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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF RICHLAND | ) | FOR THE FIFTH JUDICIAL CIRCUIT |
| LeBrian Cleckley, on behalf of himself and all others similarly situated, | ) | Case No.: 2017-CP-40-04833 |
| Plaintiff, | ) | |
| vs. | ) | |
| South Carolina Electric & Gas Company, and the State of South Carolina, | ) | |
| Defendants. | ) | |

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SC Court of Appeals

**ORDER DENYING DEFENDANT SCE&G'S MOTION TO DISMISS**

Before the Court is Defendant South Carolina Electric and Gas' ("SCE&G") Motion to Dismiss Plaintiff's First Amended Complaint pursuant to Rules 12(b)(1), (b)(3), (b)(6), and (b)(8) of the South Carolina Rules of Civil Procedure ("SCRCP"). In addition, SCE&G seeks to strike Plaintiff's jury demand pursuant to SCRCP Rule 12(f). This Motion has been fully briefed, and on January 8, 2018, Counsel for the Parties presented this Court with their arguments. As a result, this Court is now prepared to rule on SCE&G's Motion to Dismiss. After careful consideration and as more fully set forth herein, SCE&G's Motion to Dismiss is **DENIED.**

Plaintiff filed his original Complaint in this matter on August 11, 2017, which alleged the following: (1) Unjust Enrichment; (2) Negligence; (3) Breach of Fiduciary Duty; (4) Money Had and Received; and (5) Breach of Contract and/or Breach of Implied Contract. Prior to SCE&G's answer, Plaintiff filed an Amended Complaint on September 27, 2017.

In response, SCE&G moved to dismiss Plaintiff's First Amended Complaint, or, in the alternative, to stay the Complaint pending the outcome of two administrative proceedings

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currently pending before the South Carolina Public Service Commission ("PSC").[1] SCE&G bases its motion on the following: (1) that the Circuit Court lacks subject matter jurisdiction over the instant action because all of the various claims fall within the narrow province of the PSC; (2) that the PSC has primary jurisdiction over the subject matter of this Complaint; (3) that venue is improper before this Court; and (4) that the Complaint fails to state a cause of action for which relief can be granted based upon a number of affirmative defenses including the filed rate doctrine, failure to exhaust administrative remedies, and the doctrines of claim and issue preclusion.

## STANDARD

In general, subject matter jurisdiction is defined as "the power to hear and determine cases of the general class to which the proceedings in question belong." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 100, 674 S.E.2d 524, 528 (Ct. App. 2009). "In South Carolina, the circuit courts 'are vested with general original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts.'" *Fullbright v. Spinnaker Resorts, Inc.*, 420 S.C. 265, 274-75, 802 S.E.2d 794, 799 (2017), reh'g denied (Aug. 22, 2017) (quoting *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 120, 678 S.E.2d 430, 433 (2009)). In general, trial courts have subject matter jurisdiction over all actions sounding in either tort or contract. *Sabb v. South Carolina State Univ.*, 350 S.C. 416, 567 S.E.2d

[1] Docket No. 2017-207-E, *In Re: Prudence of South Carolina Electric & Gas Co. Construction of a Nuclear Base Load Generation Facility at Jenkinsville and the Unjust and Unreasonable Rates Related Thereto*; and Docket No. 2017-305-E, *Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Co.'s Rates Pursuant to S.C. Code Ann § 58-27-920.* Despite SCE&G's assertions that the *Cleckley* matter should be stayed pending the outcome of these PSC proceedings, SCE&G moved to dismiss both proceedings on the basis that the PSC lacks subject matter jurisdiction over the proceedings and is without statutory authority to grant the relief requested in either petition.

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231 (2002). Therefore, an action for damages arising in either tort or contract is well within the court's jurisdiction and it is ordinary for the Circuit Court to handle such matters.

A motion to dismiss for failure to state a claim should not be granted if the facts alleged, or those inferences reasonably deducible therefrom, entitle plaintiff to relief under any theory of the case. *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (2016). "In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Bergstrom v. Palmetto Health Alliance*, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004).

## ANALYSIS

Throughout SCE&G's Motion to Dismiss pursuant to SCRCP 12(b)(1), 12(b)(3), 12(b)(6), and 12(b)(8), SCE&G asserts that this Court does not possess jurisdiction to hear any of the Plaintiff's claims. However, I find the causes of action set forth in Plaintiff's First Amended Complaint, which specifically sound in tort, contract, and equity, all allege claims within the subject matter jurisdiction of the Circuit Court.

SCE&G asserts that Plaintiff's claims are "pocketbook claims," which attempt to interfere with the ratemaking process, and thus, are barred under the filed rate doctrine. In recognizing the filed rate doctrine, the South Carolina Supreme Court has stated "[t]he filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit." *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005).

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Having thoughtfully reviewed the cases of *Suffolk County v. Long Island Lighting Company*, 728 F2d 52 (1984), *Wilson v. Harlow*, 860 P.2d 793 (1995), and *Daily Advertisers v. Rans-La, a Div. of Atmos Energy Corp.*, 612 So.2d 7 (1993), this Court finds the rationales of *Suffolk, Wilson,* and *Daily Advertisers* inapposite from the Plaintiff's claims. In the instant case, the Court is not being asked to determine whether rates collected pursuant to the Base Load Review Act ("BLRA") were or are reasonable. Rather, the instant case embraces elements that place it in an entirely different light than *Suffolk, Wilson,* and *Daily Advertisers*. The amounts of the rate charged to consumers by SCE&G is not the issue. Instead, this complaint seeks to address whether funds collected by SCE&G, pursuant to the PSC approved rates, should be recouped by the ratepayers based on alleged principles of law and equity. The filed rate doctrine is thus no bar to the relief Plaintiff has requested under the causes of action set forth in the First Amended Complaint.

As stated above, this action does not challenge the ratemaking process. Rather, it alleges that consumers were charged rates for a benefit that SCE&G failed to deliver. As such, the Plaintiff's claims fall squarely within the observation of the New Jersey Superior Court in *Richardson v. Standard Guaranty Ins., Co.*, 371 N.J. Super. 449, 470, 853 A.2d 955, 967 (App. Div. 2004), where the court found "[t]he filed rate doctrine does not preclude a consumer from suing for damages by having been deprived of benefits which were promised, and were consistent with the filed rate, but were not delivered." This action also involves claims concerning a guaranty payment and who the proper recipient of that payment should have been, as well as whose rights were negotiated and by what authority. These claims are likewise not precluded by the filed rate doctrine. *See Randleman v. Fidelity Nat'l Title Ins. Co.*, 465 F. Supp. 2d 812, 823 (N.D. Ohio 2006) (the filed rate doctrine was inapplicable because plaintiffs were

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not challenging the reasonableness of the filed rate, but were instead attempting to enforce a contract that incorporated a filed rate).

SCE&G cites four cases to the Court in support of its argument that Plaintiff's claims are barred by the filed rate doctrine. *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware*, 805 F. Supp. 1277 (D.S.C. 1992) is a District Court memorandum opinion authored by The Honorable Henry Herlong. First, *Lifschultz* is an opinion ruling on a motion for summary judgement, not a motion on the pleadings. Thus the court had the benefit of additional discovery, and was not required to make a decision based on the pleadings. Second, Judge Herlong addresses the filed rate doctrine in the context of *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922). Of particular note is that the *Keogh* court set forth as one of its underlying premises for the rule the fact that an aggrieved rate-payer could, under the Interstate Commerce Act, recover damages when the Interstate Commerce Commission found a charged rate to be illegal or unreasonable.

In the instant case, Plaintiff is not, as observed above, attacking the legality or reasonableness of the rate. The *Keogh* court recognized that in the context of government regulated entities, parties should be entitled to recover damages even when the governmental agency has approved a charged rate. In addressing the filed rate doctrine, the *Keogh* court also factored in the speculative nature of the plaintiffs' damages. As to this latter point, it is too early for the Court to launch into a damages assessment (an exercise which may or may not later materialize). At first blush it would seem that simple math computation, however, establishes specific baseline damages that Plaintiff has incurred based on his claims.

SCE&G also cites to *Wegoland Ltd. v. Nynex Corp.*, 27 F.3d 17 (2nd Cir. 1994). *Wegoland* is inapposite. Per the Opinion, the plaintiff's complaint in *Wegoland* directly attacked

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defendant's rates as being inflated based on misleading financial information and an alleged scheme. *Wegoland* appears to be a direct attack on the rates at issue based on fraudulent conduct that resulted in the setting of the inflated rates. *Wegoland* has no application here.

SCE&G further relies upon *Marcus v. AT&T Corp., 138 F.3d 46* (2d Cir. 1998). The *Marcus* court stated that the filed rate doctrine is motivated by two "companion principles," non-discrimination and regulatory exclusivity. In the context of the instant case, the first principle (non-discrimination) has no applicability. The second "companion" principle directly relates to a regulator's exclusive role in setting rates. Plaintiff's claims also do not implicate the second principle.

SCE&G's reliance on *Marco Supply Co., Inc. v. AT&T Communications, Inc.*, 875 F.2d 434 (4th Cir. 1989), is also misguided. *Marco* involves a direct attack on rates charged by AT&T. SCE&G's Memorandum states that the Fourth Circuit applied the filed rate doctrine and barred the ratepayer's claims for breach of contract, negligent misrepresentation, and willful misrepresentation. However, in actuality, the only issue on appeal was plaintiff's claim based on willful misrepresentation. This claim was a direct attack on the rates charged by AT&T. Here, Plaintiff does not seek relief from rates, but rather seeks relief based on Plaintiff's claims that the Plaintiff class has been financing the construction of a project, which SCE&G has voluntarily elected to abandon, and for which SCE&G has been paid considerable sums by a third party related to the abandonment.

SCE&G also cites *Medco Energi US, LLC v. Sea Robin Pipeline Co.*, 729 F.3d 394 (5th Cir. 2013). In addition to distinguishable facts, *Medco* involves an appeal from a grant of summary judgment, and not an appeal from a ruling on pleadings, and does not particularize what state claims would not be viable. As set forth more fully above, in the instant case, each of

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Plaintiff's causes of action in the well-pleaded First Amended Complaint is viable and proper before this Court.

SCE&G also has cited *Fullbright* for the proposition that the courts may not invade the rate-making authority of a regulatory agency. As noted herein, Plaintiff's claims do not seek to invade the ratemaking authority of the PSC. As such, SCE&G's motion to bar Plaintiff's claims, based on the filed rate doctrine, is denied.

As it relates to SCE&G's claim that Plaintiff's First Amended Complaint must be dismissed under SCRCP 12(b)(1), the Plaintiff's Complaint contains allegations of SCE&G's negligence, breach of contract, and unjust enrichment, matters well within the everyday purview of this Court. Plaintiff has alleged that SCE&G undertook construction of the V.C. Summer Project (the "Project") using Plaintiff's funds and then received settlement proceeds from its contractor as a result of the Project's failure. Yet, despite Plaintiff funding a significant portion of the Project over the past nine years, SCE&G has kept all proceeds of this settlement and has not returned any of the settlement proceeds to Plaintiff. As a result, Plaintiff's claims do not arise out of the PSC's limited jurisdiction to regulate rates. This Court is properly vested with jurisdiction to hear the allegations set forth in Plaintiff's Complaint. *See Dema, supra* (trial court had subject matter jurisdiction to hear plaintiff's claims for unjust enrichment arising out of violations of a statute regulated by the South Carolina Department of Health and Environmental Control).

In contrast, the PSC has no authority to make decisions regarding any of Plaintiff's causes of action. The PSC has no authority to ascertain the negligence of corporate entities and their boards, no authority to ascertain the proper beneficiary of a guaranty made by a third party, no authority to engage in retroactive relief or engage in a process to determine damages arising

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out of either negligence or a breach of contract, and no authority to determine the overarching constitutionality of the BLRA at issue in this action.

SCE&G relies on S.C. Code Ann. § 58-33-320. However, SCE&G ignores the plain language of the statute, which provides:

> Except as expressly set forth in Section 58-33-310, no court of this State shall have jurisdiction to hear or determine any issue, case, or controversy concerning any matter which was or could have been determined in a proceeding before the commission under this chapter or to stop or delay the construction, operation, or maintenance of a major utility facility, except to enforce compliance with this chapter or the provisions of a certificate issued hereunder, and any such action shall be brought only by the Office of Regulatory Staff. Provided, however, nothing herein contained shall be construed to abrogate or suspend the right of any individual or corporation not a party to maintain any action which he might otherwise have been entitled.

The Court finds Section 58-33-320 of the Code does not divest the Circuit Court of jurisdiction for the following reasons:

1. Plaintiff's claims do not ask the Court to decide an issue, case, or controversy which has been or could have been determined by the PSC.
2. Plaintiff's claims do not seek to stop, delay the construction of, operation of, or maintenance of a major utility facility.
3. The relief Plaintiff seeks is not predicated on the rates approved and charged by SCE&G, but rather the relief sought is based on principles of law and equity. Plaintiff's claims seek monetary damages based not on the amount of the rates allowed under the BLRA, but rather on the SCE&G's collection of funds pursuant to the allowed rates, the receipts of the Toshiba payment, and SCE&G's failure to appropriately and fairly utilize the amounts so collected.

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4. There is a proviso in section 58-33-320 which the Court finds, for the purposes of the Motions presently before the Court, allows certain aggrieved parties to maintain suits such as Plaintiff's.

Additionally, the constitutionality of the BLRA is an issue raised in Plaintiff's Complaint. If section 58-22-320 is determined to be unconstitutional, its provisions would have no efficacy. The statute unambiguously applies only to cases which were or could have been determined in a proceeding before the PSC, or cases which bear upon the construction or attempt to stop construction of a nuclear utility plant. Plaintiff's claims arise out of tort, contract, and equity, and could never have been brought before the PSC. Moreover, Plaintiff's Complaint has no impact on construction, which SCE&G has elected to cease on its own. Finally, and importantly, the statute specifically states: "nothing herein contained shall be construed to abrogate or suspend the right of any individual or corporation not a party to maintain any action which he might otherwise have been entitled." S.C. Code Ann. § 58-22-320.

The statute thus acknowledges and contemplates that a party is not divested of its right to bring any action that does not involve setting future utility rates or delaying or stopping ongoing nuclear construction. "In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look at the relevant statute." *Fullbright*, 420 S.C. at 275, 802 S.E.2d at 799. It is clear that the Legislature vested the PSC with only the narrow jurisdiction to assess and assign prospective rates for utilities. In this matter, SCE&G received its proportionate share of an approximately $2.2 billion settlement from Toshiba directly related to the Project's failure. No language in the BLRA contemplates the receipt by a utility of damages paid by a third-party contractor or the disbursement of damages back to the financiers of a project, in this case the Plaintiff class. This action therefore falls precisely within the language of



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the statute, which allows for all actions except those as to rates to proceed before courts of competent jurisdiction.

This Court notes that this matter is properly before this Court even without the presence of a constitutional challenge. However, the inclusion of the constitutional challenge cements this Court's exclusive jurisdiction to determine this combination of causes of action and resolve the entirety of the case.

Next, SCE&G moves to dismiss this action pursuant to SCRCP 12(b)(3). This issue was briefed by the Parties. After consideration of the briefs and all supporting documents, the Court denies SCE&G's Motion to Dismiss for Improper Venue. The arguments asserted by SCE&G do not provide a basis for this Court to determine that the venue is improper.

SCE&G also moves to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Rule 12(b)(6), SCRCP. This Court first finds that the allegations in Plaintiff's well-pleaded Complaint are sufficient to withstand a challenge under a Rule 12(b)(6), SCRCP, Motion to Dismiss for failure to state a claim. With regard to SCE&G's contention that Plaintiff's claims are barred by the economic loss rule, voluntary payment doctrine, and the doctrines of res judicata and collateral estoppel, none of these doctrines are appropriate to support a dismissal. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (the economic loss doctrine does not support dismissal at the pleading stage). *See also In & Out Welders, Inc. v. Sunbelt Rentals, Inc.*, No. CV 7:16-04021-MGL, 2017 WL 2255780, at *3 (D.S.C. May 23, 2017) (the voluntary payment doctrine is an affirmative defense, usually more appropriate for determination after an opportunity to develop and conduct discovery, and is improper at the pleading stage).

Def #10

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Three elements must be shown to establish res judicata: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). SCE&G cannot establish this defense because none of these elements are satisfied here. First, Plaintiff or his privies have never before been involved in litigation with SCE&G, so there can be no "identity of the parties." Plaintiff has never sued SCE&G over the company's negligent management of the Project, so there is no "identify of the subject matter." And there is no final judgment in a former suit.

"The party asserting collateral estoppel must demonstrate that the issue in the present action was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Carolina Renewal v. Dept. of Transp.*, 385 S.C. 779, 684 S.E.2d 779 (Ct. App. 2009). Collateral estoppel applies only when the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue. *See S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991) ("Nonmutual collateral estoppel may be asserted unless the party precluded lacked a full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him the opportunity to relitigate the issue.") In the present case, collateral estoppel cannot apply because the issues raised in this litigation have never been decided before. Further, Plaintiff has never had an opportunity to litigate these issues, and collateral estoppel cannot be used to prevent him from continuing this action.

Finally, SCE&G moves to dismiss Plaintiff's Complaint pursuant to SCRCP 12(b)(8), which requires a defendant to establish that the parties are identical, the claims are identical, and the relief sought is identical. *See Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 701 S.E.2d 39, 44 (Ct. App. 2010) ("To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the

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movant must show that the actions in question are between the same parties in their same capacities."). SCE&G cannot make any of the showings necessary for dismissal pursuant to SCRCP 12(b)(8), nor does the existence of other proceedings require this Court to delay any proceeding pursuant to the primary jurisdiction doctrine, which has no application in this case.

Based on presentations to the Court, the Court is aware of the South Carolina Office of Regulatory Staff ("ORS") and *Friends of the Earth* matters pending before the PSC. The Court finds neither of the proceedings affects this Court's jurisdiction over Plaintiff's claims. The Court also finds that, as it relates to either matter, the doctrine of primary jurisdiction does not warrant dismissing or delaying this case.

The ORS matter seeks suspension of the current BLRA rates, and seeks alternative relief only if the BLRA is determined by a court of competent jurisdiction to be unconstitutional. The pendency of the ORS proceeding does not entitle SCE&G to Rule 12(b)(8) relief. Contrary to SCE&G's assertions, the ORS does not serve as a substitute advocate for the interests of SCE&G's customers. Instead, ORS is admittedly conflicted, representing both the interests of utilities and customers in matters before the PSC. Moreover, the PSC has not been asked to determine, nor can it determine, claims for negligence, breach of contract, and unjust enrichment. Therefore, SCE&G has no basis for a Rule 12(b)(8) Motion, and Plaintiff's action shall proceed in this Court.

As to SCE&G's argument that the *Friends of the Earth* matter seeks the same ultimate relief as does Plaintiff, abatement and reparations to ratepayers, this Court finds that the *Friends of the Earth* action is based on the prudency of SCE&G's acts and not on the grounds upon which Plaintiff seeks relief. As SCE&G observes, there may be some overlap between the instant case and the *Friends of the Earth* matter. SCE&G's allegation that there may be inconsistencies

from the existence of any overlap does not, however, warrant this Court ceding the instant case to the PSC. Plaintiff has the absolute right of access to this Court on his own to seek relief based on the allegations of the First Amended Complaint.

SCE&G also seeks to strike Plaintiff's demand for a jury trial. Plaintiff's Complaint contains causes of action for negligence and breach of contract. These are matters at law, properly decided by a jury. As such, SCE&G's motion to strike pursuant to SCRCP 12(f) is denied.

Plaintiff's Complaint properly states causes of action in the original jurisdiction of the Circuit Court, which the PSC is incapable of hearing. The relief sought by Plaintiff is not available through the PSC, or any other administrative channel. And Plaintiff's claims are separate and distinct from those matters currently pending before the PSC. Accordingly, SCE&G's Motion to Dismiss is **DENIED**.

**IT IS SO ORDERED** this 1st of March, 2018,

John C. Hayes, III

The Honorable John C. Hayes, III
Assigned Circuit Court Judge



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Hampton Common Pleas

**Case Caption:** Richard Lightsey VS South Carolina Electric & Gas

**Case Number:** 2017CP2500335

**Type:** Order/Other

So Ordered

s/John C. Hayes III 2049