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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPEAL FROM HAMPTON COUNTY
APPEAL FROM FAIRFIELD COUNTY
APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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SC Court of Appeals

C.A. No.: 2017-CP-40-4833
C.A. No.: 2017-CP-25-0335
C.A. No.: 2017-CP-25-0348
C.A. No.: 2017-CP-20-0300
C.A. No.: 2017-CP-08-2009
Appellate Case No. 2018-000384

LeBrian Cleckley, on behalf of himself and all others similarly situated,....................Respondent,

v.

South Carolina Electric & Gas Company and the State of South Carolina,................. Defendants.

Of whom:

South Carolina Electric & Gas Company is .................................................................Appellant.

AND

Richard Lightsey,.........................................................................................................Respondent,

v.

South Carolina Electric & Gas Company,.................................................................Defendant.

Of whom:

South Carolina Electric & Gas Company is .................................................................Appellant.

AND

Jessica S. Cook,............................................................................................................Respondent,

v.

South Carolina Public Service Authority (also known as Santee Cooper), South Carolina Electric and Gas, Palmetto Electric Cooperative, Inc., and Central Electric Power Cooperative, Inc., ........................................................................................................................ Defendants.

Of Whom:

South Carolina Electric & Gas Company is ............................................................ Appellant.

AND

Edwinda Goodman, Bobby Lee Jones, Bobby Cunningham, Daryl Davis, Phillip Cooper, Karla Cooper, Jackie Mincey, Dean M. Perry, Steve Lawson, Freddie Lawson individually and on behalf of other similarly situated Plaintiffs,............................................................... Respondents,

v.

SCANA Corporation and South Carolina Electric & Gas Company, .......................... Defendants.

Of whom:

SCANA Corporation and South Carolina Electric & Gas Company are.....................Appellants.

AND

Chris Kolbe and Ruth Ann Keffer,
on behalf of themselves and all others similarly situated, .......................................... Respondents,

v.

South Carolina Public Service Authority, an Agency of the State of South Carolina; W. Leighton Lord, III, in his capacity as chairman and director of the South Carolina Public Service Authority; William A. Finn, in his capacity as director of the South Carolina Public Service Authority; Barry Wynn, in his capacity as director of the South Carolina Public Service Authority; Kristofer Clark, in his capacity as director of the South Carolina Public Service Authority; Merrell W. Floyd, in his capacity as director of the South Carolina Public Service Authority, Calhoun Land, IV, in his capacity as director of the South Carolina Public Service Authority; Stephen H. Mudge, in his capacity as director of the South Carolina Public Service Authority; Peggy H. Pinnell, in her capacity as director of the South Carolina Public Service Authority; Dan J. Ray, in his capacity as director of the South Carolina Public Service Authority; David F. Singleton, in his capacity as director of the South Carolina Public Service Authority; Jack F. Wolfe, in his capacity as director of the South Carolina Public Service Authority; South Carolina Electric & Gas Company; and SCANA Corporation,.................................... Defendants.

Of Whom:

South Carolina Electric & Gas Company and SCANA Corporation are.........Appellants.

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**SOUTH CAROLINA ELECTRIC AND GAS COMPANY'S AND SCANA CORPORATION'S PETITION FOR REHEARING**

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Pursuant to Rule 221, SCACR, Appellants South Carolina Electric & Gas Company and SCANA Corporation (collectively, "SCE&G") petition the Court for a rehearing of the order mailed in this case on March 7, 2018, and received by the undersigned on March 8, 2018 (the "Order"). A copy of the Order is attached hereto as Exhibit A. In the Order, the Court dismissed SCE&G's appeals in the above-captioned cases (the "Appeals") on the grounds that the orders appealed from (the "Orders") were not immediately appealable. Ex. A, p. 2.[1] For the reasons set forth below, SCE&G respectfully submits that the Court overlooked or misapprehended the following points.

## ARGUMENT FOR REHEARING

**I. Appealability of interlocutory orders requires an analysis of the effect of the order.**

Although titled "Order Denying Defendant SCE&G's Motion to Dismiss," the effect of the appealed Orders goes *far* beyond simply holding that Respondents have pled allegations sufficient to proceed to discovery. Instead, the Orders consider the full merits of the threshold issue of what types of claims the Respondents allege and the relief they can and do seek, rule on mode of trial issues, and effectively strike many of SCE&G's affirmative defenses.[2] The Orders

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[1] The Order also consolidated the Appeals under Rule 214, SCACR. SCE&G does not seek rehearing on this portion of the Order.

[2] Many—but not all—of the Respondents are electric service customers of SCE&G, otherwise known as "ratepayers" because they pay for the electricity they receive from SCE&G at rates for that electricity set by the South Carolina Public Service Commission ("PSC").

leave no doubt that these issues involve the merits, affect substantial rights, and strike a portion of SCE&G's pleadings as those concepts are interpreted under S.C. Code Ann. § 14-3-330.

"[T]he question of whether an order is immediately appealable is determined on a case-by-case basis." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 539, 773 S.E.2d 144, 146 (2015). Appellate courts are directed to look at the effect of an order – not just what it is called. *Id.* at 539, 773 S.E.2d at 147 ("Our review of trial court orders is not constrained by how the order is styled."). "An appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011); *see also Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 174, 624 S.E.2d 439, 442 (Ct. App. 2005) (holding in an interlocutory appeal on subject matter jurisdiction, that "the circuit court weighed the evidence and concluded that the exclusivity provision did not apply," and that, thus, the circuit court "finally determined a substantial matter forming a part of the Hospital's defense," and that therefore, the order was appealable).

Further, under South Carolina law, "the character of an action is not necessarily determined by the recitations in the pleadings. Rather, it is the nature of the issues and the remedies which are sought that is determinative." *State v. Yelsen Land Co.*, 257 S.C. 401, 403, 185 S.E.2d 897, 898 (1972); *see also Winn v. Grantham*, 263 S.C. 368, 372, 210 S.E.2d 602, 604 (1974) ("'The character of an action is not to be determined by the terminology which the pleaders may chance to give it.'") (quoting *Walsh v. Evans*, 112 S.C. 131, 131, 99 S.E. 546, 548

(1919)). It is incumbent on this Court to look beyond simple labels and evaluate the effect of these Orders in determining appealability, and, as a corollary, evaluate the actual nature of the claims Respondents purport to bring. As described further below, these Orders are appealable under S.C. Code Ann. § 14-3-330.

## II. SCE&G *must* immediately appeal the Orders pursuant to South Carolina law because they make a determination as to the mode of trial.

Rather than simply denying SCE&G's motions to dismiss under Rule 12(b), the Orders also decided the mode of trial by denying SCE&G's Rule 12(f), SCRCP motions to strike the Respondents' demands for a jury trial. Orders p. 13.[3] Though the Plaintiffs have asserted causes of action for negligence, breach of contract, and other purportedly legal claims, these labels are misleading because the essential nature of the relief sought is equitable. In South Carolina, "there is no right to trial by jury for equitable actions." *Verenes v. Alvanos*, 387 S.C. 11, 15-16, 690 S.E.2d 771, 773 (2010). Consequently, the Respondents' right to a jury trial is determined by whether the relief requested is legal or equitable. This necessarily raises the threshold issue of whether Respondents' claims are, in fact, legal or equitable. In determining whether an action is legal or equitable, courts must ascertain the plaintiff's "main purpose" in bringing the action, which involves reviewing the body of the complaint and, "if necessary, ... to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Id.* (quotation omitted). Respondents' "main purpose" for bringing their actions against SCE&G hinges on allegations that SCE&G has retained benefits and money, in the form of revised electric rates paid by Respondents, and that justice dictates that those benefits belong to Respondents. These allegations amount to nothing more than claims for unjust enrichment, the

[3] The trial court order entered in *Cleckley* is attached hereto as Exhibit B. Identical orders were entered in the other four cases.

remedy for which is the equitable remedy of restitution. *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 691-92 (Ct. App. 2013) (internal citations omitted). This raises the mode of trial issue because SCE&G will be "erroneously required to proceed before a jury in an equity case." *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000).

South Carolina courts have unequivocally held that parties must both (1) raise issues regarding the mode of trial "at the first opportunity" and (2) immediately appeal such a ruling in order to preserve the issue. *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 103, 431 S.E.2d 587, 590 (1993) ("Issues regarding the mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is *immediately appealable*.") (emphasis added); *see also Salmonsen v. CGD, Inc.*, 377, S.C. 442, 452, 661 S.E.2d 81, 87 (2008) ("[T]his Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable."); *Frampton v. S.C. Dept. of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013) ("Orders affecting the mode of trial affect a substantial right . . . *and must, therefore, be appealed immediately*.") (emphasis added). SCE&G *must* therefore appeal the order denying its motion to strike Respondents' demand for a jury trial under Rule 12(f), SCRCP at this juncture.

In order to fully and fairly evaluate the mode of trial issue—which is unequivocally immediately appealable—the Court must examine the actual nature of the claims Respondents purport to bring. This necessarily requires the Court to evaluate the type of relief Respondents are seeking, and, in the course of this necessary evaluation, the Court must ascertain whether Respondents are (as SCE&G claims) challenging the rates they have paid for electricity or if they are (as Respondents claim) challenging some other alleged harm. Simply put, the mode of trial

is at the core of these Appeals and cannot be decided without a full evaluation of the types of claims Respondents actually seek to bring.

## III. The Orders strike certain of SCE&G's affirmative defenses and are thus immediately appealable.

An interlocutory order is also immediately appealable if it "strikes out an answer or any part thereof." S.C. Code Ann. § 14-3-330(2)(c). Affirmative defenses are required to be set forth in an answer. Rules 8(c), 12(b), SCRCP.[4] Although the general rule is that denials of Rule 12(b) motions are not immediately appealable, *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993), interlocutory orders that delve deeply into the merits of a case, strike portions of pleadings, or otherwise finally determine a substantial right may be appealable depending on the effect of the order. Again, the Court must determine appealability on a case-by-case basis and look beyond the cursory labels or titles applied to an order. *Morrow*, 412 S.C. at 539, 773 S.E.2d at 147.

Here, the Orders effectively reach the full merits of and strike several of SCE&G's affirmative defenses, as defined by Rules 8 and 12, SCRCP, including the filed rate doctrine, res judicata, and collateral estoppel. Ex. B, pp. 4, 5, 7, 11. With respect to the nature of the Respondents' claims and the filed rate doctrine, the Orders held that "this action does not challenge the ratemaking process" and that "[t]he amounts of the rate charged to consumers by SCE&G is not the issue." *Id.* p. 4. Consequently, "[t]he filed rate doctrine is . . . no bar to the

[4] SCE&G answered the Amended Class Action Complaint in the *Lightsey* matter on September 14, 2017, raising, among other defenses, the affirmative defenses of res judicata, collateral estoppel, and the filed rate doctrine. Answer ¶ 40, attached as Exhibit C. The South Carolina Rules of Civil Procedure make it clear that "[e]very defense, in law or fact, to a cause of action in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the [Rule 12(b)(1)-(8)] *defenses may at the option of the pleader be made by motion.*" Rule 12(b), SCRCP (emphasis added). Inclusion of a Rule 12(b) defense in a motion as opposed to an answer does not negate that such defenses are integral and necessary parts of a pleading.

relief [Respondents] ha[ve] requested under the causes of action set forth," and "[t]hese claims are . . . not precluded by the filed rate doctrine." *Id.* The Orders also held that the filed rate doctrine was inapplicable because the "claims do not seek to invade the ratemaking authority of the PSC," nor are the Respondents "attacking the legality or reasonableness of the rate." *Id.* pp. 5, 7. As for res judicata and collateral estoppel, the Orders held that "SCE&G cannot establish [res judicata] because none of these elements are satisfied," and that "collateral estoppel cannot apply because the issues raised in this litigation have never been decided before." *Id.* p. 11. Thus, rather than simply holding that Respondents plausibly alleged causes of action against SCE&G sufficient to proceed to discovery, the Orders reach the merits of and finally decide certain of SCE&G's affirmative defenses.

South Carolina law is clear that an order striking these defenses is immediately appealable. *See* S.C. Code Ann. § 14-3-330(2) ("An order affecting a substantial right made in an action when such order . . . (c) strikes out an answer or any part thereof or any pleading in any action.") Indeed, the Supreme Court has held that interlocutory appeals were permissible where the lower court ruled in the course of deciding a motion to amend "that *res judicata* did not operate as a bar against [defendant] in any way." *Collins v. Sigmon*, 299 S.C. 464, 466, 385 S.E.2d 835, 836 (1989). In that case, the Supreme Court noted that normally a ruling on a motion to amend is not appealable, but "[b]ecause the parties at the motion hearing fully argued the *res judicata* issue [and] because the trial judge ruled as he did," the ruling was properly appealable. *Id.* at 467, 385 S.E.2d at 837. Because the trial judge's order reached "the legal substance or merits of certain of [defendant's] proposed counterclaims"—effectively striking them—the interlocutory order was sufficiently final to be appealed. *Id.* Here, the Orders similarly go far beyond a determination that Respondents have simply made sufficient

allegations to proceed beyond the motion to dismiss stage. Rather, the Orders reach the full merits of certain of SCE&G's affirmative defenses, and therefore affect a substantial right as contemplated by S.C. Code Ann. § 14-3-330(2). Thus, the Orders are immediately appealable.

**Conclusion**

For the reasons set forth above, SCE&G respectfully submits that the Court overlooked or misapprehended the nature of the Orders on appeal. This Petition for Rehearing should thus be granted pursuant to Rule 221(a), SCACR, and these appeals should continue before this Court in the normal course.

Respectfully submitted,

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March 8, 2018

# The South Carolina Court of Appeals

LeBrian Cleckley, Respondent,

v.

South Carolina Electric & Gas Company, and the State of South Carolina, Defendants,

And

Richard Lightsey, Respondent,

v.

South Carolina Electric & Gas Company, Defendant,

And

Jessica S. Cook, Respondent,

v.

South Carolina Public Service Authority (also known as Santee Cooper), et al, Defendants,

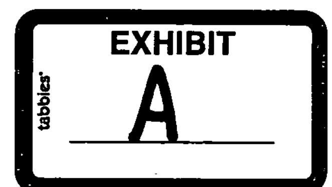
And

Chris Kolbe and Ruth Ann Keffer, on behalf of themselves and all others similarly situated, Respondents,

v.

South Carolina Public Service Authority, et al., Defendants,

And



Edwinda Goodman, et al., Respondents,

v.

SCANA Corporation, et al., Defendants,

Of which South Carolina Electric & Gas Company and SCANA Corporation are the Appellants.

Appellate Case No. 2018-000384

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ORDER

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This appeal arises out of multiple orders from different counties[1] denying the appellants' motions to dismiss. These appeals are hereby consolidated pursuant to Rule 214 of the South Carolina Appellate Court Rules (SCACR). Because the denial of a motion to dismiss is not immediately appealable, this appeal is dismissed. *See Levi v. Northern Anderson Cnty. EMS*, 409 S.C. 374, 382, 762 S.E.2d 44, 48 (2014) ("The denial of a motion to dismiss [] under Rule 12(b)(6), SCRCP . . . [is] not immediately appealable."); *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) ("[T]he denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable."); *Breland v. Chevrolet Olds, Inc.*, 339 S.C. 89, 94-95, 529 S.E.2d 11, 14 (2000) (declining to consider an interlocutory appeal from a claim of improper venue until after trial). The remittitur will be sent pursuant to Rule 221(b), SCACR.

, C.J.

FOR THE COURT

Columbia, South Carolina

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[1] The appellants filed notices of appeal from the following counties and lower court case numbers: Berkeley (2017-CP-08-02099); Richland (2017-CP-40-04833); Hampton (2017-CP-25-00335 and 2017-CP-25-00348); and Fairfield (2017-CP-20-00300).

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The Honorable John C. Hayes, III

| 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. | ) | |

RICHLAND COUNTY FILED
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JEANNETTE W. MCBRIDE C.C.P. & G.S.

**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

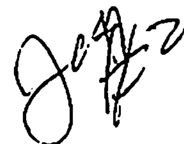
currently pending before the South Carolina Public Service Commission ("PSC").[1] SCE&G bases its motion on the following: (1) that the Circuit Court lacks subject matter jurisdiction over the instant action because all of the various claims fall within the narrow province of the PSC; (2) that the PSC 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.





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).



JE #7

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

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

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

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

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.

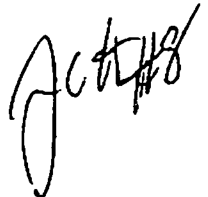
SCE&G relies on S.C. Code Ann. § 58-33-320. However, SCE&G ignores the plain language of the statute, which provides:

> 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.





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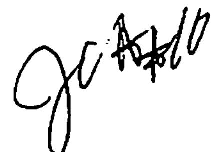
the statute, which allows for all actions except those as to rates to proceed before courts of competent jurisdiction.

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).



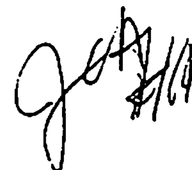


Three elements must be shown to establish res judicata: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986). SCE&G cannot establish this defense because none of these elements are 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





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.

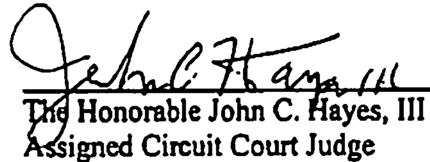
As to SCE&G's argument that the *Friends of the Earth* matter seeks the same ultimate relief as does Plaintiff, abatement and reparations to ratepayers, this Court finds that the *Friends of the Earth* action is based on the prudency of SCE&G's acts and not on the grounds upon which Plaintiff seeks relief. 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 19th of March, 2018,



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

#17

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

IN THE COURT OF COMMON PLEAS

Richard Lightsey,

Plaintiff(s),

v.

South Carolina Electric & Gas Company,

Defendant.

Case No. 2017-CP-25-0335

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**ANSWER OF DEFENDANT**
**<u>SOUTH CAROLINA ELECTRIC & GAS COMPANY</u>**

Subject to its Motion to Dismiss under Rule 12(b), SCRCP, previously filed herein, Defendant South Carolina Electric & Gas Company ("SCE&G") submits the following Answer to the Plaintiff's Amended Class Action Complaint, filed August 14, 2017 ("Complaint")[1]:

**<u>FOR A FIRST DEFENSE</u>**
**(General Denial)**

**<u>INTRODUCTION</u>**

1. Responding generally to the Complaint, SCE&G admits that on July 31, 2017, it announced that it was abandoning the Jenkinsville nuclear power plant project, consisting of two new units, units 2 and 3, at the V. C. Summer nuclear power station (the "Project"). This action became necessary because the prime contractor for the Project, Westinghouse, declared bankruptcy on March 29, 2017, and rejected its fixed-price contract with SCE&G to build the Project, and SCE&G's partner in the Project, Santee Cooper, with its own set of business considerations, decided and informed SCE&G that it would not participate in or contribute to further construction of the Project. After obtaining previously unavailable information through

[1] Plaintiff did not serve his original Complaint on SCE&G.

the Westinghouse bankruptcy proceeding and performing its own updated analysis of the cost to complete one or both units, SCE&G determined that the total cost to complete both units greatly exceeded any of Westinghouse's prior projections in terms of both cost and time for completion. SCE&G concluded that it could not move forward with the construction on its own under the circumstances. After a diligent search for other partners to share in the costs of completing the Project, and finding none, SCE&G reluctantly concluded that the most prudent course under all the circumstances at the time was to cease construction of the Project.

2. SCE&G further alleges in general response to the Complaint that the South Carolina Public Service Commission ("PSC") issued an order in 2009 granting SCE&G's request for a certificate to construct and operate the Project and that the South Carolina Supreme Court affirmed the PSC's decision. *Friends of the Earth v. Public Service Commission of South Carolina,* 387 S. C. 360, 369, 692 S.E.2d 910, 915 (2010) ("[B]ased on the overwhelming amount of evidence in the record, the Commission's determination that SCE&G considered all forms of viable energy generation, and concluded that nuclear energy was the least costly alternative source, is supported by substantial evidence."). SCE&G further alleges that five subsequent fully-litigated reviews were conducted before the PSC, and the PSC issued orders in 2010, 2011, 2012, 2015, and 2016 concluding that the updates and revisions to cost and construction schedules were prudent. In 2012, 2015, and 2016, SCE&G again presented detailed studies to the PSC establishing that it was prudent to continue construction of the units. These reviews were in addition to the 34 detailed quarterly updates that SCE&G filed with the PSC since 2009 that identified construction progress, cost forecast updates, and areas of focus for the Project.

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3. SCE&G further alleges in general response to the Complaint, that at all times throughout the history of the Project, its actions in proposing, planning, commencing, and managing the Project were reasonable and prudent and based on the information available at the time. By this action, Plaintiff seeks to revisit and challenge, based on hindsight, decisions that were approved by the PSC and, in some instances, the South Carolina Supreme Court. Plaintiff also asks the court to decide matters that are exclusively within the jurisdiction of the PSC. SCE&G denies any allegations in the Amended Complaint that are inconsistent with SCE&G's allegations herein, and SCE&G specifically denies that any promises were made to Plaintiff or any other ratepayer concerning the Project. SCE&G further notes that it withdrew its petition with the PSC to abandon the Project by letter dated August 15, 2017.

## PARTIES AND JURISDICTION[2]

4. SCE&G currently lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 1 of the Complaint.

5. Responding to Paragraph 2, SCE&G admits that it is a South Carolina Corporation with its principal place of business in Lexington County, South Carolina.

6. In response to the allegations of Paragraph 3 of the Complaint, SCE&G admits only that South Carolina law governs certain issues in this case, and SCE&G alleges further that federal law may govern other issues.

7. Responding to Paragraph 4, SCE&G admits that it supplies electricity to hundreds of thousands of customers, including customers in Hampton and Allendale Counties. SCE&G further admits that it is required to supply electric service to those customers who pay rates approved by the PSC. SCE&G denies the remaining allegations of Paragraph 4.

[2] For ease of reference, this Answer includes the same subject headings as the Complaint.



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8. Responding to Paragraph 5, SCE&G admits only that this court possesses personal jurisdiction over SCE&G. SCE&G denies that this Court possesses subject matter jurisdiction over this action. SCE&G denies that venue is appropriate in Hampton County and further alleges that venue is proper only in Lexington County where SCE&G's home office is located and where the most substantial part of the acts or omissions giving rise to the action occurred.

## SUBSTANTIVE ALLEGATIONS

9. SCE&G denies Paragraph 6.

10. In response to the allegations of Paragraph 7 of the Complaint, SCE&G admits only that the Complaint accurately quotes the editor's note that appears under § 58-33-210 of the Base Load Review Act, and SCE&G alleges further that the statute should be read as a whole and in harmony with other relevant sections of the South Carolina Code. SCE&G denies that the Act specifically incorporates S.C. Code § 58-27-810.

11. Responding to Paragraphs 8, 9, 10, 11, and 12, SCE&G admits only that in 2008, it petitioned the PSC for authorization to build the Project with its co-owner, Santee Cooper. In the 2008 proceeding, SCE&G sought a determination under the Base Load Review Act that its forecasted costs and construction plan were reasonable and prudent. The PSC subsequently approved SCE&G's petition in 2009, and thereafter approved additional cost estimates and rates as described in paragraph 2 above of this Answer. SCE&G denies the remaining allegations.

12. Responding to Paragraph 13, SCE&G admits that on July 31, 2017, it announced that it was abandoning the Project. SCE&G denies the remaining allegations of Paragraph 13.

13. SCE&G denies Paragraph 14 as stated and refers to the Base Load Review Act and related statutes for their provisions.





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14. In response to Paragraphs 15 and 16, SCE&G admits only that the Complaint accurately quotes portions of the Base Load Review Act, and SCE&G alleges further that the statute should be read as a whole and in harmony with other relevant sections of the South Carolina Code. SCE&G denies the remaining allegations of Paragraphs 15 and 16.

15. SCE&G denies Paragraph 17.

16. SCE&G currently lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 18 as they refer to non-specific and unidentified cases.

17. Responding to Paragraph 19, SCE&G denies that rates paid prior to 2009 included any Project costs. SCE&G currently lacks knowledge or information sufficient to form a belief as to historic bill payment practices by Plaintiff.

18. SCE&G denies Paragraphs 20 and 21.

## CLASS ALLEGATIONS

19. SCE&G denies the allegations of Paragraphs 22, 23, 24, and 25.

20. In response to the allegations of Paragraphs 26 through 34, SCE&G denies that this case is appropriate for handling as a class action, denies that the necessary factors for class action treatment exist for this case, denies that the alleged class definitions are appropriate, and denies that Plaintiff or any putative class member is entitled to any legal or equitable relief in this lawsuit.

## FIRST CAUSE OF ACTION OF THE COMPLAINT
(Negligence)

21. Responding to Paragraph 35, SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.



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22. Paragraph 36 of the Complaint, including all subparagraphs, states or attempts to state legal conclusions, rather than facts. To the extent a response is required, the allegations are denied.

23. SCE&G denies Paragraphs 37 and 38.

**SECOND CAUSE OF ACTION OF THE COMPLAINT**
(Breach of Contract)

24. Responding to paragraph 39, SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.

25. Paragraph 40 of the Complaint states or attempts to state legal conclusions, rather than facts. To the extent a response is required, the allegations are denied.

26. SCE&G denies Paragraphs 41 through 43.

**THIRD CAUSE OF ACTION OF THE COMPLAINT**
(Unfair Trade Practices)

27. Responding to Paragraph 44, SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.

28. SCE&G denies Paragraphs 45, 46, 47, and 48.

**FOURTH CAUSE OF ACTION OF THE COMPLAINT**
(Violation of South Carolina Antitrust Laws)

29. Responding to Paragraph 49, SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.

30. Responding to Paragraph 50, SCE&G is without knowledge or information sufficient to form a belief as to the truth of the allegations.

31. Paragraph 51 of the Complaint states or attempts to state legal conclusions, rather than facts. To the extent a response is required, the allegations are denied.

32. SCE&G denies Paragraphs 52 through 55.

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**FIFTH CAUSE OF ACTION OF THE COMPLAINT**
(Unjust Enrichment)

33. Responding to Paragraph 56, SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.

34. SCE&G denies Paragraphs 57 through 62.

**SIXTH CAUSE OF ACTION OF THE COMPLAINT**
(Declaratory Judgment)

35. Responding to the second Paragraph 62 under the heading "Declaratory Judgment," SCE&G repeats and realleges its answers to each and every previous paragraph of the Complaint as though fully set forth herein.

36. Paragraph 63 of the Complaint states or attempts to state legal conclusions, rather than facts. To the extent a response is required, the allegations are denied.

37. SCE&G denies Paragraphs 64 and 65, and SCE&G alleges further that Plaintiff is not entitled to any declaratory or other relief in this lawsuit.

38. SCE&G denies that Plaintiff is entitled to any of the relief requested in his Jury Trial Demand and Prayer for Relief.

**FOR A SECOND DEFENSE**
**(Lack of Subject Matter Jurisdiction)**

39. In 2009, 2010, 2011, 2012, 2015, and 2016, the PSC issued final orders in proceedings on applications filed by SCE&G under the Base Load Review Act, S.C. Code § 58-33-210, *et seq.*, ("BLRA") seeking various forms of relief. Some of these orders were appealed to the South Carolina Supreme Court under S.C. Code §58-33-310 and all are now final. Under S.C. Code § 58-33-320, "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 [PSC] under this chapter [BLRA]…." Accordingly, this court

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lacks subject matter jurisdiction to hear or determine any matter that was raised or could have been raised in any of the aforementioned six proceedings before the PSC. In addition, any matter that has been determined by the South Carolina Appellate Courts is the law of the case and may not be revisited.

**FOR A THIRD DEFENSE**
**(Estoppel, Lack of Standing)**

40. As a ratepayer, Plaintiff would have received notice of his right to intervene as a party in any of the aforementioned six proceedings before the PSC on applications filed by SCE&G under the BLRA. Plaintiff is now barred from raising any matter he could have raised as a party to any of these proceedings under the doctrines of Res Judicata, Collateral Estoppel, Law of the Case, and the Filed Rate Doctrine. In addition, Plaintiff lacks standing to pursue these claims.

**FOR A FOURTH DEFENSE**
**(Exclusive Jurisdiction of the PSC)**

41. The relief sought by the Plaintiff is only available through the PSC, which has exclusive jurisdiction. Therefore, this action must be dismissed.

**FOR A FIFTH DEFENSE**
**(Primary Jurisdiction of the PSC)**

42. In the alternative, the PSC has primary jurisdiction of the issues Plaintiff seeks to raise and the court should dismiss or stay the present action pending resolution of those issues by the PSC.

**FOR A SIXTH DEFENSE**
**(Rule 12(b)(8), SCRCP)**

43. There is presently pending before the PSC another matter that involves SCE&G and its ratepayers or organizations representing its ratepayers that seeks to raise the same issues

as plaintiff, In the Matter of: *Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent*, Docket No. 2017-207-E filed June 22, 2017, and the present action should be dismissed pursuant to Rule 12(b)(8), SCRCP, or stayed.

44. As a further grounds for dismissal under Rule 12(b)(8), there is another, earlier filed lawsuit raising claims relating to rates charged pursuant to the Base Load Review Act to fund the Jenkinsville nuclear power plant project on behalf of SCE&G's South Carolina customers pending in Richland County, *Cleckley v. SCE&G*, Richland County Court of Common Pleas Case No. 2017-CP-40-4833, filed August 11, 2017.

**FOR A SEVENTH DEFENSE**
**(Failure to State a Claim, No Private Right of Action)**

45. Plaintiff's Complaint fails to state facts sufficient to constitute a cause action or for which there is a private right of action against SCE&G.

**FOR AN EIGHTH DEFENSE**
**(Statute of Limitations)**

46. Plaintiff's claims are barred by any applicable statutes of limitation.

**FOR A NINTH DEFENSE**
**(Federal Preemption)**

47. Plaintiff's claims are barred in whole or in part by the doctrine of Federal Preemption because certain expenses incurred by SCE&G were required by federal law, including but not limited to the Atomic Energy Act of 1954 (as amended), federal regulations promulgated thereunder, and requirements of the Nuclear Regulatory Commission for purposes of federal licensing and regulation of certain nuclear materials and facilities based on the common defense and security and radiological health and safety.



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**FOR A TENTH DEFENSE**
**(Failure to Exhaust Administrative Remedies)**

48. Plaintiff's claims are barred as a result of his failure to pursue and to exhaust administrative remedies.

**FOR A ELEVENTH DEFENSE**
**(Economic Loss Rule)**

49. Plaintiff's tort claims are barred by the Economic Loss Rule because of the nature of the relationship between SCE&G and Plaintiff.

**FOR A TWELFTH DEFENSE**
**(Ripeness)**

50. Plaintiff's claims are not ripe for prosecution.

**FOR A THIRTEENTH DEFENSE**
**(Equitable Defenses)**

51. Plaintiff's claims are barred by any and all equitable defenses available to SCE&G, including, but not limited to, the doctrines of Laches, Waiver, and/or Estoppel.

**FOR A FOURTEENTH DEFENSE**
**(Class Action Not Proper)**

52. This action should not proceed as a Class Action pursuant to Rule 23, SCRCP, because the requisite elements are not met. Moreover, Plaintiff's claim under the South Carolina Unfair Trade Practices Act ("SCUTPA," S.C. Code § 39-5-10, *et seq.*) may not proceed as a class action. S.C. Code § 39-5-140(a) (A litigant "may bring an action individually, *but not in a representative capacity*") (emphasis added).

**FOR A FIFTEENTH DEFENSE**
**(State Law Preemption)**

53. Plaintiff's claims should be dismissed because they are preempted by the Base Load Review Act and other applicable South Carolina statutes and regulations.

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**FOR AN SIXTHTEENTH DEFENSE**
**(Acts of Third Parties)**

54. Plaintiff's cause of action for negligence should be dismissed in whole or in part because Plaintiff's damages were proximately caused by intervening and superseding events and acts of third parties, for which SCE&G is not responsible.

**FOR A SEVENTEENTH DEFENSE**
**(Lack of Foreseeability)**

55. Plaintiff's cause of action for negligence should be dismissed because Plaintiff's damages were caused by unforeseeable acts and events, for which SCE&G is not responsible.

**FOR A EIGHTEENTH DEFENSE**
**(Due Process of Law)**

56. Plaintiff's claims, if permitted to proceed, would upset and violate Defendant's rights to due process pursuant to the South Carolina and United States Constitutions.

**FOR A NINTEENTH DEFENSE**
**(Voluntary Payment Doctrine)**

57. Plaintiff's claims are barred, in whole or in part, by the doctrine of Voluntary Payment.

**FOR A TWENTIETH DEFENSE**
**(No Conspiracy)**

58. Plaintiff's claims for violation of South Carolina Antitrust Laws, S.C. Code § 39-3-10, *et seq*., are barred because SCE&G is a wholly owned subsidiary of SCANA Corporation, and a parent corporation and its wholly-owned subsidiary are legally incapable of conspiring or colluding with each other.

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**FOR A TWENTY-FIRST DEFENSE**
**(S.C. Code § 39-5-40)**

59. There is no basis for a claim under the SCUTPA by operation of S.C. Code § 39-5-40 as the rates charged by SCE&G were expressly permitted and approved by the PSC.

**FOR A TWENTY-SECOND DEFENSE**
**(Other Potential Defenses)**

60. SCE&G intends to rely on any and all other available defenses as may be developed through discovery and the evidence.

WHEREFORE, having fully answered and moved to dismiss, SCE&G prays that the Court look into the matters and things alleged in the Complaint, dismiss the Complaint with prejudice, or in the alternative, without prejudice under the doctrine of Primary Jurisdiction, and for such other and further relief as the Court may deem just and proper.

**HAYNSWORTH SINKLER BOYD, P.A.**

By: s/James Y. Becker
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Columbia, South Carolina 29201
(803) 779.3080

*Attorneys for South Carolina Electric and Gas Company*

September 14, 2017
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
APPEAL FROM HAMPTON COUNTY
APPEAL FROM FAIRFIELD COUNTY
APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

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SC Court of Appeals

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C.A. No.: 2017-CP-40-4833
C.A. No.: 2017-CP-25-0335
C.A. No.: 2017-CP-25-0348
C.A. No.: 2017-CP-20-0300
C.A. No.: 2017-CP-08-2009
Appellate Case No. 2018-000384

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LeBrian Cleckley, on behalf of himself and all others similarly situated,....................Respondent,

v.

South Carolina Electric & Gas Company and the State of South Carolina,................. Defendants.

Of whom:

South Carolina Electric & Gas Company is ..................................................................Appellant.

AND

Richard Lightsey,.............................................................................................Respondent,

v.

South Carolina Electric & Gas Company,.................................................................Defendant.

Of whom:

South Carolina Electric & Gas Company is ..................................................................Appellant.

AND

Jessica S. Cook,.............................................................................................Respondent,

v.

South Carolina Public Service Authority (also known as Santee Cooper), South Carolina Electric and Gas, Palmetto Electric Cooperative, Inc., and Central Electric Power Cooperative, Inc., .................................................................................................................................. Defendants.

Of Whom:

South Carolina Electric & Gas Company is .................................................................Appellant.

AND

Edwinda Goodman, Bobby Lee Jones, Bobby Cunningham, Daryl Davis, Phillip Cooper, Karla Cooper, Jackie Mincey, Dean M. Perry, Steve Lawson, Freddie Lawson individually and on behalf of other similarly situated Plaintiffs,............................................................... Respondents,

v.

SCANA Corporation and South Carolina Electric & Gas Company, ........................... Defendants.

Of whom:

SCANA Corporation and South Carolina Electric & Gas Company are....................Appellants.

AND

Chris Kolbe and Ruth Ann Keffer,
on behalf of themselves and all others similarly situated, .......................................... Respondents,

v.

South Carolina Public Service Authority, an Agency of the State of South Carolina; W. Leighton Lord, III, in his capacity as chariman and director of the South Carolina Public Service Authority; William A. Finn, in his capacity as director of the South Carolina Public Service Authority; Barry Wynn, in his capacity as director of the South Carolina Public Service Authority; Kristofer Clark, in his capacity as director of the South Carolina Public Service Authority; Merrell W. Floyd, in his capacity as director of the South Carolina Public Service Authority, Calhoun Land, IV, in his capacity as director of the South Carolina Public Service Authority; Stephen H. Mudge, in his capacity as director of the South Carolina Public Service Authority; Peggy H. Pinnell, in her capacity as director of the South Carolina Public Service Authority; Dan J. Ray, in his capacity as director of the South Carolina Public Service Authority; David F. Singleton, in his capacity as director of the South Carolina Public Service Authority; Jack F. Wolfe, in his capacity as director of the South Carolina Public Service Authority; South Carolina Electric & Gas Company; and SCANA Corporation,.................................... Defendants.

Of Whom:

South Carolina Electric & Gas Company and SCANA Corporation are.........Appellants.

**PROOF OF SERVICE**

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

1. **South Carolina Electric and Gas Company's and SCANA Corporation's Petition for Rehearing**

*Parties of Record*

*VIA HAND DELIVERY*
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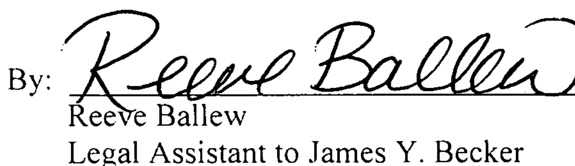
**HAYNSWORTH SINKLER BOYD, P.A.**

By: 
Reeve Ballew
Legal Assistant to James Y. Becker

March 8, 2018
Columbia, South Carolina

Haynsworth
Sinkler Boyd, P.A.

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March 8, 2018

**VIA HAND DELIVERY**
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: *LeBrian Cleckley v. South Carolina Electric and Gas Company, et al.*
Appellate Case No. 2018-000384

Dear Ms. Kitchings:

Enclosed for filing, please find the original and seven copies of the following for filing in regards to the above referenced matter:

(1) South Carolina Electric and Gas Company's and SCANA Corporation's Petition for Rehearing;
(2) Proof of Service; and
(3) a check in the amount of $25.00 for the filing fee.

Please return the extra copy via our courier.

RECEIVED
MAR 08 2018
SC Court of Appeals

Sincerely,

James Y. Becker

JYB/ajw
Enclosures

cc: all counsel of record