testimony, p. 3).

ARGUMENT

I

THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION ERRED AS A MATTER OF LAW IN AUTHORIZINGTHE RESPONDENT SCE&G TO RECOVER CAPITAL COSTS WHICH ARE IMPRUDENT UNDER THE BASE LOAD REVIEW ACT.

Relying upon the authority of S.C. Code Ann. § 58-33-270(E), the Commission granted SCE&G authority to recover $278 million in additional capital costs in rates as prudent and necessary costs to construct the units. However, in so doing, the Commission failed to apply the relevant legal standard of prudency under the BLRA to the additional capital costs requested by the utility. Because the additional capital costs approved by the utility could have been

anticipated at the time of SCE&G's 2008 BLRA application, the additional costs are imprudent and the Commission erred in authorizing the utility to recover them in rates. Accordingly, the orders of the Commission should be reversed.

The Base Load Review Act

The BLRA provides that, as long as a nuclear plant is constructed in accordance with the approved schedules, estimates and projections, as adjusted by the inflation indices, a utility must be allowed to recover its capital costs related to the plant through revised rate filings, S. C. Code Ann. § 58-33-275(C). The traditional concept of rate making in South Carolina is based on historical data with adjustments permitted for known and measurable out of period changes. *Hamm v. Southern Bell Telephone & Telegraph Company,* 302 S.C. 132, 394 S.E. 2nd 311 (1990); *South Carolina Cable Television Association v. The Public Service Commission of South Carolina,* 313 S.C. 48, 437S.E. 2nd 38(1993). The BLRA breaks from traditional concepts of ratemaking by allowing a utility advanced cost recovery of certain of its capital costs of constructing nuclear plants based upon anticipated capital costs to be expended many years into the future, long before they are used and useful for generating electricity. The Commission authorized SCE&G to construct its two AP1000 units in 2009, permitting SCE&G to recover certain of its capital costs in revised rates seven years in advance of the scheduled operation of the first of the two units in 2016.

A careful review of the BLRA is necessary to an understanding of the Commission's error in authorizing the recovery of the capital costs requested.

The purpose of the BLRA,

> ...is to provide for the recovery of the prudently incurred costs associated with new base load plants, as defined in Section 58-33-220 of Article 4, when constructed by investor-owned electrical utilities, while at the same time

protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs.

Base Load Review Act Section 1(A).

The goal of the BLRA is "two-fold: (1) to allow SCE&G to recover its 'prudently incurred costs' associated with the nuclear facility; and (2) to protect customers 'from responsibility for imprudent financial obligations or costs'." *South Carolina Energy Users Committee v. South Carolina Public Service Commission,* 388 S.C. 495; 697S.E.2d 592. To balance the interests of the utility and the customers, the General Assembly designed a specific and detailed statutory blueprint for establishing prudent costs to be recovered through revised rate filings. The Commission's authority to issue a base load review order is prescribed by the express terms of the BLRA. A base load review order issued pursuant to the BLRA,

> ...means an order issued by the commission pursuant to Section 58-33-270 establishing that if a plant is constructed in accordance with an approved construction schedule, approved capital costs estimates, and approved projections of in-service expenses, as defined herein, the plant is considered to be used and useful for utility purposes such that its capital costs are prudent utility costs and are properly included in rates.
>
> S. C. Code Ann. § 58-33-220(4).

The BLRA expressly sets out the factual showing necessary for a base load review order. S. C. Code Ann. § 58-33-250 provides (in its pertinent part):

> The application for a base load review order under this article shall include:
>
> (1) information showing the **anticipated** construction schedule for the plant; [Emphasis added]
> (2) information showing the **anticipated** components of capital costs and the anticipated schedule for incurring them; [Emphasis added]

If a utility establishes that its nuclear plant is constructed in accordance with (1) an approved construction schedule, (2) approved capital costs estimates, and (3) approved projections of in-service expenses, the nuclear plant is considered to be used and useful for utility purposes and

the utility is entitled to advanced recovery of its capital costs for in revised rates. S. C. Code Ann. § 58-33-275 (A) and (C).

The BLRA provides that as circumstances warrant, a utility may petition the Commission for an order modifying its schedules in the base load review order. However, the proposed changes may not be the result of imprudence on the part of the utility. S. C. Code Ann. §§ 58-33-270(E), 58-33-275(E). While the BLRA retains the traditional notions of prudency, to wit S.C. Code Ann. § 58-33-220(4), the concept of the term imprudence as it applies to SCE&G's petition is broadened by S. C. Code Ann. § 58-33-275(E) which provides:

> 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. [Emphasis added]

The intent of the General Assembly was to authorize advanced recovery of prudently incurred capital costs. If the utility could have anticipated or avoided the additional costs, given the information available to it at the time of its application under the BLRA, the Commission must disallow advanced recovery of those additional costs. This limitation on the utility's recovery of capital costs is found throughout the BLRA.

The BLRA provides for the recovery of certain capital costs for a plant which is ultimately abandoned by the utility. With respect to the recovery of the capital costs of abandonment of a nuclear plant, the utility is limited to prudently incurred costs, but the utility's

> ...recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the **failure by the utility to anticipate** or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs,

was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.

S. C. Code Ann. § 58-33-280(K) [Emphasis added].

Moreover, in the event a utility determines to abandon the project after a prudency determination under S. C. Code Ann. § 58-33-225 authorizing a project development order,

> ...recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the **failure by the utility to anticipate** or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.

S. C. Code Ann. § 58-33-225(G) [Emphasis added]

A base load review order constitutes a final and binding determination that a plant is used and useful for utility purposes and that its capital costs are prudent utility costs and are properly included in rates so long as the plant is constructed within the parameters of the approved construction schedule and the approved capital costs estimates. S. C. Code Ann. § 58-33-275(A). So long as the nuclear plant is constructed in accordance with the approved schedule and estimates set forth in S. C. Code Ann. §§ 58-33-270 (B)(1) and (2), the utility is allowed to recover its capital costs through revised rate filings or general rate proceedings. S. C. Code Ann. § 58-33-275(C). A utility may seek relief from its base load review order as circumstances warrant but the changes in the schedules and estimates may not be the result of imprudence on the part of the utility. S. C. Code Ann. § 58-33-270 (E). Where a party has demonstrated that there has been a material and adverse deviation from the schedules and estimates set forth in S. C. Code Ann. §§ 58-33-270 (B)(1) and (2), the Commission must disallow those cost deviations to the extent that the failure of the utility to anticipate or avoid the deviation was imprudent given the information available. S. C. Code Ann. § 58-33-275(E).

By allowing utilities advanced cost recovery of their nuclear construction costs, the BLRA has dramatically altered the customer protections found in traditional ratemaking. To protect the utility's customers from excessive capital costs, the BLRA requires a utility to conclusively establish its capital costs in its BLRA application. In exchange, the utility has certainty that the capital costs are deemed prudent. As explained by Dr. Cooper, the risk to the customer posed by advanced cost recovery is that it allows,

> [t]he utility ... to charge ratepayers before the plant is used and useful. In the case of South Carolina, the recovery of approved costs is guaranteed, even if the reactor is not completed, subject to a prudence review. These changes alter the incentives of the utilities and shift the balance between stockholder and ratepayer interests.

- Advanced cost recovery with a guarantee of recovery shifts the risk of construction so dramatically that it provides a strong incentive for utilities to pursue the technologies that have been favored by the statute.
- By conferring a special advantage on nuclear, it distorts the utility and regulatory decision-making process and gives utilities an incentive to choose investments that yield higher, guarantee returns, even where the investments are not the lowest cost option.
- Shifting the risk of nuclear reactor construction onto the backs of ratepayer creates an ongoing problem because it diminishes the utility's incentive to drive a hard bargain with vendors or joint owners that recovers cost overruns from them, rather than ratepayers.
- Pre-approving and guaranteeing costs creates a large quantity of sunk costs. Utilities can "nickel and dime" the Commission to death with a series of "small" cost overruns, which the Commission may feel pressured to approve, since so much has been sunk.
- Because the technologies that tend to be favored by advanced cost recovery are very large central station technologies, utilities favor them, since they increase the rate base and inflate shareholder income.
- Nuclear projects are so large that utility management tends to become totally focused on the single large project and to disregard to resist alternative projects.
- They may even have an incentive to oppose alternatives that might reduce the need for the large central station facilities.

(R. pp. 751-752; Tr. pp. 959 – 960; Cooper prefiled direct testimony, pp. 11-12).

Moreover, under the BLRA the utility's customers are asked to pay for capital costs long before they are used and useful and generating electricity. Because of the risks to the utility's

customers, the General Assembly afforded the utility's customers the protection against cost overruns found in S.C. Code Ann. § 58-33-275(E). The BLRA does not require SCE&G's customers to pay for cost overruns in advance.

The Commission held that S. C. Code Ann. § 58-33-270 controls its authority to permit SCE&G to recover all reasonable capital costs associated with its construction of its nuclear plants, notwithstanding the fact that the additional costs were anticipated or could have been anticipated at the time of SCE&G's BLRA application. (R. p. 75; Order No. 2012-884, p. 71). The Commission expressly held that the prudency standard of S. C. Code. Ann. § 58-33-275(E) does not apply to SCE&G's petition for additional capital costs. (R. p. 89; Order No. 2013-5, p. 10). The Commission erred in failing to review SCE&G's request of additional capital costs in light of the definition of imprudence as required by S. C. Code. Ann. § 58-33-275(E) of the BLRA.

As a regulatory body, created by statute, the Commission is possessed with only those powers specifically delineated. *South Carolina Electric & Gas Company v. Public Service Commission,* 275 S.C. 487, 272 S.E.2nd 793 (1980). The Commission may not construe the provisions of the BLRA so as to authorize it to exceed the authority granted it by the General Assembly. *Nucor Steel v. South Carolina Public Service Commission*, 310 S.C. 539, 426 SE 2nd 319 (1992). Here the Commission exceeded the authority granted it under the BLRA by authorizing SCE&G to recover its capital costs in rates in excess of those authorized by statute.

The Commission concluded that $278 million of the additional capital costs requested were not the result of imprudence. (Order No. 2012-884; R. p. 43; Change Order 16, p. 39; R. p. 62; Owner's costs, p. 58; R. p. 67; transmission costs, p. 63; R. p. 70; Change Orders 12, 14 and 15, p. 66). The Commission held that the additional $278.05 million in costs were reasonable,

necessary and prudent costs incurred so as to ensure that the project is constructed prudently, efficiently and economically and to ensure the nuclear plants are operated safely and efficiently. (R. p. 76; Order No. 2012-884, p. 72). While the Commission employed a traditional standard of prudency in determining whether to authorize recovery of the cost overruns, it failed to apply the statutory definition of "imprudent" under the BLRA.

However, the prudency standard applied by the Commission below is the standard by which the costs proposed in the initial BLRA application under S. C. Code Ann. § 58-35-250(1) and (2) are to be judged pursuant to S. C. Code Ann. § 58-33-275(A) and (C). The additional $278 million in costs authorized by the Commission are material and adverse deviations from the approved schedules. (R. p. 75; Order No. 2012-884, p. 71). To recover additional capital costs which constitute a material and adverse deviation from the estimates approved in the base load review order, the utility must demonstrate that the costs are not only used and useful for utility purposes and prudent utility costs, but also that the costs were not the result of the failure by the utility to anticipate or avoid them. S. C. Code Ann. § 58-33-275(E).

In rejecting the applicability of S. C. Code Ann. § 58-33-275(E) to the request for the additional costs requested in this docket, the Commission held that provision to be limited to revised rate proceedings and general rate cases. The provisions of the BLRA do not so limit the protections of S. C. Code Ann. § 58-33-275(E). Moreover, all capital costs approved by the Commission under the BLRA are recoverable through revised rates, including those approved by the Commission below. Therefore, the Appellant's challenge to the additional capital costs sought here has a direct impact on revised rates.

In essence, the Commission concluded that the decision in *South Carolina Energy Users Committee v. South Carolina Public Service Commission, supra*, served as its authority for its

construction of S. C. Code Ann. § 58-33-270(E). (R. pp. 84-85; Order No. 2013-5, pp. 5-6). While this Court recognized that the BLRA provided a means by which a utility might seek relief from the provisions of its base load review order, this Court held that the provisions of S. C. Code Ann. § 58-33-270(E) must be construed consistently with the objectives of the BLRA, to wit, the recovery of prudently incurred costs associated with the nuclear plants and the protection of the customers from responsibility of imprudent financial obligations or costs. *South Carolina Energy Users Committee v. South Carolina Public Service Commission*, 388 S.C. 496, 697 S.E.2d 592 (2010).

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *South Carolina Energy Users Committee v. South Carolina Public Service Commission,* 388 S.C. 486; 697 S.E.2d 587 (2010). In ascertaining the intent of the legislature, the court should not focus on any single section or provision of an act but should consider the language of the statute as a whole. *Mid-State Auto Auction of Lexington, Inc. v. Altman,* 324 S.C. 65, 476 S.E. 2d 690(1996). By holding that the provisions of S. C. Code. Ann. § 58-33-275 do not apply to SCE&G's petition for additional capital costs, the Commission construes S. C. Code Ann. § 58-33-270(E) in isolation. While the BLRA provides the utility with the financial benefits of advanced cost recovery, the BLRA also provides customers with protection from imprudent costs, including payment in advance for capital costs which the utility imprudently failed to anticipate. The BLRA was designed to give a utility the benefit of an initial determination of prudency and advanced recovery for its anticipated capital costs through annual revised rates. However, the BLRA also protects the customer by requiring the utility to establish its anticipated components of capital costs in advance and by protecting the customer from having to pay for construction cost overruns years in advance of the in-service date of the nuclear

plant. A petition under S. C. Code Ann. § 58-33-270(E) must be construed in light of S. C. Code Ann. § 58-33-275(E) which prohibits recovery of the additional costs authorized by the Commission below

By failing to examine the prudency of the additional capital costs as required by the provisions of S. C. Code Ann. § 58-33-275(E), the Commission failed to protect SCE&G's customers from the responsibility for SCE&G's imprudent financial obligations or costs. The BLRA does not authorize the Commission to allow a utility to recover capital costs, as here, which could have been anticipated at the time of the base load review order. As set out in Argument II, *infra,* the additional capital costs, which the Commission authorized SCE&G to recover in rates, could have been anticipated in the 2008 BLRA application. As a consequence, the Commission erred in its failure to apply the statutory provisions of the BLRA which permit the recovery in rates of only those capital costs which are prudent.

II

THE COMMISSION ERRED IN FINDING THAT THE ADDITIONAL CAPITAL COSTS GRANTED THE RESPONDENT SCE&G WERE PRUDENT, THE ERROR BEING THAT EVIDENCE OF RECORD COMPELS THE FINDING THAT SCE&G'S FAILURE TO ANTICIPATE OR AVOID THE ADDITIONAL COSTS WAS IMPRUDENT UNDER THE BASE LOAD REVIEW ACT.

The Commission found that the additional $283 million in capital costs requested by SCE&G in this docket had not been previously presented to the Commission for review and approval. Of SCE&G's request, the Commission approved recovery of $278 million of the additional capital costs in rates. The additional costs represent an increase of 6.6% of the total costs of constructing the units and are a material and adverse deviation from the approved

schedules and estimates set out in the base load review order. Under the BLRA, where it has been demonstrated that there has been a material and adverse deviation from the approved schedules and estimates and a party has made out a prima facie case of the imprudence of the capital costs, the utility has the burden of demonstrating that its failure to anticipate or avoid the additional costs was not imprudent under the BLRA. S. C. Code Ann. § 58-33-275(E); S. C. Code Ann. § 58-33-240(D). SCE&G presented no evidence in this docket to demonstrate that its failure to anticipate or avoid the deviation was not the result of imprudence. To the contrary, the evidence of record reflects that SCE&G could have anticipated the additional capital costs requested. Therefore, the additional capital costs approved by the Commission below should have been disallowed. The Commission erred in authorizing SCE&G to recover the additional capital costs in the amount of $278 million in rates and should be reversed.

In its rush to construct the nuclear plants, SCE&G sought and obtained its base load review order based on an incomplete, unapproved design for the Westinghouse AP1000. The $137.5 million in costs associated with Change Order 16 were anticipated, or should have been anticipated, by SCE&G in its 2008 BLRA application and are therefore imprudent under the BLRA. The Company applied for a base load review order without the benefit of an approved design for the Westinghouse AP1000 units. SCE&G undertook to proceed with its BLRA application with full knowledge of the risk that the AP1000 design would prove more costly after the issuance of the base load review order. It was SCE&G's responsibility to obtain the wetlands certification and permitting. The utility assumed the risk of the additional cost associated with any delay in the issuance of the COL by the NRC. SCE&G acknowledges in its testimony that the delay in the issuance of a COL was the result in whole or in part of SCE&G's delayed decision to site its transmission lines using existing rights-of-way and the delay in obtaining

required wetlands certification and permitting from the Corps of Engineers and the EPA. SCE&G knew that under the provisions of the BLRA and Order No. 2009-104(A) time was of the essence, and SCE&G could have and should have anticipated that the Corps of Engineers and EPA would expect the utility to conclusively demonstrate the wetlands impact of its transmission siting before issuing its wetlands certification. That the macro-corridor process may be a prudent way to site transmission lines in other circumstances is not dispositive of the prudency issue. Viewed at the time of the BLRA application, siting the transmission lines for the nuclear plants in existing rights of way was the prudent way to proceed. Anticipating the regulatory process and knowing that time was of the essence under the BLRA order, a decision to site the transmission lines on existing easements where the utility had previously identified and addressed wetlands issues is more compelling. SCE&G assumed the risk of the additional costs associated with Change Order 16 and these costs are not recoverable under the BLRA. Moreover, SCE&G has failed to demonstrate that the settlement agreement between SCE&G and Westinghouse was prudent and reasonable. Likewise, the evidence of record reflects that SCE&G could have anticipated that the rock formations under the ground were unpredictable and taken steps in its EPC contract to protect itself from cost overruns. These costs are not recoverable under the BLRA.

SCE&G could have and should have anticipated the additional $131.6 million in owner's costs it seeks recovery of in this docket. It is undisputed on this record that SCE&G failed to fully determine its owner's costs when making application under the BLRA. The record is replete with evidence demonstrating that the owner's costs such as staffing, facilities, transmission, insurance and wastewater infrastructure in SCE&G's 2008 BLRA application were based upon high level estimates and conceptual designs. Indeed, the evidence of record reflects

that in its rush to negotiate its purchase of two nuclear plants, which were not fully designed and which had not been licensed by the NRC, SCE&G did not take the time to analyze its needs for owner's costs and fully identify them for the Commission as required by the BLRA. Having failed to comply with the BLRA in its 2008 application, SCE&G has returned to the Commission for recovery of the owner's costs overlooked in SCE&G's haste to file its 2008 BLRA application. In Docket No. 2010-376-E, SCE&G requested recovery of an additional $174 million in capital costs, including $145 million in owner's costs. The Commission authorized SCE&G to recover the additional $174 million in Order No. 2011-345, issued on May 16, 2011. Yet, the evidence of record reflects that SCE&G underestimated the need for additional owner's costs by $131.6 million in Docket No. 2010-376-E and petitioned this Commission for these additional costs less than ten months after the issuance of Order No. 2011-345. The record is devoid of any reasonable explanation of how SCE&G could have failed to anticipate $131.6 million in owner's costs which it now seeks in this docket. SCE&G should have anticipated these additional owner's costs in its 2008 application as required by the BLRA. SCE&G failed to meet its burden of proving these owner's costs to be prudent. On this record, the $131.6 million in owner's costs are not prudent under the BLRA.

The evidence of record reflects that the transmission costs were identified as conceptual estimates and were not fully identified for the Commission in the 2008 BLRA proceeding. The additional transmission costs could have and should have been anticipated in 2008 in the utility's BLRA application. In addition, as set out above, siting its transmission lines in existing easements and rights-of-way would have ensured that the wetlands issues were identified and addressed timely and, therefore, any additional transmission costs occasioned by delay could likewise have been anticipated. These costs are not prudent under the BLRA.

The costs for Cyber Security, Change Order 12 and Change Order 15, could have been anticipated in the 2008 application as is borne out by the testimony of Dr. Mark Cooper. These costs are not prudent under the BLRA.

Because the BLRA requires the utility to demonstrate its capital cost of constructing a nuclear plant years in advance of its actual expenditure of those costs, the Act indeed requires the utility to put the cart before the horse. SCE&G's decision to file its BLRA application in 2008 was its own. There was no compelling reason for SEC&G to request authority to construct two incomplete and unlicensed plants and no compelling reason that SCE&G could not have given itself time to accurately identify and demonstrate its capital costs.

SCE&G failed to offer evidence to demonstrate that it could not have anticipated the additional $278 million in capital costs authorized by the Commission at the time of its 2008 BLRA application. The evidence of record reflects that the capital costs approved by the Commission could have and should have been anticipated by SCE&G in its 2008 BLRA application and are therefore imprudent. S. C. Code Ann. § 58-33-275(E). The Commission erred in finding that approximately $278 million of SCE&G's request in the docket were recoverable under the BLRA. Accordingly, the petition below should have been denied by the Commission.

III

THE BASE LOAD REVIEW ACT REQUIRES THAT ALL CAPITAL COST EXPENDITURES IN THE CONSTRUCTION OF NUCLEAR GENERATING PLANTS BE PRUDENT AND THE COMMISSION ERRED IN HOLDING THAT A PRUDENCY EVALUATION OF THE NEED FOR THE CONTINUED CONSTRUCTION OF THE UNITS WAS NOT REQUIRED BY THE ACT.

Under the BLRA, a base load review order issued by the Commission, pursuant to S. C. Code Ann.§ 58-33-270, establishes that if a nuclear plant is constructed in accordance with approved schedules and cost estimates, the plant is considered to be used and useful for utility purposes such that its capital costs are prudent utility costs. S. C. Code Ann. § 58-33-220(4). However, the BLRA contemplates that the abandonment of a plant after a base load review order and protects the utility from loss by allowing it to recover the authorized capital costs in rates. S.C. Code Ann. § 58-33-280(K). The Commission erred in failing to require a review of the prudency of the continued construction of the plants in this docket.

A measure of prudency under the BLRA is whether the expenditure of additional capital costs are prudent utility costs. The Appellant Sierra Club, through the testimony of Dr. Cooper raised the question of the prudency of continuing to construct the nuclear plants. (R. p. 753; Tr. p. 961, Cooper prefiled direct testimony, p. 13). Dr. Cooper testified that it would be imprudent to continue constructing the plants. (R. pp. 746-748; Tr. pp. 954-956; Cooper prefiled direct testimony pp. 6-8). In response to Dr. Cooper's testimony, SCE&G's witness, Dr. Joseph M. Lynch, testified that he updated his analysis in the 2008 BLRA proceeding and that he remained of the opinion that the cost of continuing to construct two nuclear generating plants was more cost effective than the cost of constructing two gas-fired generating plants. (R. p. 255, l. 13 – p. 256, l. 2; Tr. p. 103, l. 13 – p. 104, l. 2; R. p. 258, ll. 19-24; p. 106, ll. 19-24; R. p. 688, l. 2 – p. 691, l. 22; p. 890, l. 2- p. 893, l. 22). As borne out by the testimony of Dr. Cooper, Dr. Lynch's analysis failed to take into consideration SCE&G's need for capacity in its system. Further, the analysis failed to consider the prudency of alternatives such as constructing one of the nuclear generators and mothballing the second under construction, or building natural gas-fired plants as the need for capacity arises as opposed to over-constructing generating capacity by continuing to

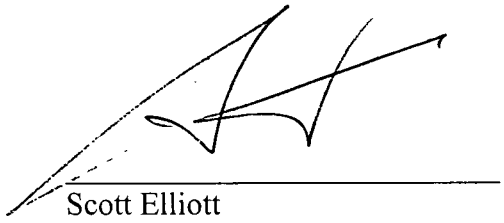
the construction of the two nuclear generators. (R. p. 778, l. 2 – p. 782, l. 2; Tr. p. 1004, l. 2 – p. 1008, l. 2; Cooper supplemental surrebuttal testimony, p. 4, l. 2 – p. 8, l. 2).

The Commission concluded that the findings of the 2009 base load review order were not subject to review citing S.C. Code Ann. §§ 58-33-275(A) and (D) (R. p. 91; Order No. 2013-5 at p. 12). However, the BLRA contemplates that a plant abandoned after a base load review order may be prudently abandoned. S.C. Code Ann. § 58-33-280(K). Construing S.C. Code Ann § 58-33-270(E) to permit the utility or other party to petition the Commission for relief from a base load review order for authority to abandon the construction of a nuclear plant is consistent with the protections afforded the utility and its customers under the Act.

A thorough evaluation of the utility's need for capacity will demonstrate whether one or both of the nuclear plants are prudent. Were the evaluation to justify the continued construction of the units, SCE&G would be justified in proceeding with their construction. Should the evaluation determine that SCE&G's needs did not justify constructing one or both plants and the utility scaled back its construction, SCE&G would nonetheless be afforded the protections of the BLRA for its prudent costs invested in the units, and its customers would benefit from the savings of unnecessary capital costs. However, if a thorough evaluation would demonstrate that one or both plants were not justified and SCE&G were to either fail to make the evaluation or ignore the results of an evaluation, the costs of construction going forward would be imprudent under the BLRA. S. C. Code Ann. § 58-33-280(K). The Commission failed to examine the need for the continued construction of the units as authorized under the BLRA. Accordingly, the matter should be remanded to the Commission for a review of the prudency of the capital costs to be incurred by continuing to construct the units.

CONCLUSION

For the foregoing reasons, the South Carolina Energy Users Committee respectfully submits that Orders 2012-884 and 2013-5 of the South Carolina Public Service Commission be reversed and that the matter be remanded to the Commission with instructions to issue an order denying SCE&G's petition for $283 million in additional capital costs and for a full and complete determination of the prudency of the capital costs to be incurred by continuing to construct the units.



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January 22, 2014

THE SUPREME COURT OF SOUTH CAROLINA

Appellate Case No. 2013-000529

South Carolina Energy Users Committee,

Appellant-Respondent,

v.

South Carolina Electric & Gas, Office of Regulatory Staff, Pamela Greenlaw,

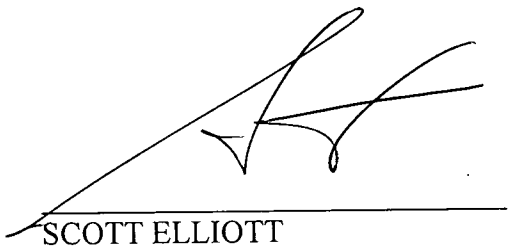
Respondents,

and Sierra Club, is Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

January 22, 2014



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PROOF OF SERVICE

I, the undersigned, do hereby certify that I have this date served the Appellant's Final Brief and Reply Brief on each of the below-named parties by forwarding a copy of each of these documents to the addresses listed through the United States Mail, first-class postage prepaid:

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