

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-
20.....Respondents.

SUPPLEMENTAL APPENDIX TO THE RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2008-CP-17-0180

GARY WEAVER, BEA Wallenstein,
and B.E.A. Wallenstein Hospice Inter
Vivos Trust,

Plaintiffs Pro Se,

vs.

Progress Energy Carolinas, Inc.,
William Johnson, and John Does 1-20,

Defendants.

**ORDER DISMISSING CASE
AND GRANTING ATTORNEY FEES
TO DEFENDANT PROGRESS ENERGY**

Job
This matter was heard by this Court on November 3, 2009, during a non-jury term in Dillon. The Defendant has filed a Motion to Dismiss this action in its entirety. The Plaintiffs have filed numerous Motions in this case which was initially filed by Mr. Gary Weaver as a Pro-Se Complaint. The filing of the initial Summons and Complaint in this action occurred on May 30, 2008. The case was assigned docket number 2008-CP-17-0180.

The Plaintiffs Gary and Beatrice Weaver (nee Wallenstein) have been pursuing litigation against the Defendant both before this Court and before the Public Service Commission for nearly the past ten years. This current action was filed in direct violation of previous Orders entered by the Court.

In 2004, Progress Energy Carolinas, Inc. brought an action against Gary Weaver and Beatrice Weaver seeking collection of amounts it claimed was owed for service to the Weaver residence. See *Progress Energy Carolinas, Inc., Plaintiff vs. Gary Weaver and Beatrice Weaver*,

Defendants, Case Number 2004-CP-17-0232. It appears from the record that a Mutual Release and Settlement Agreement was entered into between the parties on September 18, 2007.

On October 2, 2007, Judgment was entered in the matter noting that the case had been settled. Progress Energy filed a Motion to Enforce Settlement on October 25, 2007. Mr. Weaver filed a Motion to Enforce Settlement on October 26, 2007. A hearing on those pending Motions was heard before the Honorable Paul M. Burch on January 30, 2008.

Judge Burch entered judgment on a Form 4 Order on February 28, 2008, granting Progress Energy's Motion to Enforce Settlement. In his February 28, 2008 Order, Judge Burch ordered that "the Defendant (Weavers) shall within forty-five days of this date (2/28/09) come into compliance with the terms of Paragraphs 3 and 4 of the Mutual Release Agreement."

7/12 In an Order dated March 24, 2008, Judge Burch noted that Mr. Weaver had filed numerous post-trial Motions including a Request for Clarification dated March 7, 2008, and a letter of transmittal dated March 10, 2008. In his March 24, 2008 Order, Judge Burch noted that "the Court construes the Request for Clarification and the letter of transmittal to be a Rule 59(e) Motion and finds that this is the only issue properly before the Court at this time." Judge Burch then denied Defendant Gary Weaver's Rule 59(e) Motion to Reconsider or Amend. Subsequent to Judge Burch's March 24, 2008 Order, Mr. Weaver continued to present various filings to the Clerk of Court of Dillon County challenging the veracity of the Settlement Agreement as well as other matters clearly related to the dismissed action.

In the face of continued filings from Mr. Weaver, the Honorable James E. Lockemy scheduled a hearing on June 3, 2008 at the Georgetown County Courthouse. In his Order entered as a result of the June 3, 2008 hearing, Judge Lockemy noted that Mr. Weaver's arguments

related to the Mutual Release and Settlement Agreement, his contention that Progress Energy was in violation of the Settlement Agreement and his arguments that Progress Energy had violated the Settlement Agreement "were not properly before me as they had been previously addressed by Judge Burch in the hearing on January 30, 2008, his Order of February 28, 2008, and his Order in response to Defendant Gary Weaver's Motion for Reconsideration, dated March 24, 2008."

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In his June 27, 2008 Order, Judge Lockemy stated **"this case has ended. The Clerk of Court is directed not to accept any further pleadings or filings in this matter. This case ended with the issuance of Judge Burch's Order of March 24, 2008. The time for appeal has expired. Since this matter has ended there will be no Rule 59(e) appeal available with regard to this Order"** (emphasis added). In a handwritten notation to the Order Judge Lockemy noted **"as Ordered, case number 2004-CP-17-0232 is over at the trial level. If Mr. Weaver is dissatisfied with any ruling of this Court, then he should seek appellate relief. All parties are directed to follow the terms of the above Order."** (emphasis added)

In spite of the clear unambiguous Orders of Judge Burch and Judge Lockemy, Mr. Weaver then persisted in prosecuting case number 2008-CP-17-0180, which makes basically the same allegations all over again. Progress Energy filed a Motion to Dismiss this action on August 4, 2009. During the November 3 hearing, this Court reviewed the various Orders of Judge Lockemy and Judge Burch and their admonitions to the Weavers that all of the matters related to case number 2004-CP-17-0232, including the issues related to the Mutual Release and Settlement Agreement, had ended. During his argument before the Court, Mr. Weaver acknowledged that all of the causes of action in this instant case stemmed from his contention

that Progress Energy has violated the terms of the Settlement Agreement. As a result, this Court has determined not only to dismiss this successive case, but to also impose sanctions.

IT IS HEREBY ORDERED

1. Case number 2008-CP-17-0180 and all of the allegations contained therein have previously been addressed in case number 2004-CP-17-0232. That case has ended and the matters alleged in this case are res judicata. The Plaintiff continued to pursue these matters at the trial level in direct contravention of the Court's Orders.

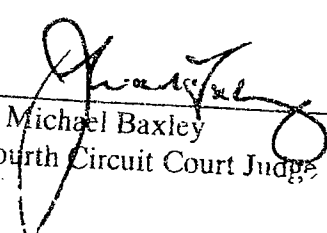
2. Case number 2008-CP-17-0180 is dismissed. The continued pursuit of these matters constitutes repetitive and frivolous filings. Pursuant to Rule 11(a) SCRCP, the Plaintiff Gary Weaver is hereby required to pay the reasonable attorney's fees and expenses of Progress Energy's counsel, Willcox, Buyck, & Williams, P.A., that were necessitated by Plaintiff's filing of this successive action, from May 30, 2008 through the date of this Order. I find that the reasonable and necessary amount of those fees is \$7,367.50, as confirmed by affidavit from Attorney Mark W. Buyck, III, which is attached hereto.

3. Mr. Weaver shall have thirty (30) days from the date that this Order is served upon him to pay this amount to Willcox, Buyck & Williams, P.A. Service may be made upon Plaintiff by first class US Mail, return receipt requested. Payment shall be made by one certified check either delivered by hand or sent via US Mail with proof of postdate and mailing. In the event Mr. Weaver does not make the payment as outlined above, it is the Court's Order that he shall be sentenced to ninety (90) days in the Dillon County Detention Center and held pursuant to the Court's criminal contempt powers. Mr. Weaver's obligation to make payment for the fees will not be stayed in the event the Plaintiffs choose to appeal this Order. The obligation to pay

the fees and the consequence for not doing so will survive any notice of appeal which Mr. Weaver may take from this Order, unless there is supercedeas or other specific relief granted by the appellate Courts.

The Clerk is directed to dismiss Plaintiff's case, with prejudice.

IT IS SO ORDERED.


J. Michael Baxley
Fourth Circuit Court Judge

At Chambers
November 25, 2009

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NO EXHIBIT OFFERED



1 (Whereupon, these proceedings are brought to
2 order at 11:25 a.m. on Tuesday, November 3, 2009.)

3 THE COURT: All right. This leaves us with one
4 matter now, the matter of Gary Weaver versus Progress
5 Energy.

6 Madame Court Reporter, this is the case of 2008-17-
7 180. Let's come across and let everyone introduce
8 themselves. Mr. Weaver we will begin with you.

9 MR. WEAVER: Well, Your Honor, I am Gary Weaver,
10 and I am here representing myself.

11 THE COURT: Very good. Counsel.

12 MR. BUYCK: Your Honor, I am Mark Buyck, III, and I
13 am here on behalf of Progress Energy.

14 THE COURT: All right. What the Motion is, I
15 believe is your Motion Mr. Buyck to dismiss; am I
16 correct?

17 MR. BUYCK: Yes, sir.

18 THE COURT: And there is also a Motion pending for
19 default, is that correct?

20 MR. BUYCK: Yes, sir, Your Honor. I am prepared
21 to give Your Honor the background of the case.

22 THE COURT: Let me first of all say, Mr. Weaver
23 the way we are going to proceed here is, I am going to
24 let Mr. Buyck argue first. His Motion to Dismiss would
25 be dispositive, meaning it would end everything, whereas



1 a partial summary judgment or partial default. I will
2 hear from him first.

3 The court has some familiarity with this. Either I
4 have had hearings in this matter before, or at least have
5 had some knowledge of the case, and I am not certain of
6 from what source. But, I do recall the name of the case
7 as soon as I saw it on the Roster. And is there any
8 objection to this court hearing it from the defendants?

9 MR. BUYCK: No, sir, Your Honor.

10 THE COURT: And any from the defendant?

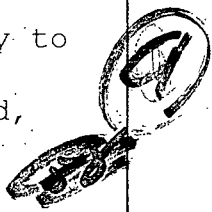
11 MR. WEAVER: No, sir.

12 THE COURT: All right. Please be seated, and Mr.
13 Buyck, I will hear from you first.

14 MR. BUYCK: All right, Your Honor. I want to
15 start by passing up a Order from Judge Brigden, and that
16 is dated December 2004.

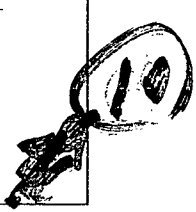
17 THE COURT: All right.

18 MR. BUYCK: And the reason I present this order to
19 the court is that it does set out sort of the history of
20 the dispute between the Weavers and Progress Energy. If
21 you look at the bottom of page one, that last sentence,
22 it says that the parties have been involved in a long
23 running dispute regarding the provision of electricity to
24 the defendant's residence at 1253 Harley's Bridge Road,
25 in Dillon County.



1 Mr. Weaver contracted with Progress Energy for some
2 area lights, and they - The Weavers have had service
3 there since about 1994. They had some - they put some
4 area lights in there in 1996. There were some problems
5 with the lights. The Weavers brought a Complaint with
6 the Public Service Commission, actually opened a file
7 there. And, The Commission through that process, heard
8 the Complaint, and issued an Order, and part of the Order
9 was that Progress Energy was to credit the Weavers with a
10 portion of the Bill for the area light service that they
11 were complaining about. This was done, and there was no
12 dispute that Progress did what they were ordered to.

13 However, Mr. Weaver appealed the Public Service
14 Commission's Order, and that was the first case at
15 Circuit Court, and it was here in Dillon County, and it
16 was Case Number 2002-CP-17-090. Judge Burch dismissed
17 that Complaint in April of 2002. Judge Breeden notes on
18 the top of page three, that the incident Complaint, the
19 one that was pending in 2004, was nothing but a rehash of
20 the plaintiff's various complaints and charges, lies
21 against the defendant before the Public Service
22 Commission. All of the plaintiff's charges stems from
23 dissatisfaction with the installation, operation, repair
24 and maintenance of various security lights. Then Judge
25 Brigden goes on to explain why it is that he is



1 dismissing the Complaint that Mr. Weaver brought in
2 Florence County in 2004.

3 Now, in 2004, after that Complaint was actually
4 while that Complaint was pending, Progress brought an
5 Action in Dillon County to collect past due amounts, due
6 to the service owed on the service. Mr. Weaver then
7 Counterclaimed in that Action. We have been before Judge
8 Burch several times. We have been before Judge Lockemy
9 numerous times. The case was ultimately mediated, and at
10 the time this was in - on September 18, 2007, we had a
11 conference in Mr. Shine's Office. Dan Shine at that
12 time, was representing Mrs. Weaver. He was not
13 representing Mr. Weaver. However, he was representing
14 Mrs. Weaver, and we entered into a mutual release, and a
15 settlement agreement on September 18, 2007. And as part
16 of that Agreement The Weavers agreed that they would drop
17 all matters that they had currently pending before the
18 Public Service Commission. On September 22nd, four days
19 later, which was, I think, a Monday, The Weavers, in
20 violation of their agreement, filed a Motion with the
21 Public Service Commission asking them to expedite the
22 matters that were on the docket before them. We filed a
23 Motion to Enforce the Settlement Agreement on October 25,
24 2007. Mr. Weaver filed a Motion to enforce the
25 Settlement Agreement the day after we did. A hearing was



1 held on that, and I believe it was - and I have the order
2 here --- Judge Burch --- actually here is our Motion to
3 Enforce the Settlement Agreement. Judge Burch issued an
4 order granting the relief that we had requested, and ---
5 I'm sorry, I have so much in this file.

6 (PAUSE.)

7 MR. BUYCK: Judge Burch's Order February 28, 2008,
8 and in his order, Judge Burch grants Progress' Motion to
9 enforce a Settlement Agreement, and says that the said
10 agreement shall be enforced, and that all parties shall
11 abide by its terms. The defendant shall within forty-
12 five-days of this date come in to the defendant, and the
13 defendant in that case was the Weavers. The defendant
14 shall come into compliance with the terms of paragraphs
15 three and four of the mutual release agreement, dated and
16 filed with the Clerk of Court on October 25, 2007, and
17 failure to comply shall subject the parties to the
18 contempt powers of the court.

19 And it is so ordered. Judge Burch.

20 There was a subsequent order issued by Judge Burch
21 on March 26, 2008, that was in response to the Motion for
22 Reconsideration that Mr. Weaver had filed. And in that
23 Motion Judge Burch said, that his Order is clear, and he
24 doesn't have any - he says that it needs to be
25 enforced.



1 Mr. Weaver on May 30, 2008, while --- in what he has
2 called a Verified Complaint, and it notes that it was
3 filed on May 30, 2008, at 2:05 p.m., and it is
4 handwritten. There was a hearing on June 3, 2008, in
5 front of Judge Lockemy. Again, Judge Lockemy in the face
6 of a number of post trial motions and whatnot from Mr.
7 Weaver, scheduled a hearing. We went down to Georgetown,
8 and he heard --- he heard this. And as you see in
9 paragraph one, it came before me on June 3, 2008,
10 regarding certain misunderstanding relating to the
11 conclusion of case number 2004-CP-17-232.

12 Paragraph 9, which is on page 3 of Judge Lockemy's
13 Order states, that the court heard argument from Mr.
14 Weaver concerning the mutual release and settlement
15 agreement. Particular Mr. Weaver's contention that the
16 plaintiff is in violation of the settlement agreement,
17 and that it had not reconnected the residence pursuant to
18 the terms of the agreement. These matters are not
19 properly before me, as they had been previously addressed
20 before Judge Burch in a hearing on January 30, 2008. His
21 Order of February 28, 2008, and his order and response to
22 Defendant Gary Weaver's Motion for Reconsideration dated
23 March 24, 2008.

24 Judge Lockemy's final paragraph of that order says
25 that this case has ended. The Clerk of Court is directed



1 not to accept any further pleadings or filings in this
2 matter. The case ended with the issuance of Judge
3 Burch's Order on March 24, 2008.

4 Then while — but before June 3, and June 27th, Judge
5 Lockemy references a letter that he received from Mr.
6 Weaver on June 19th. And again Judge Lockemy says that
7 the case — that if Mr. Weaver is dissatisfied with any
8 ruling of this court, then he should ask for appellate
9 relief. All parties are directed to follow with the tone
10 of the above order. The power was reconnected. The case
11 was ended. Mr. Weaver, however unbeknownst to us, had
12 filed a subsequent action, in which he is making the same
13 claims that he was making in the 2004 action. He is
14 claiming in his Complaint that his number 2008-17-180,
15 that Progress Energy has violated the terms of the
16 Settlement Agreement, and has caused him damage by virtue
17 of the fact that we have violated the terms of the
18 Settlement Agreement. It is our position, and we have
19 made this argument a number of times. We have made it to
20 Judge Burch, we have made it to Judge Lockemy, we did
21 comply with the terms of the settlement agreement that
22 the judge — both Judge Burch and Judge Lockemy said, that
23 we had complied with the terms of the settlement
24 agreement. As a matter of fact, Judge Burch found that
25 Mr. Weaver was the one that did not comply with the terms



1 of the settlement agreement, and issued an order saying
2 that if he fails to comply, that he will be subject to
3 the contempt powers of the court.

4 The case has ended. It is has been going on now ---
5 this feud has been going on for almost twenty years.
6 This case has been going on for over five years, and it
7 all relates to the same matter. The case is over. Judge
8 Lockemy ended the case. He said there will be no more
9 filings in the case. And we believe that if you look at
10 the verified complaint, and I don't believe it is
11 properly verified, but if you look at the complaint,
12 every cause of action that he has in here, relates to the
13 fact that he alleges that we violated the terms of the
14 settlement.

15 THE COURT: All right. Let me stop you there
16 counsel.

17 Mr. Weaver, under the multiple orders of this court,
18 how can you maintain this claim, even file this claim
19 sir?

20 Let's do this, because you are a party representing
21 yourself, we are going to place you under oath before we
22 begin.

23 Please follow our clerk's instructions, sir.

24 CLERK OF COURT: Would you raise your right hand.

25 WHEREUPON, GARY WEAVER



BEING DULY SWORN TESTIFIES AS FOLLOWS

MR. WEAVER: I do. I am sorry, Your Honor. I am hard of hearing.

THE COURT: All right, sir. And I am going to ask you to speak up, so our court reporter can hear you. But how are you able to even maintain this lawsuit, file this lawsuit, in the face of the multiple orders that you have already had handed down with regard of these issues from other judges?

MR. WEAVER: Actually, I think that is very easy, Your Honor. It is hard to know where to start with this exposition of the history of this case. It is riddled with all kinds of misinformation. In answer directly to your question, Judge Burch's order of 28th of February, follows the hearing of January 30th of the two Motions that we both filed on October 25th. Both of us filed for enforcement of the settlement agreement. Now, in Progress Energy's case, they claimed that I had not filed a letter of dismissal with The State Progress Service Commission. Now, that refers to paragraph 3 and 4 of the Settlement Agreement, and, in fact, everything has been dismissed before the public service commission, and I had it all in writing, and where we submitted all the pleadings, and all of the exhibits, and exception of service. In addition to which counsel for Progress



1 Energy, which is Mr. Anthony, General Counsel for the
2 company, they filed a Notice with the Public Service
3 Commission that the case had been dismissed, and
4 acknowledged to me in several letters that I filed,
5 everything has been dismissed. So in addition to which,
6 the ambiguity of paragraph 4 was the issue at state, and
7 January 30th hearing.

8 THE COURT: All right, sir. Let me stop you there
9 with the history that you are giving me, and ask you
10 this. What is the new issue that you raise in this new
11 Complaint?

12 MR. WEAVER: The violation of the Order issued by
13 Judge Burch on the 28th of October, which says that both
14 parties are to meet in terms of the settlement agreement.
15 Progress Energy does not turn on the electricity. And
16 all of the conditions, and this is a two page document
17 --- I find, the first two paragraphs says, I will make
18 certain payments, which we agreed on. I have made those
19 payments. Seven months later we still didn't have any
20 electricity. So I filed abuse of the agreement, breach
21 of the agreement, non compliance with Judge Burch's
22 order, and abuse of court authority.

23 THE COURT: This is in the new lawsuit?

24 MR. WEAVER: Yes, sir.

25 THE COURT: All right.



1 MR. WEAVER: It has nothing to do with 272
2 whatsoever, except for the settlement agreement.

3 THE COURT: All right. Let me stop you right
4 there, and go back to Mr. Buyck. Tell me why it took
5 seven months as Mr. Weaver said, to turn on the power,
6 when it should have been turned on previously, again that
7 is his position.

8 MR. BUYCK: Your Honor, I would be happy to give
9 you a detailed response to that question. However, I
10 will refer you to Judge Lockemy's Order from June 2008 --

11 THE COURT: All right.

12 MR. BUYCK: -- When he heard us. And we have had
13 this argument. We had an hour and a half argument in
14 front of Judge Lockemy concerning the misunderstandings
15 about the settlement agreement.

16 THE COURT: All right.

17 MR. BUYCK: And it was our position then and now

18 --

19 THE COURT: Very good. Thank you. That matter
20 has been litigated, and Judge Lockemy has ruled on it.

21 MR. WEAVER: That is on case 232, Your Honor.

22 THE COURT: Sir?

23 MR. WEAVER: Let me explain a little bit. I have
24 an order --- a full court order from Judge Lockemy on
25 that hearing in June, and that hearing in June had to do

18
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1 with consolidating two cases. I will go further and
2 explain it. Judge Burch had dismissed 232, back in
3 October. I did not know, I never received a copy of the
4 Form 4 Order. Somehow it got missing in the mail, and
5 that is possible because at that time I was Arizona with
6 Mrs. Weaver at the Mayo Clinic getting cancer treatments
7 with her, so in the mail I may not have received that.
8 But I never received a copy of that order from Judge
9 Burch back in October of 2007, until May of 2008, and we
10 had a hearing right here on January 30th, for an hour or
11 an hour and a half, and I was talking about going to
12 trial, and the judge was talking about the settlement
13 agreement. I didn't know that the case had already been
14 dismissed by him, and it is right here. Per the
15 attorneys, first per the attorneys the case settled, a
16 formal order forthcoming. There was never any formal
17 order forthcoming. I never received any order that it
18 had been dismissed at all. So I went rightly along,
19 figuring I was going to trial, demanding a jury trial.
20 And then when I flied after I got the settlement from
21 Judge Burch, and they did not comply with this order,
22 they issued on the 28th of February. I said, okay, I will
23 file a new complaint on the settlement, which I did. Now
24 just before this court today, it has nothing with 232, it
25 is 180. I filed a complaint, why are they against it,

19
22

1 the issues have never been tried.

2 THE COURT: All right, sir. Mr. Weaver, I am going
3 to stop you there, sir. This matter is *res judicata*. It
4 is a case that has been decided. It is over. And, sir,
5 you have been ordered by Judge Lockemy as well as
6 certainly the tone of the other judges' orders is to,
7 cease and desist from these constant filings. This
8 matter is done. The Courts do not have the personnel or
9 the time to continue to relitigate, and relitigate, and
10 relitigate, and this is The Court's decision.

11 Not only am I going to dismiss this case that you
12 have filed, but I am going to grant sanctions against you
13 Mr. Weaver.

14 I am going to require you to pay the attorney fees
15 that Mr. Buyck has generated on behalf of Progress Energy
16 Carolinas from the date of the filing to the present
17 date. I am going to give you thirty days to pay those.
18 And if you fail to do that, then I am going to sentence
19 you to ninety days in the County Detention Center.

20 Now, let's make sure that we understand how we are
21 going to go from here. Mr. Buyck, I am going to ask you
22 to prepare an Order, which basically states the ruling
23 that The Court has just made.

24 I am going to sanction Mr. Weaver, because I find
25 this to be a repetitive and frivolous filing; volitive of



1 the previous courts orders. I am going to require you to
2 pay attorney fees. And I am going you to require you to
3 attach an Affidavit of Attorney Fees to the proposed
4 order that you provide us electronically.

5 Once the Order is signed, Mr. Weaver will have
6 thirty days to pay those fees. Failure to do so within
7 thirty days, he will have to serve ninety days in the
8 County Detention Center.

9 Please understand, and I want it noted in the Order
10 that an appeal of this decision will not prevent a
11 trigger of the time frame he must pay it and then appeal,
12 otherwise this Court will enforce this Order and place
13 him in the County Detention Center. Do you have any
14 questions about what I have directed to be contained
15 within the Order, Mr. Buyck?

16 **MR. BUYCK:** Let me clarify it. Would this be the
17 fees generated subsequent to Judge Lockemy's, the date of
18 Judge Lockemy's Order ending the case?

19 **THE COURT:** No, sir. This is from the day of the
20 filing of 180, what we are here about today being your
21 responsive pleadings, your Motions, whatever we have
22 done, today's time, everything from that day forward, not
23 from Judge Lockemy's Order. What I have today, really is
24 before me in the case 180, let that be the trigger date,
25 the filing of 180.



1 Again, in your Affidavit, please account for the
2 time so that it can be readily reviewed, and The Court
3 will be prepared to first of all review it myself to
4 determine whether if it appears fair under the
5 circumstances, and then issue an Order that would be
6 consistent therein. All right, that is the decision of
7 The Court.

8 Mr. Weaver, we cannot have any further filings over
9 these issues. These matters are done.

10 This Court is in recess in this case.

11 MR. WEAVER: Your Honor, I am going to file a
12 Motion and a Notice of Appeal.

13 THE COURT: All right. But, Mr. Weaver, please be
14 very careful. You are certainly welcome to appeal. But,
15 please note, the Order is requiring you to make payment,
16 otherwise it is going to trigger the arrest for failure
17 to make payment within the thirty days.

18 If you wish relief from that, you will have to get a
19 supercedeas from the Appellate Courts, all right, sir?

20 MR. WEAVER: I understand that.

21 THE COURT: All right, sir. Very good. Then that
22 is The Court's Order. Thank you.

23 MR. WEAVER: There will be an objection on that for
24 abuse of discretion and clear error of law and fact.

25 THE COURT: Very good, and that will ultimately be

22
A

1 decided by the Appellate Court. But, this Court has made
2 its decision.

3 Good luck to you, sir.

4 MR. BUYCK: Thank you, Your Honor.

5 -- END OF REQUESTED TRANSCRIPT --

23

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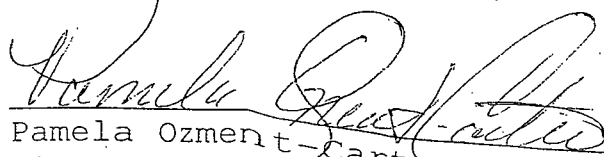
CERTIFICATE OF REPORTER

19

I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and partial Transcript of Record in the trial of the above captioned case, relative to appeal, in The Court of Common Pleas in Dillon County, South Carolina, on the 3rd day of November 2009.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

June 22, 2010


Pamela Ozment-Cartee
Circuit Court Reporter

24

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) CASE NO.: 04-CP-17-232

PROGRESS ENERGY CAROLINAS,)
INC.,)

PLAINTIFF,)

VS.)

MUTUAL RELEASE

GARY WEAVER AND BEATRICE)
WEAVER,)

DEFENDANTS.)

.....
The case of Progress Energy Carolinas, Inc., v. Beatrice Weaver and Gary Weaver CA #

2004-CP-17-232 will be dismissed on the following terms and conditions:

- (1) Payment from Beatrice Weaver and/or Gary Weaver to Progress Energy Carolinas, Inc in the amount of \$3,110.44 as follows:

September 18, 2007 - \$1,000.00 (upon the execution of this release)

October 18, 2007 - \$1,000.00

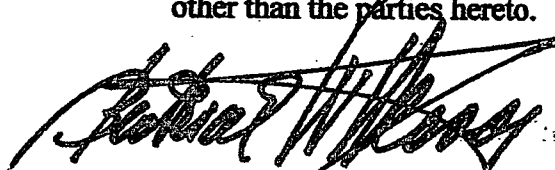
November 18, 2007 - \$1,110.44
- (2) Progress Energy Carolinas, Inc will reinitiate electrical service to 1253 Harlees Bridge Road, Dillon, SC 29536 in the name of Beatrice Wallenstein Living Trust upon payment of the first \$1,000.00 referenced above and upon payment of the normal and customary security deposit.
- (3) Beatrice Weaver, Gary Weaver and Progress Energy Carolinas will dismiss any complaint and any response thereto relating to any matter currently pending before the South Carolina Public Service Commission.

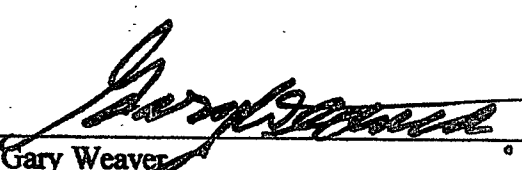
EXHIBIT "A"

[Handwritten signatures and initials]
25
[Circular stamp]

September 17, 2007.

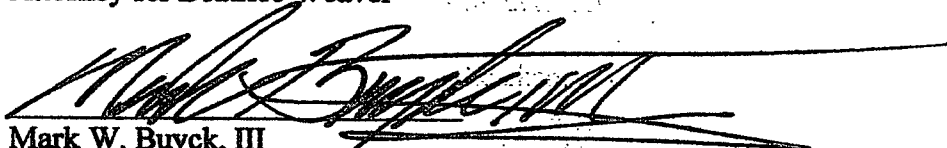
- (5) Progress Energy Carolinas, Inc will consent to a request by Beatrice Weaver, Gary Weaver or the Beatrice Wallenstein Living Trust for a change of service provider to the premises owned by the said Trust or by Mrs. Weaver or by Mr. Weaver, and they acknowledge that the ultimate decision regarding the change of service will be subject to negotiations between the Progress Energy Carolinas, Inc. and the substitute service provider. There is no guarantee that Progress Energy will ultimately approve the change of service if such change of service involves any potential loss of current or future customers of Progress Energy Carolinas, Inc., other than the parties hereto.


Beatrice Weaver


Gary Weaver

We Consent:


Daniel H. Shine
Attorney for Beatrice Weaver


Mark W. Buyck, III
Attorney for Progress Energy Carolinas, Inc.



STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2008-CP-17-180

GARY WEAVER, BEA Wallenstein,
and B.E.A. Wallenstein Hospice Inter
Vivos Trust,)

Plaintiffs Pro Se,)

vs.)

Progress Energy Carolinas, Inc.,)
William Johnson, and John Does 1-20,)

Defendants.)

RULE 12(b) MOTION TO DISMISS

The undersigned, appearing specifically for the limited purpose of presenting lack of jurisdiction issues, does hereby move for an Order of Dismissal pursuant to S.C.R.C.P. Rule 12(b)(2), S.C.R.C.P. Rule 12(b)(4), and Rule 12(b)(5). The grounds for the Motion are as follows:

1. The Plaintiff initiated a Pro Se Complaint against the Defendants Progress Energy Carolinas, Inc., William Johnson, and "John Does". The Complaint was filed with the Dillon County Clerk of Court on or about May 30, 2008.

2. The Plaintiff has not affected service on either the individual Defendant, Mr. Johnson, or the Corporate Defendant Progress Energy Carolinas, Inc., therefore this Court does not have personal jurisdiction of the Defendants.

3. The case now appears on the trial roster for a term of court in Dillon County commencing on August 10, 2009. Based on the foregoing it is requested that the Court dismiss

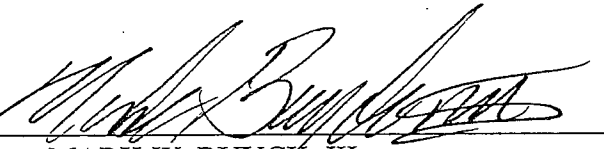
27



the pending action and remove the case from the trial roster.

RESPECTFULLY SUBMITTED.

WILLCOX, BUYCK & WILLIAMS, P.A.

By. 

MARK W. BUYCK, III

I.D. No.: 011902

PO Box 1909

Florence, SC 29503-1909

(843) 662-3258 - Tel

(843) 662-1342 - Fax

ATTORNEY FOR DEFENDANTS

Progress Energy Carolinas, Inc. and
William Johnson ✓

August 4, 2009

FILED
GWEN T. HYATT FORM 4

2010 JAN -6 AM 9:40

CLERK OF COURT
DILLON COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF DILLON

Gary Weaver, et al,

Plaintiffs,

v.

Progress Energy Carolinas, Inc., et al,

Defendants.

IN THE COURT OF COMMON PLEAS

Case Number: 08-CP-17-0180

**ORDER DENYING PLAINTIFF'S
MOTION TO RECONSIDER, ALTER,
OR AMEND JUDGMENT AND FOR
EXTENSION OF TIME TO FILE
PLEADINGS**

Received: Thurs. Jan 14/2010
(3:00 PM)
GLB

IT IS ORDERED AND ADJUDGED:

Plaintiff has moved to reconsider this Court's Final Order filed December 1, 2009, dismissing Plaintiff's case and imposing sanctions against Plaintiff. In that final Order, the Court found this litigation to be successive, vexatious, and directly violative of previous Court Orders finding the issues raised in this lawsuit to be res judicata. After review, this Court finds no reason to alter or amend its previous decision dismissing the case and imposing sanctions. The previous decision is confirmed. Plaintiff's Motion to Reconsider, Alter, or Amend is **DENIED**. This Court further declines to grant any extension of time to file an appeal. This matter has been fully litigated previously and is now ended at the trial level.

IT IS SO ORDERED.

Dated at Hartsville, South Carolina, this 4th day of January, 2010.

[Signature]
J. Michael Baxley, Presiding Judge

This Judgment was entered on the 6 day of January 2010, and a copy mailed first class this 6 day of January 2010 to attorneys of record as follows:

Pro Se Plaintiff
Gary Weaver
Post Office Box 539
Little Rock, SC 29567

Attorney for the Defendants
Mark W. Buyck, Jr., Esquire
Post Office Box 1909
Florence, SC 29503

**A CERTIFIED
TRUE COPY**
[Signature]
**CLERK OF COURT
DILLON COUNTY**

[Signature]
CLERK OF COURT

29

29

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2001-249-E - ORDER NO. 2001-1095

DECEMBER 5, 2001

IN RE: Gary Weaver,) ORDER DISMISSING
Complainant,) COMPLAINT WITH
) PREJUDICE
-vs.-)
)
Carolina Power & Light Company,)
)
Respondent.)

I. INTRODUCTION AND SUMMARY OF TESTIMONY

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Complaint of Gary Weaver against Carolina Power & Light Company (CP&L or the Company). Weaver's Complaint alleged, among other things, improper billing practices and procedures, including improperly billed amounts by the Company. CP&L denied the allegations of the Complaint. For the reasons stated below, we dismiss the Complaint on its merits, with prejudice.

A hearing was held on the matter on November 27, 2001 at 2:30 PM in the offices of the Commission. The Honorable William Saunders, Chairman, presided. Gary Weaver represented himself pro se. CP&L was represented by Len S. Anthony, Esquire. The Company presented the testimony of Gregory A. Cagle. The Commission Staff was represented by F. David Butler, General Counsel. The Staff presented the testimony of April Sharpe.

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DECEMBER 5, 2001
PAGE 2

Weaver testified in support of his complaint. Weaver alleged that CP&L had violated its own conditions for conduct of the Equal Payment Plan (EPP) with respect to Weaver's account, in arbitrarily increasing his EPP amount without notice. Weaver also stated that CP&L has consistently charged late charges incorrectly and cumulatively. In addition, Weaver alleged that the Company disconnected his service in violation of Commission regulations, for example, without prior notice. Weaver also states that CP&L harassed him. With regards to billing, Weaver stated a belief that CP&L has been inconsistent, incorrect, arbitrary and confusing, and that CP&L disregarded payment arrangements made. Weaver requested sanctions and damages against CP&L, a refund order, and other relief. (We would note parenthetically that we are without authority to award sanctions and damages in this case, nor are we able to rule on Weaver's request that we declare CP&L to have engaged in unfair trade practices.) Weaver testified that CP&L at times apparently held his checks for payment up or otherwise mishandled them. Parties and Commissioners attempted to propound questions to Weaver with regard to his ability to pay his bill. Inquiries into his finances were rebuffed with comments like "That's none of your business." Weaver would only state that \$280 per month plus or minus could be paid on the electric bill.

Gregory Cagle, Project Analyst-Regulatory Affairs for Progress Energy Services, testified for CP&L. Cagle stated that Mr. Weaver and his wife own a three-story house and approximately 200 acres of farmland near the community of Little Rock, South Carolina, which is outside of Dillon, and have lived there since 1994. (Weaver disputes ownership, stating that the house and farmland are owned by a trust.) Cagle stated that

DOCKET NO. 2001-249-E- ORDER NO. 2001-1095

DECEMBER 5, 2001

PAGE 3

there are several other metered buildings on the property, including a guest cottage. Cagle opined that, as residential customers go, Mr. Weaver and his wife are relatively large users of electricity. The main house has a 400-amp service entrance, compared to the 200-amp service entrance installed on the vast majority of residences. Cagle further states that electrical consumption in the main house over the last five years has averaged about 2250 kilowatt-hours per month, and their overall bills have averaged about \$280 a month. The monthly CP&L bill for the main house presently includes a basic facilities charge, energy charges for metered service, \$67.86 per month for six 9500 lumen sodium-vapor area lights, \$57.99 per month for payment on CP&L loans for heat pumps and energy efficiency upgrades installed in early 1999, and a monthly lease payment of \$9.49 for CP&L-owned surge suppression equipment and associated state and local sales taxes. Cagle notes that because the account is in arrears, the monthly bills typically include a 1% late payment charge on one or more of the above-listed items. All but the lease payment of \$9.49 for the surge suppression equipment and taxes are charges approved by this Commission and reflected in CP&L's filed tariffs.

According to Cagle, the records of CP&L reflect that Weaver consistently makes partial payments, intentionally withholding payment for specific line items that he disputes. He often pays his monthly bill using multiple checks earmarked for specific components of the bill. Sometimes he pays using a mixture of present-dated and post-dated checks with handwritten processing instructions that require special handling by CP&L. The result, according to Cagle, is an extremely convoluted accounting record, and an unusually labor-intensive account to administer.

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DECEMBER 5, 2001

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At the time of the hearing, Weaver's account balance was \$4,625.89. Cagle noted that much of the debt was accumulated during a nearly four-year period (March 1997 to December 2000) when Weaver's account was on CP&L's Equal Payment Plan. The EPP is a tool designed to help customers budget for electric bills by establishing a twelve-month "levelized" monthly payment based on historical data. The problem was that throughout the 46 months that Weaver was on the EPP, his monthly EPP amount was set, at Weaver and/or his wife's insistence and against CP&L's recommendations-at a level substantially below the amount of his actual monthly usage. The result, according to Cagle, was that regardless of whether he paid his bills on time and in full, his EPP deficit balance grew with each passing month. CP&L records show that at the end of his first year on EPP, Weaver's deficit account balance was approximately \$1500. By the time he was removed from EPP in December 2000, his deficit balance had grown to more than \$3,000. In the eleven months since his removal from EPP, Cagle states that Weaver's debt has grown to more than \$4,000, mainly because of Weaver's partial payments on his monthly bills, and his refusal to make payment arrangements for (or even acknowledge the existence of) his debt.

Cagle states that Weaver paid his EPP bills on time and in the proper amount only when his account was on bank draft. Out of twenty-three months when Weaver was not on bank draft, CP&L records show that Weaver was late a total of eighteen times, and paid the full amount of the EPP bill only five times. Weaver's monthly arrearage built up to the point that his EPP payment required in December 2000 was \$2,012.56. When Weaver defaulted on this payment, CP&L removed him from the plan. Cagle further

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PAGE 5

notes that even when Weaver paid the required EPP amount on time, his debt was continuing to accumulate because his monthly EPP was always too low to cover his average monthly consumption, let alone reduce his debt.

Cagle noted that the Company attempted several times to increase the amount of the EPP, however, each notice drew a round of phone calls from the Weavers, who would call until they were successful in having a Company representative set an EPP figure that they considered appropriate. Invariably, though, this amount was insufficient to lower the amount of debt. Cagle notes that the Company attempted to remedy the situation, but the Weavers have fought each attempt with either pleas for sympathy and lenience on the grounds of ill health and limited/fixed income, or with indignant, threatening letters to the Commission accusing CP&L of negligence and/or incompetence.

In response to Weaver's allegations of CP&L consistently charging late charges incorrectly and cumulatively, Cagle states that CP&L has billed late payment charges in strict accordance with the filed tariff and the referenced Commission rule, and in a fashion consistent with all other customers. Cagle states that Weaver's allegations regarding the charging of late payment charges are at best vague and unsubstantiated.

With regard to the subject of electric service disconnection, Cagle discusses Weaver's allegations that the Company violated several rules regarding prior notice to the customer. Cagle notes that the Company followed all of the appropriate rules, and did not violate any of them.

In summary, Cagle states that since January 1997, CP&L has accurately billed the Complainant for both Commission-regulated services and unregulated services. Further,

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PAGE 6

Cagle has not discovered any billing adjustments that should be made to Weaver's residential account. Lastly, Cagle asserts that all of Weaver's bills since January 1999 have been prepared in accordance with CP&L's standard billing practices, procedures, and programs which are used to bill all of CP&L's customers.

The Commission Staff presented the testimony of April Sharpe, Manager of the Commission's Consumer Services Department. Mrs. Sharpe presented the findings of the Department's Complaint investigation.

Mrs. Sharpe noted that Weaver filed a letter of complaint against the Company on December 27, 2000. In his complaint, he claimed that the Company threatened termination of service after a payment agreement was made by telephone on December 8, 2000 with a Company customer service representative. According to the Company, Mrs. Weaver called and talked with a customer service representative, but there was no payment agreement made. Mrs. Sharpe pointed to the Company's record of customer contact history, which indicated that Mrs. Weaver advised that she could pay \$412.28 of the charges billed. Payments totaling \$434.17 posted to the Weaver account on December 13, 2000, leaving a balance of \$3,016.57. On December 15, 2000, the Company sent a discontinuation notice for payment of the past due amount of \$918.02 to avoid disconnection.

Mrs. Sharpe went on to summarize Weaver's payment history while on the EPP. Mrs. Sharpe noted that her review of Company records revealed that Mr. Weaver did not pay the amounts as billed by past due dates for August, September, October, November, and December of the year 2000.

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DECEMBER 5, 2001

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Mrs. Sharpe stated a belief that the Company should have removed Weaver from the EPP as soon as he failed to comply with the payment requirements of the agreement, and it should have not agreed to adjust the EPP to lower payments which resulted in an increasing balance. The Company records showed that Mr. Weaver had a history of late payments which resulted in late payment charges as authorized by Commission Regulation 103-339(3). Further, Ms. Sharpe stated that Weaver has not met his obligation to pay the Company for the electric services he received as prescribed by Commission Regulation 103-341(2).

Mrs. Sharpe also expressed the opinion after her investigation that CP&L complied with the following Commission regulations: 103-340(5) to provide payment by the Equal Payment Plan; 103-352(A) and (B) to send the customer 10 and 2 day written notices of service disconnection for non-payment; and 103-352(C) to offer the customer a deferred payment plan for payment arrangements for an outstanding account balance.

Mrs. Sharpe concluded that the Company has attempted reasonable efforts for collection of the outstanding account balance, and the customer has not met his obligation to pay the Company for the electric services he received. As of October 31, 2001, Weaver's account balance was \$4,362.81.

We would note that there was also discussion in the testimony of the various witnesses about difficulties with Weaver's outside lighting. However, we believe that these issues have been resolved with our separate ruling granting in part Weaver's partial motion for summary judgment. See Order No. 2001-1090.

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DECEMBER 5, 2001

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Also, it should be stated that counsel for CP&L moved for a directed verdict and for dismissal at the end of Weaver's case. He also renewed his motion for a directed verdict at the end of all of the evidence.

II. DISCUSSION

First of all, we would state that our view of the matter after hearing all of the evidence in this case is that Weaver's testimony lacks credibility when compared with the testimony of the Company and the Commission Staff. Clearly, Weaver's ability to pay his bill was relevant in this case, considering the large amount of arrearage accumulated by him. His refusal to answer relevant questions related to this subject contribute to our belief that Weaver simply failed to prove his case. Further, after hearing all of the testimony, we simply do not believe that CP&L violated any Commission regulations in its handling of this case, although we do believe that the better practice would have been to have either removed Weaver from the EPP as suggested by Mrs. Sharpe, or, in the alternative, to have set the EPP at a level where no further arrearage accumulated. However, it appears to us that CP&L acted pursuant to humanitarian instincts in both keeping him on the EPP and not increasing the amount of the monthly payment under the plan. We therefore understand the Company's actions in this case with regard to the EPP Plan, and we do not believe that the Company violated any regulations in this regard.

The Findings of Fact and Conclusions of Law below will lay out our reasoning in this case, however, we would point out that our ultimate dismissal of this case is based on Weaver's failure to prove his case before us, rather than through a ruling on CP&L's Motions for Directed Verdict and Motion to Dismiss. We believe that Motions for

Directed Verdict under Rule 50, SCRCF are only appropriate in jury trials. Therefore, both Motions for Directed Verdict are denied. Further, CP&L's Motion to Dismiss at the end of Weaver's case is denied. During the course of his testimony, CP&L alleges that Weaver failed to demonstrate an inability to pay his electric bill. CP&L made its Motion to Dismiss on this basis. This Motion is denied, because, as is seen from the totality of the testimony, the issues in this case are broader than the question of ability to pay.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Complainant, Gary Weaver, is a retail residential electric customer of Carolina Power & Light.
2. Weaver is a relatively large residential user of electricity, with a five year electrical consumption in the main house of about 2250 kilowatt-hours per month.
3. Weaver's complaint entailed references to CP&L's alleged violations of procedures and Commission regulations in the area of the Equal Payment Plan, late charges, disconnection, and billing. Weaver also claims harassment by CP&L.
4. At the time of the hearing, Weaver's CP&L account balance was \$4,625.89.
5. When CP&L attempted to "true-up" the amount of the EPP, Weaver and/or his wife prevailed on CP&L's humanitarian instincts to keep the payment at a level where arrearages continued to accumulate.
6. Weaver consistently makes partial payments.
7. Weaver was late in his payments to CP&L a total of eighteen times out of twenty-three payments.

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DOCKET NO. 2001-249-E -- ORDER NO. 2001-1095

DECEMBER 5, 2001

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8. The disconnection of Weaver's service was done with the proper notices.
9. Since January 1997, CP&L has accurately billed the Complainant for both Commission-regulated services and unregulated services. Since January 1999, Weaver's bills have been prepared in accordance with CP&L's standard billing practices, procedures, and programs which are used to bill all of CP&L's customers.
10. Weaver has failed to prove his case, and his testimony lacks credibility. When asked about his ability to pay his electric bills, Weaver consistently refused to answer inquiries from both the parties and the Commissioners themselves. Weaver's ability to pay was relevant in the Commission's determination of this case.
11. CP&L properly followed Commission Regulation 103-339(3).
12. Weaver has not met his obligation to pay the Company for the electric services he received as prescribed by Commission Regulation 103-341(2).
13. CP&L complied with Regulation 103-340(5) on the Equal Payment Plan. Proper notice was given Weaver when true-ups were attempted.
14. CP&L complied with Regulation 103-352(A) and (B) to send the customer 10 and 2 day written notices of service disconnection for non-payment of his electric bill.
15. CP&L complied with Regulation 103-352(C) when it offered Weaver a deferred payment plan for payment arrangements for an outstanding account balance.
16. CP&L did not "harass" Weaver.
17. CP&L's Motions for Directed Verdict are denied, since such Motions under Rule 50, SCRCR are reserved for jury trials.

DOCKET NO. 2001-249-E - ORDER NO. 2001-1095

DECEMBER 5, 2001

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18. CP&L's Motion to Dismiss is denied, since it was based only on Weaver failing to show a lack of ability to pay. As shown above, there were multiple issues in this case.

19. Weaver's complaint is without merit and must be dismissed with prejudice. Weaver failed to demonstrate an inability to pay the amount due for residential electric service consumed by him as billed by CP&L. Additionally, Weaver was evasive and non-responsive to questions regarding his ability to pay his electric bill. Further, Weaver failed to demonstrate any error in CP&L's billing practices and procedures, and failed to demonstrate that the balance stated on his bill was incorrect. Weaver also failed to demonstrate harassment by CP&L, and failed to demonstrate that all proper notices were not given to him prior to attempted true-ups on the EPP, and prior to disconnection.

20. Weaver's complaint is hereby dismissed, with prejudice.

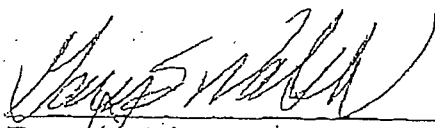
21. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:



Executive Director

(SEAL)

38

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
CA NO. 2004-CP-21-703

GARY WEAVER,

Plaintiff Pro Se,

vs.

CAROLINA POWER AND LIGHT
COMPANY (PROGRESS ENERGY),
JOHN AND JANE DOES 1-20,

Defendants

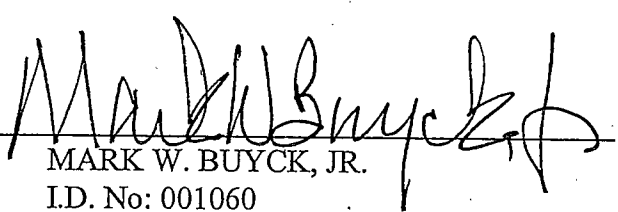
DEFENDANTS' MOTION TO DISMISS

FILED
2004 SEP 14 P 4:26
COMPTON R. BELL
CLERK OF COURT
FLORENCE COUNTY SC

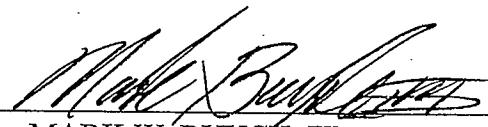
COMES NOW the movant, Defendant Progress Energy Carolinas, Inc., by and through its attorneys, and files this Motion to Dismiss and in support thereof relies upon the authority of SCRCP 12(b) or in the alternative SCRCP Rule 56.

The Court is also respectfully referred to the Memorandum of Points and Authorities submitted in support hereof, which memorandum movant reserves the right to supplement prior to the hearing of this motion.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 

MARK W. BUYCK, JR.
I.D. No: 001060

By: 

MARK W. BUYCK, III
I.D. No.: 011902
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEYS FOR DEFENDANTS

September 14, 2004

A TRUE COPY
39
Beck
CLERK OF COURT
FLORENCE COUNTY SC

County of Florence County

2004 CP-21-703

Gary WeaverCarolina Power and
Light Company et al

Plaintiff(s)

Defendant(s)

Check one:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT** This action came to trial or hearing before the court. The issues have been tried or heard and decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41 (a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the court:

FILED
2004 DEC 21 A 9:23
JUDITH R. BELL
Clerk of Court
FLORENCE COUNTY SC

Dated at Florence, South Carolina, this _____ day of _____, 2004.

PRESIDING JUDGE

This judgment was entered on the 20 day of Dec, 2004, and a copy mailed first class this 21 day of Dec, 2004 to attorneys of record or to parties (when appearing pro-se) as follows.

Gary Weaver Pro Se
P.O. Box 7682
Florence, S.C. 29502
Attorney(s) for Plaintiff(s)

Mark W. Buyck, Jr.
P.O. Box 1909
Florence S.C. 29503
Attorney(s) for Defendant(s)

Connie R. Bell
Florence County Clerk of Court
SCRPC FORM 4 (REVISED 5/00)

SCRPC APP-24

CERTIFIED: A TRUE COPY
Connie R. Bell
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS

CA NO. 2004-CP-21-703

GARY WEAVER,)
)
Plaintiff Pro Se,)

vs.)

CAROLINA POWER AND LIGHT)
COMPANY (PROGRESS ENERGY),)
JOHN AND JANE DOES 1-20,)
)
Defendants)

ORDER

CERTIFIED: A TRUE COPY

Connie R. Beel

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

CLERK OF COURT
C.P. & G.S.
FLORENCE COUNTY, S.C.

2004 DEC 20 P 3:43

FILED

Mr. Weaver, the Pro Se Plaintiff, initiated this action by filing a Summons and Complaint with the Florence County Court of Common Pleas on April 15, 2004. The Complaint was not served on the Corporate Defendant until August 16, 2004. The Defendant filed a Motion to Dismiss relying upon the authority of S.C.R.C.P. Rule 12 (b) or in the alternative S.C.R.C.P. Rule 56. The Defendants Motion to Dismiss and Memorandum of Points and Authorities in Support of the Motion to Dismiss were filed on September 14, 2004. A hearing on this matter was originally scheduled for November 15, 2004 but was continued at the request of the Plaintiff. The hearing was rescheduled for November 22, 2004 before the undersigned. Immediately prior to the rescheduled hearing the Plaintiff submitted a thirty-two (32) page Memorandum in Opposition to Defendant's Motion to Dismiss. The Plaintiff's Memorandum was also accompanied by affidavits and numerous lengthy exhibits. During the hearing the parties agreed to submit the matter to the Court for a ruling based on the Memoranda. For the reasons outlined below, the Court grants the Defendant's Motion to Dismiss in its entirety.

The parties had been involved in a long running dispute regarding the provision of electricity

to the Defendant's residence at 1253 Harllees Bridge Road in Dillon County.¹ Mr. Weaver contracted with the Defendant for electrical service on June 20, 1994. On April 11, 1996 Mr. Weaver contracted with the Defendant to provide outdoor lighting service on the property. Shortly after the installation of the outdoor lighting service Mr. Weaver began making complaints regarding the service of the Defendants, the reliability of the equipment and the billing of his account. On June 4, 2001 the Plaintiff filed a formal Complaint against the Defendant with the Public Service Commission of South Carolina (hereinafter "PSC"). Copies of relevant orders of the PSC were included in both the Defendants Motion to Dismiss and the Plaintiff's Memorandum in Opposition. During the pendency of the PSC complaint the Commission directed the Defendant to eliminate the area light service fees and charges in Weaver's account for the period from August, 2000 and November 27, 2001 due to his claims of unsatisfactory service. The Defendant complied with this direction by crediting Weaver's electric service account on December 4, 2001.

On December 5, 2001, the PSC issued Order Number 2001-1095, entitled "Order Dismissing Complaint with Prejudice" dismissing the remainder of Weaver's Complaint against CP&L. Following the issuance of Order Number 2001-1095 Mr. Weaver filed numerous Motions with the PSC requesting a rehearing, Motions to Compel, Motions of Reconsideration, etc. Mr. Weaver then appealed to the Dillon County Court of Common Pleas in Case Number 2002-CP-17-090. On April 19, 2002 the Honorable Paul Michael Burch issued an Order dismissing Weaver's Complaint and Appeal with prejudice. Judge Burch noted that Weaver had failed to name the Public Service Commission as a party, failed to commence his action within thirty (30) days and failed to direct the Court's attention to any abuse allegedly committed.

¹The Complaint indicates that Mr. Weaver also maintains an address at 701 West Palmetto Street in Florence and that his spouse is a permanent resident of the Dillon County property.

The instant Complaint is nothing but a rehash of the Plaintiff's various complaints and charges lodged against the Defendant before the Public Service Commission. All of the Plaintiff's charges stem from his dissatisfaction with the "installation, operation, repair and maintenance of area security lights" (see Complaint, Paragraph 9).

The Defendants have advanced several bases for dismissing the Plaintiff's claims. Each of the Defendants theories is sufficient standing alone to warrant dismissal of the Plaintiff's claims.

I. The Plaintiff's claims are barred by the Filed Rate Doctrine.

The Filed Rate Doctrine requires consumers and providers of regulated service to comply with the tariff filed with the regulatory agency responsible for enforcement of the rate and service requirements.

The South Carolina Public Service Commission is vested with the power and jurisdiction to supervise and regulate the rates and services of every public utility in this State. (See S.C. Code Ann. §§ 58-3-140, 58-5-210, 58-27-40, 58-27-140, 58-27-150, and 58-27-160.) The area lighting service complained of by the Plaintiff is a regulated tariffed service on file with and approved by the Public Service Commission. The Commission has the sole jurisdiction to hear complaints regarding such services. In *Clarke vs. General Telephone Company of the Southeast*, 268 S.C. 92, 232 S.C. 2d. 26 (1977), the Supreme Court held that failure of a consumer to timely submit a complaint to the Public Service Commission is fatal, and the consumer is foreclosed from bringing a subsequent action challenging the rate and service of the utility. Based on the reasoning in *Clarke*, Weaver's Complaint must be dismissed as the Filed Rate Doctrine prohibits collateral attacks on services provided by an utility pursuant to a filed tariff.

II. The Plaintiff's claims before this Court are barred by the Doctrine of Res Judicata.

The Plaintiff's Complaint should be dismissed because res judicata clearly precludes this Court from adjudicating the Plaintiff's claims. Res judicata applies where there is: (1) identity of parties; (2) identity of subject matter; and (3) adjudication of the issue in the former suit. *Hilton Head Center of South Carolina vs. The Public Service Commission of South Carolina*, 294 S.C. 9, 362 S.C. 2d. 176 (1987); *Lowe vs. Clayton*, 264 S.C. 75, 212 S.C. 2d. 582 (1975).

The Plaintiff litigated before the PSC his claims regarding the area lighting service at issue in this Complaint. The Commission ruled upon this matter and ordered CP&L to provide a credit to the Plaintiff, which CP&L promptly did. The Plaintiff did not properly perfect his appeal of the Commission's Order ruling upon this matter and the Circuit Court dismissed it with prejudice. This belated attempt by Mr. Weaver to re-litigate these identical matters is barred by res judicata and collateral estoppel.

III. The Plaintiff has failed to exhaust his administrative remedies following the final order of the Commission on December 5, 2001.

S.C. Code § 58-3-140 vest with the PSC the "power and jurisdiction to supervise and regulate the rates and services of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." The PSC is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State." (S.C. Code Ann. § 58-5-210). Before appeal can be had to the Circuit Court the complainant must exhaust his administrative remedies, S.C. Code Ann. § 1-23-380(a). A review of the PSC Order dismissing Mr. Weaver's claim clearly indicates that the area lighting service was the main issue before the PSC. The Plaintiff's appeal of this Order to the Circuit Court was summarily dismissed.

as being untimely. The Plaintiff failed to appeal this dismissal. The Plaintiff's attempts to re-litigate the same issues nearly two and a half (2-1/2) years later is completely unfounded. There must be an ultimate conclusion to any litigation. While it is apparent to the Court that the instant Complaint is limited to the issues initially before the Public Service Commission, to the extent, if any, any new matter involving the jurisdiction of the Public Service Commission has been alleged, such new matter must first be addressed before the Public Service Commission.

IV. The claims now before the Court are barred by the statute of limitations.

The complaint purports to allege sixteen (16) separate causes of action against the Defendant. Many of the allegations fail to state a cause of action upon which relief can be granted. To the extent that the allegations can be read to allege valid causes of action, any such cause of action is either precluded by the applicable statute of limitations, precluded by the 2002 Order of Judge Burch or precluded by the Plaintiff's failure to exhaust or even pursue administrative relief. In particular, the Plaintiff's breach of warranty claims are precluded by the statute of limitations. The PSC Order Number 2001-1090 issued on November 30, 2001 determined "that there was some difficulties in the provision of service by CP&L to the security lights, and accordingly we would grant the part of Weaver's Motion with regards to service to these lights." The Public Service Commission ordered CP&L to eliminate fees and charges related to Mr. Weaver's area lighting from August 20 through November 27, 2001. In response to Weaver's request for reconsideration the PSC issued Order Number 2002-27 on January 16, 2002. In that Order the Commission specifically found that as of August, 2000, the area light service was malfunctioning to a point that it would entitle Weaver to a credit for any service after that date.

#5/6/02

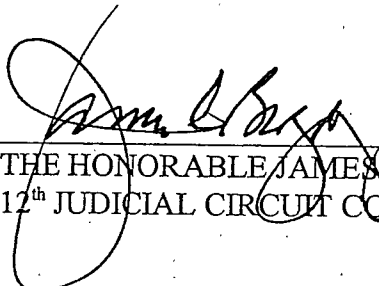
S.C. Code Ann. § 15-3-530 establishes a three (3) statute of limitations for an action upon a contract, obligation, or liability, expressed or implied. § 15-3-530(4) establishes the same three (3)

year statute of limitations for an action for taking, detaining, or injuring any goods or chattels. It is clear on the record before the Court that Mr. Weaver's various breach of warranty claims were all presented to the PSC in 2001. It is undisputed that Mr. Weaver knew no later than August, 2000, that he may have a claim against CP&L. Any breach of warranty claim which the Plaintiff now brings is precluded by the statute of limitations.

CONCLUSION

BASED ON THE FOREGOING, it is hereby,

ORDERED that the Defendant's Motion to Dismiss is granted in its entirety.



THE HONORABLE JAMES E. BROGDON, JR.
12th JUDICIAL CIRCUIT COURT JUDGE

#6
At Chambers

December 17, 2004

FILED
2004 DEC 20 P 3:43
JAMES R. BELL
CLERK & G.S.
FLORENCE COUNTY SC

CERTIFIED: A TRUE COPY

Connie R. Bell

CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

9
COPY

Rec'd
2/5/02
1/11/02

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-249-E - ORDER NO. 2002-27
JANUARY 16, 2002

IN RE: Gary Weaver,	)	ORDER DENYING
	)	RELIEF AND RULING
Complainant,	)	ON MEMORANDUM
	)	AND PETITION
vs.	)	
	)	
Carolina Power & Light Company,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) for consideration of two documents filed and served by Mr. Gary Weaver, the complainant in this case. The first document is a Memorandum Objecting to Procedures and Objecting to Carolina Power & Light Company's (CP&L's) Motion to Dismiss. Second, Weaver has filed a Petition for Rehearing or Reconsideration of Commission Order No. 2001-1090. Pursuant to the following reasoning, we hereby clarify certain of our prior rulings, but deny the relief sought by Weaver in the two documents.

First, with regard to the Memorandum Objecting to Procedures and Objecting to CP&L's Motion to Dismiss, we would note that Weaver claims that he has been denied both procedural and substantive due process regarding the disposition of the Summary

EXHIBIT "D"

Judgment and In Limine Motions. See Order No. 2001-1090. Weaver claims that he did not have an opportunity to participate in a full, fair, and impartial hearing before the Commission on these two motions. Weaver also claims that CP&L did have the opportunity to participate, and therefore CP&L received favored treatment to Weaver's disadvantage.

It must be stated that CP&L was not given any greater opportunity to participate in any proceeding regarding the above-mentioned Motions. No oral arguments were held regarding the Motion in Limine or the Motion for Partial Summary Judgment. CP&L was not given an opportunity to be heard on these subjects. The Motions were decided by this Commission solely on the written record before it. Therefore no advantage accrued to that Company.

Further, Commission Regulation 103-840(B) governs prefiled motions. The Commission has two options under this Regulation: (1) In its discretion, and after prior notice to all parties of record, the Commission may entertain oral argument and response on prefiled motions in advance of the hearing; or (2) Otherwise, such argument and response shall be made at the commencement of the hearing. In the present case, no party requested oral arguments on their motions. Next, pursuant to Regulation 103-803, "in any case where compliance with any of these rules and regulations produces unusual hardship or difficulty, the application of such rule or regulation may be waived by the Commission upon a finding of the Commission that such waiver is in the public interest." This Commission waived the provisions of Regulation 103-840(B), and decided the Motions on the record at the Commission meeting prior to the hearing on the merits of this case.



First, the Motions in question were very thorough and detailed in their written form, and provided a substantial amount of information for the Commission to review and rule upon during its Commission meeting. Thus, we found that with the wealth of information in the pleadings, an unusual hardship would be placed on the parties to require oral arguments when the pleadings were sufficient by themselves in outlining the positions of the two parties. Accordingly, we believed that it was in the public interest to rule on the written record, and we did so, waiving Regulation 103-840(B).

In addition, on page 18, paragraph 3, Weaver discusses his testimony at the merits hearing. We would hold that our other Commission Orders in this Docket discuss the merits of the case, and dispose of the case. Thus, we crave reference to those orders.

On page 18 of his Memorandum, Weaver asks for additional relief. In the first paragraph, Weaver asks that the verbal Motion to Dismiss be denied. This request is too late. Any objections must be stated during the hearing, and not after the evidence is closed. We would also note that Weaver has filed his Memorandum without permission of the Chairman. Commission Regulation 103-875 states that the presiding officer shall fix the time for filing and service of briefs. This rule allows all parties the opportunity to participate in filing any briefs after the conclusion of a case. No one requested permission to file briefs with the Commission after the hearing in this case, so Weaver's Memorandum is actually improper, although we are ruling on the various questions propounded by him.

We believe the same answer as stated above applies to the second paragraph under Section 1 in the Relief section of the Memorandum. In paragraphs 3 and 4 under

this Section, Weaver asks for reconsideration and an amendment to Order No. 2001-1090 to correct an alleged error in granting partial summary judgment. Weaver wants credit for area lighting to commence from March 4, 1999, not August 2000. On page 5, paragraph 9 of Weaver's Motion for Partial Summary Judgment, Weaver states that "on or about March 4, 1999, he called CP&L by telephone and inquired about the terms and conditions of the ALS agreement and informed CP&L through its telephone operator that the ALS security lights were malfunctioning and need repairs. Weaver also attaches a letter dated March 4, 1999 from CP&L allegedly in support of his allegation, however, the letter does not support the fact that Weaver complained about malfunctioning security lights on March 4, 1999. Accordingly, since there is no support in the record for modification of our August 2000 date, we must deny this request for reconsideration and amendment to Order No. 2001-1090. We believe that the evidence cited in Order No. 2001-1090 points to August 2000 as the proper date.

We now turn to Weaver's Petition for Rehearing or Reconsideration, dated December 14, 2001. In this document, Weaver seeks a definition of the Commission's legal authority for the position that we have no authority to determine negligence or whether the Unfair Trade Practices Act was violated. Additionally, Weaver wants to know what legal authority states that the Commission has no authority to award damages.

First, S.C. Code Ann. Section 58-3-140 (Supp. 2000) clearly outlines the powers of the Public Service Commission as to public utilities. Section (A) of this Code section states as follows: "The Public Service Commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to

fix just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, or observed and followed by every public utility in this State.” Nowhere in Section 58-3-140 does it state that this Commission has the authority to award damages, find negligence, or issue a decision regarding a violation of the Unfair Trade Practices Act. Further, the South Carolina Supreme Court has held that this Commission possesses only the authority given by the Legislature. See South Carolina Cable Television v. Public Service Commission, et.al., 437 S.E. 2d 38, 40 (1993).

Second, we would note that Section 39-5-140 of the Unfair Trade Practices Act states that, “any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act, or practice declared unlawful by Section 39-5-20 may bring an action individually, but not in a representative capacity, to recover actual damages.” This Commission, however, is not empowered by the Unfair Trade Practices Act or any other law to award the damages contemplated by that Act.

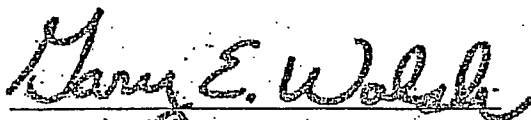
Accordingly, because of the reasoning stated above, although we have clarified some of our previous rulings in this matter, we deny all relief sought by Weaver in both

his Memorandum and his Petition for Rehearing. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)

10

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2001-249-E - ORDER NO. 2002-28
JANUARY 17, 2002

10

IN RE: Gary Weaver,) ORDER DENYING
Complainant,) PETITION
-vs.-)
Carolina Power & Light Company,)
Respondent.)

10

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Rehearing or Reconsideration of Commission Order No. 2001-1095 filed by Gary Weaver in this Complaint case. For the reasons stated below, the Petition is denied.

First, Weaver asks that the Commission excuse or delay compliance with Commission Order No. 2001-1095 "beyond the automatic stay of ten days" until issuance of a new Order. Weaver cites Rule 62 SCRCP for the proposition that a ten-day automatic stay of the Order is applicable. We disagree. Rule 62(f) states that the "ten day automatic stay" provisions of Rule 62 are cumulative to and do not supersede the right of any party to a stay of execution accorded by statute. In our case, S.C. Code Ann. Section 58-27-210 (1976) provides for a stay of the Commission's electric orders under certain circumstances. The language states "The Order shall take effect and become operative twenty days after service thereof, unless otherwise provided, and shall continue in

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force....(emphasis added).” Paragraph 21 of Commission Order No. 2001-1095 states that, “this Order shall remain in full force and effect until further Order of the Commission.” We hold that this language constitutes the unless otherwise provided language in Section 58-27-2120. We hold that Paragraph 21 in essence states that Order No. 2001-1095 takes effect upon issuance by the Commission. Weaver’s first request must therefore be denied, since Section 58-27-2120 provides that the Commission can specify when it wants its Order to go into effect, and we did so in Order No. 2001-1095.

Next, Weaver requests that this Commission order Carolina Power & Light (CP&L or the Company) to cease and desist from threats of disconnect. It does not appear to this Commission from the record that CP&L is in violation of Commission Regulation 103-343, which outlines insufficient reasons for denying service to a customer. Further, we found in Order No. 2001-1095 that CP&L was in compliance with Commission Regulations regarding the “equal payment plan,” notices of disconnection, deferred payment plan arrangements, and customer billing. Therefore, this request is denied.

Further, Weaver asks that this Commission order its Staff and CP&L to provide for the record information discussed in his Petition. Weaver claims that this information is needed for the record and was not objected to at the hearing on November 27, 2001. This request must also be denied. The Chairman of the Commission closed the record at the hearing on November 27, 2001, and no late-filed exhibits were requested to be filed after the close of the hearing.

Next, Weaver requests that the Commission order the submittal of Briefs as provided for in Regulation 103-875. We deny this request. The submittal of Briefs, as per

the regulation, is in the discretion of the Presiding officer at the hearing, and the Chairman did not order the submittal of Briefs in this case, nor did any party request to submit a Brief. Further, in any event, we do not believe that Briefs would be useful to us in considering the issues in this case.

In addition, Weaver petitions this Commission for a rehearing or reconsideration of Order No. 2001-1095 "as discussed hereinabove on the basis of the requested brief." This Commission made several specific findings in Order No. 2001-1095 regarding Weaver's credibility and his ability to pay. Further, this Commission made several findings regarding CP&L's compliance with our regulations. We based our decision on the record as a whole, and we believe that our decisions in Order No. 2001-1095 are supported by the record and the law.

Finally, Weaver alleges that this Commission made an error in dismissing his complaint "with prejudice." Order No. 2001-1095 fully set our reasoning in this matter. Our Order clearly shows Weaver's complete failure to prove his case. We believe that a dismissal with prejudice was appropriate in this case, as Weaver is not entitled to "two bites at the apple."

In addition, any further relief requested by Weaver in his Petition, but not herein addressed above is denied, based on the record and our findings in Order No. 2001-1095.

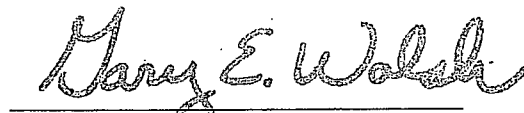
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Accordingly, the Petition for Rehearing or Reconsideration is denied. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:


Chairman

ATTEST:


Executive Director

(SEAL)

56

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17- **232**

Progress Energy Carolinas, Inc.,)
Plaintiff,) SUMMONS
vs.) (Non-Jury)
Gary Weaver and Beatrice Weaver,)
Defendants.)

FILED
GWEN T. HYATT
CLERK OF COURT
DILLON COUNTY
04 JUL -9 AM 11:06

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices: 248 West Evans Street, P O Box 1909, Florence, South Carolina 29503-1909, Tel. No. (843) 662-3258, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

DATED at Florence, S.C., this 7th day of July, 2004.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: Mark W. Buyck, Jr.
MARK W. BUYCK, JR.
I.D. No: 001060
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEYS FOR PLAINTIFF

A CERTIFIED
TRUE COPY

Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT **232**
CASE NUMBER 2004-CP-17-_____

Progress Energy Carolinas, Inc.,)
)
Plaintiff,)
)
vs.)
)
Gary Weaver and Beatrice Weaver,)
)
Defendants.)

COMPLAINT
(Non-Jury)

A CERTIFIED
TRUE COPY

Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

CLERK OF COURT
DILLON COUNTY

04 JUL -9 AM 11:06

FILED
GWEN T. HYATT

The Plaintiff, Progress Energy Carolinas, Inc., complains of the Defendants, Gary Weaver and Beatrice Weaver, and alleges as follows:

1. The Plaintiff is an electric utility organized and existing under the laws of North Carolina and authorized and doing business in the County of Dillon. **THIS IS AN ATTEMPT TO COLLECT A DEBT AND ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.**

2. Upon information and belief, the Defendant, Gary Weaver, is a citizen and resident of the County of Dillon, State of South Carolina.

3. Upon information and belief, the Defendant, Beatrice Weaver, is a resident of the County of Dillon, State of South Carolina.

4. Pursuant to an open account and contract between the Plaintiff and the Defendants, the Plaintiff, for consideration provided, electrical goods and services to the Defendants in exchange for monetary compensation pursuant to rates established by the South Carolina Public Service Commission. There is now due and owing to the Plaintiff by the Defendants the sum of Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97) as shown on the Statement of Account

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(Exhibit "A") attached hereto and made a part hereof by reference. No part of the balance due has been paid.

5. The Plaintiff has made repeated demands upon the Defendants for full payment of the account as set forth and the Defendants have failed and refused and continues to fail and refuse to pay any part of the account and the Defendants are indebted to the Plaintiff as of this date for the sum of Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97).

COUNT ONE
(ACCOUNT STATED)

6. The Plaintiff incorporates by reference paragraphs 1 through 5 above.

7. The Defendants owe the Plaintiff Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97), plus post-judgment interest from the date of the judgment as specified by statute.

COUNT TWO
(OPEN ACCOUNT)

8. The Plaintiff incorporates by reference Paragraphs 1 through 7 above.

9. The Defendants owe the Plaintiff Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97) in principal, plus post-judgment interest, as dictated by statute for delivery of services by the Plaintiff to the Defendant.

COUNT THREE
(BREACH OF CONTRACT)

10. The Plaintiff incorporates by reference Paragraphs 1 through 9 above.

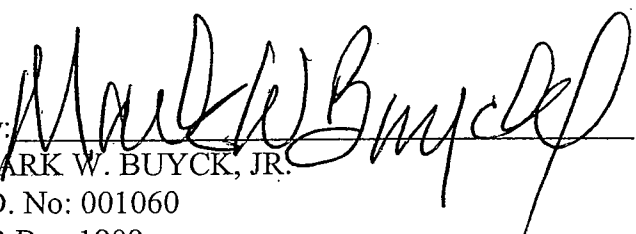
11. The Plaintiff and the Defendants entered into an agreement whereby the Plaintiff would provide the Defendants with electrical goods and services in consideration for which the Defendants would pay the Plaintiff for services provided.

12. The Plaintiff has provided the Defendants with the said services and the Defendants have failed to pay Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97), leaving an unpaid balance of Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97) in principal. The Defendants refuse to pay the Plaintiff the balance due.

13. The Defendants owe the Plaintiff Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97) in principal, pursuant to the terms of the contract with the Plaintiff.

WHEREFORE Plaintiff prays this Court will render judgment in its favor for Seven Thousand Ninety-one Dollars and 97/100 (\$7,091.97) as principal, plus post-judgment interest from the date of the filing of the judgment as dictated by statute, for court costs, and for such other and further relief as this Court may deem just and proper.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 
MARK W. BUYCK, JR.
I.D. No: 001060
PO Box 1909
Florence, SC 29503-1909
(843) 662-3258 - Tel
(843) 662-1342 - Fax
ATTORNEYS FOR PLAINTIFF

July 7, 2004

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO.

2004-CP-17-232

PLAINTIFF(S)

Progress Energy Carolinas

DEFENDANT(S)

GARY WEAVER

Beatrice Weaver

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

FILED
GWEN L. HYATT
2007 OCT -1 PM 1:35
CLERK OF COURT
DILLON COUNTY

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Per attorneys Case Settled - Formal
Order forth coming

Dated at Dillon, South Carolina, this 1 day of Oct, 2007

T. H. H. H.
PRESIDING JUDGE

This judgment was entered on the 1 day of Oct, 2007, and a copy mailed first class this 1 day of Oct, 2007 to attorneys of record on to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

Mark W. Buyck, Jr.

ATTORNEY(S) FOR THE DEFENDANT(S)

DAN SHINE
CLERK OF COURT

Progress Energy Carolinas, Inc.,)
)
 Plaintiff,)
)
 vs.) MOTION TO
) ENFORCE SETTLEMENT
)
 Gary Weaver and Beatrice Weaver,)
)
 Defendants.)
)

1. A copy of the Mutual Release representing the settlement of the above entitled action by and between the parties is attached hereto as Exhibit 1.

2. The Defendants have failed to comply with the terms set forth in the Mutual Release attached as Exhibit 1.

62 ~~SECRET~~

4. On September 21, 2007, Mrs. Weaver/Wallenstein filed the first of a series of filings with the Public Service Commission. The September 21 filing did not request that the action be dismissed, rather she requested that the Commission "expedite...formal responses to the outstanding pleadings which I require for the record, pending future proceedings" (See attached Exhibit 2).

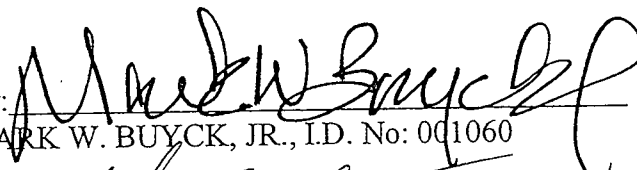
5. The Plaintiff in this action has complied with the terms of the settlement agreement insofar as acknowledging the Defendants' potential request for a change of service providers. The release and settlement document has been filed with the Public Service Commission. No alternative service provider has contacted Progress Energy Carolinas, Inc. as of the date of this Motion.

6. Progress Energy and the Defendants reached a negotiated settlement with Progress Energy giving up part of its debt in consideration of the terms of the Mutual Release. Both Progress Energy and the Defendants were represented by counsel at the time the Mutual Release was negotiated and signed by Beatrice Weaver and Gary Weaver with the consent of Attorney Daniel H. Shine representing Beatrice Weaver and Mark W. Buyck, III, attorney for Progress Energy Carolinas, Inc.

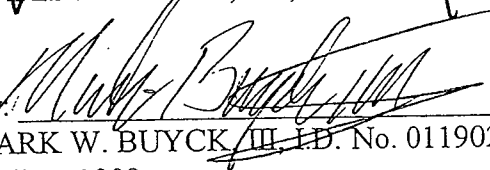
WHEREFORE, the Defendants having failed to comply with the settlement and Mutual Release, the Plaintiff hereby applies to the Court to compel the Defendants to comply with the terms of the Mutual Release and Settlement Agreement by dismissing any action or matter whatsoever which existed between the parties as of September 17, 2007, specifically the matters pending before the South Carolina Public Service Commission, at which time the Plaintiff will consent to a request

by Beatrice Weaver, Gary Weaver and the Beatrice Wallenstein Living Trust for a reinstatement of electrical service to 1253 Harllees Bridge Road, Dillon, South Carolina.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: 

MARK W. BUYCK, JR., I.D. No: 001060

By: 

MARK W. BUYCK, III, I.D. No. 011902

PO Box 1909

Florence, SC 29503-1909

(843) 662-3258 - Tel

(843) 662-1342 - Fax

ATTORNEYS FOR PLAINTIFF

October 24, 2007

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004CP-17-232

PLAINTIFF(S) *Progress Energy Carolinas*

DEFENDANT(S) *Weaver, Gary
Pro/se*

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. *on 1/30/08.* The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy, ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other.

CLERK OF COURT
DILLON COUNTY

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order.
☒ Statement of Judgment by the Court:

The Court heard extensive oral arguments concerning the motion to enforce settlement agreement and finds that said agreement shall be enforced and that all parties are to abide by its terms. The defendants shall within 45 days of this date (2/28/08) come into compliance with the terms of paragraphs 3 and 4 of the Mutual Release Agreement dated or filed with the Clerk of Court on October 25, 2007. Parties to comply shall subject

Dated at *Dillon* South Carolina, this *28th* day of *Feb.* 2008

The parties to this Contempt Proceeding of the Court, and it is so ordered.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

MARK W. Buyck, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)
*PO Box 1909
Florence SC
29503*

*DAN SHINE
GARY WEAVER*
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

CLERK OF COURT
DILLON COUNTY
2008 FEB 28 PM 12:29
FILED
GIVEN THYATT

*DAN SHINE
205 W. Hampton St
Dillon SC 29536
GARY WEAVER
PO Box 7682
Florence SC 29502*

EXHIBIT A

65

THE STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

CA: 2004-CP-17-232

Progress Energy Carolinas, Inc.)
Plaintiff)
versus)
Gary Weaver, Pro Se)
Defendant)

ORDER

FILED
CLERK OF COURT
DILLON COUNTY

2008 MAR 26 AM 9:29

GWEN T. HYATT

This matter concerning Plaintiff's motion to enforce settlement agreement was heard before the Court at a Commons Pleas Non-Jury term held the week of January 28, 2009.

And Order was issued by the Court on February 28, 2008, granting Plaintiff's Motion. Numerous post trial motions have been filed by the Defendant, Gary Weaver, including a request for clarification dated March 7, 2008 and Letter of transmittal dated March 10, 2008.

The Court construes the Request for Clarification and the Letter of Transmittal to be a Rule 59(e) motion and finds that this is the only issue properly before the Court at this time.

The Court has reviewed its previous Order and the documents and briefs presented by the Defendant. The terms of this Court's Order dated February 28, 2008 are crystal clear with no ambiguities.

IT IS THEREFORE ORDERED that the Defendant's 59(e) motion to reconsider or amend is respectfully denied.

AND IT IS SO ORDERED.

A CERTIFIED
TRUE COPY

Gwen T. Hyatt

Paul M. Burch
JUDGE PAUL M. BURCH

March 24, 2008

Pageland, South Carolina

CLERK OF COURT
DILLON COUNTY

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,

Plaintiff,

vs.

Gary Weaver and Beatrice Weaver,

Defendants.

A CERTIFIED
TRUE COPY
ORDER
CLERK OF COURT
DILLON COUNTY

FILED
GWEN T. HYATT
2008 JUL -3 PM 1:05
CLERK OF COURT
DILLON COUNTY

1. This matter came before me on June 3, 2008 regarding certain misunderstandings relating to the conclusion of Case Number 2004-CP-17-232, *Progress Energy Carolinas, Inc., Plaintiff vs. Gary Weaver and Beatrice Weaver, Defendants*. It appears from the record that a Mutual Release was entered into between the parties on September 18, 2007.

2. On October 2, 2007 Judgment was entered in the matter noting that the case had been settled. The Plaintiff filed a Motion to Enforce Settlement on October 25, 2007. The Defendant Gary Weaver filed a Motion to Enforce Settlement on October 26, 2007. A hearing on the pending Motions was heard before Judge Burch on January 30, 2008.

3. Judge Burch entered Judgment on a Form 4 Order on February 28, 2008 granting the Plaintiff's Motion to Enforce Settlement. In the February 28, 2008 Order Judge Burch ordered that "The Defendant shall within forty-five (45) days of this date (2/28/08) to come into compliance with the terms of Paragraphs 3 and 4 of the Mutual Release Agreement."

4. In an Order dated March 24, 2008 Judge Burch noted that the Defendant, Gary Weaver, had filed numerous post trial motions including a Request for Clarification dated March 7, 2008 and a Letter of Transmittal dated March 10, 2008. In his March 24, 2008 Order Judge Burch

67

noted that "The Court construes the Request for Clarification and the Letter of Transmittal to be a Rule 59 (e) Motion and finds that this is the only issue properly before the Court at this time." Judge Burch then ordered that the Defendant Gary Weaver's Rule 59 (e) Motion to Reconsider or Amend be denied.

5. Prior to and subsequent to Judge Burch's final ruling in the case Mr. Weaver has presented various filings to the Clerk of Court of Dillon County bearing the 2004-CP-17-232 Case Number. In addition, Mr. Weaver has written several letters to the undersigned as well as Judge Burch regarding matters related to the case. In particular, Mr. Weaver has transmitted two checks in the total amount of Two Thousand One Hundred Ten and 44/100 (\$2,110.44) Dollars, these sums representing the second and third payments due pursuant to the September 18, 2007 Mutual Release and Settlement Agreement which this Court paid into the account of the Dillon Clerk of Court.

6. The Court held a hearing in this matter for June 3, 2008 at the Georgetown County Courthouse. Appearing on behalf of the Plaintiff was attorney Mark W. Buyck, III. Mrs. Weaver was represented by her attorney Dan Shine. Mr. Weaver has appeared *Pro Se* in this action and appeared at the hearing.

7. During the hearing there was discussion regarding Paragraph 3 of the Mutual Release and Settlement Agreement whereby the parties agree to dismiss any complaint and any response thereto relating to any matter currently pending before the South Carolina Public Service Commission. Mr. Weaver agreed in open court that the September 18, 2007 Agreement is unambiguous on this point and that all issues pending between these parties occurring prior to September 18, 2007 have ended.

8. It is this Court's Order that the Docket Number 2004-219-E currently pending before the South Carolina Public Service Commission between these parties is to be closed and ended and

a copy of this Order entered into the record of the South Carolina Public Service Commission.

9. The Court heard argument from Mr. Weaver concerning the Mutual Release and Settlement Agreement, particularly Mr. Weaver's contention that the Plaintiff is in violation of the Settlement Agreement and that it had not reconnected the residence pursuant to the terms of the Agreement. These matters were not properly before me as they had been previously addressed by Judge Burch in the hearing on January 30, 2008, his Order of February 28, 2008, and his Order in response to the Defendant Gary Weaver's Motion for Reconsideration, dated March 24, 2008.

10. Progress Energy represented to the Court that it was ready, willing and able to reconnect service to the Weaver's residence at 1253 Harllees Bridge Road, Dillon, SC 29536. Mr. Weaver acknowledged that Progress Energy previously attempted to reconnect service on April 22, 2008; however, Mr. and Mrs. Weaver desired an inspection of the premises prior to any reconnection and refused reconnection.

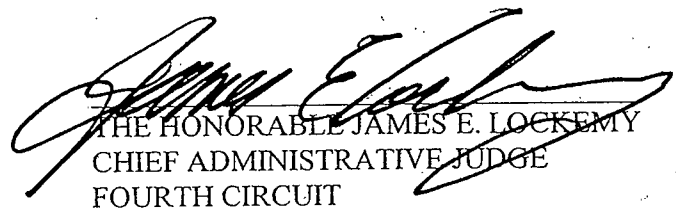
11. It is this Court's Order that Mr. and Mrs. Weaver provide Progress Energy Carolinas, Inc. with a list of three (3) dates on which they will be willing to make the premises available to Progress Energy Carolinas, Inc. for the purposes of reconnecting the service to 1253 Harllees Bridge Road. The dates provided must be on a week day with a minimum of ten (10) days notice of the desired reconnect date. Progress Energy will then have seven (7) days to designate which of the three (3) days it will be available to perform the reconnection. The appointment will be scheduled for 10:00 a.m. on whichever date is determined.

12. In the event the Weavers do not provide Progress Energy with reconnection dates within forty-five (45) days of the date of this Order, it will be assumed that the Weavers have abandoned any desire to reconnect service.

13. Once reconnection is established the attorney for Progress Energy will notify the Dillon County Clerk of Court and the Clerk is ordered to disburse the Two Thousand One Hundred Ten and 44/100 (\$2,110.44) Dollars paid into the Court by the Weavers to Progress Energy Carolinas, Inc.

14. This case has ended. The Clerk of Court is directed not to accept any further pleadings or filings in this matter. This case ended with the issuance of Judge Burch's Order of March 24, 2008. The time for appeal has expired. Since this matter has ended there will be no Rule 59 (e) Appeal available with regards to this Order.

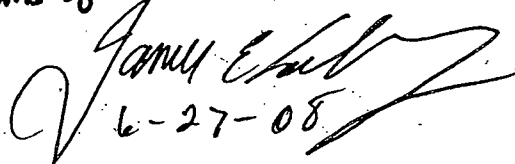
IT IS SO ORDERED.


THE HONORABLE JAMES E. LOCKEMY
CHIEF ADMINISTRATIVE JUDGE
FOURTH CIRCUIT

In Chambers

W June 27, 2008

The Court received the attached letter from Mr. Weaver on June 19, 2008. Although the Court did not feel that a 59(c) motion for reconsideration or any type of Rule 59(c) motion was appropriate, it views Mr. Weaver's letter as such, and his request is respectfully denied. After a careful review of the Court's notes regarding this hearing, I find that the above order accurately reflects the ruling of the Court. As ordered, case number 2004-CP-17-232 is over at the trial level. If Mr. Weaver is dissatisfied with any ruling of this Court, then he should seek appellate relief. All parties are directed to follow the terms of the above order.

W

6-27-08

19-08

FILED
GWEN T. HYATT
2008 JUL -3 PM 1:06
CLERK OF COURT
DILLON COUNTY

P.O. Box 7682
Florence, S.C.
29502

June 15, 2008

The Hon. James E. Lockemy
Judge, Court of Pleas
Dillon County
P.O. Box 750
Dillon S.C. 29536

Dear Judge Lockemy:

Subject: Proposed Order Re Hearing June 3, 2008, *Georgia*
Ref: Docket No. 2004-CP-17-00232; Progress Energy vs. Weaver

A CERTIFIED
TRUE COPY
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

I have recently returned to Dillon from attending Mrs. Weaver at MUSC in Charleston, and have received a copy of the proposed Order submitted for review by Mr. Buyck dated June 5, 2008.

Following review of my notes, please be advised that I object to the tenor and errors and omissions in that draft, and shall submit an alternative draft for consideration of the Court and the parties. To that end I shall obtain a copy of the transcript from the Court Reporter. It is important to me that the order be correct in view of Docket No. 2008-CP-17-180, the Complaint filed on or about May 30, 2008. ⁽¹⁾ Mr. Buyck's draft is clearly laying a foundation for Progress Energy's defense in that action.

Within ten days of the transcript receipt I will submit an alternative draft Order for your consideration.

Respectfully submitted.

Gary Weaver
Gary Weaver, Defendant Pro Se

Cc: Mr. Daniel Shine
Mr. Mark W. Buyck, III

1. It may interest the Court to know that I have invited the Law School and the Graduate School of Business of a leading West Coast University to prepare a joint Case Study of this case. It is under review. The focus would be on the policy and practice relationships between the law, business and government regulation. That is one reason I am particular about getting things right. The case would refer to legislation, court practices, legal ethics, business ethics and management, regulation of public utilities (PUC) c/f regulation of competitive industries (FAA-air carriers; FDA-drug companies, etc); conflicts of influence; consumer protection and rights; Federal/State fair debt collection practices, constitutionality and obsolescence of the doctrine of necessities, and other related legal and business issues including Pro Se representation issues. The case would be distributed to the major universities and colleges in the country.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF DILLON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2008-CP-17-00180

GARY WEAVER

PROGRESS ENERGY CAROLINAS

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

- ☐ See attached order. (Formal order to follow)
☐ Statement of Judgment by the Court:

Dated at DILLON, South Carolina, this day of AUGUST, 2008.

See Action Below

James E. Schell
PRESIDING JUDGE

This judgment was entered on the day of AUGUST, 2008, and a copy mailed first class this day of AUGUST, 2008 to attorneys of record to parties (when appearing pro se) as follows:

GARY WEAVER, PRO/SE
ATTORNEY(S) FOR THE PLAINTIFF(S)

MARK W. BUICK, JR.
ATTORNEY(S) FOR THE DEFENDANT(S)

Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

Gwen T. Hyatt
CLERK OF COURT

THIS MOTION ATTEMPTS TO CONSOLIDATE THIS CASE WITH AN ACTION THAT HAS ENDED. THEREFORE, IT IS DENIED RESPECTFULLY. If Plaintiff disagrees with the dismissal of 2004-CP-17-232, He should appeal the same.

James E. Schell
Circuit Judge

SCCA SCRPC Form 4 Revised 06/2008

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-219-E - ORDER NO. 2007-298
MAY 3, 2007

IN RE: Petition of Progress Energy Carolinas, Inc. to) ORDER DENYING
Terminate Service) MOTION TO CONTINUE
) AND DISMISSING
) COUNTERCLAIMS

This matter comes before the Public Service Commission of South Carolina (Commission) pursuant to the Motion to Continue Date of Hearing and Extension of Time for Filing of Pleadings (Motion to Continue) filed by Mrs. Beatrice Weaver (Respondent or Weaver) and the Motion to Close Docket filed by Progress Energy Carolinas, Inc. (PEC).

The above-referenced docket was established by the Commission on August 5, 2004, in response to PEC's Petition to Terminate Service to Mrs. Weaver's property at 1253 Harllees Bridge Road, Little Rock, South Carolina. Mrs. Weaver's current Motion to Continue represents her fifth request to delay the hearing in this docket.

On September 29, 2004, in response to Mrs. Weaver's request for a formal hearing on PEC's Petition to Terminate Service, the Commission issued its order setting a hearing date of December 9, 2004. On November 24, 2004, Mrs. Weaver moved for a three-month continuance of the hearing on the basis of her medical condition. The

73 73

Commission, by its order dated December 3, 2004, granted her motion and scheduled the hearing for March 10, 2005.

Prior to the scheduled hearing date of March 10, 2005, in a motion received February 14, 2005, Mrs. Weaver again moved the Commission for a continuance based upon medical reasons. The Commission issued its order on March 14, 2005 granting a continuance. Thereafter, on September 12, 2005, the Commission received a letter from Mrs. Weaver advising that her medical condition would preclude her participation in a hearing until mid-November 2005, at the earliest. To accommodate Mrs. Weaver's needs, the Commission again rescheduled the hearing, setting it for December 14, 2005.

PEC requested withdrawal of its petition to terminate service on or about October 17, 2005. However, in a letter dated November 17, 2005, Mrs. Weaver informed the Commission that she intended to continue prosecuting her counterclaims against PEC, and requested further that the matter be again continued. Subsequently, in a letter dated November 25, 2005, Mrs. Weaver asked the Commission to order PEC to reconnect service to her house in her name without requiring payment of the outstanding debt. PEC opposed the request, and on December 16, 2005, the Commission issued its Order Ruling on Various Requests and Establishing Hearing. In the order, the Commission scheduled all contested matters, including Mrs. Weaver's claim of entitlement to reconnection of service, to be heard on January 12, 2006. The Commission's order further sought to accommodate Mrs. Weaver's medical needs by offering to provide her with a video conference hook-up to relieve her from the necessity of traveling to Columbia to attend

and participate at the hearing in person. Mrs. Weaver ignored the Commission's offer of videoconferencing.

On January 10, 2006, Mrs. Weaver again requested that the hearing be postponed, and the Commission again accommodated her request by rescheduling the matter for April 13, 2006.

On February 8, 2006, Mrs. Weaver again moved for a continuance, citing without specificity the anticipated absence of unnamed material witnesses for observances of Passover and/or Easter. In an order entered February 27, 2006, the Commission denied Mrs. Weaver's motion for a continuance of the April 13, 2006 hearing. Mrs. Weaver renewed her motion for continuance through several filings thereafter, this time raising medical grounds for her request. In her March 10, 2006 Memorandum in Support of Motion to Continue Date of Hearing, Mrs. Weaver revealed that, within days of filing her February 8, 2006 motion for continuance, and with full knowledge that her hearing was scheduled for April 13, 2006, she elected to have surgery on April 12, 2006, thereby making it impossible for her to attend the April 13 hearing or to comply with any other hearing date scheduled until after the end of May.¹

The Commission is empowered with broad discretion, pursuant to S.C. Code Ann. Regs. 103-862, to grant or deny requests for continuances. The Commission has demonstrated its ample willingness to accommodate the needs of Mrs. Weaver by granting four previous requests for continuances over a sixteen-month period. The

¹ Subsequently, in a letter dated August 7, 2006 and received in the Commission's offices on or about August 17, 2006, Weaver again advised the Commission that her medical condition precluded her from participating in any proceeding "until further notice" and requested that the Commission "continue the proceedings indefinitely until [her] medical condition permits [her] to attend the hearing."

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Commission has further offered to facilitate Mrs. Weaver's claimed travel-related difficulties by allowing her to participate by videoconference at no additional expense to her.

For the duration of the pendency of this docket, Mrs. Weaver's actions have made it apparent that she is personally either unwilling or unable to litigate this matter to its conclusion. For example, in her January 6, 2006 correspondence filed with the Commission, Mrs. Weaver asserts that necessary documents and notices involving this case were received in the mail but withheld from her by her staff, purportedly due to her continuing illness. And as detailed previously, Mrs. Weaver has repeatedly found it necessary to seek continuances due to her medical condition. Not having access to necessary notices in the case, no matter what the reason, creates obvious problems in prosecuting the case, since Mrs. Weaver has been proceeding *pro se* and therefore has no one else to answer for her in case of incapacity due to illness.

The Commission makes every reasonable effort to accommodate the needs of all litigants, and is particularly sensitive to the needs of those appearing *pro se*. It is not obligated, however, to continue these proceedings simply because a litigant makes a request that it do so. A contrary ruling would empower a litigant to impose a continuance upon the Commission unilaterally. Whether to grant a request for continuance is squarely within the discretion of the Commission. 26 S.C. Code Ann. Regs. 103-862. Consistent with the discretion afforded the Commission by the Regulations, the Commission therefore denies Mrs. Weaver's now fifth request for continuance.



While the Commission is always sensitive to the needs of individual litigants, Mrs. Weaver's own filings to date indicate that she is unable to participate in a hearing now or in the foreseeable future. The Commission has further been made aware that Mrs. Weaver has likewise repeatedly demanded and received continuances of PEC's ongoing civil suit against her and her husband Gary Weaver in the Dillon County Court of Common Pleas, Fourth Judicial Circuit (Case No. 2004-CP-17-232), in which PEC seeks recovery of alleged unpaid electric bills, and that the civil case has, like this matter, languished on the docket for an extended period of time.

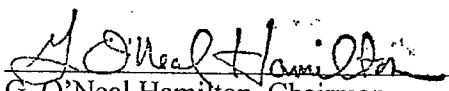
This matter has now been pending at the Commission for almost three years, having been commenced in August 2004. It has not been adjudicated because Mrs. Weaver cannot or will not appear for a scheduled hearing. Viewed in the light most favorable to Mrs. Weaver, it can fairly be said that she is, by her own representations to this Commission, physically unable to prosecute her counterclaims. Accordingly, the Commission now dismisses Mrs. Weaver's counterclaims without prejudice for lack of prosecution. Because PEC had previously withdrawn its petition and the Commission has now dismissed Mrs. Weaver's counterclaims, PEC's motion to close the docket is now moot.

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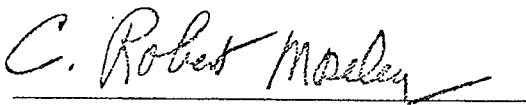
CONCLUSION

The motion of Mrs. Beatrice Weaver to continue the April 13, 2006 hearing in Docket No. 2004-219-E is denied. PEC's Motion to Close Docket is dismissed as moot. Pursuant to the Commission's discretionary authority, this matter is dismissed without prejudice.

BY ORDER OF THE COMMISSION:


G. O'Neal Hamilton, Chairman

ATTEST:


C. Robert Moseley, Vice Chairman

(SEAL)

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2004-219-E - ORDER NO. 2007-835
NOVEMBER 13, 2007

IN RE: Petition of Progress Energy Carolinas, Inc. to) ORDER DENYING
Terminate Service) MOTION FOR
) RECONSIDERATION
) AND REHEARING

This matter comes before the Public Service Commission of South Carolina ("Commission" or "PSC") pursuant to the Motion for Reconsideration filed by Mrs. Beatrice Weaver ("Respondent" or "Mrs. Weaver"), in which Mrs. Weaver urges that we reconsider and vacate Order No. 2007-298, issued on or about May 3, 2007. For the reasons explained herein, we deny Mrs. Weaver's motion as untimely pursuant to S.C. Code Ann. §58-27-2150, and reiterate that the Commission acted properly within its discretion pursuant to S.C. Code Ann. Regs. 103-862 (renumbered as S.C. Code Ann. Regs. 103-838 effective April 27, 2007) when it dismissed Mrs. Weaver's counterclaims without prejudice in Order No. 2007-298. As Order No. 2007-298 is now a final order not subject to subsequent reconsideration by the Commission, Mrs. Weaver may seek relief from the order only in the appellate courts of South Carolina.

Mrs. Weaver received her copy of Order No. 2007-298 on Saturday, May 5, 2007. The date of receipt was indicated on the U.S. Postal Service receipt card, which bore Mrs. Weaver's signature. On May 17, 2007, Mrs. Weaver faxed her motion for

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reconsideration to the Commission's offices. The Commission's Hearing Officer issued his directive on May 24, 2007, finding that the motion was untimely pursuant to S.C. Code Ann. §58-27-2150. Section 58-27-2150 requires that such motions be made within ten days after service of notice of entry of the order or decision.

Ms. Weaver argues that Rule 6(e), S.C.R.C.P., requires the addition of five days to the time prescribed in S.C. Code Ann. §58-27-2150, and that her motion for reconsideration was therefore timely filed. Ms. Weaver is mistaken, however, as Rule 6(e) is inapplicable to the time in which a litigant is allowed to file a motion to reconsider or a notice of appeal. Rather, Rule 6(e) adds five days to the time in which a litigant is required to respond to pleadings and discovery requests served by mail.

In Witzig v. Witzig, the South Carolina Court of Appeals stated:

Rule 6(e), SCRCP, does not provide an additional five days to file a notice of intent to appeal. Unlike Rule 74, SCRCP, and S.C. Code Ann. § 62-1-308(a), which pertain to appeals, Rule 6(e) is a pleadings rule and applies only when service is effective upon mailing. The extra five days provided by Rule 6(e) compensates for the time notice is in the mail. James F. Flanagan, South Carolina Civil Procedure 52 (2d ed. 1996).

Witzig v. Witzig, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996). The Witzig rationale also applies in this matter.

As was the case in the Witzig matter, the present dispute concerns the allowable time to respond to an order, not a pleading, and on that rationale alone, Rule 6(e) would not apply here. Furthermore, the policy reasons for the five-day extension provided in Rule 6(e) would not support an extension here. The situation presented in the present case is easily distinguished from that presented when a party serves a pleading or

yo

discovery request upon another by first class mail and deems service effective upon mailing. In the case of service of a pleading or discovery request by mail, the date of receipt is indeterminate, and the Rule adds five days to the response period to compensate for time in the mail, as the Court of Appeals explains. However, in this case, there is undisputed proof of the actual date of receipt of the order by certified mail. Thus, there is no need for adding five days to compensate for time in the mail. Ms. Weaver received actual notice of the entry of the order on May 5, 2007. The ten-day time period in which Ms. Weaver was required to file her motion for reconsideration began running on May 6, 2007, the day following the date on which the order was received. The tenth day after receipt was May 15, 2007.

Because Mrs. Weaver made her motion outside the statutory ten-day period, the Commission finds that the Hearing Officer was correct in his application of the statute. However, rather than relying exclusively upon Ms. Weaver's untimeliness as the basis for affirming our prior order, and to provide finality to our prior judgment for purposes of any possible appeals, we have elected to exercise our discretion and rule upon the merits of Mrs. Weaver's motion as well.

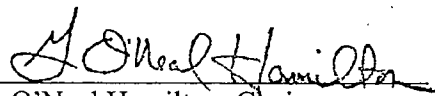
We have considered all of the arguments presented by Mrs. Weaver, and find that none have merit. This Commission is vested with broad discretion to control its docket, and Regulation 103-838 affords the Commission the discretion to determine good cause for granting a request for continuance. The Commission determined that Mrs. Weaver's history of repeated requests for continuances fairly indicated that she was unable or unwilling to pursue her counterclaims at the present time, and that under these circumstances, it was appropriate to dismiss Mrs. Weaver's counterclaims. We know of

no court or quasi-judicial body upon which a litigant may unilaterally impose a continuance. Under the specific facts here, and in consideration of the multiple continuances granted to Mrs. Weaver previously, we believe it an unreasonable waste of judicial resources to maintain Mrs. Weaver's counterclaims on our docket ad infinitum. Therefore, we reiterate and affirm our prior denial of Mrs. Weaver's request for continuance and dismissal of her counterclaims without prejudice.

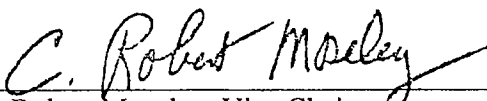
CONCLUSION

The motion of Mrs. Beatrice Weaver to reconsider and vacate Order No. 2007-298 is, for the foregoing reasons, denied in its entirety.

BY ORDER OF THE COMMISSION:


G. O'Neal Hamilton, Chairman

ATTEST:


C. Robert Moseley, Vice Chairman

(SEAL)

82

(21)

PO Box 7682
Florence SC 29502
Ph/Fax: 843 841 1606

Oct. 18, 2007

The Hon. Gwen T. Hyatt
Clerk of Court, Dillon County
P.O. Drawer 1220
Dillon SC 29536

Dear Ms. Hyatt:

Subject: Recordation of Request to Make Deposit in Court Pursuant
to Rule 67 SCRCF

Ref: Case No. 2004 CP-17-00232

Enclosed please find the subject Request for recordation, together with a letter
addressed to The Hon. Judge James E. Lockemy, whom I believe has jurisdiction at this
time.

Please mail me return a time stamped copy in the enclosed return stamped and
addressed envelope.

Best Regards:

Sincerely,

Gary Weaver
Gary Weaver, Defendant Pro Se

Encl: Request for Deposit in Court
Letter to The Hon. Judge James E. Lockemy

FILED
GWENT.HYATT
2007 OCT 18 PM 1:54
CLERK OF COURT
DILLON COUNTY

A CERTIFIED
TRUE COPY
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

47

P.O. Box 7682
Florence, S.C.
29502

October 18, 2007

FILED
GIVEN T. HYATT
2007 OCT 18 PM 1:54
CLERK OF COURT
DILLON COUNTY

The Hon. James E. Lockemy
Judge, Court of Pleas
Dillon County
P.O. Box 750
Dillon S.C. 29536

A CERTIFIED
TRUE COPY

Sam T. Hyatt

Dear Judge Lockemy:

Subject: Rule 67 S.C.R.C.P. Deposit in Court.
DILLON COUNTY
Ref: Docket No. 2004-CP-17-00232
Progress Energy vs. Weaver

Pursuant to **Rule 67, S.C.R.C.P.** enclosed for filing and your approval, please find my **Request for Leave to Make Deposit in Court**, of the 2nd payment due under the settlement agreement that has been reached in this case.

On September 18, 2007 a settlement agreement was executed with the Plaintiff which has since seen fit not to comply with its terms. See **Exhibit A**, Mutual Release document hereto. Those issues will be addressed subsequently if the Plaintiff persists in non compliance.

Several regulatory issues are now pending before the S.C. Public Service Commission and quite possibly it may be necessary to directly involve the Office of Regulatory Staff as well, to exhaust administrative relief and for mitigation purposes.

These regulatory administrative issues are unrelated to the case of a consumer loan collection action still pending before this Court, because of the Plaintiff's non-compliance with the Mutual Release. Please note that as of this date, the Plaintiff still has not provided me with a Stipulation to Dismiss in this Court (Para. 1 & 2 of the Release), or for the Commission (Para. 3 & 4 of the Release.).

The issues contained in Para. 5 of the Release relate to changing the provider from Plaintiff to another provider. That was in exchange for defendant Beatrice Weaver's release of the 2004 Complaints she filed with the Commission against Plaintiff on matters related to an adjacent property at 1249 Harllees Bridge Road, Dillon. Those regulatory

complaints are not related in any way to the case before your Court involving my alleged debt for consumer services for the period 1994 to 2001.

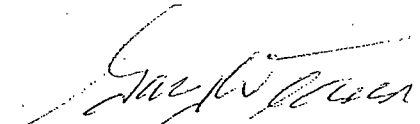
To elaborate further, to retaliate for the 2004 complaints she filed with the Commission, Mrs. Weaver was incorrectly included in this case by the Plaintiff under the rubric of the "doctrine of necessities" which is actually quite inappropriate under the facts and circumstances of this case. Please refer to the attached copy of Mrs. Weaver's letter dated Oct. 15, 2007 addressed to the Commission. It provides further background to this case and the regulatory situation that Plaintiff has "married" together.

Meanwhile, one month after execution of the Release, and payments of some \$2, 592 in this case, Mrs. Weaver still does not have electricity connected to her residence as agreed with Plaintiff. Accordingly it may be expected that this case may end up back in your Court for adjudication.

Because of the unsettled nature of the settlement agreement, and the Plaintiff's refusal to connect electric power, it is appropriate to deposit the 2nd payment of \$1,000 with the court for protection of all concerned until the issues are resolved in one way or the other.

Accordingly, I respectfully request your approval of this request. May I request a receipt from the Clerk of Court?

Respectfully submitted.


Gary Weaver. Defendant Pro Se

Attachments: Cashier's check dated Oct. 18, 2007 for \$1,000 payable to Clerk of Court
Copy of letter to Public Service Commission dated Oct. 15, 2007.
Copy of Mutual Release dated Sept. 18, 2007

Cc: Daniel H. Shine, Esq.
Mark w. Buyck, Jr, Esq.
Mr. Charles L.A. Terreni
Chief Clerk/Administrator
S.C. Public Service Commission

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON) FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
Plaintiff,)
vs.)
Gary Weaver and Beatrice Weaver,)
Defendants.)
REQUEST FOR LEAVE TO MAKE
DEPOSIT IN COURT; AFFIDAVIT OF
GARY WEAVER; NOTICE OF REQUEST
CERTIFICATE OF SERVICE;
EXHIBITS A-C

JURY TRIAL REQUESTED
A CERTIFIED
TRUE COPY

REQUEST FOR LEAVE TO MAKE DEPOSIT IN COURT

Pursuant to S.C. Code Ann. Sections 15-59-10, and S.C. R.C.P. Rule 67

Defendant Pro Se Gary Weaver ("Defendant") hereby seeks leave of the Court to make a good faith deposit of the sum of one thousand dollars (\$1,000.00) with the Court towards the settlement of the case as provided for in the said rule, and paragraph 1 of that certain Mutual Release settlement document ("Release") executed by the parties hereto on September 18, 2007, a copy of which is attached hereto as **Exhibit A** and by reference incorporated herein..

Said sum is attached hereto by way of First Bank cashier's check # 788 947 dated October 18, 2007 paid to the Clerk of Court, Dillon County Court of Pleas. Upon approval of the Court, Defendant respectfully requests that the Clerk of Court duly issue Defendant a receipt for same.

The Court was previously notified on the case record that as a show of good faith, Defendant opened a private trust account for the stated purpose of a settlement. On or about September 5, 2007 Defendant in fact purchased a cashier's check for deposit with the Court, together with a Summary Status of the Case, in anticipation of a Status Conference for the trial in this case set for October 2, 2007, pursuant to **Rule 16 (e) SCRCP**. These were not filed. See **Exhibit B** hereto.

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GWENTHYATT

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CLERK OF COURT
DILLON COUNTY

CLERK OF COURT
DILLON COUNTY

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Plaintiff's attorney set an oral deposition of Defendant Beatrice Weaver for September, 18, 2007 preparatory to the trial set for October 2, 2007. Given her medical disabilities and pending major surgery then scheduled for September 20, 2007 Plaintiff wanted the deposition on the record in the event Mrs. Weaver could not be present for the trial. This Defendant also had some issues to be recorded in the deposition for the trial.

The deposition meeting held on September 18, 2007 resulted in a settlement agreement entitled "Mutual Release" (**Exhibit A**). Paragraph 1 of said Release provides for three payments. The first payment due of \$1,000.00 was duly made on September 19, 2007 by deposit with the law firm of Daniel H. Shine, Esq. by way of cashier's check substituted for check #788872 dated September 5, 2007, as agreed. A copy of said check is attached hereto as **Exhibit C**. It was in fact exchanged for the replacement September 19th check made out to the Clerk of Court as noted above.

The Court is respectfully requested to note that one month after the 1st settlement payment was duly made as agreed, Plaintiff has still not connected electric power to Defendant Beatrice Weaver's residence as agreed. The second payment pursuant to Paragraph 1 of the Release is due on or before October 18, 2007. The third payment is due on or before November 17, 2007, and there seems to be no assurance that the Plaintiff will comply with the terms of paragraphs 1 and 2 of the Release by that date either.

Because Plaintiff is in violation and non-compliance of the Release as to paragraphs 1 and 2, and because Defendant wants to ensure compliance with the terms of the release and protect any and all legal rights accruing as a result of Plaintiff's non compliance with the Release, it is appropriate to seek permission of the Court to deposit said second payment with the Clerk of Court pending resolution of the issues outstanding.

Inter alia, this involves mitigation and administrative relief procedures of one or two State regulatory agencies which may take some time to process. Meanwhile, some \$2,592 has been paid pursuant to the Release agreement and there is still no electricity connected to the residence of Defendant Beatrice Weaver as agreed with Plaintiff.

Said deposit should remain on deposit with the Court until such time as the settlement issues between the parties are resolved.

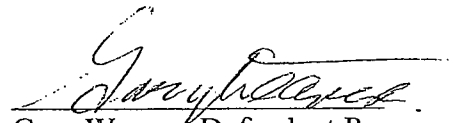
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It is now timely in good faith, to make the second settlement payment deposit of \$1,000.00 with the Court towards the settlement agreement in order to protect Defendant's interests herein.

Pursuant to **S.C.R.C.P. Rule 67**, the attached Notice informs every other party of this action.

Dated: Dillon, S.C. October 18, 2007

Respectfully submitted.


Gary Weaver, Defendant Pro

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STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
Plaintiff,)
vs.)
Gary Weaver and Beatrice Weaver.)
Defendants.)

AFFIDAVIT OF GARY WEAVER;
EXHIBITS "A"- "C "

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DILLON COUNTY

AFFIDAVIT OF GARY WEAVER

County of Dillon)
State of South Carolina)
_____)

SS.

A CERTIFIED
TRUE COPY
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

GARY WEAVER, being first duly sworn upon his oath, hereinafter "Affiant",
deposes and says as follows:

1. Affiant is a Defendant Pro Se in the above entitled case and files this affidavit in support of the document to which it is attached, and specifically pursuant to the requirements of **Rule 67 SCRPC** relating to deposits in court.
2. Pursuant to the procedural requirements of said Rule, Affiant hereby attests under oath to the need to make deposits in court of settlement payments due Plaintiff in this case pursuant to paragraphs 1 and 2 of the Release (Exhibit A hereto.). Plaintiff is in violation of the terms of said paragraphs 1 and 2, and issues remaining outstanding as to compliance with the terms of the Release are yet to be settled. The request to make deposits in court of the required settlement payments protects the respective interests of both parties.
3. Affiant makes this affidavit from personal knowledge and belief of the facts of the case, and not for any improper purpose or to cause unnecessary delay in proceedings, or

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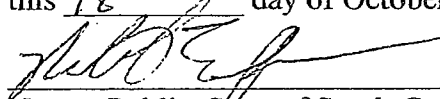
needless increase in the costs of this case. Affiant is competent to make this deposition. Affiant alleges and avers that the facts are well grounded as stated in the document to which this affidavit is attached, the files and records of the case, and the exhibits attached hereto are true and correct copies of the original documents and by reference are made part hereof.

Further, Affiant sayeth naught.


Gary Weayer, Affiant

Subscribed and sworn before me

this 18th day of October, 2007.


Notary Public, State of South Carolina

My Commission expires: 2/5/2013

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Progress Energy Carolinas, Inc.,)
)
)
Plaintiff,)
)
)
vs.)
)
)
Gary Weaver and Beatrice Weaver,)
)
)
Defendants.)
)

NOTICE OF REQUEST FOR LEAVE
TO MAKE DEPOSITS IN COURT
PURSUANT TO RULE 67, S.C.R.C.P.;
AFFIDAVIT OF GARY WEAVER;
EXHIBITS A-C

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CLERK OF COURT
DILLON COUNTY

NOTICE OF REQUEST FOR LEAVE TO MAKE DEPOSITS IN COURT

TO: Mark W. Buyck, Jr., Esq.
Attorney at Law
P.O. Box 1909
Florence S.C.
Counsel for Plaintiff

Daniel H. Shine, Esq.
201 West Hampton St
Dillon S.C. 29536
Counsel for Defendant
Beatrice Weaver

NOTICE IS HEREBY GIVEN that the above-identified Defendant Pro Se Gary
Weaver's **Request for Leave to Make Deposit in Court**, have been duly filed and may
come on for Hearing before the Honorable _____
Presiding Judge of the above-entitled Court, in his/her courtroom, in the Court of
Common Pleas, Fourth Judicial Circuit located at the Dillon County Court House, 401
Main St, Dillon S.C. 29536, at _____ o'clock ____ .m. on
_____, 2007 or as soon thereafter as counsel can be heard.

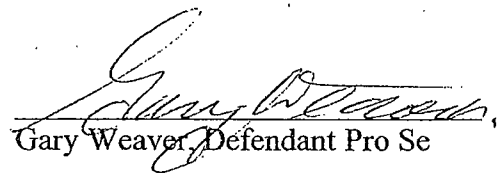
DATED: Florence County, S.C., October 17, 2007

Gary Weaver
Gary Weaver, Defendant Pro Se
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant SCRCF Rule 67, a copy of the foregoing Defendant Pro Se Gary Weaver's **Request for Leave to Make Deposit in Court** has or will be served upon the above identified counsel at their respective addresses by means of United State regular mail or by hand delivery on or before October 20, 2007 and/or hand delivery.

DATED: Florence County, S.C., October 17, 2007


Gary Weaver, Defendant Pro Se

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2007-401-E - ORDER NO. 2008-609

SEPTEMBER 3, 2008

IN RE: Application of Beatrice Wallenstein (a/k/a	)	FINAL ORDER OF
Beatrice Weaver) for Change in Electric	)	DISMISSAL
Service Provider	)	

This matter comes before the Public Service Commission of South Carolina ("Commission") on the application of Beatrice Wallenstein ("Petitioner") seeking authority for a change in her electric service provider from Progress Energy Carolinas, Inc. ("Progress") to Marlboro Electric Cooperative, Inc. ("MEC"). For the reasons detailed herein, we dismiss this matter with prejudice.

The Petitioner commenced this case on November 19, 2007. The initial application stated Petitioner's desire to change electric service providers from Progress to MEC based upon Progress's alleged service problems and failure to comply with the terms of the settlement agreement entered into as resolution of a longstanding previous dispute between Petitioner and Progress, which had been litigated both in the Dillon County Court of Common Pleas and before this Commission¹.

The Petitioner submitted no pre-filed testimony in this docket, but her husband Gary Weaver ("Mr. Weaver") did submit direct and rebuttal pre-filed testimony. Petitioner also filed a motion seeking permission for Mr. Weaver to join or intervene in

¹ These cases are styled *Petition of Progress Energy Carolinas, Inc. to Terminate Service*, PSC Docket No. 2004-219-E, and *Progress Energy Carolinas, Inc. v. Weaver*, Common Pleas Case No. 2004-17-232. Both cases have been concluded.

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this docket as a party. Progress opposed the petition for joinder or intervention and moved that Mr. Weaver's pre-filed testimony be stricken on the grounds that his pre-filed testimony repeated allegations already disposed of in Docket No. 2004-219-E. Furthermore, Petitioner and Mr. Weaver had indicated in prior filings with the Commission that they lived separate and apart from one another during a substantial portion of the time period covered by Mr. Weaver's testimony, and due to their estrangement, Progress argued that Mr. Weaver could not have testified based upon his personal knowledge as to Progress's quality of service after he left Petitioner's residence in 2002. In our Directive dated May 28, 2008, we denied Petitioner's motion seeking joinder and intervention by Mr. Weaver and granted Progress's motion to strike his testimony, finding that the stricken testimony repeated allegations already disposed of in Docket No. 2004-219-E and/or was comprised of hearsay.

On July 25, 2008, Progress filed a motion to postpone the hearing in this docket, which was scheduled to take place Tuesday, August 5, 2008, at 2:30 p.m. Progress's motion was based upon the Petitioner's failure to submit pre-filed testimony as required under Commission rules, and the resulting prejudice to Progress from its not having been afforded the opportunity to prepare for the hearing using the Petitioner's pre-filed testimony. Progress requested that the Commission postpone the hearing, contact the Petitioner and ask whether she still desired a hearing, and if so, establish a new schedule for pre-filing testimony and a new hearing date.

On July 28, 2008, MEC proposed that the scheduled hearing go forward on August 5, 2008, and that the Petitioner be permitted to adopt the proffered testimony of

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Gary Weaver in lieu of her own pre-filed testimony. MEC apparently proposed this accommodation to the Petitioner in an effort to conclude this matter on schedule for the benefit of all the parties. MEC further represented to us that Progress and the Office of Regulatory Staff (“ORS”) had no objection to this proposal. The Petitioner was served with a copy of MEC’s proposal, but did not immediately respond.

In our Directive dated July 30, 2008, we held that the interests of judicial economy and the interests of the parties in having this matter move forward would be advanced by holding the hearing as scheduled, without further delay. Accordingly, we denied Progress’s motion to postpone the hearing and granted the request of MEC that the hearing go forward on August 5, 2008. While Petitioner’s failure to pre-file testimony of her own was in itself grounds for dismissal of this docket, we offered Petitioner the extraordinary opportunity to adopt portions of Mr. Weaver’s previously-stricken testimony as her own, where such testimony would be logically and appropriately attributable to her, based upon her first-hand knowledge, and where she explicitly expressed her desire to adopt such testimony.

Therefore, Petitioner was required by our Directive of July 30, 2008, to file with the Commission, by the close of business on Friday, August 1, 2008, a document designating by document, page, and line number those portions of Mr. Weaver’s testimony which she wished to adopt as her own, and it was made clear that she would not be permitted to file new testimony above or beyond that testimony previously filed by Mr. Weaver. Progress and MEC would be permitted to make any legally applicable objections to the adopted testimony, either before or in the course of the hearing.

In spite of the Commission's deviation from its normal procedures to accommodate the Petitioner, allowing her to adopt appropriate portions of Mr. Weaver's previously-stricken testimony as her own well after the deadline for submitting pre-filed testimony, the Petitioner failed to file the required designation of testimony to be adopted by the deadline. Accordingly, at the time the hearing convened on August 5, 2008, she was in continued violation of this Commission's rules requiring the filing of pre-filed testimony.

The Commission convened the hearing in Docket No. 2007-401-E as scheduled on August 5, 2008. The Petitioner, who failed to appear at the scheduled hearing, instead faxed to the Commission on August 4, 2008, a written motion to postpone or continue the hearing in this matter². MEC opposed Petitioner's request for postponement and moved to dismiss the case. MEC pointed out that the Notice of Hearing was published on April 15, 2008, that the parties have had ample notice of the hearing date and could plan accordingly, and that the Petitioner has presented no good cause supporting postponement.

MEC further moved to dismiss, based upon Petitioner's failure to pre-file testimony as required by PSC Regulation No. 103-845(C), and upon her failure to appear at the hearing, which subjects the case to dismissal pursuant to PSC Regulation No. 103-844. As discussed above, the Commission had granted the Petitioner the opportunity to

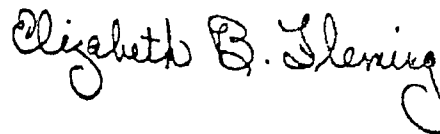
² The Petitioner's attempt to unilaterally impose a continuance upon the Commission by filing an eleventh-hour request for postponement is consistent with her conduct in *Petition of Progress Energy Carolinas, Inc. to Terminate Service*, Docket No. 2004-219-E, in which she requested continuances of scheduled hearings no fewer than five times. In Order No. 2007-298 (May 3, 2007), we denied Petitioner's last request for a continuance and dismissed her counterclaims. Following our denial of her motion for reconsideration, she did not appeal, opting instead to commence this docket, which, at least in part, appears to be an attempt to re-litigate many of the same issues she had raised previously.

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cure her failure to pre-file testimony by adopting specific portions of the testimony previously proffered by Mr. Weaver. The Petitioner had failed to avail herself of this opportunity. Because Petitioner had failed to follow the Commission's regulation requiring her to pre-file testimony, failed to attend the hearing, and thereby failed to carry her burden of proof in seeking a change in electric service providers, as set out in S.C. Code Ann. §58-27-660, MEC moved to dismiss the case. Progress and the ORS joined in MEC's motion. For all of the reasons given by MEC and recounted in this Order, we grant the motion as made by MEC and joined by Progress and ORS, and dismiss this matter with prejudice.

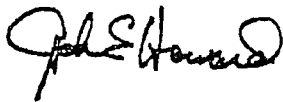
This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:



Elizabeth B. Fleming, Chairman

ATTEST:



John E. Howard, Vice Chairman

(SEAL)

8/6

1253 Harlees Bridge Rd
Dillon S.C. 29536
Ph/Fax: 843 841 1606

October 15, 2007

Mr. Charles L.A. Terreni
Chief Clerk/Administrator
S.C. Public Service Commission
P.O. Drawer 11649
Colombia S.C. 29211
Ph: 1803 896 5113; Fx: 1 803 896 5231

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CLERK OF COURT
DILLON COUNTY

Dear Mr. Terreni:

Subject: Notarized Supplemental Memorandum to Request for **A CERTIFIED**
Information on Change of Providers dated September 27, 2007 **COPY**

Ref: Progress Energy Petition No. 2004-219-E
"Mutual Release" dated Sept. 18, 2007 by and between
Progress Energy and the Undersigned.

Sam T. Hyatt
CLERK OF COURT
DILLON COUNTY

Further to my request for information concerning the change of providers, I refer you to the "Mutual Release" (hereafter "Release") dated September 18, 2007. See **Exhibit A** hereto. Mr. Anthony filed a copy of the Release with the Commission according to the notice I received from your Office. Be advised that Progress Energy is in unilateral violation of the Release. A number of legal issues have arisen as a result. These relate to the "change of provider" issue, and other related regulatory matters.

The subject Release consists of two parts: **PART ONE** relates to collection of a consumer debt under the jurisdiction of the Dillon Court, which is subject to Federal and State Consumer Debt collection statutes and regulations. These issues are pending possible appeals to the upper courts should this case go to trial instead of being settled because of Progress Energy's bad faith breach of the terms of the Release. See attached exhibits documenting the utility's non compliance, and my compliance with these requirements..

PART TWO of the Release relates to administrative **regulatory matters** under the jurisdiction of the Public Service Commission. These issues are pending and have not yet been finally disposed of either administratively by the Commission's Hearing Officer, or on appeal by the Administrative Law Judge. Possible subsequent appeals to the Dillon

Court, and then the upper courts for flagrant violations of statutes and regulations are pending disposition of the Release.

In both venues any possible appeals will be based on the standards of clear errors of law, abuse of discretion, denial of due process, and constitutional issues, particularly relating to the so-called "doctrine of necessities" which is Progress Energy's only claim against me with respect to the legal action in the Dillon Court in the consumer debt collection lawsuit..

PART ONE OF THE RELEASE

Para. 1 and 2 of the Release provides for settlement of a consumer billing for electric power and consumer products and services and an illegal disconnect of power to Mr. Weaver on Dec. 21, 2001.

The alleged billing at that time was some \$3,110.48, which was formally disputed by Mr. Weaver the alleged debtor. Mr. Weaver was the only party to the agreement with then C.P. & L for power. The service was in fact actually arranged on his behalf by the law office of Daniel H. Shine, Esq. The action filed with the Dillon Court of Pleas is for collection of an alleged debt. (The Commission was requested to take judicial notice of that action by both parties.)

Para. One of the settlement provides for two monthly payments of \$1,000.00 and one for \$1,110.48, each paid to the utility under a payment plan by Mr. Weaver who is liable alone for any alleged debt: As agreed, the first \$1,000 was duly paid by Mr. Weaver on September 19, 2007, the day after reaching the settlement agreement.

Pursuant to Para 2 of the Release, a security deposit of \$177.00 stipulated by the Consumer Services Dept. of Progress Energy, was paid as agreed under the Release, on Sept. 26, 2007. The new Account No.221-185-1577 in the name of Beatrice Wallenstein was opened as agreed.

On October 2, 2007, 14 days after the Release was executed, Progress Energy subsequently requested an Electrical Code Inspection by the Dillon County Building Code Dept. Following the fee payment of \$15.00 on Oct. 3, 2007, the said Dept. approved and authorized connection of electric power and duly notified Progress Energy on Oct. 4, 2007 at 10.41 a.m via telefax. Time being of the essence under the Release terms, the 14 day delay in requesting the code inspection was either due to managerial

negligence or was deliberate. Both were harmful to me given my present **medical condition which was the only reason why I agreed to settle in the first place.** The delay was also inexcusable in that **on four separate occasions** between Sept. 18 and Oct. 2, 2007, Progress Energy representatives knew or should have known as professionals and should have given me timely notice of the Electrical Code inspection requirement, instead of deliberately delaying 14 days.

Pursuant to the Release, the electric power should have been connected by close of business on Friday, Oct. 5, 2007 as promised to me on Oct. 4, 2007 when I checked with the Progress Energy Consumer Service Dept. following notice of approval of the Building Code Dept. Electrical power to my residence was NOT provided as agreed and promised for Oct. 5, 2007.

Progress Energy has thus subjected itself to liability and damages under the doctrine of laches by negligently "sitting on its hands" for 14 days without justification, and negotiating in bad faith for the Release with "unclean hands" in the first place.

In good faith, I have paid consideration pursuant to the Release totaling some \$1,192.00 in compliance with the Release and the Code inspection, plus attorney fees out of pocket, and no electricity has been provided in one month when it was supposed to be connected immediately on execution of the Release.

Thus, this consumer applies a late penalty of \$100.00 per day, for each and every day subsequent to Oct. 5, 2007, that electric power is not connected. See attached notice to Progress Energy dated Oct. 5, 2007; **Exhibit B** hereto.

For the record, this consumer has complied with each and every condition of the Release under Para 1 and Para 2 relating to the connection of electricity following settlement of the alleged debt situation.

Progress Energy has not complied, and is in bad faith breach of the Release agreement. With false intentions and undue pressure the utility through its attorneys has committed **fraudulent inducement** in order for me to enter into the Release. It has deliberately, irresponsibly, and maliciously thwarted the intent of the settlement on my part. As I explained to Progress Energy, notwithstanding no liability on my part or Mr. Weaver's acknowledged liability for a disputed amount, I decided to settle simply because of the pressing need of electrical service due to my serious medical problems and

the impending major surgery scheduled for Sept, 20, 2007 two days after execution of the Release. Progress Energy's subsequent adverse actions and gross negligence has caused me severe and gross emotional distress, and other damages. A number of related legal issues were thus created for attention by the Dillon Court in the event Progress Energy does not timely perform its obligations under the Release, several of which are regulatory in nature.

PART TWO OF THE RELEASE

Para. 3, 4 and 5 comprise Part Two of the Release relating to settlement of outstanding regulatory issues that remain under the present and future jurisdiction of the Commission. The issues under this part flow from four events:

1. The illegal disconnect of electric service to **1253 Harllees Bridge Rd**, and other regulation violations, on Dec. 21, 2001, executed under the direct supervision and orders of the Commission's then Executive Director, Mr. Gary Walsh engaging in illegal ex parte communications with Progress Energy staff and field employees.
2. My complaints to the Commission and O.R.S. filed since **spring 2004** relating to **1249 Harllees Bridge Rd**, Dillon. The complaints involved trespassing, incorrect meter reading, incompetent and poorly trained meter readers, agents employees and representatives without identification, not using the designated ingress/egress gate, improper billing, arbitrary and illegal change of property rate status from residential to small commercial; trespassing over 1253 Harllees Bridge Rd to reach 1249 Harllees Bridge Road with its own entrance and exit; etc. All of these numerous complaints were for violation of Commission regulations which the Commission and ORS have to date ignored.
3. Progress Energy's **two retaliatory frivolous and nuisance petitions** filed on or about June 30, 2004, and on or about August 3, 2004 with the Commission, on spurious and specious grounds (high grass, dogs, and meter readers); and
4. Progress Energy's filing a **Complaint** with the Dillon Court of Pleas on July 9, 2004 for collection of an alleged debt, and thus removing that issue

from the administrative jurisdiction of the Commission and subjecting itself to the jurisdiction of federal and state consumer debt statutes and regulations in the Dillon Court.

Note: The Release was the result of the settlement of the lawsuit before the Dillon Court. It was on the insistence of Progress Energy's attorney that the terms of the Release "marries" the administrative, regulatory issues of 2004, subject to the Commission's jurisdiction, with the consumer debt collection issues of December 2001, subject to the Court's jurisdiction. Progress Energy's Mr. Len Anthony wanted the regulatory issues settled as a condition of settling the alleged debt issues. However, under certain federal and state statutes and cases, that course may not be ^{un}enforceable and may be voidable. Nevertheless, under the doctrine of "exhaustion of administrative remedies" certain elements of the debt collection action may in fact be construed at the Court's discretion to devolve to the Commission for adjudication before submittal to the Dillon Court. See the separate Memorandum of Law and Argument to be submitted on these issues.

For the record, the 2004 frivolous and nuisance regulatory complaints filed by Progress Energy pertaining to the property located at 1249 Harllees Bridge Rd, are totally unrelated to the present Sept. 18, 2007 settlement of the alleged debt for consumer billing for electric power usage from 1994 to December 2001. The Complaint for debt was filed some three years after December 2001 in July 2004 relating to a property located at 1253 Harllees Bridge Road, under the jurisdiction of the Dillon Court.

The regulatory complaints were filed by me and Progress Energy in 2004. These relate to an adjacent property at 1249 Harllees Bridge Road. It is located some 300 feet distant from the 1253 address of the property where the alleged debt occurred in 2001; it is fenced off, with its own entrance/exit and postal address. These regulatory issues are subject to the jurisdiction of the Commission.

Retaliation of Progress Energy

As a result of my filing the complaints in spring 2004, Progress Energy's legal counsel, Mr. Len Anthony, retaliated against me and filed the action in the Dillon Court for an alleged consumer debt. He included me in the action claiming my liability for Mr. Weaver's alleged debt for electric power for the period 1994 through December 2001. This inclusion was incorrectly based under the obsolete, discriminatory and

unconstitutional “doctrine of necessities.” Mr. Anthony knew and should have known under the facts and circumstances of this case that the doctrine does not apply to me in this case, quite apart from the question of laches and the statute of limitations. Note that my Memorandum on these issues shall be submitted under separate cover as appropriate. It addresses the conduct of my complaint before the Commission/ORS and the Dillon Court.

Mr. Anthony (and the Commission) knew or should have known that the only signatory to the agreement executed in 1994 to provide electric power to 1253 Harllees Bridge Road, was that of the Shine Law firm acting solely for and on behalf of Mr. Weaver who is an entirely separate legal entity. When Mr. Weaver initiated the electric service I was absent thousands of miles away in Europe. Moreover, as for the “doctrine of necessities” at no time did Mr. Weaver ever refuse to pay a corrected amount, subject to reconciliation and validation of the account. These numerous requests were ignored on a number of occasions, and were documented for the record. On numerous occasions by letter, affidavit and verbally, Mr. Weaver accepted full responsibility and liability for any proven validated alleged debt amount with notice to the Commission.

Thus to conclude, the application of the “doctrine of necessities” is erroneous in my case. Only and solely had the signatory, in this case Mr. Weaver, refused to pay (a disputed account at that), could the creditor turn to me, and even in such a case, other related questions would arise.

To reiterate, Progress Energy’s second frivolous and nuisance petition to disconnect service at 1249 Harllees Bridge Road, was filed on spurious and fraudulent grounds.

That petition as well as the Release request, are entirely unrelated to the settlement of the alleged consumer debt in the Dillon Court.

Progress Energy’s Counsel Mr. Len Anthony, through his attorneys, took advantage of my debilitated condition and my concern about the impending surgery. Applying undue pressure on me they included the regulatory issues related to Progress Energy’s frivolous and nuisance petition before the Commission, into the settlement of the entirely unrelated disputed consumer debt issue before the Dillon Court, and thus “filled Mr. Anthony’s cup to over flowing” at my “expense” and continued suffering..

I signed the Release under undue pressure on September 18, 2007. I had major surgery scheduled on September 20, 2007, just two days later. As it happens, the surgery was postponed anyway. On the 25th of September I had an extremely severe and dangerous attack of hiatus hernia. This was the result of the post traumatic stress I suffered caused by the deposition forced on me because of the trial set for Oct. 2, 2007. I have not been well ever since.

Having executed the settlement Release on Sept. 18, 2007, before the ink was even dry, Mr. Anthony then proceeded to immediately and deliberately violate the terms of Para 1 and Para 2 of the Release. On the contrary, I fully complied with each and every condition as called for immediate attention.

The evidence shows that he has knowingly and deliberately stalled the connection of power to my residence since September 19, 2007 on one pretext after another. As of this date, he still has not connected electricity to my residence as agreed, one month later.

It is my personal experience over the past several years, that Progress Energy's Mr. Anthony's unethical, bad faith, and callous professional behavior stops at nothing, including his false statements, fabrications and misrepresentations to the Commission including his frivolous and nuisance petition to "disconnect in perpetuity" which he filed in 2004, and other violations of Commission/ORS regulations. The Commission (of course) has done nothing to protect this consumer's rights, and in fact has condoned Progress Energy's behavior, and as documented, the commission and ORS have themselves violated the statutes and regulations in order to favor and accommodate the utility.

Change of Provider: Knowing of Mr. Anthony's wicked ways, that border on legalistic "shyster" tactics, I requested and received Progress energy's consent for a change of provider as part of the settlement. The objective was to avoid further protracted harassment, rudeness and abuse, and damages, by the incompetence and negligence of the Progress Energy absentee staff in consumer services and management of its business in Dillon County. I can receive much better local consumer services amenities, and lower cost electric power from Marlboro Electric Cooperative which has a much better public reputation than Progress Energy.

Dismissals Under the Terms of the Release.

Unlike the conditions stated in Part One of the Release calling for immediate action by both sides, the regulatory conditions cited in Part Two have no specific date/time limit for tolling implementation of the terms. This aspect was overlooked in the attorneys' haste to pressure me to execute the Release. Notwithstanding, it was and remains my good faith intention to comply with filing dismissals under Para 3 and Para. 4, of the Release subject to reciprocation from Progress Energy which has not yet been evidenced. Quite to the contrary, as noted above. My intended compliance with the Part Two regulatory component of the Release will comprise several steps.

First, I will formally apply for a change of provider at the appropriate time and in the appropriate manner following my receipt of the Commission's response to my informal request for the Commission's procedures in advance. In good faith, I timely initiated the process on September 27, 2007 with my letter of request for guidance by the Commission staff concerning this issue. That is what they are there for.

Hence this supplemental memorandum further explains the background and motive for the good faith inquiry respectfully submitted to the Commission on September 27, 2007.

My inquiry is directed to the issue of Commission policy as follows:

1. As to the statutes governing the change of providers;
2. Clarification of the consumer's role in this process, and
3. Progress Energy's apparent duplicity in breaking its agreements on any pretext including fraud; such as collecting funds under an agreement and then refusing to connect electricity as agreed for 30 days and counting.

Accordingly, I want the Commission's guarantee in advance in writing to two issues:

a. That it will approve the change of providers when I file the formal application with the Commission (already prepared and pending my receipt of the Commission's procedures in this particular Case); and

b. That I shall have no complications of any kind from Progress Energy as specified in Para. 5 of the Release.

Thus in summary, it is my request to the Commission that it declare **that upon my formal application**, it will approve the change of providers as provided for in the Para 5 of the Release, and as a matter of policy.

Any aspects concerning other consumers or rights that Progress Energy may have as to its proprietary interests as expressed in the said Para. 5., should be settled solely between the Commission and Progress Energy without hindrance to execution of the Release.

It is my objective to pre-empt any attempt by Progress Energy to use the Commission, over which it appears to exercises undue influence, to "weasel out of" its agreement in Para. 5 of the Release.

As noted it has already started to "weasel out" of its commitment to immediately connect electric power to my residence pursuant to Para. 1 and Para 2 of the Release. Based on past experience in dealing with Progress Energy's personnel, and the harassment and abusive dealings with the utility's consumer services staff, I do not trust Mr. Len Anthony or the company one iota.

Provided I receive the advance assurance requested in writing from the Commission, we can then proceed to address the requirements of Para 3 and Para. 4 of the Release relating to dismissal of to the outstanding regulatory and judicial matters before the Commission and the Dillon Court.

Once I get a firm Commission advance written committal containing its approval to the change of providers as requested, and acceptance is filed thereof by Progress energy, I shall then proceed to the dismissal of my claim which shall remain open and pending until that time. (See the letter dated October 16, 2007 from Mr. Gary Weaver, Respondent Pro Se in this case, addressing those issues).

Meanwhile, I respectfully request the Commission for an uncommonly rare display of consumer protection to this S.C. consumer; for an order to Progress Energy to promptly connect the electric power to my residence at 1253 Harllees Bridge Road, Dillon County, pursuant to Para.1 & 2, of the Release, a copy of which Mr. Anthony has formally filed with your Office on Sept. 27,2007. Additionally, I request the Commission to issue an admonishment that failure to do so will subject

Progress Energy to sanctions. Said connection to remain in place until I become a consumer of an alternative provider as ordered by the Commission.

The Commission's authority to order electric power connection is prima facie under Para 1 and Para 2 of the subject Release, given that I have complied with the terms and conditions stated therein.

This request is also intended to comply and satisfy any claim by any party at any time, anywhere, as to my efforts for exhausting administrative relief and for mitigation, and that I am complying with Para. 3, 4, and 5 as stated above.

Conclusion and Follow-up.

Based on my disappointing experiences in dealing with the Commission and the O.R.S. over the past few years, it appears to me that both entities operate under the undue influence of Progress Energy. It is a billion dollar, for profit, interstate utility that pays the Commission and ORS salaries by assessment and hence costs charged to the S.C. consumer through its rates. Partly that explains Len Anthony's attitude in dealing with customers and the regulatory agencies as discussed elsewhere.

Under separate cover, I shall place on record the numerous violations of State statutes and Commission/Ors Regulations committed in the processing of my case by the utility, with complete continuing and unwavering condonation and support of the Commission and ORS. In my communications with this government body, I have stated that it is one thing for a lawyer to use legalistic "shyster" tactics in representing his employer client; however, it is quite another for a public agency not only to condone such tactics, but to entirely fail its duty and its mandate to make any effort to protect the S.C. consumer. More on these aspects under separate cover.

Right now, it is the Commission's duty as a regulatory agency to ensure my electricity power supply, "the necessity of life" is provided for me without further delay.

Please be advised that the respective case dismissals provided for in the Release, will not be formally filed unless and until Progress Energy fully complies with all of its obligations cited in the Release, particularly Para 1 and Para 2 therein. See the separate letter from Mr. Weaver to be filed concerning these issues.

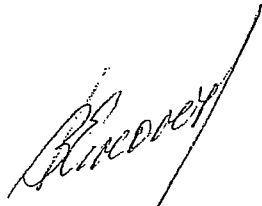
For the record and as further evidence for this and future or related cases, a copy of medical schedules and tests for my two cancer afflictions will be filed under separate

cover and must be handled as strictly private and confidential AND NOT FOR RELEASE, pursuant to related Federal and State statutes. Enclosed is the original copy of yet another **Certificate of Medical Necessity from Dr. Phil. Wallace, dated October 15, 2007**. On record for further reference, are also several exhibits which over the years, the Commission has refused to even consider.

To the best of my belief and understanding, the facts and events cited herein above, are true and correct and the attached exhibits are true and correct copies of the originals.

This supplemental memorandum is filed for the record and based on the records and files of this case. Please be so kind and distribute copies to any and all parties your Office deems necessary.

Respectfully submitted.



Beatrice Weaver, Respondent Pro Se

Cc: To all parties of interest by request of the Office of the Executive Director.

Att: Exhibits A-F; Copy of Medical Certificate.

Transmitted via telefax and U.S. Certificate of Mailing
Confirmation copy for legal reference.

THIS DOCUMENT HAS AN ARTIFICIAL WATERMARK PRINTED ON THE BACK. THE FRONT OF THE DOCUMENT HAS A MICRO PRINT SIGNATURE LINE, HOLOGRAM AND THERMOCHROMIC. ABSENCE OF THESE FEATURES WILL INDICATE A COPY.

FIRST BANK

DD

REMITTER GARY W WEAVER

OFFICIAL CHECK

788947

25-1554
440

DATE October 18, 2007

PAY TO THE ORDER OF DILLON COUNTY CLERK OF COURT

\$*****1,000.00

ONE THOUSAND AND 00/100

ISSUED BY: MONEYGRAM PAYMENT SYSTEMS, INC.
P.O. BOX 9476, MINNEAPOLIS, MN 55480

DRAWEE: HUNTINGTON NATIONAL BANK
COLUMBUS, OH

DRAWER: FIRST BANK

FOR Case 2004-CP-17-232 Settlement Payment

James B. Standley

90139 / M 58858-N

A CERTIFIED
TRUE COPY
CLERK OF COURT
DILLON COUNTY
James T. Weaver

2007 OCT 18 PM 1:55

FILED
GWF T. HYATT

23
PO Box 7682
Florence SC 29502
Ph/Fax: 843 841 1606

December 3, 2007

The Hon. Gwen T. Hyatt
Clerk of Court, Dillon County
P.O. Drawer 1220
Dillon SC 29536

Dear Ms. Hyatt:

Subject: Recordation of Pleadings
Ref: Case No. 2004 CP-17-00232

Enclosed please find two copies of the following pleading for recordation:

**Notice Of Defendant Pro Se Gary Weaver's Supplemental Memorandum In
Support Of Defendant's Motion To Enforce Settlement And For Redress Of
Wrongs And For Equitable Relief**

Please mail me return a time stamped copy in the enclosed return stamped and
addressed envelope.

Best Regards.

Sincerely,


Gary Weaver, Defendant Pro Se

Cc: Counsel for Plaintiff
Counsel for Def. Beatrice Weaver

Encl: Stamped addressed envelope for return copy.

12/04/07
108

106 PAGES OF ATTACHMENTS OMITTED

109

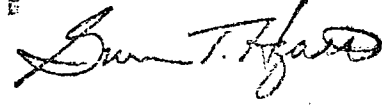
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
COUNTY OF DILLON) CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
) MOTION FOR ENFORCEMENT OF
) SETTLEMENT AND FOR REDRESS
Plaintiff,) OF WRONGS AND EQUITABLE
) RELIEF; NOTICE OF MOTION;
) CERTIFICATE OF SERVICE

vs.)

Gary Weaver and Beatrice Weaver.)

Defendants.)

 A CERTIFIED
TRUE COPY

CLERK OF COURT
DILLON COUNTY

FILED
GUYTON HYATT
2007 OCT 25 PM 3:56
CLERK OF COURT
DILLON COUNTY

**MOTION FOR ENFORCEMENT OF SETTLEMENT AND FOR
REDRESS OF WRONGS AND FOR EQUITABLE RELIEF**

Comes now Gary Weaver, Defendant Pro Se (hereafter "Defendant") in the above entitled case, and respectfully moves this Honorable Court for adjudication of the above entitled Motion.

This motion is filed pursuant to **Rule 7, Rule 8, particularly (e) (2), Rule 9, and Rule 10, S.C.R.C.P.**

Grounds for this Motion are Plaintiff's demonstrated bad faith, malicious, deliberate, calculated, grossly negligent and damaging violation and untimely non compliance with the terms and conditions of that certain settlement agreement titled "Mutual Release" executed by the parties hereto, on September 18, 2007; copy attached hereto as **Exhibit A** and by reference made part hereof.

Further grounds for this Motion result from Plaintiff's attempts to impose clearly punitive, discriminatory and arbitrary post-settlement terms and conditions on Defendants, together with its continued pattern and practice of harassment and abuse in violation of Federal and State Consumer Protection Fair Debt Collection Practices Acts.

Additionally, Plaintiff has continued its past practice of negligently and deliberately with malicious intent, to violate State statutes and regulations in the conduct

of its business practices since the execution of the said settlement agreement on September 18, 2007.

All of these practices have wronged Defendants who have incurred inconvenience, physical, and emotional stress and economic and tortious damages and losses as a result of Plaintiff's bad faith violations and non compliance with the terms and conditions of the Mutual Release.

Defendants' efforts to exhaust administrative relief and for mitigation of the issues with the Public Service Commission of South Carolina (the "Commission"), and the Plaintiff directly, have been unsuccessful as of this date.

Defendant complied in full with the immediate requirements of the Release (paragraphs 1 and 2) and Plaintiff did not as agreed and is in violation of the Release.

At the settlement conference on September 18, 2007, in order to expedite a compromise and settlement in good faith, Defendant agreed to pay considerably more than he wanted to in order to relieve the emotional stress on Defendant Beatrice Weaver who was scheduled for major surgery two days later on September 20, 2007.

Plaintiff's attorney drafted the Mutual Release and the ambiguous terms therein have created the need for this motion. Defendant did not participate in the drafting. Case law provides that interpretation of the Release document is in favor of the non-drafter of the document.

Therefore, time being of the essence, Defendant finds it necessary to file this Motion for equitable, tortious and administrative relief. A Memorandum of Law and Argument in support of this Motion shall be filed in due course under separate cover.

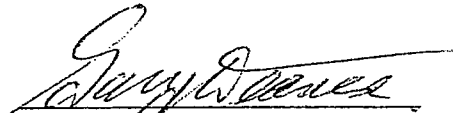
WHEREFORE, the Plaintiff having deliberately violated the terms and conditions of the Mutual Release, and having deliberately, willfully and wantonly failed to comply with the settlement agreement in a timely and responsible manner, and having caused Defendants harm, damages and losses, Defendant hereby moves the Court to compel the Plaintiff to comply with the terms and conditions of the said Mutual Release and Settlement Agreement by ordering Plaintiff to immediately connect electricity to Defendant Beatrice Wallenstein/Weaver's residence as provided in the agreement (paragraphs 1 and 2 of the Release), immediately initiate the process for a change of

provider (paragraph 5 of the Release) as agreed, and for damages and losses as claimed in Defendant's separate Memorandum of Law and Argument to be filed.

Compliance with the other terms of the Release shall turn on the Court's interpretation of the ambiguous and imprecise wording of the document, the intent of the parties, the "meeting of the minds" and Plaintiff's breach of the agreement, as discussed at length in Defendant's Memorandum of Law and Argument.

Dated: Florence, October 24, 2007.

Respectfully submitted.


Gary Weaver, Defendant Pro Se

DRAFT

(24)

113-145

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DILLON	)	CASE NUMBER 2004-CP-17-232
Progress Energy Carolinas, Inc.,	)	DEFENDANT PRO SE GARY
	)	WEAVER'S MEMORANDUM IN
Plaintiff,	)	RESPONSE TO PLAINTIFF'S MOTION
	)	TO ENFORCE SETTLEMENT
vs.	)	
	)	ETC ETC
Gary Weaver and Beatrice Weaver.	)	

DEFENDANT GARY WEAVER'S MEMORANDUM IN RESPONSE TO PLAINTIFF'S MOTION TO ENFORCE SETTLEMENT

Comes now Gary Weaver, Defendant Pro Se in this action (hereafter "Defendant"), and files this verified **Memorandum in Response to Plaintiff's Motion to Enforce Settlement** filed October 24, 2007, and **Memorandum In Support of Defendant's Motion to Enforce** filed on October 25, 2007, subject to filing further supplementary Memoranda of Law, Authorities and Argument as may be appropriate.

The purpose of this Memorandum is to rebut Plaintiff's claims and allegations submitted in its Motion to Enforce Settlement and to support Defendant's Motion to Enforce Settlement and lay the foundation for Defendant's claims for damages for Plaintiff's breach of contract, and torts.

in particular for hearing & adjudication of

1. INTRODUCTION

On September 18, 2007, the parties hereto executed that certain compromise and settlement agreement titled "Mutual Release," copy attached as **Exhibit A** hereto and made part hereof, (hereafter "Release").

Plaintiff's attorney drafted the said Release document which contains both ambiguous and unambiguous language in the respective five paragraphs comprising the two page document. As such, under case law cited herein below, its interpretation by the Court and the jury, must be in the light most advantageous to Defendant who was not the drafter of the Release document.

On or about October 24, 2007, Plaintiff filed a Motion to Enforce Settlement. Based on the facts, circumstances, Plaintiff's post signing actions, demonstrated bad

11/3

faith, and its non-performance of the Release agreement, the said motion is fraudulent, frivolous and a nuisance filing. Plaintiff is subject to sanctions, and inter alia, application of the doctrine of laches as relief for Defendant. Plaintiff comes to the Court with unclean hands, and has sat on its unclean hands doing nothing until the date of this filing.

Plaintiff is in willful and wanton, intentional breach of contract and has subjected itself to Defendant's relief for its tortious acts against Defendants. Said relief for Defendant is discussed in Defendant's directly related motions and memoranda filed under separate cover. The Court is respectfully requested to take judicial notice of the supplemental pleadings in connection with adjudicating this memorandum and Plaintiff's spurious and redundant motion.

For these reasons, Defendant submits that based on the facts, Plaintiff's Motion is submitted as a "red herring," and a transparent "smoke screen" for Plaintiff's transgressions, designed to divert the Court's attention from Plaintiff's reprehensible and flagrant violations of the Release terms and conditions. Accordingly, this memorandum discusses Plaintiff's non-performance, Defendant's demand for relief, the case law and authorities supporting Defendant's claims, and the validity of the Release agreement ~~as~~ basis for Defendant's damages claims.

2. LEGAL AUTHORITY FOR PLAINTIFF'S MOTION

Plaintiff's motion applies to the Court to compel Defendants to comply with the terms of the Mutual Release agreement with reference to paragraphs 3 and 4 of the document. The motion is silent as to paragraphs 1 and 2 of which Plaintiff is in breach of contract, and paragraph 5 where it has sat on its hands and which it intentionally used as fraudulent inducement to Defendants to settle.

This Defendant is unclear as to the legal authority by which Plaintiff's motion is filed, nor the form of remedy Plaintiff is calling for.

It is established that once an action is brought, the Court retains inherent jurisdiction and equitable power to enforce agreements entered into in settlement of litigation before the Court. See, **Ozyagcilar vs. Hewitt, 86 S.C. 576, 68 S.E. 820 (1910), cited in 6 S.C. Juris. Sect.19. p.98.** Accordingly, Defendant is looking to the Court for adjudication of Plaintiff's liability for breach of contract and tortious acts, and to the jury for damages. See Defendant's supplemental pleadings related to these claims.

According to the cited authority, once the parties enter into a valid compromise agreement, any subsequent remedy of the parties with reference to matters included in the agreement must be based on the agreement itself. The agreement operates as a merger and bar of all included claims, even if the agreement has not yet been performed. 6 S.C. Juris, *Ibid*, citing *W.T. Ferguson Lumber co. vs. Elliott*, 171 S.C. 455, 172 S.E. 616. (emphasis added). *except para 1 & 2*

Defendant claims herein below that the Release document prepared by Plaintiff is ambiguous as a whole and for each paragraph as to its meaning, obligations, timing, etc. of the parties' performance. Whether or not it is valid, is left to the discretion of the Court and the jury. *Def considered the validity of the agreement prepared to the Court for summary judgment*

In a pending action, the party wishing to enforce a settlement may make a motion for summary judgment. *Ibid*, citing *Hester vs. New Amsterdam Cas. Co.*, 268 F.Supp. 623 (D.S.C. 1967). And the Court may set aside a settlement for inadvertence, improvidence, or excusable neglect, pursuant to **Rule 60 (b) S.C.R.C.P.** *Ibid*. *1 in stated on evidence discussed in the issue herein below*

At first glance, although unstated, Plaintiff's motion appears to be for **summary judgment** applied to paragraphs 3 and 4; in which case it is inappropriate. As discussed herein below, the facts and circumstances clearly establish genuine issues of material fact and Plaintiff is definitely not entitled to summary grant as a matter of law, especially since it comes to the Court with decidedly unclean hands *on all 5 paragraphs*.

Conversely, as discussed herein, and in greater detail the aforementioned supplementary pleadings, Defendants are entitled to summary judgment for liability as a matter of law for at least paragraphs 1 and 2, and as argued herein, liability for breach of contract as to paragraphs 3 and 4 of the Release, notwithstanding Plaintiff's violation of **Rule 41 (a) (1)(B) S.C.R.C.P** as discussed below.. *on the one hand would be liable*

Plaintiff's motion also has elements of a **declaratory judgment** relating to paragraphs 3 and 4 of the Release. This remedy is probably not appropriate since it is not an executory remedy. On the other hand, Defendants are entitled to a declaratory judgment as may be appropriate. As discussed herein below and the supplementary pleadings, unlike Plaintiff, Defendants have in fact complied with each and every one of the five paragraphs comprising the said Release. Where there may be any ambiguity, or

inadvertence or excusable neglect as a result thereof, it goes against Plaintiff which drafted the document.

Plaintiff's motion also has elements of administrative relief by way of the **doctrine of partial specific performance** of paragraphs 3 and 4 of the Release. If so, it is redundant as discussed herein below. Moreover it is deficient as a remedy for Plaintiff as to paragraphs 1, 2, and 5, all of which Plaintiff is in flagrant violation and breach. Again, Defendants are entitled to specific performance of all five paragraphs. However, it is an inadequate remedy for defendants since it is an alternative to money damages which is not acceptable to Defendants.

Finally, Plaintiff's motion seems to rely on the doctrine of breach of contract for administrative relief for paragraphs 3 and 4. The facts show it is Plaintiff that is in willful, wanton **and reckless breach of contract** of all five paragraphs and especially as related to this motion, paragraphs 3 and 4, particularly given the circumstances of Defendant Beatrice Weaver's serious medical needs for electric power connected to her residence. To the contrary, the facts and circumstances show that Defendants have complied in good faith with all five paragraphs of the Release.

Declaratory Judgment or Summary Judgment for Paragraphs 3 and 4

As noted, Plaintiff has refused to initiate notices of dismissal to any of the regulatory and judicial bodies pursuant to paragraphs 3 and 4.

Given that fact and the ambiguities associated with paragraphs 3 and 4 discussed herein below, Defendant has concluded that a motion for summary judgment would not be appropriate for remedy in its case. The factual evidence and the actions and conduct of Plaintiff, supports the conclusion and inference that there are genuine issues of material facts as to the implementation of paragraphs 3 and 4. A declaratory judgment action is an "action at law." See, **Wilson vs. Wilson, (S.C. App.1993) 312 S.C. 172, 439 S.E. 2d 323, 461 S.E. 2d 816.**

There is also the complication that Plaintiff being in breach of the contract, refusing to connect electric power as agreed, and refusing to file the stipulations to dismiss, as to whether or not a **Declaratory Judgment** is an appropriate remedy. Here we respectfully direct the Court's attention to Defendant's **Motion for Enforcement**

filed on or about October 25, 2007 as the more likely vehicle to enforce the said dismissals.

3. PLAINTIFF'S CLAIMS

Plaintiff's motion includes six paragraphs stating its claims against Defendants. The following discussion in rebuttal answers each claim and paragraph in order.

1. **Paragraph 1:** The Mutual Release document (**Exhibit A**) was drafted by Plaintiff's attorney. As discussed herein below, the document is **ambiguous** as to certain issues relating to paragraphs 3, 4 and 5 of the Release document. Plaintiff submits that the document is **unambiguous** as to the meaning and intent of paragraphs 1 and 2 of the Release, of which Plaintiff is in willful, wanton and reckless breach. See the discussion herein below on "**Ambiguity of the Release.**"

2. **Paragraph 2:** Plaintiff incorrectly and misleadingly claims that the Defendants have failed to comply with the terms set forth in the Release. As discussed further herein below, Defendants in fact have duly and timely complied in full, with each and every paragraph of the Release. As the facts show, Plaintiff on the other hand, has deliberately, intentionally, willfully, wantonly and recklessly violated each and every paragraph of the Release and are liable to Defendants for redress of wrongs and damages for breach of contract and torts as discussed in Defendant's supplementary pleadings.

3. **Paragraph 3:** This paragraph contains several claims and are rebutted in detail in following discussion:

1. That Defendants are required to dismiss all complaints pending before the Public Service Commission of South Carolina ("Commission")

2. This has not transpired.

Comment: In fact **all three parties to the Release** are required to dismiss as stated in paragraph 3. Pursuant to **Rule 41 (a)(1)(B) SCRCP** the onus, legal duty and obligation is on Plaintiff to initiate Stipulations for Dismissal before this Court and the Commission. It has not as of this date, it has specifically refused to do so, and must be held accountable for sanctions and liability by the Court for violation of the said Rule. See below.

3. Plaintiff claims Mrs. Weaver applied to the Commission almost immediately after execution of the Release for action by the Commission in connection with matters pending before the Commission.

4. Mrs. Weaver's **alleged** action contravened the Mutual Release.

Comment: As discussed in more detail herein below, the said communications had nothing to do with this action or the Release, and Defendant Mrs. Weaver was not in contravention of the Release, while Plaintiff continues to be in deliberate violation as a matter of choice. See below. Plaintiff has deliberately and negligently misinterpreted these communications to cover its violations of the Release, as discussed below.

4. **Paragraph 4:** Plaintiff refers to Mrs. Weaver's September 21, 2007 communication to the Commission, claiming:

1. It did not request that the action be dismissed.

2. Rather, she requested that the Commission "expedite... formal responses to the outstanding pleadings which I require for the record, pending future proceedings."

Comment: As noted above and further discussed herein below, there was no requirement that Mrs. Weaver or this Defendant take any action to file a dismissal with the Commission. That is and remains the responsibility of Plaintiff under **Rule 41 (a)(1)(B) SCRC**P. cited above and discussed below. The Commission is subject to the jurisdiction of said Rules.

The Commission was requested to respond for the purpose of closure, and more importantly for the record, in view of Defendants' planned "future proceedings" relating directly to the Commission, and the Office of Regulatory Staff. The request had nothing to do with the Plaintiff or the matters pending before the Commission, except for the proposed "Change of Providers" pursuant to paragraph 5 of the Release. See copy of Defendant's "**Application for Change of Provider**" ("Application") duly filed with the Court.

The communications and "future proceedings" referred to, have to do with Defendant Mrs. Weaver's intention to litigate against the Commission and its individual Commissioners, per se, assuming she survives the impending major surgery, which is

well known to Plaintiff and duly filed with the Court. The communications also have to do with her intended television documentary on public regulation of electric utilities in this State. The proposed documentary shall be along the lines of the well known "Corridor of Shame" education program recently broadcast in this State. See the discussion in the said Application, Attachment One.

Moreover, as discussed below, the matters pending before the Commission in fact were dismissed before the execution of the Release on September 18, 2007, and are dismissed as discussed below. Plaintiff knew of this and should have known of this fact, being a party to the action. So Plaintiff's claim is redundant and self serving.

5. **Paragraph 5:** Plaintiff claims as follows:

1. Plaintiff has complied with the terms of the Release insofar as acknowledging the Defendant's potential request for a change of service providers.
2. The Release document has been filed with the Commission.
3. No alternative service provider has contacted Plaintiff as of the date of the Motion.

Comment: Paragraph 5 provides that Plaintiff "will consent" to a change of providers subject to certain conditions which in fact Plaintiff knew or should have known would be next to impossible to achieve. This and its deliberate, fraudulent silence at the settlement conference will be discussed at trial. Plaintiff is liable to Defendants for fraudulent inducement, fraudulent intent, and committing a fraudulent act.

As such it is liable to Defendants for punitive damages under the law of torts and the exception to the breach of contract doctrine. To claim that an "acknowledgement" constitutes performance is misrepresentation and prevarication at least. Plaintiff in fact is required under paragraph 5 of the Release to initiate action to effect a change of providers which it has not done as of this date.

Plaintiff notes that the Release document has been filed with the Commission. This was done by Plaintiff on or about September 27, 2007, some nine days after execution of the Release. This does not constitute a Stipulation for Dismissal as required of the Plaintiff under SCRCF Rule 41. If it does, then it applies to all three

parties. Moreover as noted the action has already been dismissed by the commission. See discussion below.

Pursuant to paragraph 5, Plaintiff has an obligation to initiate the change of provider proceedings With Marlboro electric cooperative, which it has not disclosed to Defendants or the Commission as of this date. See discussion on the change of providers in Defendant's supplementary pleadings.

6. **Paragraph 6:** Plaintiff makes several claims in this paragraph that are incorrect, and misleading.

1. Plaintiff points out that it gave up part of its (alleged) debt in consideration of the terms of the Release.

2. Both Progress Energy and Defendants were represented by counsel at the negotiation and signing of the Release.

3. With the consent of Defendant Mrs. Weaver's counsel.

Comment: Both Defendants agreed to the compromise and settlement on September 18, 2007, because of the major surgery scheduled for Mrs. Weaver on September 20, 2007 and the long rehabilitation period that would prevent her from being present as this Defendant's material witness at the trial set for October 12, 2007. The intent was to remove stress and strain. Plaintiff knew of this and should have known of this as the prime purpose for executing the Release. As such its subsequent breach of the Release agreement was not only reckless, but also unconscionable. See Defendant's supplementary pleadings discussing these issues and Plaintiff's liability for damages.

As consideration this Defendant agreed to pay more than was due Plaintiff in order to accommodate Defendant Mrs. Weaver's wish to remove the case, for medical reasons. She needed electricity connected. See **Exhibit** __ copy of the Certificate of Medical Necessity which Plaintiff has recklessly chosen to ignore in its violation of paragraphs 1 and 2 of the Release.

This Defendant was not represented by Counsel, since he is appearing Pro Se before the Court. This Defendant's consent to the Release was conditioned on Plaintiff's fraudulent representations and silence concerning the proposed change of service providers at the settlement conference.

4. **STIPULATIONS TO DISMISS**

Plaintiff has raised the issue that Defendants have failed to comply with the Release by failing to dismiss matters pending before the Commission pursuant to paragraphs 3 and 4. Rebuttal to this claim relies on three factors as follows:

1. As noted, Plaintiff has the legal duty and obligation to file Stipulations for Dismissal with the Commission and this Court. pursuant to **Rule 41 (a)(1)(B) S.C.R.C.P.**
2. Plaintiff filed a copy of the Release document with the Commission on September 27, 2007.
3. The Commission in fact has dismissed all matters pending before it. Any further action is unnecessary and redundant. See Exhibits from dong.

Discussion

1. **Rule 41(a)(1)(B) S.C.R.C.P** provides that an action may be dismissed by the Plaintiff without order of the Court, by filing a stipulation of dismissal signed by all parties who have appeared in the action. **Rule 41 (a)(2)** provides that an action shall not be dismissed at the Plaintiff's instance save upon order of the Court and upon such terms and conditions as the court deems proper.

Note that these rules refer specifically to the Plaintiff, not Defendants, who may initiate the dismissals. Having agreed to a compromise and settlement agreement and to dismiss, it is incumbent legally, for Plaintiff to timely prepare, obtain signatures and file the Stipulations to Dismiss.

Paragraph 3 refers specifically to matters pending before the Commission as of September 17, 2007. **All three parties** to the Release agreed they **"will dismiss"** any complaint, etc.

Paragraph 4 states that the three parties "will mutually release" each other as to any matter, action, etc., that may exist as of September 17, 2007.

Pursuant to **Rule 41 (a)(1)(B)** the onus, obligation and legal **duty** is for Plaintiff, not Defendants, to prepare any stipulations for dismissal provided for in para.3 and 4, **as a matter of law**. It is also customary for any such dismissals to be immediate or be filed within a reasonable time by Plaintiff, which to this date has done nothing..

Plaintiff has failed its legal duty and obligation to initiate the stipulations and in fact has refused to initiate any of the five paragraphs of the Release. In addition to breach of contract, torts and damages, Plaintiff is in violation of the law and must be held

accountable. Sanctions are called for at the very least in this instance. See Exhibits (shine.)

2.

Copy to commission

Commission has dismissed the Matters.

5. **AMBIGUITY OF THE RELEASE DOCUMENT**

The Mutual Release Agreement drafted by Plaintiff's legal counsel contains ambiguous language in paragraphs 3, 4, and 5 as to interpretation related to respective responsibilities, obligations and time for respective party's performance, mutuality of assent as to performance, intent or purpose, and meeting of the minds.

1 **Interpretation of Ambiguous Language.**

A contract which is capable of an interpretation which will make it valid will be given such an interpretation if the agreement is ambiguous. See, **Osteen vs. T.E. Cuttino Const. Co.**, 315 S.C. 422, 434 S.E. 2d 281 (1993). It is a question of law for the Court whether the language of a contract is ambiguous. See, **S.C. Dept. of Nat. Res. vs. Town of McClellansville**, 345 S.C. 617, 550 S.E. 2d 299 (2001). An ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning. See, **Atlantic Fin. Services, Inc., vs. Middleton**, 349 S.C. 77, 562 S.E. 2d 482, (Ct. App. 2002).

Ambiguities or conflicts in documents constituting a contract must be construed against a party who prepared the contract, in this case Plaintiff's counsel. See, **Mid-Continent Refrigerator Co. vs. Way**, 263 S.C. 101, 208 S.E. 2d 31 (1974). Where a contract is susceptible of more than one interpretation, a doubt is to be resolved against the Party whose business it was to speak without ambiguity. See, **Williams vs. Teran, Inc.**, 266 S.C. 515, 221 S.E.2d (1976). Where an agreement is ambiguous, the Court should seek to determine the parties' intent. See, **Smith-Cooper vs. cooper**, 344 S.C. 289, 543 S.E. 2d 271 (Ct. App. 2001). The determination of the parties' intent is a question of fact, if the language of the contract is ambiguous. **S.C. Dept. of Nat. Res. vs. Town of McClellansville, Op Cit.** And the Court must first look to the language of the contract and if the language is clear and unambiguous, the language alone determines the

contracts force and effect. See, **Barnacle Broadcasting, Inc. vs. Baker Broadcasting, Inc.**, 343 S.C. 140, 538 S.E.2d 672, (Ct. app. 2000).

The subject Mutual Release ("Release") contains both ambiguous and unambiguous terms that require interpretation and construction of the Court and the Jury. All three parties to the Release have different views or interpretations on the meaning of paragraphs 3, 4 and 5 separately and when considered together as a whole, as evidenced by the post-agreement interpretations, actions and writings of both parties. Plaintiff Progress Energy is in clear and convincing breach of the unambiguous terms in paragraphs 1 and 2. The ambiguity attaches to the meaning and intent of paragraphs 3, 4 and 5 of the Release.

Entire or Severability of the Release.

It is noted elsewhere herein, that the Release document is presented in two separate and unrelated parts. The first part is addressed to settlement of the alleged debt for adjudication before this Court. The second part is addressed to dismissal of unrelated matters between the parties before the Commission and the action before this Court. As noted there is no ambiguity attached to the first part for settlement procedures of the debt. The ambiguity relates to the procedures and related matters to performing paragraphs 3, 4 and 5. Note that it was Plaintiff's Counsel who drafted the Release document and interpretation of the document is to be in favor of Defendants.

Thus we confront the interpretation of a two part, five paragraph agreement. Defendant has filed for a partial summary judgment relating to the first part, and Jury trial for the second part relating to Administrative matters before the Commission and for damages.

Under S.C. law, a severable contract is one which is, in its nature and purpose, susceptible of division and apportionment, having two or more parts which are, on the basis of the parties' intentions, not necessarily dependent upon each other. See, **Beach Co. vs. Twillman, Ltd**, 351 S.C. 56, 566 S.E. 2d 863, (Ct. App. 2002). **This is exactly the case in consideration in this pleading for summary judgment.** Defendant pleads to sever the first part from the second part for adjudication by the Court and the Jury. Neither part is dependent on the other as Plaintiff is attempting to claim in its Motion for Enforcement filed on October 24, 2007. Interdependence of the two parts was not a pre-

condition of the wording of the Release document, nor in any way part of the intent or meeting of the minds of the three parties. Paragraphs 1 and 2 were to be immediately performed by all parties equally. Paragraphs 3, 4 and 5 are ambiguous as to timing and whose responsibility it is to initiate dismissals and changeover of providers. As noted, it is normal and customary in court procedures, for the Plaintiff in any action to provide the Stipulations for Dismissal, not the Defendants. Plaintiffs have negligently and deliberately refused to meet that implied obligation, especially since Plaintiff's Counsel drafted the Release document and omitted any implied or express verbal or oral reference to those issues.

The question thus arises: **How is the intention of a party to a contract to be deduced?** It has been said that:

The intention of the parties is to be deduced from the language employed by them, and the terms of the contract, where unambiguous, are conclusive, in the absence of averment and proof of mistake, the question being, not what intention existed in the minds of the parties, but **what intention is expressed by the language used**. When a written contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence, **words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed**. 13 C.J.524, quoted by Rhodes, J. in *National Realty Appraisal Co. vs. Art Club*, 195 A.139, 129 Pa. Super. 99, (1937). (emphasis added)

There is a long line of case law in South Carolina citing essentially the same dicta. For example see: *Schulmeyer vs. State Farm Fire and Cas. Co.*, 353 S.C. 491, 579 S.E. 2d 132 (2003); *L-J, Inc. vs Bituminous Fire and Marine Ins. Co.* 350 S.C. 549, 567 S.E. 2d 489 (Ct. App. 2002).

In the instant case, we have Plaintiff Progress Energy, both expressly and impliedly denying its obligation to prompt installation of electricity for Defendant Beatrice Weaver as agreed under para. 1 and 2, and reading words and intent into the Release Agreement where none exists, either expressly or by implication, applied to all five paragraphs.

Thus the logical question then arises: **How important is the intent of the Release Agreement?** To this question it has been stated:

As the meaning of the law-maker is the law, so the meaning of the

contracting parties is the agreement. Words are merely the symbols they employ to manifest their purpose that it may be carried into execution.... The intent developed is alone material, and when that is ascertained, it is conclusive. **Johnson vs. Stumbo**, 126 S.W. 2d 165, 277 Ky.301(1939) citing **Swayne J. Whitney vs. Wyman**, 101 U.S. 392.

2. Reasonable, Just and Practical Construction of Contract Language

The logical sequence of analysis leads us to consider the following question:

What must be considered in interpretation and construing an ambiguous contract?

As noted herein, the Release is a poorly drafted combination of both ambiguous and unambiguous terms and conditions, and equally, a clearly demonstrated absence of the meeting of the minds on certain issues, to Defendant's harm and detriment. In every respect the evidence is **clear and convincing that Plaintiff is in flagrant violation of all five paragraphs of the release.**

It is stated that common sense and good faith are the leading touchstones of construction of a contract. See, **Farr vs. Duke Power Co.**, 265 S.C. 356, 218 S.E. 2d 431 (1975). In this case, Defendants have performed in good faith. The same cannot be said of Plaintiff Progress Energy, as evidenced in this pleading. Further, where one construction of a contract makes it **unusual or extraordinary**, and another construction, which is equally consistent with the language employed, would make it **reasonable, fair, and just**, the **latter** construction would prevail. **Ibid.**

This rule requires that language used in a contract be interpreted in its "natural and ordinary sense", and that a contract should receive "a sensible and reasonable construction, and not such construction as will lead to absurd consequences." See, **Twenty Ninth Ave, Corp. vs. Great Atlantic and Pacific Tea Co., Inc.**, 311 S.c. 275, 428 S.E. 2d 734 (Ct. app. 1993) reh'g dnd, (apr. 26, 1993.)

Consistent with this principle, Courts generally prefer construction imposing mutuality of obligation to one imposing an obligation which is unilateral. See, **Moody vs. McLellan**, 295 S.C. 157, 367 S.E.2d 449 (Ct. App 1988). When the language used by the parties is plain and unambiguous as in para.1 and 2, there is no room for construction. The law of contracts does not permit courts to take liberties with unambiguous contractual language to reduce liabilities clearly assumed (by Plaintiff). See, **Grimes vs. Toensing**, 277 N.W. 236, Minn. 1938.

In this case, paragraphs 1 and 2 of the Release obligated Defendants for a definite term; viz., to make certain payments which it did on time. Similarly, the same term imposed an obligation on Plaintiff Progress Energy to connect electricity immediately said payments were made. It did not. There is no clear evidence, nor anything in the Release wording that the parties to the Release intended differently; therefore Plaintiff Progress Energy was bound by the terms of the contract, to be expressly and impliedly bound by the same term as Defendants; i.e., to perform immediately when required.

Ibid. There is no "subject to", or "conditioned on," or any similar qualification or terms for performance by any Party, under para.1 and 2. In South Carolina it is established law that there exists in every contract an implied covenant of good faith and fair dealing.

See, **Boddie-Noell Properties, Inc. vs. Magnolia Partnership**, 344 S.C. 474, 544 S.E. 2d 279, (Ct. App. 2000). Further, if the evidence is conflicting or raises more than one reasonable inference as to contract formation, the issue should be submitted to the Jury. See **Hendricks vs. Clemson Uni.**, 353 S.C. 449, 578 S.E. 2d 711 (2003). There can be no doubt about the meaning and intent of paragraphs 1 and 2 of the Release.

Consequently with respect to the interpretation of the respective responsibilities and obligations under paragraphs 1, 2 and 5 of the Release, the Court must imply consistent terms into the Release document if reason, justice, honesty or fairness would lead the Court to believe that the parties omitted implied terms. See, **Wilder Corp. vs. Wilke**, 324 S.C. 570, 479 S.E. 2d 510 (Ct. App. 1996) reh'g dnd (Jan 3, 1997) cert.grntd (July 10, 1997), dec. aff'd, 330 S.C. 71, 497 S.E. 2d 731 (1998).

3. Surrounding Circumstances

Under South Carolina law, although it is a question of law for the court, whether language of a contract is ambiguous, the meaning of the ambiguous terms is not a matter for the Court to decide; rather, once the court decides that language is ambiguous, evidence may be admitted to show the intent of the parties and determination of the parties' intent is then a question of fact. See, **Osborn vs. Uni. Med. Assoc. of the Med.Uni. of S.C.** 278 F.Supp.2d 720 (D.S.C. 2003)

We have seen that the Release is unambiguous as to the meaning and intent of paragraphs 1 and 2 of the Release, but is ambiguous as to the intent and meaning of paragraphs 3, 4, and 5. Case law holds that in general, an instrument must be construed so

as to carry out the intention of the maker as gathered from all attendant circumstances, and the facts surrounding the making of the instrument, both of which must be given weight. See, **Harper vs. S.C. Tax Comm.**, 267 S.C. 144, 226 S. E 2d 699 (1976). In short the Court must judge the meaning of the words and the correct application of the language. See, **Klutts Resort Realty, Inc. vs. Down'Round Dev't Corp.** 268 S.C. 80, 232 S.E.2d 20 (1977).

Words which admit of more extensive or more restrictive signification must be taken in that sense which will best effectuate what is reasonable to suppose was the real intention of the parties in light of the surrounding circumstances. See, **Ellis vs. Taylor**, 311 S.C. 66, 427 S.E. 2d 678. The surrounding circumstances to be considered include the purposes of the parties in entering into the contract. See, **Klutts, Op cit.**

The subject matter of a contract is also to be considered in ascertaining the intention of the parties and the meaning of the terms they have used. See, **Stuckey vs. Uni. Of S.C.**, 284 S.C. 295, 325 S.E. 2d 709(Ct. App. 1985).

4. **Construction and Conduct of the Parties**

The construction of the contract by the parties themselves may also be considered when the contract is ambiguous or there is doubt as to its intended meaning. See, **Jordan vs. Security Group, Inc.**, 311 S.C. 227, 428 S.E.2d 705 (1993). In this case ALL THREE Parties have placed a differing construction of paragraphs 3, 4 and 5 of the contract, evidenced by the several pleadings filed with the Court for enforcement. Defendant submits that Plaintiff's construction of the contract is not only negligent, deliberate, in error and self serving, but made in bad faith and with no intention of meeting the terms of paragraphs 1 and 2, and its position on who is responsible for initiating paragraphs 3-5 as discussed below.

It is stated that the **conduct of the parties** is also entitled to great weight in interpreting an ambiguous contract. See, **Langston vs. Niles**, 265 S.C. 445, 219 S.E. 2d 829 (1975). In this case, Defendants' conduct has been carried out in good faith compliance with the terms of the agreement. On the other hand, Plaintiff Progress Energy's conduct has been that of deliberate unconscionable delay, harassment and abuse, and reprehensible, unreasonable breach of all five paragraphs of the agreement. See further discussion below.

2. INTERPRETING THE VALIDITY OF THE RELEASE DOCUMENT

The foregoing review suggests that under case law we have the following factors to consider with application to this pleading for relief and damages.

1. Ambiguity of the Release Language.
2. Construction of the Agreement.
3. Surrounding Circumstances.
4. The Purposes/Intent of the Parties
5. The Subject Matter of the Release.
6. Conduct of the Parties
7. Time for performance

1. **Ambiguity of the Release Language is to be Interpreted in Favor of Defendants.**

There is nothing ambiguous about the language of paragraphs 1 and 2 of the Release. The language of paragraphs 3-5 is ambiguous, as is the conflicting and mutually unclear intent of the three parties to the Agreement, particularly as to time for performance and who will do what to initiate performance.

Plaintiff's Counsel drafted the Release document. Defendant did not participate in the drafting. Nor did Defendant Pro Se Gary Weaver participate in any of several side bar conversations or drafting between Plaintiff's counsel and counsel for Defendant Beatrice Weaver that took place outside the settlement conference room (for typing the document and discussions concerning paragraph 4.). As noted above any ambiguity in the drafting of the contract is interpreted in favor of Defendants the non drafting party. This rule has been recently reinforced in South Carolina and Defendants claim refuge in the rule. Thus, it is stated that ambiguous language in a contract should be construed liberally and interpreted strongly in favor of the non-drafting party. See, Bazzle vs. Green Tree Fin. Corp., 351 S.C. 244, 569 S.E. 2d 349 (2002)

2. **Paragraphs 1 and 2 are Not Ambiguous as to Language, Time of Performance, or Intent and Defendants are entitled to Summary Judgment as a Matter of Law for Specific Performance and Damages**

1. As noted above, paragraphs 1 and 2 of the Release are clear and unambiguous as to the obligations of the three parties involved in the agreement. The language is specific, to the point and quite clear, and the mutual intent and purposes are quite clear. There can be no misinterpretation as to the respective liabilities and obligations of all three parties under these two paragraphs and as to time for performance.

2. The language used in paragraphs 1 and 2 must be interpreted in the "natural and ordinary sense" and should receive "a sensible and reasonable construction, and not such construction as will lead to absurd consequences."

3. Defendant submits that it is an absurd interpretation of the paragraphs by Plaintiff to mean anything other than that Plaintiff Progress Energy should immediately connect electric power to the residence of Defendant Beatrice Weaver upon Defendant Gary Weaver's payment of the agreed settlement amounts which are his liability, and Defendant Beatrice Weaver's payment of the security deposit as agreed. Both Defendants timely complied with the respective obligations as agreed. See **Exhibits ____**. **Plaintiff still has not complied as of this writing.**

4. There is nothing in the language of paragraphs 1 and 2 that indicates any intent of the parties that performance of the terms were "conditional", "contingent on", or "subject to", or "in the event of," or any other similar provisions implying that performance would be anything other than immediate by all three parties upon due performance of the obligations as called for in paragraphs 1 and 2.

Summary judgment for Defendants under paragraphs 1 and 2 is justified. **There are no genuine issues of material facts in paragraphs 1 and 2, and Defendants are entitled to summary judgment as a matter of law pursuant to Rule 56 S.C.R.C.P. and the discussion of the applicable law favorable to Defendants in Appendices ____ hereto.**

5. In the absence of any ambiguity attached to performance under paragraphs 1 and 2, the conclusion is clear that Plaintiff Progress Energy's flagrant and indeed arrogant violation of the agreement terms, is a major breach of contract subject to immediate relief from the Court for summary judgment for specific performance, and damages from the Jury.

3. **Paragraph 3**

The wording of paragraph 3 is not ambiguous as to the intent of the three parties. All three parties agree that they "will dismiss" any action currently before the Commission. The language is ambiguous as to performance.

The ambiguity of Paragraph 3 lies in the lack of a meeting of the minds as to the intent, the timing of the performance **by each of the parties**, under what conditions, and who will initiate the performance.

There is no reference as to any required unilateral initiative on the part of any one party to perform the terms under paragraph 3. The language of this paragraph is silent on the timing required to perform. Further, because of a dispute it is not "perfectly obvious by the parties," nor was a reference to timing "inadvertently omitted" as to the timing of the act by any of the parties. See, **17A am.Jur.2d. Contracts, Sect. 379.**

Para. 3 does not refer to the words "immediate," "promptly," or "upon execution hereof," or "simultaneously with", or any similar conditional expression relating to time being of the essence or even "within a reasonable time" with respect to performance of the three parties under this paragraph. **In short there is no express agreement as to exactly when the terms should be met by any of the parties under paragraph 3.**

Implied terms: Since there is no express provision in the release Agreement as to time for performance under paragraph 3, we turn to the policy of the law with respect to implied terms that may be interpreted from the parties' conduct, construction, and intentions, etc. In this case, whatever any such implied terms may be, they would apply to all three of the parties equally.

In the absence of any express conditions the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made. See, **Columbia East Assoc. vs. Bi Lo Inc., 299 S.C. 515, 386 S.E. 2d 259 (Ct. App.)**

In this case **it is clearly expressed that all three parties will dismiss the action before the Commission** (Para. 3). However, with the usual and typical disregard for its commitments, Plaintiff Progress Energy has filed a motion for enforcement of para.3. and 4 in this Court (on or about Oct. 24, 2007), only by Defendants. Plaintiff conveniently excuses itself from any such obligation or liability to Defendants to do so. See below discussion. Plaintiff's motion claims that the para.3 clause applies only to Defendants and

not to Plaintiff, even though in fact it also signed off on the provision. Further, Plaintiff Progress Energy asserts that it is Defendants alone that are remiss in not timely filing a dismissal in the absence of any requirement for time of performance.

Plaintiff's actual **conduct** concerning this point subsequent to signing the Release, together with the additional harassment and abuse of Defendants as documented elsewhere herein, particularly in refusing to connect electricity as agreed, clearly evidences that Plaintiff had a different intent, a different interpretation of the meaning of the ambiguous language, and certainly there is no meeting of the minds on the subject in question. This is exacerbated further with respect to paragraph 4 as discussed below.

Plaintiff is liable to Defendants for breach of the agreement under para. 3. specifically.. Cumulatively, Plaintiff's actions are incontrovertible as to its fraudulent inducement and intent in executing the Release in the first place. The ambiguity is further enhanced by the language of paragraph 4. Let us examine the issue.

4. Paragraph 4

The language of this paragraph is clear, express and not ambiguous as to the intent of all three parties to a mutual release of litigation, but it is also ambiguous as to performance.

Paragraph 4 of the Release agreement provides that **all three of the parties** "... will mutually release each other as to any matter, action potential action, or any matter whatsoever which may exist between the parties as of September 17, 2007."

As for paragraph 3, this provision is also silent on the issue of performance, particularly as to timing.

In paragraphs 1 and 2, of the Release document we have shown that Plaintiff provided specific and precise provisions for performance by both parties, notwithstanding that Progress Energy has defaulted on performing its part as discussed above.

However in both paragraphs 3 and 4 Plaintiff omitted any direct or express reference or terms as to timing and the circumstances for performance of the agreements. So again we turn to consideration and construction of the agreement as to **implied terms**, if any.

First, the terms expressed apply equally to all three Parties to the agreement. Whatever applies to one, applies to all three as to performance. Further, Defendant

submits that the language of para. 4 in fact implies if not expressed directly, that performance of this paragraph inherently includes performance of paragraph 3. Performance by all three Parties of the two paragraphs are interdependent and connected and may be interpreted as meaning performance of both together, simultaneously, the latter (para.4) automatically activates the three parties performance of the former (Para.3). Here again the onus is on Plaintiff to submit a proposed Stipulation for Dismissal to the Defendants. It has not.

What is more, Defendant has specifically refused to provide any such stipulation on the argument that Defendants should **unilaterally** file a stipulation to dismiss a ction before the Commission. See exhibit __ (lettere to shine.) and discuss. This is a direct and deliberate abrogation of Plaintiff's obligations and liability to Defendants to perform para. 4. terms as agreed. Plaintiff is liable to Defendants for specific breach of para. 4 of the agreement.

(discuss here progresss motion for enforcement.

5. Paragraphs 5

Defendants have timely and reasonably initiated performance to effectuate a change of providers, but Plaintiff has not initiated any effort to effect such a change and is liable to Defendants for a bad faith Non-performance of the Agreement.

The terms and conditions of this paragraph are quite clear, concise and expresses to the intent or meeting of the minds of the parties. Here again the terms are ambiguous as to which party takes the initiative to effect the change of providers as agreed. Nothing is implied other than that Plaintiff Progress Energy will promptly within a reasonable time initiate negotiations with Marlboro Electric Cooperative for a change pf providers and the regulatory procedures with the Commission.

During the settlement negotiations Defendant made it a point to inform Plaintiff's Counsel that he had already discussed the issue with a Marlboro Electricity Cooperative representative and that Progress Energy should have no difficulty in negotiations, subject to Commission approvals, etc, and the other conditions to protect Plaintiff's business interests.

Within a reasonable time after the September 18, 2007 execution of the Release document, Defendants promptly initiated efforts to effectuate the changeover of

providers. Defendants do not wish to have Plaintiff Progress Energy as the provider of electricity if it can be arranged otherwise. On or about September 22, 2007, just four days later, Defendants submitted a written Request to the Commission for guidance as to the policy and correct procedures to facilitate a change of providers under the Commission regulations. See **Exhibit ____** hereto. BEW letter to PSC). On or about September 27, 2007 Plaintiff Progress Energy filed a copy of the Mutual Release document with the Commission. See Exhibit **__** hereto. Plaintiff did not initiate any changeover action.

The Commission set to discuss Defendant's Request on Oct. 17, 2007 and cancelled that discussion when Defendant informed it that he would be present at the Meeting. The Commission this was because Defendant had informed it that the Mutual Release was not yet in effect since the Plaintiff Progress Energy had not performed as agreed. Defendants objected claiming undue process and continued favoritism to Plaintiff. Defendants have a right to request a changeover with or without any Release.

Meanwhile, since the Commission has refused to act since September 22, 2007, and Plaintiff has continued to sit on its unclean hands, on or about October 18, 2007, Defendants contacted Marlboro Electric Cooperative directly to commence the efforts to arrange the changeover. See Exhibit ..

As of this date, the Commission still has not responded to Defendant's efforts to effect the changeover, Plaintiff continues to sit on its unclean hands, and Marlboro Electric Cooperative has not yet responded.

It was Defendant's expectation and intent, with a tacit understanding at the settlement conference that Plaintiff in anticipation of the proposed changeover, would promptly within a reasonable time, directly contact the Commission and Marlboro Electric Cooperative to initiate the changeover of provider process. Plaintiff is a sophisticated, interstate conglomerate utility organization with a bevy of professional staff, in-house and contract attorneys at its disposal, all steeped in the regulatory, administrative and operational processes for changeover procedures and related matters. Defendants are not. **Here again, the wording of the Release is ambiguous as to intent and meeting of the minds, and upon construction must be interpreted in favor of Defendants.**

When it became clear to Defendants that Plaintiff was going to sit on its unclean hands in relation to the expected changeover and the remainder of the Release commitments it made, Defendants unilaterally initiated efforts to timely and reasonably perform the requirements of Paragraph 5 as to exhausting administrative relief, in mitigation of any damages that may accrue, and since Plaintiff Progress Energy continues to do nothing.

3. TIMING OF PERFORMANCE

The issue of time provisions in the Release agreement relates directly to the determination of the materiality of delay in performance of either party. Is there a delay in performance by a party; if so, is it reasonable; if not, does it harm the other party; if so, what are the damages?

Both Defendant and Plaintiff have filed Motions for Enforcement of the Release Agreement, in large part based on the timing of performances pursuant to the charge of the respective paragraphs in the release. Based on the facts, Plaintiff's motion is groundless, whereas on the same grounds, Defendant's motion and this pleading are enforceable based on the law of contracts as discussed herein.

It has been stated that if the delay of one party (Plaintiff) is considerable having reference to the nature of the transaction and the seriousness of the consequences, (e.g., Plaintiff's inexcusable delay in connecting electricity required by Defendant Beatrice Weaver for medical reasons), and is not justified by the conduct of the other party (Defendants), the duty of the latter (Defendants) is discharged. See, **Morgan, J., O'Brien vs. Bradulow, 80 N.E. 2d 685, Ohio App. 1948**. Discusses a line of cases citing four rules in determining the materiality of delay in performance.

On this ground alone, Defendant is entitled to summary judgment on Paragraphs 1 and 2, and Plaintiff should forfeit the third payment required under the Release. See additional discussion on delay herein.

Plaintiff Progress Energy claims in its Motion to Enforce that both Defendants have not performed the obligations pursuant to paragraphs 3 and 4 of the Release with respect to dismissals. This charge has been answered above. However, the issue has been raised as to the question of timing of performance and requires construction according to the intention of the parties to the Release. Thus we ask:

What are the provisions in the Release that specify any timing for performance by the respective parties for each paragraph and the Release as a whole?

Is time of the essence in the parties' performance of Release terms?

What is the policy of the law as to time for performance?

In answering these questions we again face the issues of express and implied agreements, intent and conduct of the parties, the meeting of the minds, and construction of the document as to provisions for timing of performance.

Time of the Essence.

According to one authority, while express terms and provisions in a contract as to time, are effective and cannot be ignored, such terms and provisions are often stated in such a manner as to require construction, and must be construed according to the intention of the parties. **17A Am Jur. 2d Contracts, Sect. 478**

It is further said that time is not ordinarily of the essence of the contract unless made so by express stipulation or unless there is something connected with the purpose of the contract, and the circumstances surrounding it which makes it apparent that the parties intended that the contract must be performed at or within the time named. **Ibid. Sect. 483.**

It is already noted above that para.1 and 2 and 5 of the Release provided for specific performance under specific conditions, and it is both express and implied from the wording, intent and purposes and actions of the parties that time is of the essence for performance by both parties.

Paragraphs 3 and 4 of the Release are ambiguous as to time being of the essence for performance by all three parties. Therefore we must look to the law for interpretation of the element of time applied to performance under paragraphs 3 and 4..

The law provides that **time may be made of the essence**, one party giving notice to the other that he or she will insist on a **strict performance**, or, if the time of performance has arrived or is passed, that he or she will insist on performance by a certain date, provided that the time allowed by the notice is reasonable, which is a question of fact depending on the circumstances of the particular case. See, **Bishop vs. Tolbert, 249 S.C. 289, 153 S.E. 2d. 912 (1967).**

Reasonable time for Performance: Where a contract sets no date for performance, time is **not** of the essence in the contract, but it must be performed within a reasonable time. See, **Drews Co. Inc. vs. Ledwith-Wolfe Assoc. Op Cit.** Whether a party's performance was completed within a reasonable time is ordinarily a jury question. **Ibid.** Before canceling a contract for non-performance within a reasonable time, express, unequivocal, and reasonable notice must be given to the other party. **General Sprinkler vs. Luris Development, Op cit.**

Applying these principles of the law to this case, note that Defendants upon their full performance of para. 1 and 2, gave due reasonable notice to Plaintiff on October 4, 2007 and was promised connection of power on October 5, 2007 which did not happen. Subsequently, in further mitigation, Defendants gave several more express, unequivocal, and reasonable strict notices of time being of the essence, and additional reasonable time for Plaintiff's performance to no avail, and Plaintiff denied connection until this date of writing (Oct. 2, 2007 to November __, 2007. See, **Exhibits ____**. **Discuss here.** See also discussion of Plaintiff's **harassment and abuse** herein.

Plaintiff Progress Energy is in violation of the legal requirement to give adequate and reasonable notice for performance.

Note that Plaintiff Progress Energy has provided no timely notices as required by the law to Defendant relating to performance of any of the five paragraphs within a reasonable time. One oral notice was given on Oct ??? that electric power would not be connect5ed ... Se. Exhibit . ???? Instead on October 24, 2007, (36 days), Plaintiff filed a Motion for Enforcement on dubious grounds, of an ambiguous document that it drafted on September 18, 2007. This act alone contravenes the law requirement that express, unequivocal, and reasonable notice must be given to the other party.

4. THE SUBJECT MATTER OF THE RELEASE AGREEMENT

The underlying subject matter of the Release is the case before this Court relating to an alleged debt that Plaintiff claims is owed it for the period 1994 through December 2001. Any alleged debt amount is owed by defendant Gary Weaver only. Defendant Beatrice was incorrectly included n the complaint on the dubious grounds of the

“doctrine of necessities.” She in fact has no liability to Plaintiff as acknowledged by Defendant Gary Weaver.

At the settlement conference on September 18, 2007, Plaintiff added the unrelated matters pending before the Commission as part of the settlement negotiations of the three parties.

5. THE PURPOSES/INTENT OF THE PARTIES

As discussed elsewhere herein, based on the discussions at the settlement conference on September 18, 2007, the purpose/intent of the respective parties may be summarized as follows with respect to interpreting the Release agreement.

Plaintiff Progress Energy.

Plaintiff had one main purpose: To terminate the action pending before the Commission that it initiated in 2004 with two **frivolous and nuisance petitions** on spurious and specious grounds to the Commission in retaliation for Defendant Beatrice Weaver’s filing several complaints with the Commission against Plaintiff in 2004.

A second purpose was to settle its claim for an alleged debt against Defendants that it also filed in 2004, wherein it incorrectly included Defendant Beatrice Weaver as an alleged debtor under the so-called “doctrine of necessities” which was inapplicable in this particular Case.

Defendant Beatrice Weaver.

Following several postponements spanning some 18 months, Defendant was scheduled for major esophageal surgery on September 20, 2007 just two days following the settlement conference and deposition, and only a few weeks to the October 1, 2007 trial for this case. Consequently, due to her impaired medical condition, and the emotional and physical stress and strain of these events Defendant decided to compromise and settle the case. However, it was her intention only to settle the issue of an alleged debt for which she was wrongly sued by Plaintiff. Against her will and wishes, under the intense undue pressure of the other parties present, this Defendant decided to agree to Plaintiff’s demands for terminating the actions before the Commission as well.

Plaintiff "married" the two unrelated issues in the settlement; one before the Commission, and one before the Court.

Another major objective was to ensure connection of electric power to her residence for medical purposes particularly during the pre and post operation periods.. See **Exhibit __ Certificate of Medical Necessity**, which Plaintiff has ignored. Urgency and time was of the essence in that regard, well known to all parties present at the settlement conference.

Defendant Gary Weaver.

Out of consideration for Defendant Beatrice Weaver, this Defendant decided to compromise and settle as well, specifically for the purpose of relieving the stress and strain on Defendant Beatrice Weaver. However, Defendant did not agree with the settlement amount that Defendant Beatrice Weaver was willing to pay, and under the circumstances finally executed the Release document against his will.

6. **CONDUCT OF THE PARTIES**

The conduct of the parties is an indicator of the existence of, and used for the interpretation and construction of an agreement under the law of contracts. Conduct can also be an indicator of a meeting of the minds or mutual assent. Thus the manifestation of mutual assent may be made wholly or partly by written or spoken words, or by other acts, or conduct. See, **Hotz vs. Equitable Life A.S., 276 N.W. 413, Iowa 1937**. Conduct is especially pertinent in interpreting an ambiguous contract and must be given great weight. See, **Langston vs. Niles, 265 S.C. 445, 2129 S.E. 2d 829 (1975)**.

The law requires that one who seeks redress against another for breach of contract is bound to use diligence himself in presenting, as far as possible, the loss by reason of the breach. See, **Walker J.H.&T.C. RR.Co vs. Mitchell, 38 Tex.85 quoted in F&D Co. vs. Fidelity Finance Co. 111 S.W. 2d 809, Tex. 1937**.

Under these rules we have three situations to consider:

- a. The conduct of Plaintiff in performing its obligations to implement the Release agreement, and related to its Motion for Enforcement;
- b. The conduct of Defendant Beatrice Weaver to meet her obligations

c. The conduct of Defendant Gary Weaver to meet his obligations to implement the Release agreement in toto, his Motion for Enforcement, and this pleading for Summary Judgment.

a. It has been shown herein that Plaintiff Progress Energy has not performed on any of the five paragraphs as of this writing. The breach is in fact **prima facie**. Moreover its conduct has been such that it has committed grievous tortuous damages and losses on Defendants. See discussion below, and also **Appendix ____** for a chronology of facts and events depicting Plaintiff's breach of agreement, conduct, and harassment and abuse of Defendants.

Laches: Elsewhere herein Defendants claim the **doctrine of laches** entitles them to damages because Plaintiff has deliberately and negligently sat on its unclean hands with respect to connecting power and change of providers, time being of the essence for medical reasons. See **Appendix** discussing Plaintiff's conduct since September 18, 2007 the effective date of the Release; harassment and abuse of defendants.

b. As discussed herein Defendant Beatrice Weaver has performed within reasonable time on all five of the paragraphs, with the proviso that none of the three parties have performed on para.3 and 4 for the reasons discussed herein above.

c. Defendant Gary Weaver has also performed in the same manner as Defendant Beatrice Weaver, as discussed herein above.

7. PLAINTIFF'S PREVENTION AND FRUSTRATION PURPOSE

The question has been raised by Plaintiff that Defendants have not performed paragraph 3 and 4 requirements of the Release document. See Plaintiff's Motion for Enforcement filed with the Court on or about October 24, 2007. Defendant Gary Weaver also filed a similar motion on October 25, 2007, and this pleading for a summary judgment and damages, etc.

Thus the question arises as to which of the three parties has prevented or frustrated performance of the other parties, and what is the impact under the law of contracts. Purpose, intent, and conduct of the respective parties have been discussed herein above. Based on that analysis we now show how Plaintiff has knowingly, willingly, wantonly, deliberately, negligently, fraudulently and maliciously prevented

Defendants full performance under the Release Agreement, by its total non-performance of the contract. Case law is decidedly on Defendants side on this issue.

It is established in this State that although a promise made under proper circumstances gives rise to a legal duty to perform the act promised, after the making of a promise certain circumstances may arise, under which the duty to perform the promised act is excused or discharged. **17 A Am. Jur.2d, Contracts, Sect. 664**

Where one party to a contract repudiates it or refuses to perform, the other party is not obligated to perform his or her promise. **Ibid, Sect. 704**

In this case, as discussed at length herein, the evidence clearly shows that in bad faith, Plaintiff has refused to perform paragraphs 1 and 2, without any justification whatsoever. In contrast, Defendants have met all the performance requirements. **Thus in keeping with the above dicta, Defendant's further duty to perform the promised act is excused or discharged (pay the balance of the settlement agreement and demand refund of payments already made), and Defendants' are not obligated to perform his or her promises elsewhere in the release (paragraphs 3 and 4).**

Impossibility of Performance.

A party must perform its obligations under a contract unless its performance is rendered **impossible** by an Act of God, the law, or the other party. See, **Hawkins vs. Greenwood Dev't. Corp., 328 S.C. 585, 493 S.E. 2d 875 (Ct. App. 1997)**, Defendant's have been rendered an impossible situation to perform under paragraphs 3 and 4 by Plaintiff's actions or in this case is inaction in not providing the stipulations to dismiss as agreed.

On the other hand, Defendants have made it possible for Plaintiff to perform its obligations under paragraphs 1 and 2, and 5. Plaintiff has no excuse for not performing on any of the paragraphs. In all five situations it is within the power of Plaintiff to perform its obligations., and Plaintiff has no claim of any "Subjective" Impossibility.

Plaintiff's Prevention of Defendant's Performance

It is established that where one party's performance is prevented by the other party to the contract, the first party's non performance is excused. See, **Int. Wood Processors, vs. Power Dry, Inc., 593 F. Supp. 710 (D.S.C. 1984); judgment aff'd 792 F.2d (4th Cir. 1986)**. Again, Defendants' are excused under this case law because of

Plaintiff's acts as discussed hereinabove have materially prevented Defendants from performing paragraphs 3, 4, and 5.

Plaintiff's Frustration of Defendant's Purpose.

Defendant's purposes are simply stated as discussed above:

1. To settle the alleged debt;
2. To remove all stress and strain caused by Plaintiff's claims in this Court.
3. During the settlement conference, Plaintiff added the condition to dismiss the action before the Commission as part of a compromise and settlement. Defendants did not wish to do so, but in the spirit of compromise decided to execute the Mutual Release; time being of the essence to connect electric power to Defendant Beatrice Weaver's residence for extreme medical purposes. Plaintiff has refused to comply as of this writing.

The case law refers to frustration of purpose as grounds for redress as in this pleading. In instances where performance has not become impossible, but the achievement of the object or purpose of the contract was frustrated because of changed conditions supervening during the term of the contract, performance may be excused under the "doctrine of frustration of purpose." 17 A Am. Jur. Contracts, Sect. 666.

It is further stated that although the doctrines of frustration and impossibility are akin, frustration is not a form of impossibility of performance, but more properly relates to the consideration for performance. Under the frustration doctrine, performance remains possible but is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. 17 A Am. Jur. Contracts. Sect. 667.

Accordingly, Defendants may be excused because of Plaintiff's unexpected violations of the contract, or its long delay in initiating any performance which continues to this day. Defendants' achievement of the object or purpose of the compromise and settlement contract was frustrated because of changed conditions supervening during the term of the contract; i.e., Plaintiff's breach of all five paragraphs.

Plaintiff's Delay in Performance

The law of contracts is quite specific about the consequences of a party's delay in performing as agreed. Where a party to a contract does not perform within the time

specified and his or her performance within such time, is of the essence of the contract, the other Parry is not obligated to perform his or here original promise and there is no right of action against such other party upon the contract. **Ibid. Sect. 622.**

However delay from causes beyond the control of the contractor may be excused in accordance with the rules governing excuses for nonperformance generally. **Ibid Sect. 623.** Further, delay in performance of a contract will as a rule, be excused where it is caused by the party (Plaintiff) who objects to or seeks damages for the delay. **Ibid Sect 625.**

The delay caused by Plaintiff is manifested in its actions following the execution of the Release. Please refer to the detailed discussion in **Appendix __** recording the chronology of daily events and Platiff's harassment and abuses in Defendants' dealing with Plaintiff. After several weeks, Plaintiff's agents arrived at the residence with the "wrong meters", and it took several weeks for several agents to finally inform Defendants that a Electrical Code Inspection was required. Then Plaintiff presented Defendants with an additional "Agreement" that should have properly been included in the Release Agreement.

Plaintiffs professionals knew and should have known to inform Defendants immediately in taking care of these extraneous matters, instead of waiting several weeks where time is of the essence for Defendants known to Plaintiff..

Pursuant to the foregoing dicta, Defendants cannot be held liable for any delays caused by Plaintiff with respect to performing its obligations for all five paragraphs of the Release agreement.

8. CONSIDERATION

A basic element of any agreement is the valuable consideration that the parties provide to seal the bargain. See, **Roberts vs. Gaskins, 327 S.C. 478, 486S.E. 2d 771 (Ct. App. 1997).** Validity of the agreement requires that the offer and acceptance be accompanied by valuable consideration. See, **Carolina Amusement Co. Inc. vs. Conn. Nat. Life Ins. Co., 313 S.C. 215, 437 S.E. 2d 122 (Ct. App. 1993).** Thus we raise the question as to what valuable consideration have the respective parties provided for sealing the Release Agreement?

To answer that question, we must first decide what "valuable consideration" is, that qualifies with respect to the subject Release agreement. It is stated that in general, valuable consideration to support a contract, may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other. See, **J.C. White Lumber Co. vs. Allen**, 306 S.C. 103, 410 S.E. 2d 588 (Ct. App. 1991); **Sanchez vs. Tilley**, 285 S.C. 449, 330 S.E. 2d 319 (Ct App. 1985.) It has been stated that the settlement of a bona fide dispute or a doubtful claim, if made fairly and in good faith is a sufficient consideration for a compromise based thereon. **12 C.J. 324, Sect. 17**. In this case, the facts and circumstances clearly show that Plaintiff has not acted fairly and certainly not in good faith.

Significant to this case, is that forbearance to exercise a legal right is valid consideration for a promise made on account of such forbearance. See, **Caine & Estes Ins. Agency Inc., vs. Watts**, 278 S.C. 207, 293 S.E. 2d 859 (1982). An agreement to forego prosecution of a complaint before the U.S.D.A. in exchange for weekly payments due, was sufficient consideration to support a breach of contract claim, as in this case. See, **General Elect. Co. vs. Gate**, 273 S.C. 88, 254 S.E. 2d 305 (1979). Of further interest for this case, is the general rule that no special consideration need be singled out or apportioned for each separate provision in a contract. See, **Furse vs. Timber Acquisition**, 303 S.C. 388, 410 S.E. 2d 155 (19 91).

Defendants' Consideration

Defendant Gary Weaver has provided valuable consideration in two respects:

1. Settlement Payments were timely paid as agreed; and
2. Legal rights have been foregone by agreeing to compromise and dismiss the suit.

1. Settlement Payments:

The evidence of record clearly and convincingly shows that Defendant Gary Weaver duly and timely paid the settlement amounts of two thousand dollars (\$2,000.00) as agreed in paragraph 1 of the Release agreement, as of this writing.

Defendant Beatrice Weaver duly and timely paid the security deposit of \$177.00 as agreed in paragraph 2 of the Release agreement.

By definition this is valuable consideration, validating the agreement as to Defendants' timely performance. As noted above, no special consideration need be singled out or apportioned for each paragraph in the Release agreement. These acts of timely payments are sufficient to validate consideration for all paragraphs.

2. Defendants' Forbearance of Exercising Legal Rights.

Additional consideration occurs in the form of Defendants' forbearance in agreeing to dismiss all matters pending before the Commission as provided in paragraphs 3 and 4, together with the Plaintiff, that as of this date, has not provided the Stipulation to Dismiss.

Additional consideration lies in the forbearance of Defendant Gary Weaver on two counts:

1. Dismissal of legal rights in this case relating to objections and appeal of the Court's summary denial of his Counterclaim against Plaintiff (genuine issues of material facts, and discretion relating to the law, etc); the court's denial of two motions to compel production of documents, and the court's leniency to Plaintiff's violation of Rule 11, SCRCF and Exhibit A on the open account.

2. Compromise and settlement for an amount of an alleged debt far larger than he would have, without the undue pressure of relieving the stress and strain of Defendant Beatrice Weaver. Absent that stress and strain and undue pressure and Plaintiff's **fraudulent inducement** that it would immediately install power once the agreed on payments were made, this Defendant would have not compromised and preferred to go to trial.

Plaintiff's Consideration.

The evidence clearly shows that as of this date, Plaintiff has provided no consideration because it has not performed any of its promises.

Paragraphs 1 and 2 require Plaintiff to connect electric power to Defendant Beatrice Weaver's house as soon as the payments agreed on were paid. Some six weeks following Defendant's timely performance of that event, Plaintiff still refuses to connect the electric service as agreed. Furthermore, Plaintiff's promises (para.3 and 4) to dismiss the action before this Court and the Commission have not been kept as of this date. No

Stipulations to Dismiss has been forthcoming from Plaintiff for either venue. See Exhibit ___ evidencing Plaintiff's refusal to provide the stipulations.

Neither has Plaintiff made any effort to facilitate the change of providers, which constitutes its partial consideration for the Release Agreement. More than a reasonable passage of time has passed for Plaintiff to undertake that promise and the other promises to dismiss the matters before this Court and the Commission.

Summary

Defendants have provided valuable consideration with payments to Plaintiff as agreed, and stand ready to dismiss the suits as agreed with Plaintiff upon receipt of stipulations from Plaintiff, and have unilaterally initiated a change of providers pursuant to paragraph 5 of the Release.

On the other hand, Plaintiff has chosen to sit on its unclean hands and has done nothing to keep any of its promises. In fact Plaintiff has deliberately thwarted the whole purpose and intent of the compromise and settlement for Defendants as discussed herein above.

Plaintiff's inadequate consideration and breach of the release agreement, raises the question:

Is Plaintiff's inadequacy of consideration sufficient to avoid a contract ?

An early case discusses this issue as follows:

"Mere inadequacy of consideration is not enough to avoid a contract entered into between parties of mature judgment, nor can one who claims to have been overreached invite the review of a court of equity unless the inadequacy of consideration is so great that a presumption of fraud follows the recital of the transaction." See, **Tausick vs. Tausick, 53 Wash. 303, cited in Meyer vs. Eschbach, 73 P2d 803, Wash. 1937.**

This statement raises the specter of Plaintiff's bad faith, and **fraudulent inducement** for Defendants to execute the Release. Plaintiff's subsequent actions clearly **show that it had no intent to promptly connect electric power to Defendant Beatrice Weaver's residence as agreed.** (para. 1 and 2). And it has not provided any Stipulations to Dismiss the actions before the Commission and this Court. (para 3 and 4). Nor has it done anything to expedite the change of providers. (Para. 5).

A normal and reasonable person would conclude fraudulent inducement under these facts and circumstances. The impact of its violations and breach of consideration for the Release is "...so great, that a presumption of fraud follows...." **Accordingly, Defendants are justified in seeking redress of wrongs, summary judgment and possible rescission of the release and set the case for trial.**

Plaintiff's Moral Obligation to Perform Under the Law of Contracts.

Plaintiff knew and should have known of Defendant Beatrice Weaver's motives for deciding to compromise and settle this case. At the settlement conference both Defendants explained very clearly the purpose and intent of executing the Release Agreement. So did the Plaintiff.

Defendant's motive was to relieve the stress and strain of the case in view of Mrs. Weaver's serious medical conditions and major surgery pending two days later and a long re-habilitation period that would preclude participation in the October 1, 2007 trial.

Of special and immediate concern was the need for electric power to her residence to operate medical equipment and other purposes related directly to her post operation rehabilitation. For example, to operate an electric chairlift to her bedroom and bath, operate special breathing equipment and heart equipment in the event of an emergency following the operation, the need to prepare special foods; take special care and prevention to prevent infections, guard against falling, charge wheel chair batteries, operate the well water pump, heating, water heater, and so on. See her Primary Physician **Certificate of Necessity** attached hereto as **Exhibit ____**. This is the most recent of some five such Certificates filed with the Commission and the Plaintiff since 2004 to the present.

As discussed at length herein, in breach of contract, Plaintiff has negligently and maliciously chosen to ignore these life saving needs of Defendant Beatrice Weaver and deliberately and flagrantly refused to connect power as agreed on spurious grounds.

Plaintiff has known for the past three years of the serious and extensive nature of Defendants' illnesses including two cancers; five eye operations, physical impairment and debility, impaired walking, etc. **Thus, the question arises as to any moral**

obligation on the part of Plaintiff to perform its obligations as agreed. The law of contracts has addressed that question.

Apart from the legal requirement to perform the release, Plaintiff also has a **moral obligation under the law** to support a contract in the public interest and equitable relief, and to immediately connect power to her residence as agreed, and since all of Defendants obligations in that regard have been met. See, **Stilmack vs. Glen Alden Coal Co. 14 A. 2d 127, Pa. 1940; Stebbins vs. City of Crawford, 92 Pa. 289.**

9. DEFENDANTS' RESCISSION OF THE RELEASE AGREEMENT.

The law provides Defendants with ultimate recourse, when a contract which is voidable, such as the Release, because it was induced by fraud (such as Plaintiff's fraud), or obtained under duress (such as the extreme pressure placed on Defendant Beatrice Weaver to execute the Release), or executed by mistake, may be rescinded. **17 A Am.Jur. Contracts, Sect. 566.** Where fraud is discovered at a time the contract remains executory, equity will not require the defrauded party to wait until the time of performance to seek rescission. See, **O'Qinn vs. Beach Assoc. 272 S.C. 95, 249 S.E. 2d 734 (1978).**

Further law provides Defendants recourse if a party induced to enter a contract by fraud which gives rise to a breach of promise or warranty, sues in contract, he or she may seek his or her expectancy damages under the contract, or rescission, and restitution of the contact price. See, **Baeza vs. Robert E. Lee, et al. Op Cit.** Defendants are seeking damages and the Court's decision as to rescission and to set the underlying case for trial in 2008 as to paragraphs 3,4 and possibly 5.

It has been and remains the objective of Defendant to finalize the performance of the Release agreement by all three parties. This has been expressed in correspondence and Defendant's Motion for Enforcement filed on October 25, 2007 and this pleading for summary judgment of paragraphs 1 and 2. See **Exhibits ____** However, it has been shown conclusively from the evidence that Plaintiff is in serious breach of the settlement agreement and shows no signs of performing its obligations while demanding that Defendants perform their remaining obligations under paragraphs 3 and 4 to which it is also equally obligated to perform. In fact under the normal and customary court

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procedure the onus is on Plaintiff to actually initiate the dismissals. Consequently Defendants' purposes and intent for entering into a compromise and settlement has been frustrated or made impossible and very difficult for Defendants to perform paragraphs 3, 4 and 5. Defendants performed in full, its obligations under paragraph 1 and 2, but Plaintiff refuses.

Thus it has been stated that a breach of contract to warrant its rescission must be so substantial and fundamental as to defeat the purpose of the contract. See, **Elliot vs, Snyder, 246 S.C. 186, 142 S.E. 2d 374, (1965)**. Defendant submits that Plaintiff's breaches are so pervasive and prima facie and so substantial and fundamental as to defeat the purpose of the contract and grounds for summary judgment and damages as demanded herein.

As noted above, it is self evident that if Plaintiff is not going to perform as agreed, then Defendants have little option but to return to the status quo and set the case for trial in 2008. Defendants choose to leave the option open for discussion with the Court and to abide by his discretion under the circumstances.

Notwithstanding, Plaintiff is in breach of contract and whether the court enforces the Agreement in toto, grants partial summary judgment for para. 1 and 2, or remands paragraphs 3, 4, and 5 for trial, Defendants claim damages for Plaintiff's flagrant breach of the Release agreement.

Defendants therefore demand that the issue of damages be submitted to the Jury for deliberation of the facts and setting of the damages sought by Defendants.

10. CONCLUSION

It is clear from the evidence that Plaintiff's conduct is a major breach of the Release agreement warranting summary judgment as requested herein, and damages for Defendants. Under the circumstances, there is little remaining incentive for Defendants to continue with the Release agreement, which it may reasonably demand to be rescinded and to set the case for trial in 2008.

3. THE FACTS

See Memo Ref. to Supra 147
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25
c 1 (32)

**DEFENDANT GARY WEAVER'S FORMAL RESPONSE TO PLAINTIFF'S
LETTER DATED APRIL 24, 2008 FILED BY MR. MARK W. BUYCK, III., ESQ.**

Introduction

Once again, Mr. Buyck on behalf of his client Progress Energy comes to the Court with unclean hands, having sat on their hands for some seven months in violation of the Mutual Release dated September 18, 2008, and subsequently in contempt of court authority, ignoring Judge Burch's Orders dated on or about February 28, and March 28, 2008.

Even allowing for the broadest latitude to an attorney representing his client, Mr. Buyck's letter to the Court dated April 24, 2008 has again demonstrated his self serving misrepresentation and distortion of facts, and committing of an outright lie to the Court. Characteristically, he has also neglected to include the Exhibits.

I wish to place this situation on the record for future reference at trial, possible appeal, and more specifically for the Court's consideration in deliberating the matters referred to in Mr. Buyck's letter.

Mr. Buyck incorrectly claims that Judge Burch has issued orders ending the case. (p.2, para.2, line2). Thus, I have filed a separate motion for a declaratory judgment of even date referring to the status of the case on the Court's File Book of Dockets (See, **Rule 79, S.C.R.C.P.**)

This is of direct relevance since I have several pleadings on file pending Court disposition, and plan to file another. Furthermore, as of this date, the Plaintiff still has not complied with matters provided for in paragraph 4 of the settlement agreement. Mr. Buyck's reference to paragraph 3 is a mis-statement and mis-leading, (p1. para.1, line 5), as is the reference to Judge Burch's Order of March 28, 2008.

Case Background to the Mutual Release Compromise and Settlement Agreement.

Despite the pleadings on file, it has been observed that the Court may not be fully aware of all the facts of the background of the continuing dispute between the parties.

Thus it is believed relevant here to briefly review for the record the essential factors underlying the protracted differences that exist between the parties. Justification for this view lies in Plaintiff's continuing violation of the doctrine of laches, its breach of two agreements and its contempt of court, my request for jury trial and summary

judgment, the possibility of the need for appeal, and Mr. Buyck's mis-leading letter of April 24, 2008.

1. **Origin of Docket 2004-CP-17-232.**

This complaint originated in the Spring of 2004 when Progress Energy's Ms. Pam Hardy, unilaterally and illegally in violation of Commission **Regulation 103-341** which establishes an agreement between the utility and the customer, summarily changed the status of the building located on an adjacent property at 1249 Harllees Bridge Road, Dillon S.C. from "residential" to "small commercial." This breach of the service agreement was made arbitrarily without prior written or verbal notice to Mrs. Weaver, another violation of Commission regulations. The building had been "residential" for ten years prior since 1994.

Ms. Hardy not only illegally changed the "residential" status, she also cancelled an existing account with a credit balance. She issued a brand new "small commercial" account number with a debit balance showing, and ignored all protests to the contrary, to this day.

That is when Mrs. Weaver filed a complaint with the Commission in early Spring of 2004 regarding this involuntary change of status and incorrect billing procedure. She was assigned an "investigator" by the name of "Chad." Mrs. Weaver requested "Chad" to visit the property to verify the "residential" status of the building. Pursuant to Commission Regulation **103-345 (A)** a customer complaint concerning the charges, practices, facilities or service of the electrical utility "...shall be investigated promptly, thoroughly and professionally." Furthermore, under Reg. **103-345 (B)** the electrical utility "...shall refrain discontinuing the service of that account until the commission's investigation is completed and the results have been received by the electrical utility."

"Chad" required to undertake a prompt investigation pursuant to **Reg. 103-345**, took some **six months** to visit the property and "investigate" sometime in November the Fall of 2004. That is not a "prompt" investigation. And there never was a report filed or any corrective action taken by the Commission. Defendants exhausted administrative relief and efforts in mitigation of the damages.

Mrs. Weaver had also requested a test of the meter at that property to verify its accuracy. Regulations require an independent private sector third party to conduct the

test. Instead, "Chad" arrived with a small staff of Progress Energy employees and an "independent observer" in violation of the Commission regulations.

The meter test was done by Progress Energy staff with its equipment, in violation of the regulations, under the ostensible "observation" by the "independent observer." The meter was supposed to be done by a third party from the private sector. The party also trespassed on the adjacent property at 1253 Harlees Bridge Road, and removed the unused meter from Mrs. Weaver's residence, and took unauthorized photographs of Mrs. Weaver's property. None of these activities had anything to do with the ostensible purpose of the inspection of the residence and testing of the meter at the adjacent 1249 Harlees Bridge property.

The undersigned was present together with Mrs. Weaver's groundskeeper "Willy" as a witness. I told the Progress Energy staff they were not authorized to take photographs, that it was an invasion of privacy, to cease photographing the property, and to remit copies of the photographs to Mrs. Weaver, which they have refused to this date.

The undersigned personally showed "Chad" the main "front gate" to Mrs. Weaver's residence that is always closed but not locked as Progress Energy's Meter Readers always complained. I also showed him the correct designated gate for ingress and egress so that there could be no further confusion. There was a long history of Progress Energy's meter readers not using the correct ingress/egress gate as designated by Mrs. Weaver, thus violating **Regulation 104-344**. The Commission turned a blind eye to all of the regulatory violation which prevented Defendants from peaceful enjoyment of the property. Plaintiff's violations also placed a burden on Defendants.

For example, Mrs. Weaver requested me to be present every month between the 3rd and 5th days the designated time for the meter readers to visit the property and read the meters. Rarely did the readers stay within that designated schedule for reading the meters. The main reason for my presence was security and to prevent unidentified persons (especially non-English speaking employees) aimlessly wandering around the three properties, not knowing where to find the meters.

The record shows that the meter readers were poorly supervised, never properly briefed, usually could not find the three meters on the three separate properties, and never carried any identification when requested as required by Commission **Regulation 103-**

344. This led to a long repetitive series of aggravations and friction between the parties. Some of the meter readers and other field employees could not speak English and a security problem existed for elderly Defendants who have lost a lot of small tools, etc from theft. On a regular basis the meter readers made estimated billings in violation of Commission Reg. 103-339 (6) because they were too lazy to use the designated ingress/egress gate or unable to find the three meters, for which they had not been properly briefed by their supervisors.

I personally discussed the situation and conducted an inspection of the residential building with "Chad," the Progress Energy staff, and Mrs. Weaver's groundskeeper "Willy" who had prepared the residence for the inspection. The Commission's representative "Chad" and the Progress Energy staff were shown the kitchen, bathroom, living room and attic of the building which were the standard requirements for "residential" status according to Progress Energy's Customer Service Staff. That had been the status for ten years dating from 1994. Said "Chad" promised a "report" which to this day has not arrived, although the meter test results were remitted.

The Commission and later the Office of Regulatory Staff (ORS) did absolutely nothing to effect a change of status back to "residential" from "small commercial" under the auspices of Progress Energy, nor improve the meter reading problem.

Shortly after the inspection of the residence, Ms. Hudson from ORS wrote an **ex parte, harmful letter to "Dear Len" (Mr. Len Anthony, Counsel for Progress Energy) asking him if she should "close the book" on the case.** She did his bidding and closed the case without a hearing or any investigative reports.

Thus, since 2004, Progress Energy continues to bill Mrs. Weaver for electric service to 1249 Harllees Bridge Road at the higher rate and more inconvenient terms and conditions for "small commercial." Note that there has been absolutely no electric service directly connected to her residence at 1253 Harllees Bridge Road since December 21, 2001.

That is some of the background to the para. 3 and 4 settlement issues in the Mutual Release. Progress Energy was supposed to return the status of the property at 1249 Harllees Bridge Road back to "residential" under para. 4 of the Release. It has not, and refuses to do so.

Hence Progress Energy continues in breach of agreement under **Reg. 103-341**, and is in non compliance and contempt of court on that one issue alone. And under para. 1 and 2 of the Release, Progress Energy was supposed to connect electric power to the residence at 1253 Harlees Bridge which it has refused to do, until it precipitously contacted Mrs. Weaver on April 22, 2008 under threat of sanctions.

Accordingly, Defendants have sought injunctive relief and refund of the 2.5 cents per KWH overcharges since Spring 2004 to the present. **That is another reason why we ask the Court to retain control of the funds on deposit with the Court.**

2. **The Commission's Dismissal of Mrs. Weaver's Counterclaim on May 3, 2007.**

As further background to an understanding of Progress Energy's violation of the Mutual Release, we briefly report the Commission's processing of the case and Mrs. Weaver's Counterclaim. When Mrs. Weaver first requested a Hearing in 2004, it was scheduled first on the eve of Christmas when the Commission was actually closed, and then when she objected, it was re-scheduled for the "Passover" Holiday period when the Commission office was closed. Thereafter the Chairman of the Commission held a hearing when it was decided that Mrs. Weaver was "either unable or unwilling" to attend a Hearing. The Commission summarily dismissed her case on May 3, 2007, notwithstanding the medical reasons for continuances, which this Court accommodated.

Mrs. Weaver chose not to exercise any appeal rights pursuant to **S.C. Code Sect. 58-27-2150 for Rehearings, Sect. 58-27-2310 to vacate, etc., Sect. 38-27-2320 for stay**, etc. As of the September 18, 2007 date of execution of the Mutual Release there were no pleadings pending before the Commission and Defendants had forfeited any appeal rights. Moreover, Plaintiff never produced any proof of any pleadings pending before the Commission, then, during the negotiations, or since. There was nothing to "dismiss." And it was Plaintiff's legal obligation and duty to prepare the stipulations for dismissal pursuant to Rules 79, 40 (j), 43 (k) and 41 (a)(1)(ii), not Defendants.

Note that some 24 hours before the Commission Hearing took place in May 2007, ORS' Mrs. Hudson, issued a letter wherein she "fully approved" of the Commission's decision to dismiss the counterclaim. The issue had not even been heard when she remitted the letter to the Commission. This is further background to the processing of the

case and the issues covered under para.3 and 4 of the Release that Defendants request Progress Energy to comply with.

The crux of the matter in this case, is Progress Energy's documented violations of statutes and regulations, its cover up with the regulatory agencies' compliant support, and abuse and harassment of Mrs. Weaver. That is what has brought us to where we are today.

The utility continues in its unabashed contempt of court, breach of two agreements and takes for granted the regulatory agencies' compliant and accommodative support. Defendants' have exhausted administrative relief.

Pursuant to para. 3 and 4 of the Release, Progress Energy must: restore the "residential" status from "small commercial", refund the overcharges, install telephonic meters that do not require human meter readers, ensure its staff provide proper identification on request, and cease sending any meter readers and other personnel on to the property that Mexican workers who cannot speak English.

3. **Clarification of the intermittent use of Mrs. Weaver's legal names.**

"Mrs. Gary Weaver" or "Beatrice Weaver" is Defendant Beatrice Weaver's married name. Her professional name and title is: "Prof. B.E.A. Wallenstein, Ret."

The latter name is used for business and legal matters. The Defendants were married late in life and retained their respective professional names to facilitate separate professional and business activities.

Pursuant to Commission **Regulation 103-341** the original service agreement with Progress Energy was executed in 1994 by Mr. Shine on my behalf, in my name only. Mrs. Weaver was not in South Carolina at that time and was in fact thousands of miles away. She was not and it was not intended for her to be a signatory to that original contract which is the subject of this continuing dispute over collection of my alleged debt. That original contract executed pursuant to Commission **Regulation 103-341**, was terminated in 2002 two years before Plaintiff filed its action on July 9, 2004.

Negotiations for the new account for connection of electric power to 1253 Harllees Bridge Road, was actually originated in 2004 when Mrs. Weaver obtained a Business License to open her Renaissance Estate as a "B&B" enterprise in order to create income from a dormant capital asset. She applied to Progress Energy to connect electric

power to the property, and was refused on direct orders of Mr. Len Anthony, Counsel for the utility.

Mr. Len Anthony illegally and improperly denied her the use of her property to generate income in 2004; even though Mrs. Weaver never signed my contract with Progress Energy and was not liable for my alleged bill which was in dispute (See Commission **Regulations 103-342 (k)**), and which I never refused to pay upon receipt of a proper reconciliation and accounting, still not delivered to this day.

Adding insult to injury, as noted on July 9, 2004 Mr. Anthony then filed the subject complaint against her for my alleged bill, improperly claiming liability under the "doctrine of necessities" and of doubtful liability under the **statute of limitations** for breach of contract. My alleged liability originated in November 2000, more than three years before filing of the claim in this Court. (an alleged breach of contract for a disputed consumer debt claim).

As cited in my pleadings, recent case law promulgated by the S.C. Appellate Court related to the doctrine of necessities, requires a spouse to be a signatory to the contract in question for the doctrine to apply, and the constitutionality of applying the doctrine to a spouse is also questioned by the S.C. Appellate Court. Significantly, it is noteworthy that Mr. Len Anthony's fabrications have not been questioned by anyone anywhere, and will be an issue at the jury trial that has been requested, and/or on appeal.

To harass and abuse Mrs. Weaver in retaliation for the earlier complaints she filed with the S.C. Public Service Commission, Mr. Anthony also filed two frivolous and nuisance petitions with the Commission in 2004. He also improperly included my name in the petitions. The first petition was to excuse Progress Energy's violation of Commission regulations in making excessive and successive "estimated" bills on spurious grounds in violation of **Commission Reg. 103-339 (6)**. The second ridiculous petition was to permanently terminate service to Mrs. Weaver, (and myself), and for all her business enterprises, her heirs (and probably her pets), from ever getting electricity from Progress Energy.

It was this incredible, absurd and ludicrous petition that led to Mrs. Weaver filing a **counterclaim** against Progress Energy (not a "claim" as stated by Mr. Buyck in his letter). The Commission subsequently dismissed her counterclaim on May 3, 2007, and

confirmed the dismissal again on November 8/13, 2007 (per para.3 and 4 of the Release), on the technical grounds of her inability to appear for hearings due to her cancer and other ailments. It is this dismissal that Mr. Buyck claims should have been again dismissed by Defendants in this action. See **Exhibit A**.

At the settlement negotiations on September 18, 2007 this was the dismissal that Mr. Buyck wrenched out of Mrs. Weaver as a condition of settlement, even though the matter had already been dismissed. See **Exhibit A**.

Thus, Mrs. Weaver an ailing, ill, 80 year old woman, scheduled for surgery two days later, who never signed my contract with Progress Energy, and who never owed Progress Energy a red cent, was induced by a team of three lawyers to agree to the payment of a settlement amount that was my liability, which she did not owe, and to dismiss Len Anthony from his embarrassingly ridiculous petition which had already been dismissed by the Commission in May 3, 2007, five months earlier, and to accept a condition that Progress Energy fraudulently agreed to (para 5.).

4. **The Original Cause of the Dispute and Continuing Acrimony.**

At this point it is imperative to place on the record, that the illegal actions and disconnect of service on December 21, 2001, violated every single Commission regulation and rule governing disconnect of service to a residence. It also is the direct cause of a stroke for Mrs. Weaver in the Spring of 2002, and Mrs. Weaver is handicapped and disabled since that time. The following record is relevant to the jury trial that has been requested and possible appeal.

On Friday, December 21, 2001 on the eve of Christmas Holiday Season, after 1.00 p.m. when most businesses and banks were closed for the holidays, a Progress Energy truck and several persons, arrived at the front gate of the residence, together with a Deputy Sheriff.

Mrs. Weaver was in the estate office, when a telefax arrived from Progress Energy's Ms. Pam Hardy shortly after 1.00 p.m. at the same time as the Sheriff was making his way through the front gate. The telefax refused a **deferred payment plan** that had been proposed earlier in good faith. See, Commission **Regulation 103-352 (c)**. The telefax demanded a cash payment of \$3,000.00 by 12.00 noon that day into the

hands of the three Progress Energy representatives present. The telefax arrived shortly after the deputation at the front gate.

Of course it was a physical impossibility to comply with such a request at such short notice and it had the hand print of Mr. Len Anthony using "gangster-like" tactics. A Progress Energy linesman came to the office and asked Mrs. Weaver if he could use the phone. He called Mr. Gary Walsh, the then Executive Director of the Commission. Mr. Walsh was actually in his office after all the public offices were closed on that day for the season holidays. In the presence of Mrs. Weaver the linesman asked Mr. Gary Walsh if he should also disconnect the Area Security Lights and Surge Protector device. Mr. Walsh said to "disconnect them." So we have the Commission's Executive Director directly and personally involved in the disconnect action in illegal ex parte communications with the utility linesman that harmed Defendants.

Mrs. Weaver argued with the linesman informing him there were no outstanding bills on those separate accounts which were fully paid up. The linesman said: "when Mr. Walsh says to disconnect, I disconnect." Mr. Walsh was acting at the bidding of Mr. Anthony.

The December 21, 2001 raid to disconnect was carried out without any prior notice as required by the Commission regulations. The only notice was the telefax received at the same time as the raid. Cash is never carried in the residence for security reasons and banks were closed on the eve of Christmas.

The Progress Energy linesman proceeded to disconnect all the security lights, the surge protector and power to the residence. This caused the well water pump and the residential security alarm system to stop and eventually become dysfunctional, together with the refrigerators and freezer causing the loss of hundreds of dollars of food, etc. All the appliances and lights were off. The electric elevator to the upstairs rooms and Mrs. Weaver's bedroom ceased to operate as did the essential medical equipment. The old brick house became cold as a morgue as the heating units were off. And it happened to snow over that weekend and we were "snowed in" for three days against regulations.

Of course an elder ailing woman could not cope with such an assault on her very way of life and sometime in February 2002 she suffered a stroke from which she is still handicapped. Progress Energy has willfully, wantonly, negligently and recklessly

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ignored all medical certificates of necessity, and since 2002 has steadfastly refused to provide power to Mrs. Weaver on the dubious grounds of the doctrine of necessities. Progress Energy has of course established on the record that electric power is a "necessary" of life and has placed itself in a position of *contradiccio in adjecto* and is to be held accountable at trial.

These background facts underlie the intent and purpose for Defendants executing para. 3 and para. 4 of the Release and para. 5. Progress Energy wants to escape its liabilities to Mrs. Weaver, and Mrs. Weaver wants Progress Energy to cure the outstanding matters as described herein, which first occurred in December 2001 and since. That was the reason for agreeing to para. 4 of the Release which Progress Energy continues to ignore having agreed in writing to cure the outstanding matters on September 18, 2007..

Detailed Response to Mr. Buyck's Letter Dated April 24, 2008

Following is an issue by issue rebuttal.

1. First, I wish to point out Mr. Buyck's continuing practice of neglecting to include "the attached filing" referring to the S.C. Public Service Commission "ostensibly dismissing their (Defendants) PEC complaint which was a condition of the settlement agreement;" (p1, para.1, line 9). Mr. Buyck has a habit of leaving out his Exhibits. He did it with Exhibit A in his first complaint in this action, and again in his second amended complaint, and this Court let him get away with it. In September 2007, he neglected to include a copy of his draft stipulation for dismissal in his correspondence, and he knew it was his legal duty to file under Rule 41(a)(1)(ii).and Rule 79 SCRPC.

2. As noted, Mr. Buyck misleadingly refers the Court to "their PSC complaint." (p.1, para.1, last line). There never was a PSC "complaint" filed by Defendants, (either jointly or severally) with the Commission, to be dismissed by anyone. Mrs. Weaver had filed a **counterclaim** to the Plaintiff's frivolous and nuisance petitions that it filed in 2004 on three spurious grounds as retaliation for Mrs. Weaver's earlier request for the Commission to investigate certain of Plaintiff's accounting and billing practices. Those requests were discharged by the Commission and the O.R.S. at the behest of Progress Energy. The Commission dismissed Mrs. Weaver's counterclaim action on or about May 3, 2007 and confirmed the dismissal again in November 8, and 13, 2007 at her request in

compliance with paragraph 3 of the Mutual Release. This is all documented on the record. See the Offer of Proof filed at the January 30 Hearing. Both the Plaintiff and Judge Burch are wrong on this para 3 and 4 issue. And I shall file a **Rule 60 (b)** motion for reconsideration in due course, preparatory to trial or appeal.

3. Motion to reconsider or amend: I filed with Judge Burch a "Request for Clarification of the Order" following case law requirements cited by the S.C. Appellate Court. It was not intended to be a motion for reconsideration or amendment, per se. Judge Burch deemed it to be a **Rule 59 (e)** petition, stating his order was "crystal clear." On that basis, Plaintiff has no argument for its non-compliance with the Judge's order to do what it was supposed to be done in September 2007 and since February 28, 2008. As matters stand, Plaintiff is still in breach of two agreements and has failed to comply with curing matters provided for under para 4 of the Release.

On April 10, 2008 Defendants filed **Exhibit A** under protest and threat of sanctions. I continue to respectfully disagree with Judge Burch's ruling as to para 3 and 4 of the Mutual Release. It is contrary to the facts on record, the Court's rules of procedure, and Judge Burch's three Orders in this case. Please refer to my Motion for Declaratory Judgment on that issue filed of even date hereof.

4. **Mr. Buyck is outright blatantly and irresponsibly lying to the Court. He states categorically, without any documentation, that Plaintiff "since April 11, 2008 has been in contact on several occasions with Mr. And Mrs. Weaver concerning the re-connection of service to 1253 Harllees Bridge Rd, Dillon." (p.1. para. 2, line 1).**

First, not to put too fine a point on it, there is no "re-connection" of service involved. The Mutual Release provides that Progress Energy would make a new connection to the residence in the name of Beatrice Wallenstein only. The undersigned is not party to that matter.

Second, at no time since the September 18, 2007 signing of the Mutual Release, has anyone from Progress Energy contacted the undersigned, either in writing, verbally or with any pleadings filed with the Court, concerning the connection issue or the other outstanding matters that Progress Energy has neglected under paragraph 4 of the Release.

Since September 18, 2008, **Plaintiff's first contact with Mrs. Weaver concerning the connection issue was a telephone call on April 22, 2007, some seven**

months after it was supposed to connect in September 2007, and some eight days after Judge Burch's deadline date expired on April 14, 2008.

At no time between September 18, 2007 and April 22, 2008 has anyone from Progress Energy contacted Mrs. Weaver about the new connection. **Nobody attempted to contact her on April 11, 2008 or since until April 22, 2007, the one and only contact made, to make arrangements for the new connection.**

The Office computer automatically records all incoming phone and fax calls as to time, date, and originating number. See **Exhibit B** hereto. No such calls came from Progress Energy as stated by Mr. Buyck, and no agents came to her property since September 18, 2007.

I challenge Mr. Buyck to offer to the Court and Defendants, documentary proof of the alleged efforts on April 11 to April 22, 2008 to contact Mr. and Mrs. Weaver about the new connection. On April 11, 2008 I was at the Court to obtain the address of the Court Reporter on duty at the January 30, 2008 Hearing in order to request a transcript. Mrs. Weaver was taken very ill and spent the day in retreat and did not take or make a single call on that day. The computer shows no record of any calls from Progress Energy from April 11 to April 22, 2008.

The significance of making an issue of the alleged the April 11, 2007 date used by Mr. Buyck is that the undersigned filed a notice of Plaintiff's non-compliance and contempt of Court, on or about April 14, 2007. The 45 day date certain for the parties to comply set by Judge Burch fell on April 14, 2007. I have filed a motion for summary judgment and sanctions.

Mr. Buyck is merely trying to "cover" for his client who negligently ignored Judge Burch's "crystal clear" order to comply with the terms of the Release which according to Judge Burch cannot be misunderstood by Plaintiff. Said notice of Plaintiff's non-compliance is the precursor to filing a motion for contempt pursuant to **Rule 79 (g)**. See below.

As a final comment on this issue for the record, since execution of the Mutual Release on September 18, 2007, the Plaintiff contacted Mrs. Weaver only twice. On or about October 2, 2007 a field agent came to the property to connect power and install a new meter. I personally escorted him to the meter base. He then told me he had come

"with the wrong meter" He promised to return with the right meter and install it the following week and never did. On October 4, 2007 I complied with Plaintiff's request for an inspection and approval by the Dillon County Building Department.

Several days later on or about October 5 or 6, 2007, another agent came to the residence claiming to be from the "Revenue Dept" of Progress Energy in Raleigh, N.C. He asked to see the owner of the residence, claiming he was there to collect \$5,500 owed to Progress Energy. He had no identification. I informed him of the earlier settlement agreement and sent him back to see Mr. Len Anthony and/or Mr. Cagle in Raleigh with my compliments, and the message to cease and desist from further harassment and abuse.

Until April 22, 2008 those are the only contacts with Plaintiff concerning connection of power or curing the other matters under para. 4 of the Release. Mr. Buyck is deliberately lying to the Court about any alleged April 11, 2008 contact with the Defendants simply to cover Plaintiff's manifest contempt of court and breach of agreements.

5. Connecting the service. At no time was Mrs. Weaver "cancelling a connect order." Again, Mr. Buyck is mis-stating the facts and mis-leading the Court. The undersigned happened to be present on April 22, 2007 when Progress Energy's Ms. Hill telephoned Mrs. Weaver at approximately 10.00 a.m. stating that she had an "order" to connect the electric service "tomorrow." Mrs. Weaver stated the call to be in violation of proper Court procedure given the litigation that still exists between the parties. See **Exhibit C** hereto.

Mrs. Weaver asked Ms. Hill when she received the Order and from whom, to connect service on April 23, 2008. Ms. Hill replied that she had received it "today" (April 22) from the Legal dept. This call followed the under-signed's filing of a motion for summary judgment for enforcement and contempt of Court against Plaintiff, just a few days earlier.

6. Mr. Cagle's letter referred to by Mr. Buyck, makes it very clear that Mrs. Weaver temporarily deferred the connection until she contacted her attorney on the matter since this was a legal issue and Progress Energy is in contempt of Court. **It was Ms. Hill who cancelled the order for the connection to take place the next day (April 23, 2008)**



pending further communication from Mrs. Weaver, and/or her attorney. See Exhibit C. A copy of the "order" to connect is needed showing when, and by who.

7. Mr. Buyck's distorted representations are second hand "hearsay" comments only. He never communicated directly with Mrs. Weaver and/or her attorney on these matters. He has conveniently and intentionally mis -construed the facts as discussed above to suit his purpose to cover up his negligence in failing to attend to the matter in due time as ordered by Judge Burch..

This is not to be a surprise. This is the Len Anthony-Mark Buyck III modus operandi- distort, mis-represent, twist the truth and the facts, and cover up violation of statutes and regulations.

8. Disbursement of funds on deposit. Mr. Buyck would have the Court believe that Progress Energy stands ready and willing to "re-connect, the Weaver's Harlees Bridge Road location in the normal course of business."

First, as noted above, the account is in the name of Mrs. Beatrice Wallenstein. It has nothing to do with the undersigned. And it is a new account, not a re-connect. Mr. Buyck has consistently abused the process in that direction.

Second, Mr. Buyck made these same promises and a commitment in September 18, 2007 to induce Mrs. Weaver to execute the Release; i.e., that upon payment of the first increment and the security deposit he would have Progress Energy promptly connect the electric power to the new Wallenstein account. These were the only two pre-conditions. Specifically, note that Progress Energy's performance was not contingent on any other performance by any party of any of the other matters addressed in the Mutual Release. Defendants timely and duly met the two pre-conditions and Progress Energy promptly reneged on its deal as usual for seven months and continuing.

Based on previous experience dating since 2004, and September 18, 2007, the undersigned does not trust Mr. Buyck or Progress Energy to keep their word. Moreover, Progress Energy has already shown its contempt for the Court by ignoring Judge Burch's "crystal clear" order to connect . Progress Energy should have installed the new account and connected the electric power on or about September 24, 2007 in the first place, and following the Judge Burch February "crystal clear" order, on or about March 2, 2008 in the second place.

If the funds on deposit are released prematurely before Plaintiff is forced by the Court to **comply with all the issues** provided for in the Mutual Release, it will find some way to renege, and circumvent the Judge's Orders which it has already ignored in contempt of court. **Thus, the funds on deposit should not be released at this time.**

Finally, I have filed a previous request to the Court to refrain from disbursing the funds until my claim for a full refund, and damages are adjudicated by the Court at trial. **Under the case law of contract cited in my pleadings, a party who unilaterally breaches an agreement forfeits the consideration and the other party is relieved of any further obligation under the agreement.**

In this case, Progress Energy has breached not one, but two agreements with Defendants and is liable for such claims. Whether or not there will be a further third breach under paragraph 5 of the Release, remains to be seen pending disposition of the change of providers by the Commission. I predict that issue will end up back before this Court on appeal.

I am also asking the jury and the Court to order Progress Energy to bear the cost of changing providers, and/or installing alternative energy sources as partial damages for its breach of the agreements, **gross criminal negligence**, and other claims of record.

Progress Energy knew and should have known the importance of the electricity for Mrs. Weaver due to her seriously ill health situation and the numerous medical certificates of necessity on file.

Since September 18, 2007 the denial and breach have been the direct and proximate cause of the current metastasis of her cancer; i.e., the lack of electricity for medical care, home health care, and the resulting physical and emotional stress. The undersigned is pursuing Plaintiff's gross **criminal negligence** and related claims pursuant to the demand for jury trial pending before the Court.

Summary and Conclusion

The background and history of this case is one of Plaintiff's arrogant and blatant recurring violations of the Commissions' Regulations and certain statutes, accommodated by liberal and compliant regulatory oversight, and bad faith negotiations and breach of its agreements. Progress Energy regularly abuses its right of access to private property, and regularly sends incompetent people to do its work, especially meter readers.

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On the other hand, Defendants are the kind of people who refuse to accept such standard of conduct, whatever the consequences. Plaintiff has abused the legal and regulatory process with relative impunity from the regulatory agencies and the court to date.

It is rather tragic that Progress Energy did not keep its word in September 2007. Planned surgery could not take place as "post-op" medical care and home health staff required electric power. **Unfortunately cancer metastasis waits for no one and is caused by stress.**

Due to the physical and severe emotional stress caused to Mrs. Weaver by Progress Energy not keeping its word, the cold winter months, lack of physical comfort and medical needs provided by "plug in" operating appliances, inability to use necessary "plug in" medical equipment by an ailing elder woman, all caused stress on the human immune system. The water well pump and the security alarm system were dysfunctional.

At the settlement negotiations on September 18, 2007 this situation was made very clear to Plaintiffs who took advantage and subsequently refused to connect electric power as agreed to Mrs. Weaver's residence. Defendants met all the agreed on requirements necessary to trigger the power connect and Plaintiff violated para. 4 of the Mutual Release.

Thus we find a hiatus commencing September 18, 2007, to April 22, 2008, some seven months, before Progress Energy decided to meet its obligation and connect the power as agreed. This in fact was a direct response to the undersigned's charge of non-compliance with the Court Order, and contempt of court.

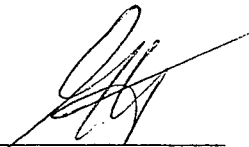
Defendants are pursuing Plaintiff for criminal neglect, since it knew and should have known the consequences of its willful, wanton, negligent and reckless violation of the Mutual Release and the Court Order. The harassment and abuse has continued for some seven years, and seven months too late. Ms. Weaver will shortly enter hospice as an in-patient, which situation will be discussed under separate cover, etc. The perpetrators face potential federal investigation for wrongful death.

On these grounds, for good cause I respectfully request that the Court not disburse the funds on deposit and retain control until the outstanding issues have been resolved including conclusion of the requested jury trial.

Further, that the court order Progress energy to meet the other terms of para. 4 of the Mutual Release as cited above, especially changing the "small commercial" status of 1249 Harllees Bridge Road, back to "residential" status, rep[air of the well pump and security alarm systems, etc.

Respectfully submitted.

DATED: Florence, May 2, 2008



Gary Weaver, Defendant Pro Se

Attachments: Exhibits A-C.

Cc: The Hon. Paul M. Burch
Daniel H. Shine, Esq
Mark W.. Buyck, Esq.

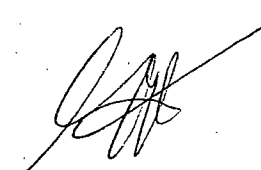
AFFIDAVIT OF GARY WEAVER

County of Dillon)
)
State of South Carolina) SS.
_____)

GARY WEAVER, being first duly sworn upon his oath, hereinafter "Affiant,"
deposes and says as follows:

1. Affiant is a Defendant Pro Se in Docket 2004-CP-17-232, Dillon Court of Pleas,
and hereby files the document titled: "Defendant Gary Weaver's Formal Response to
Plaintiff's Letter Dated April 24, 2008 Filed by Mr. Mark W. Buyck, Jr., Esq.," attached
hereto and part hereof.
2. Affiant makes this affidavit from personal knowledge and belief of the facts of the
case, and not for any improper purpose or to cause unnecessary delay in proceedings, or
needless increase in the costs of this case. Affiant is competent to make this deposition.
Affiant alleges and avers that the facts are well grounded as stated herein, and any
exhibits attached hereto are true and correct copies of the original documents and by
reference are made part hereof.

Further, Affiant sayeth naught.



Gary Weaver, Affiant

Subscribed and sworn before me
this _____ day of April, 2006.

Notary Public, State of South Carolina

My Commission expires: _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DILLON	)	CASE NUMBER 2004-CP-17-232
Progress Energy Carolinas, Inc.,	)	SUMMARY STATUS OF THE CASE;
	)	EXHIBITS A-D AND G-1, G-2;
Plaintiff,	)	CERTIFICATE OF SERVICE
vs.	)	
	)	
Gary Weaver and Beatrice Weaver,	)	
	)	
Defendants.	)	

[Handwritten Signature]
 CLERK OF COURT
 DILLON COUNTY

SUMMARY STATUS OF THE CASE

1. Introduction

Both Plaintiff and Defendant Gary Weaver have filed respective Motions to Enforce the compromise and settlement agreement titled "Mutual Release" executed on September 18, 2007. See, **Exhibit A** hereto.

This Defendant has filed two Memoranda with the Court: (1) Memorandum in Response to Plaintiff's Motion and in Support of Defendant's Motion to Enforce filed on or about December 3, 2007, (hereafter "Memorandum In Response"), and (2) Supplemental Memorandum in Support of Motion filed on December , 2007. (hereafter "Supplemental Memorandum").

Plaintiff's Motion filed on October 24, 2007 relates to enforcement of paragraphs 3 and 4 of the Mutual Release. Defendant claims in the said Memoranda that the issue is moot having been settled in May 2007 as discussed herein below; that **Plaintiff's Motion should be summarily dismissed as there are no genuine issues of material fact and Defendant is entitled to judgment as a matter of law**, and Plaintiff ordered to immediately connect electric power as agreed in paragraphs 1 and 2 of the Mutual Release.

This Defendant's Motion to Enforce relates to paragraphs 1 and 2 of the Mutual Release of which Plaintiff is in breach, along with paragraphs 3 and 4 dealing with

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 DILLON COUNTY

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matters allegedly before the Public Service Commission of South Carolina (the "Commission"). Defendant has moved the Court to bifurcate the issues of liability and send the facts and damages claims to the Jury.

As of this filing this Defendant has not been apprised by Plaintiff or the Court as to when the hearing on the said Motions is to be held.

Accordingly, pursuant to **Rule 16 (c) S.C.R.C.P.** in view of the circumstances and facts of this case, and in the interests of furthering Court administrative efficiency and conduct of a fair hearing on the Motions, this Defendant respectfully files this **Summary Status of the Case** report for the Court's consideration. Defendant anticipates that the Court may call a conference of the parties and files this report primarily directed at the summary dismissal of Plaintiff's Motion.

2. Plaintiff's Motion is redundant, moot and should be summarily dismissed with Judgment for Defendant for filing a frivolous and nuisance pleading, and with sanctions.

1. Plaintiff's motion relates to enforcement of paragraphs 3 and 4 of the Mutual Release which call for dismissal of matters before the Commission and before this Court.

2. As discussed in Defendant's Supplemental Memorandum, pursuant to **Rule 41 (a) (1) (ii) S.C.R.C.P., Plaintiff had a legal duty to file properly executed Stipulations for Dismissal with this Court and the Commission. It did not and is in violation of the law.**

3. Plaintiff did file a copy of the Mutual Release with the Commission on or about September 27, 2007, some nine days after execution of the Release on September 18, 2007. The question before this Court is whether or not the said submittal to the Commission constitutes a Rule 41 filing of a stipulation. See discussion.

4. Finally, irrespective of the Court's finding as to items (a) and (b), the issue is moot and never should have been brought to the Court in the first place. The matters before the Commission were disposed of in May 2007 and reconfirmed at Defendant's request for closure in November 2007. Plaintiff knew and should have known that the

commission had disposed of the matters and wasted the Court's time in filing its frivolous and nuisance motion.

2. **In May 2007, the Commission disposed of all matters under Docket No. 2004-219- E, the only matter before it as to Defendants, and Plaintiff's Motion is moot and never should have been filed.**

1. On or about May 3, 2007, the Commission issued Order No. 2007-298 **Denying Motion to Continue and Dismissing Counterclaims. See Exhibit B hereto.**

2. Ignoring good cause based on medical reasons properly documented, and in documented violation of statutes and the Commission's own regulations, the said Order abused its discretion and denied the motion claiming: "... she is, by her own representations to the commission, physically unable to prosecute her counterclaims." See **Exhibit B, page 5 at para. 2, line 3.** The commission dismissed the counterclaim and declared the docket moot.

3. On or about May 24, 2007, the Commission's Hearing Officer issued a **Directive** stating Mrs. Weaver's filings were untimely and must be rejected and the relief sought must be denied. See **Exhibit C, last line.**

4. On or about November 8, 2007, the Commission confirmed the earlier closing of Docket 2004-219-E. See **Exhibit D, Defendant's Motion in Response, p.2 at 2.**

5. On or about November 13, 2007, the Commission issued Order No. 2007-835 reiterating and affirming "... our prior denial of Mrs. Weaver's request for continuance and dismissal of her counterclaims without prejudice." See **Exhibit B attached to Defendants Supplemental Memorandum, pages 1, para. 1, and p. 4 last line.**

6. Finally, Plaintiff filed a copy of the Mutual Release with the Commission on or about September 27, 2007. Receipt confirmed by the commission on October 9, 2007. See Exhibit G-1 and G-2 in the Memorandum in Response (copy attached).

7. **Plaintiff knew and should have known that the matters before the commission were finalized and should not have filed the Motion to Enforce. It was**

fraudulent, frivolous and a nuisance. The issue is moot. Plaintiff's Motion should be summarily dismissed with sanctions.

3. Defendant's matters before the Commission have been final since May 2007, and Defendants have had no further recourse pursuant to statutes and Commission regulations.

1. Pursuant to S.C. Code Ann. Sect. 58-27-2150 a party may request Rehearing within ten days after service of the order or decision. A failure of the commission to act upon such application within twenty days, "... shall be deemed a refusal thereof." Based on this statute Defendant understood and believed that the Commission's failure to act within the said twenty day period, constituted a refusal. Upon request, a seven month later re-confirmation as cited above is finality and documents Defendant's claim that there were no matters before the Commission contrary to the claims of Plaintiff.

Note: **Plaintiff's Motion to Enforce did not provide any proof or documentation that as of September 17, 2007 there were any matters outstanding before the Commission as referred to in paragraphs 3 and 4.**

2. Pursuant to S.C. Code Ann. Sect. 58-27-2310, provides for appeal of the Commission's orders **but only after filing and refusal of a Rehearing as in this case.** There is the necessity of a prior petition for rehearing. Based on this statute, Defendant Beatrice Weaver filed a petition for Rehearing as a matter of proper procedure prior to an intended appeal. Any such action must commence within thirty days. Since Defendant did not file any appeal within thirty days, the matter before the Commission was final. **Plaintiff knew this. See, Hamm vs. S.C. Pub. Serv. Comm. (S.C. 1992) 307 S.C. 188, 414 S.E.2d 149. rhg dnd.**

3. S.C. Code Ann. Regulations 103-880 provides for finality of the Commission's Order; **Reg. 103-881** provides for Rehearings as a predicate to any appeal to a Court; **Reg. 103-883** provides for Appellate Review of Commission Orders pursuant to "applicable provisions of law." See **Code Sect. 58-27-2150..** essentially the Commission regulations mirror the statutes.

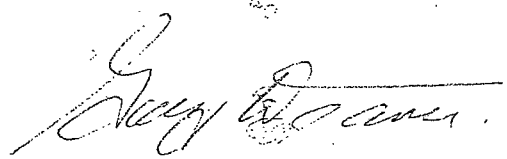
4. According to the cited statutes and regulations, Defendants action before the Commission was final in MAY 2007, some **seven months before the September 18, 2007 Mutual Release**. The Commission's letters to Defendant Beatrice Weaver dated November 8 and 13, 2007 merely re-confirmed the earlier finalization of the matters in May, 2007.

5. **The issues cited in Plaintiff's Motion to Enforce are moot. There are no material facts in dispute and there are no genuine issues before the Court. Plaintiff's motion has not presented any proof to the Court that there are in fact any matters before the commission to be dismissed. Plaintiff's Motion must be dismissed summarily and Plaintiff ordered to connect electric service as agreed.**

4. Defendant's Motion to Enforce should be summarily granted as to Paragraphs 1 and 2 of the Release. There are no genuine issues of material fact and Defendants are entitled to the grant as a matter of law.

5. Defendant's Motion requests submittal to the Jury for finding of facts and damages for breach of contract, and tortious acts. Defendant relies on recognized authority that the Court has the inherent jurisdiction of the subject matter and the discretion to decide on bifurcation under Rule 42 (b). Further, that the correct process is to file for summary judgment rather than a formal separate Complaint for breach of contract. See, 6 S.C. Juris., Sect. 19, p.98 citing, **Oxzagilar vs. Davis. 701 F. 2d. 306 (4TH Cir. 1983)**. However, Defendant stands ready to file according to instructions from the Court to process claims for breach, damages, etc as cited in Defendant's Motion to Enforce, etc., and the cited Memoranda.

Respectfully submitted,


Gary Weaver
Defendant pro Se

DATED: Florence, December 7, 2007

PO Box 7682
Florence SC 29502
Ph/Fax: 843 841 1606

January 19, 2008

The Hon. Gwen T. Hyatt
Clerk of Court, Dillon County
P.O. Drawer 1220
Dillon SC 29536

Dear Ms. Hyatt:

Subject: Recordation of Pleadings
Ref: Case No. 2004 CP-17-00232

Enclosed please find two copies of the following pleading for recordation:

Memorandum In Support Of Supplementary Argument, Law And Amendments
For Defendant's Motion To Enforce

Please mail me return a time stamped copy in the enclosed return stamped and
addressed envelope.

Best Regards.

Sincerely,

Gary Weaver, Defendant

FILED
GWEN T. HYATT
2008 JAN 25 PM 3:54
CLERK OF COURT
DILLON COUNTY

Cc: Counsel for Plaintiff
Counsel for Def. Beatrice Weaver

Encl: Stamped addressed envelope for return copy.

A CERTIFIED
TRUE COPY
Gwen T. Hyatt
CLERK OF COURT
DILLON COUNTY

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STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
Plaintiff,)

vs.

Gary Weaver and Beatrice Weaver.)
Defendants.)

MOTION TO FILE SUPPLEMENTARY
ARGUMENT, LAW AND
AMENDMENTS FOR DEFENDANT'S
MOTION FOR ENFORCEMENT AND
RELIEF FILED OCTOBER 25, 2007;
AFFIDAVIT OF GARY WEAVER
EXHIBITS A-R; NOTICE AND
CERTIFICATE OF SERVICE

A CERTIFIED
TRUE COPY

Defendants.

CLERK OF COURT
DILLON COUNTY (JURY TRIAL)

2008 JAN 25 PM 3:54
CLERK OF COURT
DILLON COUNTY

FILED
GWEN T. HYATT

**MOTION TO FILE SUPPLEMENTARY ARGUMENT, LAW AND
AMENDMENTS FOR DEFENDANT'S MOTION FOR ENFORCEMENT
AND RELIEF FILED OCTOBER 25, 2007**

Comes now Gary Weaver, Defendant Pro Se (hereafter "Defendant") in the above entitled case, and respectfully moves this Honorable Court for leave to supplement and amend the pleadings and specifically Defendant's **Motion for Enforcement of Settlement and for Redress of Wrongs and for Equitable Relief** filed on October 25, 2007 (hereafter "Motion"), as discussed herein below.

This verified Motion is filed pursuant to Rules 4 and 5, Rule 7, Rule 8, particularly (e) (2), Rule 9, Rule 10, Rule 15 (a) and (d), Rule 56, Rule 42 (b), Rule 41 (A)(1)(II), Rule 43 (k) and Rule 65, S.C.R.C.P. Pursuant to Rules 15 (a) and (d) S.C.R.C.P. Defendant respectfully seeks leave of the Court to file the supplementary amendments, argument and law to further enhance and support the cited motion without prejudice to any party. This Motion is based on the pleadings and exhibits of record in this case, Defendant's sworn affidavit and the Memorandum in Support of the Motion attached hereto and made part hereof.

In reviewing this motion, the Court is respectfully requested to refer to this **Defendant's Memorandum in Response to Plaintiff's Motion to Enforce Settlement** (hereafter Motion to Enforce), **Defendant's Supplemental Memorandum in Support of Defendant's Motion to Enforce Settlement and for Redress of Wrongs** (hereafter

Supplemental Memorandum), and this Defendant's **Summary Status of the Case** ("Summary") of record.

Grounds for this Motion are based on this Defendant's continued research in preparation for the hearings scheduled for this case, transactions, occurrences and events that have happened since the date of filing Defendant's motion to be supplemented herewith, discovery of new material relevant to paragraph 5 of the Release, and law such as Plaintiff's violation of Rule 43 (k) SCRCP relevant to the issues, corrections to the original motion which was defective because of inadvertent errors and omission.

Upon review of this Defendant's original Motion, it was discovered to be inadvertently procedurally defective in its statement of a claim for relief in that specific reference to this Defendant's demand for Bifurcation of the issues was not directly addressed or stated in the motion per se. Upon review of the pleadings, it was discovered that reference to requests for bifurcation of the issues pursuant to **S.C. Code Ann. Sect. 15-27-20** and **Rule 42 (b) S.C.R.C.P.** were included in Defendant's related supporting pleadings filed with the Court, but not directly referred to in the original motion. Therefore the purpose of this amendment is to rectify that inadvertent procedural oversight with approval of the Court. Based on this oversight, this Defendant concluded it procedurally appropriate to file for the record, a formal amendment to the original motion with the Court's approval, addressing directly the motion for bifurcation of the issues and other relevant issues based on further research of the case. Further grounds are discussed in the Memorandum in Support attached hereto. For example, Defendant reviewed the doctrine of waiver and estoppel, elements of which could have some application in this case and it is necessary to record the doctrine for purposes of appeal. With respect to paragraph 5 of the Mutual Release, it became clear there will be some jurisdictional issues to be addressed. This motion addresses such issues.

Pursuant to **Rules 15 and 65 (f)(1) S.C.R.C.P.**, and Defendant's sworn Affidavit attached hereto, and on the basis of further research, facts, circumstances and events that have occurred since September 18, 2007 the date of that certain "Mutual Release" of record herein was executed by the parties, this Defendant has concluded that it may be necessary to have the Court in its discretion based on the facts and circumstances, issue a **Writ of Mandamus** instructing the Public Service Commission of South Carolina



("Commission") to order Plaintiff to effect the change of service providers as provided for in paragraph 5 of the said Mutual Release.

While the Commission has the administrative duty to rule on an Application for Change of Providers, this Court has jurisdiction over the Mutual Release as to enforcing the requirement of paragraph 5. Based on the doctrine of exhausting administrative relief, this Court may decide to defer judgment on enforcement of paragraph 5 as requested by this Defendant. On the other hand, based on the established "doctrine of futility" related to administrative relief in that it is likely the Commission will sit on its hands and will continue to favor Plaintiff as in the past, it is reasonable for this Defendant to request this Court to assume direct jurisdiction immediately and by pass the Commission's Hearing process and instruct the parties to expedite the changeover.

Given the adverse medical conditions of Defendant Beatrice Weaver as fully documented in the pleadings, **time is of the essence** with respect to connection of electric power to her residence (Release paragraphs 1 and 2), and effecting the change of providers (Release paragraph 5). See **Exhibits R-1 and R-2** hereto, Medical Certificates of Necessity.

The Court is moved to issue summary judgment for specific performance pursuant to paragraphs 1 and 2 of the Mutual Release with an order to Plaintiff to immediately connect electric power to Defendant Beatrice Weaver's residence. There are no genuine issues of material fact and Defendants are entitled to enforcement as a matter of law and Plaintiff is in deliberate violation of the settlement agreement.

In addition to the claim for damages filed herein and in Defendant's pleadings of record, Defendant also seeks Court or Jury approval of a **Late Penalty** that Defendant imposed on Plaintiff in the amount of \$100.00 per day, as an incentive for mitigation of Defendants' claims for damages, pursuant to **Exhibit E** hereto.

As noted in Defendant's Memoranda of record cited herein above, and the Memorandum attached hereto, subsequent to execution of the Mutual Release it has become clear to this Defendant that if any change of provider is to be approved at all by the Commission it will take until June or July of 2008 to be effected, even assuming the Commission may order the changeover of providers pursuant to paragraph 5. See **Exhibit J** hereto.

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Defendants' process for filing an **Application for Change of Providers** was duly and timely commenced with the Commission on or about September 22, 2007. As of this date of filing, it is now some four months and will be about nine to ten months before the Commission's bureaucratic administrative "red tape" process will run its course.

Further, Plaintiff has filed its "Answer" to the Commission opposing the arguments for the change of providers. The designated replacement provider Marlboro Electric Cooperative and Plaintiff have filed letters (presumably formal "Answers") in response to Defendant's "**Application for Change of Providers**" (copy duly filed with this Court), wherein they oppose any change. See **Exhibits C and H** herein. This Defendant shall file a formal response to these "Answers" in due course with a copy filed with this Court for judicial notice. However, see **Exhibit J** hereto.

A further ground for this amendment application, is that since the September 18, 2007 execution of the Mutual Release, following further research and discovery, this Defendant has concluded that Plaintiff knew and should have known that Marlboro would not agree to the changeover, and fraudulently induced, and committed a fraudulent act by remaining silent and sitting on its hands when it agreed to this Defendant's request for change of providers as a **quid pro quo** for executing the proposed Mutual Release.

Accordingly, this Defendant submits that this Court may reasonably be requested to exercise its inherent jurisdiction to assume control of the administrative process. Based on the opposition of the Plaintiff and Marlboro to the proposed change, and the Commission's previous leniency dating since 2001 towards Plaintiff, it is doubtful to this Defendant that the Commission will approve the changeover pursuant to paragraph 5 of the Release.

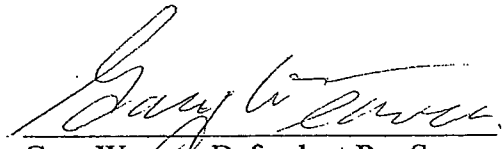
Therefore, this Defendant submits that given the Court's inherent discretion to take jurisdiction of an administrative issue, it is appropriate to request the Court to issue a summary judgment ordering the adverse party to expedite the changeover at its expense. In the alternative the Court may consider issuing a **Writ of Mandamus** as discussed in the attached Memorandum, ordering the Commission to enforce the changeover as provided in paragraph 5 of the Mutual Release over which the court has direct jurisdiction, and the Commission has none.

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WHEREFORE, on the premises and grounds cited hereinabove, for good cause, Defendant respectfully seeks permission to file this supplemental motion for amendments, argument and law and for the Court's granting the motions and claims filed herein and in Defendant's pleadings of record.

DATED: Florence, January 19, 2008.

Respectfully submitted.


Gary Weaver, Defendant Pro Se

Progress Energy Carolinas, Inc.,)
)
Plaintiff,)
)
vs.)
)
Gary Weaver and Beatrice Weaver.)
)
_____)

MEMORANDUM IN SUPPORT OF
SUPPLEMENTARY ARGUMENT, LAW
AND AMENDMENTS FOR
DEFENDANT'S MOTION TO ENFORCE

**MEMORANDUM IN SUPPORT OF SUPPLEMENTARY ARGUMENT, LAW
AND AMENDMENTS FOR DEFENDANT'S MOTION TO ENFORCE**

This Memorandum in Support of this Defendant's proposed amendments, supplementary argument and law for enforcement, relief and damages, is presented as follows, pursuant to **Rule15 (d) SCRCP**:

- I. Background
- II. Bifurcation of the Case
- III. Partial Summary Judgment For Specific Performance As To Paragraphs 1 And 2 Of The Mutual Release.
- IV. Partial Declaratory Relief May Be Appropriate To Dispose Of Paragraphs 3 And 4 Of The Mutual Release
- V. The Legal Duty To File Stipulations To Dismiss
- VI. Rule 41 (A) (1) (ii)
- VII. Rule 43 (K) S.C.R.C.P.
- VIII. Relief And Enforcement Of Paragraph 5 Of The Release
- IX. The Issue Of Dismissal "Without Prejudice."
- X. Writ Of Mandamus For Relief
- XI. Plaintiff's Fraud And Bad Faith
- XII. Relief

FILED
GWENTHYATT
2008 JAN 25 PM 3:54
CLERK OF COURT
DILLON COUNTY

I. BACKGROUND

As noted in the pleadings filed by both the Plaintiff and this Defendant, on September 18, 2007 all three of the Parties in this action executed a Compromise and Settlement Agreement, titled as a "Mutual Release." (**Exhibit A hereto**). The Release was duly signed by the parties and the respective attorneys. Said Release comprised five paragraphs on two pages. Defendants complied with the conditions called for in the Release. Plaintiff has violated the agreement, in toto, without good cause. Both parties have filed motions for enforcement which are the subject of this pleading.

A. Plaintiff's Allegations

Subsequently, on or about October 25, 2007, Plaintiff filed a Motion for Enforcement of paragraphs 3 and 4 of the Release relating to matters previously before the Public Service Commission of South Carolina ("Commission"). Plaintiff deceptively and fraudulently alleges that:

1. Plaintiff incorrectly and misleadingly alleges that it is Defendants' legal duty, obligation and responsibility to file a stipulation for dismissal with the Commission under paragraphs 3 and 4 of the Release. **Plaintiff's Motion, Item 2, page 1**
2. Plaintiff alleges that Defendants have not filed a dismissal of the matters before the Commission. **Plaintiff's Motion, Items 1 and 2, page 1**
3. Plaintiff implies but has provided no evidence of any matters pending before the Commission as of September 17, 2007 that require filing of a stipulation for dismissal by any of the three parties.
4. Plaintiff claims that Defendant Beatrice Weavers' requests to the Commission, following execution of the settlement agreement on September 18, 2007, for closure and initiation of paragraph 5 requirements of the Mutual Release does not comport with the said agreement. **Plaintiff's Motion, Item 4, page 2**
5. That this misleading allegation justifies Plaintiff's refusal to file **Rule 41 a)(1)(ii) SCRCF** stipulations for dismissal, exercise its legal duties pursuant to **Rule 43 (k) SCRCF**, and to violate paragraphs 1 and 2 to connect electric power to Defendant Beatrice Weaver's residence as agreed in the compromise and settlement agreement.

6. Plaintiff admits it formally filed a copy and notice of the Mutual Release with the Commission on or about September 27, 2007. **Plaintiff's Motion, Item 5, page 2, line 3. See Exhibit G-1 hereto.**

7. Plaintiff fraudulently claims that it has complied with the requirements of the settlement, whereas in fact it has deliberately, willfully, wantonly, negligently and recklessly violated paragraphs 1 and 2 and 5 of the Release and endangered the life of Defendant Beatrice Weaver. See **Plaintiff's Motion, Item 5, page 2, line 1.**

8. Plaintiff incorrectly claims that both Defendants were represented by Counsel and execution of the settlement document was approved by counsel. This Defendant Pro Se in fact represented himself without Counsel. **Plaintiff's Motion, Item 6, page 2, line 3.**

Based on its false, self serving and misleading allegations, Plaintiff thereby attempts to justify its refusal to this date to comply with the other settlement provisions of paragraphs 1, 2 and 5 of the Release. Moreover, not only has Plaintiff refused to execute the Release as agreed, it has continued its harassment and abuse and other tortious acts detrimental to Defendants in this action.

Given the correct facts, circumstances and the law, **Plaintiff's motion to enforce is moot, superfluous and a fraud upon the Court. Plaintiff's motion is a proposed solution in search of a problem, where none exists. As this memorandum shows, Plaintiff's motion is fraudulent, frivolous and a nuisance motion designed to cover up Plaintiff's willful, negligent and reckless actions.**

B. This Defendant's Claims.

On October 25, 2007 this Defendant also filed a similar motion to enforce the Release in its entirety and for various damages (contract, torts and administrative laws) such as intentional infliction of emotional distress to harass and abuse Defendants, etc. This Defendant has also filed a Memorandum in Response, etc. to Plaintiff's motion (hereafter "Response Memorandum") and a "Defendant's Supplemental Memorandum in Support of Motion to Enforce, etc." (hereafter "Supplemental Memorandum").

As discussed in this Defendant's Memoranda, the law, facts and evidence are prima facie that Plaintiff is in a direct, deliberate and malicious violation of the Release agreement, without any justification. Plaintiff has no case as to its allegations that

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Defendants have a legal duty, obligation or responsibility to Plaintiff under paragraphs 3 and 4 of the Release to take any alleged action to dismiss matters before the Commission that the evidence shows are non-existent. Plaintiff has provided no evidence that any matters existed as of the date of execution of the Release.

This Defendant argues that the law pursuant to **Rule 41 (a)(1)(ii) and Rule 43 (k) SCRCF** requires Plaintiff not Defendants to file any stipulations for dismissal as appropriate, that Plaintiff in fact did file a "notice" with the Commission on or about September 27, 2007, that the matters had in fact already been dismissed by the Commission in May 2007, that Defendants had forfeited any appeal rights, that the issue was moot, and that **Plaintiff knew and should have known of these factors, before filing a fraudulent, frivolous and nuisance motion, wasting everyone's time and injuring Defendants.**

C. The Main Question Before the Court and the Jury.

Both Plaintiff and this Defendant have filed Motions for Enforcement of the compromise and settlement agreement titled "Mutual Release." The disputes between the parties that underlie the respective motions to be adjudicated by this Court and the Jury dissolve down to the following two basic questions:

1. **Were there any matters pending before the Commission as of September 17, 2007 that required to be dismissed pursuant to paragraphs 3 and 4 of the Release?**

The evidence shows that there not, and Plaintiff has not provided any evidence to the contrary. Moreover, Plaintiff knew and should have known that the Commission dismissed all matters pending between the parties in May, 2007 and none of the three parties exercised any legal rights of appeal or reconsideration, etc.

2. **Which party to the compromise and settlement agreement had the legal duty, obligation and responsibility to prepare, process, and formally file a Stipulation for Dismissal of the cause before this Court, and matters that may or may not have been pending before the Commission, pursuant to paragraphs 3 and 4 of the agreement, and the law of the State?**

As discussed herein, this Defendant submits that Plaintiff has the legal duty to file the stipulations for dismissal with both the Commission and the Court and is remiss and liable to Defendants in its deliberate decision not to do so.

D. Thus the following questions arise:

1. Does the law and paragraphs 3 and 4 of the Mutual Release require Plaintiff (and not Defendants) to timely file stipulations for dismissal with this Court, and the Commission pursuant to **Rule 41(a) (1) (ii), S.C.R.C.P, and Rule 43 (k) S.C.R.C.P?**
2. If so, did Plaintiff do so? If not, why not?
3. Did Plaintiff file a written or verbal "notice" of the Release with the Court?
4. Does Plaintiff's filing of a formal "notice" of the Mutual Release with the Commission on or about September 27, 2007, constitute a stipulation for dismissal, or a "notice" as defined in **Rule 41 (a)(1) or meet the requirement of Rule 43 (k) ?**
5. Do the two Defendants in this case have any obligations pursuant to **Rule 41 (a)(1) or of Rule 43 (k)?**
6. Are the issues moot in any case, because the Commission dismissed all matters before it on May 3, 2007, (reconfirmed in November 2007 at Defendant Beatrice Weaver's request), some four months before the date of execution of the Mutual Release. See this Defendant's discussion of these issues in the Memoranda filed of record. See, **Exhibits B-1, B-2, and D hereto.**
7. Does the fact that the Commission's earlier dismissals of issues as cited "without prejudice," meet the dictates of paragraphs 3 and 4 of the Mutual Release directing all three of the parties to end process on any issues before the Commission or the Court, up to September 17, 2007?
8. **Based on the facts, the evidence and the law, did Plaintiff file an unnecessary, fraudulent, frivolous and nuisance motion for enforcement of a non existent issue?**

These issues are discussed at length in this Defendant's Memoranda of record. Further research in preparation for the motion hearings, and events that have occurred since September 18, 2007 following the execution of the Mutual Release, have called for this Defendant to file this motion with amendments and argument to clarify the issues further for adjudication of the Court and the Jury, and ensure all relevant factors and non-waiver of any rights, are a matter of record in the event of appeal.

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Thus we focus the following discussion on the dictates of all five paragraphs of the Mutual Release, bifurcation, enforcement issues, the stipulation for dismissal issue, the issue of whether or not the "without prejudice" caveat on the Commission's earlier dismissal of action before it meets the requirements of paragraphs 3 and 4 and the respective obligations of the parties therein, whether or not Plaintiff's formal filing of a "notice" of the Mutual Release with the Commission on or about September 27, 2007 meets the paragraphs 3 and 4 requirements and obligations of all three Parties to the agreement, and finally relief and damages for Defendants.

Given the statutes and the rules, the facts, the evidence and the recent events, the final decisions of course will turn on the Court's discretion and findings of fact by the Jury.

II. BIFURCATION OF THE CASE

1. Purpose.

This Defendant's pleadings have referred throughout to bifurcation of the issues pursuant to case law cited herein below, at the discretion of the Court. However, as noted in the Amendments to the motion to which this document is attached, upon review it has been noted that the original motion inadvertently omitted specific reference to moving for bifurcation. This amendment is therefore specifically filed for the purpose of rectifying that excusable oversight, with the approval of the Court. Thus this Amended Motion refers to Court permission for filing the Amendments, and for bifurcation of the issues between the Court and the Jury. The issue of trifurcation is not applicable here since there is little doubt about Plaintiff's ability to pay and any assessment of punitives adversely affecting the net worth or bankruptcy of the Plaintiff. See, the four "Dallas Carrier factors." *Mattison vs. Dallas Carrier Corp.*, 947 F. 2d 95, 110 (4th cir. 1991).

2. Summary Review of This Defendant's Requests for Bifurcation.

As noted, this Defendant's original Motion to Enforce, etc., filed on October 25, 2007 inadvertently omitted specific reference to moving for bifurcation of liability and damages, especially punitives, thus calling for this correction (particularly for the record for any potential appeals) with the amendments requested herein for Court approval.

On the other hand, Defendant's several Memoranda filed with the Court on these issues, specifically referred to the request for bifurcation of the issues and Jury participation, summarized as follows:

1. This Defendant called for a Jury trial in the underlying case. On or about December 7, 2007, this Defendant filed with the Court a **Summary Status of the Case ("Summary")** wherein it is stated "Defendant has moved the Court to **bifurcate** the issues of liability and send the facts and damages claims to the Jury." See **p.2, line 2.**

In **Item 5, page 5** of the Summary, Defendant again refers to bifurcation requesting submittal to the Jury for finding of facts and damages, etc. Defendant refers to the Court's jurisdiction and inherent discretionary powers to refer the issues to the Jury. Defendant again refers to **Rule 42 (b)** calling for bifurcation. See, **line 4.**

2. On **page 46, para. 1**, of Defendant's **Memorandum in Response to Plaintiff's Motion to Enforce Settlement ("Response Memorandum")** Defendant again states: "Defendants therefore demand that the issue of damages be submitted to the Jury for deliberation of the facts and setting of the damages sought by Defendants."

Item 12 on page 47 of the Response Memorandum again refers to submittal of the facts to the Jury for deliberation.

On **page 48, last paragraph, line 7**, Defendant again requests that "... damages be established by the Jury."

3. Defendant's **Supplemental Memorandum in Support of Motion to Enforce, etc.**, (hereafter "Supplemental Memorandum") refers to the Jury in **Item 3, paragraph 3, at page 29.**

4. Referring to Defendant's claim for punitive damages, it is stated: "Defendants have requested a bifurcation of liability and damages in order to have a jury deliberate the damages." **Supplemental Memorandum, page 34, last paragraph, line one.**

5. Further reference to the jury deliberation appears at **page 36, last paragraph, line one, Supplemental Memorandum.**

6. **Appendix A, Supplemental Memorandum, paragraph 1, page 3, and the last paragraph of page 9**, refers to presenting the claims to the Jury.

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7. **Appendix B, Supplemental Memorandum**, states: "Defendant will introduce evidence and proof of these costs and endangerment at trial for the Jury." **Paragraph 1, page 14; paragraph 3, line 7**: "Proof of damages will be introduced at trial or the Jury." Further reference to the Jury appears in **paragraph 5, line 3, page 19**;

8. **In Appendix C of the Supplemental Memorandum, at page 1, first paragraph, line 6**, this Defendant again refers to the Jury: "Here we are concerned with damages to be disposed of at the discretion of the Jury, subject to Court supervision."

3. **Legal Authority for Bifurcation of Liability and Damages Issues.**

Review of the literature on the subject suggests that the issue of bifurcation and trifurcation are not settled issues in South Carolina and the trial judge has discretion. Legal authorities discussing the issues of bifurcation of compensatory and punitive damages awards and the concept of judge-assessed punitive damages, generally state that the issues will be the next test cases taken to the high Court. For example, see T.E. Richardson, Sr and D.S. Haltwanger, Editors, S.C. **Damages, Vol. 1 and 2**, S.C. Bar, CLE, 2004.

A. According to this authority, presently, bifurcation in civil trials in South Carolina is addressed by **Rule 42 (b) SCRCP**. Unlike some other states this State does not require bifurcation of liability and punitive damages determinations. See, **Damages, Vol 1, Op cit. FN 93, p.24**. Further, that South Carolina Courts while committing to the sound discretion of the trial judge, have also expressed wariness to allow bifurcation. And have declared bifurcation inappropriate if evidence relevant to the issues of both liability and damages, overlap, and that a trial should be bifurcated only if the issues are so distinct that trial of each alone would not result in injustice. See, **Creighton vs. Coligny Plaza, 334 s.c., 108, 512 S.E. 2d, 516 (CITING Fortune vs. Gibson, 304 S.C. 279, 403 S.E. 2d 674 (Ct. App. 1991))**. The S.C. Supreme Court has stated that decisions regarding whether or not to bifurcate trials are not immediately appealable because they do not deprive a party of a mode of trial to which they would be entitled as a matter of right,. See. **Senter vs. Piggly Wiggly, 341 S.C. 78, 533 S.E. 2d 577**.

The S.C. Court of Appeals has held that "the 'economic bankruptcy' factor is not an absolute bar to the imposition of punitive damages in South Carolina...." See, **Welch**

vs. Epstein 342 S.C. 279,309, 536 S.E. 2d 408,424, (Ct. App. 2000), reh'g dnd Nov. 4, 2000. In contrast as noted above, the Fourth Circuit Court of Appeals has declared that punitive damages may not cause economic bankruptcy. See, **Mattison. Op cit.**

B. As part of continued research preparing for the hearings on the two motions for enforcement, this Defendant reviewed the November 2007 issue of the **South Carolina Lawyer** magazine published by the S.C. Bar C.L.E. discussing the issue of bifurcation. See, **Brian A. Comer, Bifurcation of Civil Cases in South Carolina and the Fourth Circuit, South Carolina Lawyer, November 2007, pp. 30-35.** The following discussion on bifurcation in South Carolina Courts for this case draws heavily on Comer's article for the purposes of this Memorandum.

Comer confirms the above view that unlike many other states, there are no South Carolina statutes that mandate or otherwise provide guidance concerning bifurcation in the civil context. Again, Comer confirms that in South Carolina, bifurcation is generally governed by **Rule 42 (b) S.C. R.C.P.** and case law.

Rule 42 (b) S.C.R.C.P. authorizes the Court to order separation of any claims or issues, "... always preserving inviolate the right of trial by jury as declared by the Constitution, or as given by a statute of the State." The Court can order a separate trial of any number of claims or issues to further convenience, avoid prejudice or to promote expedition and economy. In general, South Carolina Courts granting bifurcation have done so to promote simplicity, clarity or efficiency, or to avoid prejudice. See, **Creighton vs. Coligny Plaza Ltd P'ship, 334 S.C. 108, 512 S.E. 2d 510 (S.C. App. 1998); Doe ex.rel. Roe vs. Orangeburg Cty. Sch. Dist. No.2, 335 S.C. 556, 518 S.E. 2d 259 (1999).**

There is no *per se* rule, that the same jury must decide both issues. **304 S.C. 279, 281, 403 S.E.2d 674,675 (Ct.App. 1991).** If a Court grants bifurcation, it needs to ensure that a party will not lose its right to a full jury trial on all legal issues or that such a right is appropriately waived. **4. S.C. Juris. Action. Sect. 43 (1991), citing Johnson vs. S.C. Nat. Bank (1987) 292 S.C. 51, 354 S.E. 2d 895. (1987).** See the discussion herein on this Defendant's reservation of all rights and denial of any waiver of rights for relief.

Also **Appendix C, to Defendant's Supplemental Memorandum in Support of Motion to Enforce, etc., at page 1, last paragraph.** Therein is stated that Defendant must seek damages or redress for all claims in one action, or lose rights to any omitted claim. See,

11 S.C. Juris. Sect. 3, p.7, citing **Morgan vs. Liberty Mut. Ins. Co.**, 261 F. Supp. 709 (D.S.C. 1966). That explains in part the purpose of this Amendment to Defendant's original Motion for Enforcement. In South Carolina, a decision by a Court to grant or deny bifurcation cannot be immediately appealed. See, **Senter vs. Piggly Wiggly Carolina Co.**, 341 S.C. 74,78, 533 S.E. 2d 575,577, (2000). The standard on appeal is abuse of discretion. **Ibid.**

Motions for bifurcation generally refer to separate trials concerning liability and damages, and especially punitive damages, as in this case. The motions are addressed to the sound discretion of the Court. See, **Durham vs. Vinson. Op. Cit.** Of particular note for this case, Comer confirms that in this State's Courts, bifurcation of liability and damages in a civil case is appropriate under Rule 42 (b), "only" if the issues do not overlap and are so distinct that a separate trial of each would not result in injustice. **Comer, op cit, p.33., citing Flagstar Corp. vs. Royal Surplus Lines**, 341 S.C. 68 n.8, 73, 533 S.E. 2d. 331,333 n.8 (2000). The Court's discretion applies to determine when issues are distinct and should heed the "separate issue" mandate. See, **Durham**, 360 S.C. 645.

Comer cites (p.34) a Federal case where the Court indicated, in dicta, that bifurcation of liability and damages, "remains an available solution" where evidence relating to the amount of damages might be prejudicial to determining the appropriate level of liability. **Mattison vs. Dallas Carrier Corp.**, 947 F. 2D. 95, 110 (4TH Cir. 1991). The Court of Appeals has also indicated that there should be a greater willingness to bifurcate where determination of one issue may be highly prejudicial or confusing to the resolution of another issue. **Ibid. 95, 109.** Further, the Court noted that while an overlap of claims should "caution against bifurcation, an overlap between liability and damage issues does not preclude an otherwise justified bifurcation." See, **F&G Scrolling Mouse L.L.C. vs. I.B.M. Corp.**, 190 F.R.D. 385, 388 (M.D. N.C. 1999).

The rules for bifurcation of the legal and equitable issues tried by the Court and the Jury in South Carolina, are clearly stated in **Johnson vs. S.C. Nat. Bank** (1987) 292 S.C. 51, 354 S.E. 2d 895.

C. Discussing **Rule 42 (b) SCRPC**, another commentator on this subject, points out that the S.C. Supreme Court has held that the trial Judge may grant separate

trials on legal and equitable claims so that the former is presented to a Jury and the latter decided by the Court, citing several cases. The last sentence of Rule 42 (b) requires the Court to preserve the right to a jury and therefore, the equity matter, is deferred until the common issues are tried to the Jury. See, **Prof. J. F. Flanagan, S.C. Civil Procedure, 2nd. Edit. S.C. Bar, CLE, 1996, p.353**, citing several cases.

4. Discussion

As cited herein above, this Defendant's pleadings have requested the Court to bifurcate the issues of liability, damages, etc. However as noted above, upon review of the said pleadings, this Defendant's original Motion to Enforce, etc, the compromise and settlement agreement executed on September 18, 2007 ("Mutual Release), inadvertently omitted specific reference in the motion to the request for bifurcation. This Defendant is not certain that the cited references to bifurcation in the respective Memoranda as cited above, without a specific demand for bifurcation recorded in the originals Motion, would withstand Plaintiff's objection or challenge on technical procedural grounds, particularly in the event this Defendant has cause to file any appeals. Prudence suggests this Defendant should file a corrective amended pleading for the record.

Therefore, pursuant to **Rules 15 (d) and 42(b) S.C.R.C.P**, the purpose of this filing of proposed Amendments to the original Motion for approval of the Court, is to correct that oversight for the record, to ensure proper procedural practice before this Court and prevent any opportunity for Plaintiff's objections on a technical issue.

The cited authorities and case law in South Carolina clearly support this Defendant's claims for bifurcation of the issues of liability and damages for jury trial. Defendant submits that bifurcation of this case as requested, meets the five factors to be considered for the Court to decide on bifurcation: (1) severability of the issues; (2) simplification of discovery and conservation of resources; (3) prejudice to parties; (4) the effect of bifurcation on the potential for settlement, and (5) the suitability of bifurcating trial but not discovery. See, **F&G Scrolling Mouse, Op cit. p. 387-392**.

In this case, discovery is no longer an issue and the action relates to enforcement motions by both parties of a settlement agreement. Severability of the issues is self evident under the facts and circumstances of this case. Conservation of resources is particularly applicable in that this Defendant is basically seeking summary judgment

(paragraphs 1 -4) and determination of liability by the Court under the law. The presence of the Jury for this summary judgment phase may be deferred, subject of course to appeal, preservation of the parties' rights, etc.

Bifurcation in this case will assist with mitigation of any prejudice to the parties, particularly this Defendant who has witnessed first hand this Court's leniency towards Plaintiffs in the past. (e.g., summary denial of Defendant's counterclaim where there were genuine issues of material facts; denial of process and two motions to compel discovery; leniency in permitting Plaintiff to violate Rule 11 SCRPC in filing the original Complaint in the underlying case; refusing to summarily dismiss Defendant Beatrice Weaver from the case.). On the other hand, Defendant recognizes that this Court has been lenient in granting continuances for a long period of time to accommodate the medical problems of Defendant Beatrice Weaver.

Finally, Defendant respectfully submits that the factual considerations of the case, whether there are overlapping and distinct issues, the nature of the damages, and the venue in the Dillon Court of Pleas dictate the appropriateness of bifurcation of the issues for this case as requested by this Defendant.

5. Summary.

This amendment is filed for the record pursuant to **Rule 15 (d) SCRPC** to correct an inadvertent omission in the original Motion for Enforcement filed by this Defendant on October 25, 2007 and following further research of authorities, argument and case law to support Defendant's claims. Following is a summary of the status of the law on bifurcation in this state as discussed above:

1. Bifurcation of issues is governed by **Rule 42 (b) SCRPC** and case law in the state of South Carolina, at the discretion of the trial Judge.

2. In general bifurcation is still unsettled law in South Carolina and the Courts granting bifurcation have done so to promote simplicity, clarity or efficiency, or to avoid prejudice.

3. Court decisions on bifurcation must preserve inviolate the right of trial by jury as declared by the Constitution, or as given by a statute of the State. This Defendant has requested trial by jury in this case.

4. The issues do not overlap such as to over-ride bifurcation, and are distinct such that a separate trial of each would not result in injustice.

5. Conclusion

This Defendant respectfully submits that the arguments presented in the discussion and cases cited herein above, supports this request for bifurcation of the issues, facts, etc., and particularly for actual, consequential and punitive damages to be deliberated by the Jury. See, **Durham vs. Vinson, 360 S.C.639, 645, 602 S.E. 2d 760, 763 (2004).**

Applying the foregoing discussion to this case, we note there is no danger of any punitive or other damages award that this Defendant has and will request, causing any bankruptcy to this Plaintiff if awarded. It is a moot issue. Progress Energy has a very "deep pocket." It is a sophisticated, multi-billion dollar, major, interstate electric utility for-profit corporation, with approximately 2. 5 million retail customers in several states. It enjoys a State **guaranteed, very high return on investment of some 13. 25 percent, in a monopoly market**, and routinely declares above average annual net profits relative to NASDAQ and N.Y.S.E. listings. Refer to its annual financial reports.

It is also a major wholesale producer and distributor of electricity that sells the commodity to itself for retail markets as in Dillon County. The public regulation of these corporate vertical and horizontal integrations is questionable at minimum, and subject to challenge as stated in Appendix D to this Defendant's Supplemental Motion as filed with this Court. Plaintiff has a small army of in-house attorneys and contract legal firms to protect its various interests, particularly the regulatory environment at federal, state and even internationally.

The Court in its discretion may determine that the issues possibly "overlap" to some extent. If so, it is respectfully submitted that they are so distinct that no injustice will result to Plaintiff from bifurcation, and will afford Defendants the justice they deserve caused by Plaintiff's willful, negligent and reckless violations of the Mutual Release as documented in this Defendant's pleadings.

The facts, circumstances, evidence and issues are such that the Court can dispose of paragraphs 1 through 4 of the Mutual Release by summary judgment and possibly writ of mandamus without the necessity of any Jury deliberations on the issues of law, and

Plaintiff's liabilities to Defendants. This Defendant's motion for enforcement and partial summary judgment makes for Court economies and administrative efficiency without the necessity of a jury. Plaintiff's claims are moot, never existed in the first place, and disappeared into the thin air. There are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law as discussed further herein.

Finally, Defendant submits that bifurcation with jury deliberations in this case, furthers the cause of justice.

III. PARTIAL SUMMARY JUDGMENT FOR SPECIFIC PERFORMANCE AS TO PARAGRAPHS 1 AND 2 OF THE MUTUAL RELEASE

1. Introduction and Summary

This amendment to Defendant's motion for enforcement of the Mutual Release offers further supporting argument and law as to Defendant's claim for partial summary judgment for specific performance of paragraphs 1 and 2 as a partial equitable remedy filed previously pursuant to **Rule 56 (b) SCRCp**. This supplement is filed pursuant to **Rule 15 (d) and Rule 42 (b) C.R.C.P.**

The underlying case is a claim for an alleged debt of this Defendant. Paragraphs 1 and 2 of the Mutual Release are the compromise and settlement of the alleged debt, and Plaintiff agreed to immediately connect electricity to Defendant Beatrice Weaver's residence upon this Defendant's compliance with the agreed structured payments schedule. Thereupon, Plaintiff did not honor its obligation, and as of this date, electric power continues not to be connected as agreed, some four months later.

Generally immediacy or reasonable time, are normal and customary for performance of a compromise and settlement agreement, and in this case it was a specific condition of paragraphs 1 and 2.

Pursuant to paragraphs 1 and 2 of the Release (**Exhibit A**), this Defendant duly and timely complied with each and every requirement as agreed with Plaintiff. On the other hand, Plaintiff has not, and is in breach of the Agreement, and in doing so has also committed tortious acts. Plaintiff must be held accountable for these acts separately from the equitable remedy of specific performance which is the only equitable remedy for Defendants in the unique case of connecting electricity, the subject matter of paragraphs

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1 and 2. The facts are material and indisputable and Defendant is entitled to judgment as a matter of law.

2. The Facts.

1. The facts relating to this case are a matter of record with this Court in the several motions and memoranda filed by both parties. Under case law, when ruling on a motion for summary judgment, the trial Court must consider all of the documents and evidence within the record. **Higgins vs. Med. Uni. of S.C. (S.C. App. 1997) 326 S.C. 592, 486 S.E. 2d 269.**

2. In the interest of administrative efficiency, the Court is respectfully referred to review the summary of the facts provided in **Attachment One** hereto and by reference made part hereof.

3. Paragraphs 1 and 2 of the release required Defendants to make payments, all of which were duly and timely performed as a matter of record.

4. Paragraph 2 provided that Plaintiff would immediately connect electric power to Defendant Beatrice Weaver's residence upon the making of said payments.

5. Plaintiff has refused to make said connection as of this writing.

6. Thus the factual evidence shows that as of this date of writing, Defendants have complied in full with each and every requirement, and Plaintiff has deliberately and negligently failed to perform as agreed under paragraphs 1 and 2 of the Release. Electric power has not been connected in violation of the Release agreement.

7. The factual evidence is clear and convincingly prima facie, that Plaintiff is in negligent, willful, wanton and intentional breach of the agreement. In this case, given Defendant Mrs. Weaver's health and stated reason for executing the Release, Plaintiff has been reckless. As such, obligations under paragraphs 1 and 2 of the release are subject to summary judgment for specific performance under **Rule 56, S.C.R.P.**

3. Specific Performance as Partial Equitable Relief for Defendants

The doctrine of specific performance is an equitable remedy and is granted at the discretion of the Court. Under the facts and circumstances of this case, Defendant may seek partial specific performance of paragraphs 1 and 2 of the Release to compel Plaintiff to carry out the terms of the compromise and settlement agreement. In this case, there is no room for "substantial performance" or "partial performance." Just as a woman cannot

be "a little bit pregnant", so then can there be no "little bit of electricity." Either electricity is connected as agreed in this case, or it is not. The facts are indisputable. Defendants complied and performed according to para. 1 and 2 of the Release agreement, and Plaintiff did not. Hence the case is ripe for Defendant to claim the right of specific performance as a **partial equitable relief**. Damages for breach of contract and tortious acts, and Defendant's suffering thereof, are claimed under separate pleadings in this action.

The Doctrine of Specific Performance is well known to the Court and learned Counsel. Here we briefly review the law for the record, appeal and benefit of the jury. Black's Law Dictionary defines the doctrine as: "Performance of a contract in the specific form in which it was made, or according to the precise terms agreed upon. This is frequently compelled by a bill in equity filed for the purpose." **Black's Law Dictionary, Rev. 4th Edit. 1968. p. 1296.** We have established that the subject Mutual Release is a contractual document subject to the law of contract and torts. Thus the Plaintiff in this case is to perform specifically what it has agreed to, viz., connect electricity upon Defendant's documented performance as agreed.

It is stated that:

"A contract must be complete and definite to support a decree of specific performance, but a contract embodying all the natural factors for the accomplishment of a transaction undertaken by the parties is not incomplete or indefinite because it fails to express in terms some matters concerning the performance of the contract and reasonably necessary for the attainment of its object." See, **Ronan, J., Shayeb vs. Holland, 73 N.E. 2d. 731, 321 Mass. 429 (1947)**

Based on this dictum, taking the Release as a whole, even if there are ambiguities in the other three paragraphs, the unambiguous certainty of the language in paragraphs 1 and 2 provide the basis for granting a motion for partial specific performance for partial equitable relief here Defendants have performed their obligations as required, and Plaintiff has not.

4. **Provision of Electricity is a Unique Circumstance Requiring Specific Performance as a Partial Remedy**

Case law supports Defendant's claim for specific performance where the Court exercises its discretion based on the facts and circumstances, and determines that the

dollar damages would not be an adequate remedy as in this case. Dollar damages are considered inadequate and specific performance the proper remedy when the subject matter of the contract is unique as in this case. See, **Hogan vs. Norfleet** 113 S.2d 437, (Fla. App.) 1959.

The situation faced by the Court and the jury in this case is unique, relating to special circumstances where Defendants' **only recourse** is to seek specific performance of the Release as to paragraphs 1 and 2. Only Plaintiff in this case can timely and expeditiously provide the electricity as agreed under the terms of the Release. It has a monopoly guaranteed by the State statutes. Time being of the essence, only Plaintiff can connect electric power as agreed within one day. It has chosen not to do so. The need is immediate for several reasons, not the least being medical.

Defendants have no recourse for relief from the Commission or Office of Regulatory Staff each of which has denied any jurisdiction of the Release issues as a matter of record. See **Exhibit hereto**. Defendant Beatrice Weaver has duly and timely filed an **Application for Change of Providers** with the Commission, a copy of which is filed with this Court. Based on the actions of the Commission and the electric utilities, a change of provider will be doubtful, involve many months delay and bureaucratic procedures, and is not likely to be enforced by the regulatory agencies or the electric utilities in any case; (**leading to charges of fraud against Plaintiff herein**); and there is no other remedy. See further discussion below on these issues.

Moreover, while the partial legal remedy of dollar damages will compensate Defendants for the damages incurred as a result of Plaintiff's breach of contract and tortious acts, it will not install electricity which is a necessary of life as admitted by Plaintiff in its erroneous claim against Defendant Beatrice Weaver in the underlying case.

The equitable remedy of rescission is inappropriate as a proper remedy for Plaintiff's breach of contract in this case. Defendants' need the electricity whether or not the Release is rescinded or enforced or damages are awarded. **Plaintiff is aware of its undue economic influence, monopolistic bargaining power and impunity from the regulatory agencies in this situation, and has stooped to exploit its repudiating the Release agreement for some four months as of this writing.**

The only adequate remedy in this situation is for Defendants to require the party in breach of the Release, Plaintiff, to perform the agreement, and for the Court to enforce specific performance as an equitable remedy.

Conduct of the Parties: In determining a grant of specific performance, the Courts have turned to the conduct of the parties to ascertain their intentions. See, **Henry vs. Lind, 455 P.2d. 927 (Wash. 1969).**

Paragraphs 1 and 2 of the Release are a compromise and settlement of the underlying action for a claim of an alleged debt of Defendant. The other three paragraphs introduced to the settlement negotiations by Plaintiff, relate to Public Administration matters before the Commission, not this Court and are covered under paragraphs 3, 4 and 5 of the Release. Paragraphs 1 and 2 are clear, precise, unambiguous, and are susceptible of literal construction of the language. See further discussion on ambiguity in Defendant's **Memorandum in Response to Plaintiff's Motion to Enforce** duly filed with the Court. Notwithstanding the clarity of the language, Plaintiff has negligently breached the agreement and not performed. Defendants have performed in every aspect of the agreement as to paragraphs 1 and 2 relating to payments agreed on in the Release.

Plaintiff's non performance raises the question of its original intent in executing paragraphs 1 and 2 of the Release. To ascertain the parties' intentions the conduct of the parties in performing the agreement terms provides the best indication of their intentions. With respect to the Plaintiff, based on its conduct, it can only be concluded that it is guilty of willful, wanton and reckless breach of contract as discussed in Defendant's pleadings, and it is guilty of tortious fraud. In either case there is no other remedy for Defendants than to claim specific performance of paragraphs 1 and 2.

5. **Authority for Partial Summary Judgment**

Rule 42 (b) and Rule 56 (a-c), S.C.R.C.P. provides that Defendant may at any time with respect to enforcement of the Release move with or without supporting affidavits for a partial summary judgment in his favor as to all or any part thereof. **Rule 56 (c)** provides that the judgment sought shall be rendered forthwith if the pleadings, discovery documents, affidavits, show that there is **no genuine issue as to any material fact and that the moving party (Defendant) is entitled to a judgment as a matter of**

law. Further, that summary judgment may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

Case law supports Defendant's claim for partial summary judgment. The construction and enforcement of an **unambiguous** contract is a question of law, and thus can be properly disposed of at summary judgment. See, **Hansen ex. rel. Hansen vs. United Services Auto. Ass'n** (S.C. App.2002) 350 S.C. 62, 565 S.E. 2d 114, rhg dnd, cert. dnd. We have seen that the language of paragraphs 1 and 2 is clearly **unambiguous** and the Court has the discretion to grant summary judgment. There remains the question of genuine issues and material facts.

Defendant submits that the subject matters of said paragraphs 1 and 2 are clear and unambiguous as to the intent, purpose, consideration and performance required of the parties. The material facts are clear, simple and self evident. Defendants agreed to make certain payments which the record shows were duly and timely made. Upon that performance, Plaintiff agreed to timely connect electric power to the residence of Defendant Beatrice Weaver, which the record shows it did not and continues to refuse without good cause.

There are no genuine issues as to these material facts. The parties executed the Release agreement on September 18, 2007. Plaintiff did not provide the Stipulations for Dismissal pursuant to **Rule 41 (a) (1) (ii) or Rule 43 (k) S.C.R.C.P.** as discussed in detail herein. **Plaintiff did not perform, and Defendants did.**

There can be no dispute as to the evidentiary facts, nor the conclusions or inferences to be drawn from them based on the affidavits, pleadings, files and records in this case. See, **Redwend Ltd. Part'p vs. Edwards** (S.C. App. 2003) 354 S.C. 459, 581 S.E.2d 496 reh'g dnd, cert dnd. And for this limited partial summary judgment there is no need for further enquiry into the facts or other discovery to clarify the application of the law. **Ibid.**

Finally, it has been stated that in ruling on a motion for summary judgment the trial judge must view all facts and reasonable inferences in the light most favorable to the non-moving party; however, the trial Court is **not** required to single out "some one morsel" of evidence to create an issue of fact that is not genuine. See, **Englert, Inc., vs. Netherlands Ins. Co.** (S.C. App. 1993) 315 S.C 300, 433 S.E. 2d 871. In this instance,

Defendant submits that the Court would have a hard job finding "one morsel" or even a scintilla of evidence to create an issue of fact that is not genuine, given the record and the facts. Plaintiff has sat on its unclean hands and is liable to Defendants under the Doctrine of Laches as well.

Moreover, even a review of the facts, conclusions and inferences germane to the parties' respective performances of paragraph 1 and 2, viewed in the light most favorable to Plaintiff the non-moving party, the Court would find it difficult to rule against this claim for partial summary judgment for specific performance.

6. **Conclusion**

Based on the foregoing discussion, for good cause, this Defendant argues for partial summary judgment for specific performance for an order to Plaintiff to connect electric power as agreed in paragraphs 1 and 2 of the Release, **forthwith**, and for penalties as discussed elsewhere in these pleadings. Basis for the motion are the facts, pleadings, affidavits, and records of the case that show there is no genuine issue as to any material fact and that Defendant is entitled to a judgment as a matter of law as to Plaintiff's contractual liability and obligation to Defendants.

IV. **PARTIAL DECLARATORY RELIEF MAY BE APPROPRIATE TO DISPOSE OF PARAGRAPHS 3 AND 4 OF THE MUTUAL RELEASE**

1. **Introduction**

Paragraphs 3 and 4 relate to matters properly before the Commission under the law of public administration. The issues are in no way related to the underlying cause in this case, which is Plaintiff's claim for an alleged debt of Defendant Gary Weaver. Compromise and settlement of that debt was to be achieved in paragraphs 1 and 2, notwithstanding that Plaintiff is in breach of contract, etc, as discussed above and in Defendant's related pleadings addressed to Plaintiff's breach, torts, and damages.

Plaintiff's insisted on adding paragraphs 3 and 4 over Defendant Beatrice Weaver's objections and reluctance to give up, or waive any legal rights or claims she may have had as a result of Plaintiff's harassment and abuse over a period of some six years. Eventually, in the spirit of compromise and settlement, under considerable stress and pressure of the parties present at the settlement conference, she reluctantly executed

the Release in good faith relying on the representations, promises and agreements of Plaintiff.

The main purpose and intent for executing the compromise and settlement agreement was the imminent need for electric power to her residence for medical reasons in light of impending major surgery scheduled for September 20, 2007, just two days following the settlement conference, and post operative services required during rehabilitation. Without electricity connected, she has been forced to make expensive alternative arrangements for post operative services, for which damages are claimed in this action.

No sooner was the Release document executed than a dispute arose over which party to the Release agreement should initiate dismissals called for in paragraphs 3 and 4 of the Release. Plaintiff's conscious delay has caused Defendants' considerable harm for which Plaintiff is being held accountable under the doctrine of laches, violation of the Rules of Civil Procedure, breach of contract and torts, etc. as discussed in this Defendant's Memoranda in the record..

The reason this situation has occurred is Defendants' reliance on Plaintiff to fulfill its legal obligation under **Rule 41(a)(1)(ii) and Rule 43 (k) S.C.R.C.P**; the unambiguity in part, and the ambiguity in part of the language and meaning of said paragraphs 3 and 4; and Plaintiff's documented refusal to provide the stipulations. See, **Exhibits L-1, L-2 and G-2**

In consideration of this section of the motion, Defendant respectfully refers the Court to take judicial notice of Defendant's **Memorandum in Response to Plaintiff's Motion to Enforce**. ("Response Memorandum"), and **Motion to Enforce** filed on October 25, 2007.

2. The Ambiguity Issue

As noted, both para 3 and para. 4 contain unambiguous language and certain related ambiguities. The intent to dismiss is clear and unambiguous, both before this Court and the Commission. The Office of Regulatory Staff of South Carolina (ORS) is not included in either paragraph. Was this an oversight, mistake or intentional on the part of the drafter of the document, Plaintiff?

The ambiguity relates to the Release document's **silence** as to the means for effectuating the dismissals, which party shall initiate and file the dismissals, and when, how and to which entities the dismissals should be filed. The Office of Regulatory Staff of South Carolina presumably would be included under paragraph 4. In the absence of any specificity, this Defendant claims that we must resort to the law and cases to determine the respective obligations under the law to file dismissals.

Plaintiff is on record claiming that Defendants should file dismissals with the Commission, and that it will not file any dismissals with this Court. See Exhibit ____

So the question is: Which party is responsible for preparing and filing stipulations for dismissal with this Court, the Commission, and whether or not with the ORS.

Defendant claims that it is the legal obligation, duty and responsibility of Plaintiff to undertake the task, and in a timely manner, without conditions. See below discussion on Rules 41 and 43 SCRPC.

Finally, we note that the statutes and regulations subject the Commission to the jurisdiction of the rules of S.C.R.C.P. And that the interpretation of an ambiguous document drafted by Plaintiff, is considered in the light most favorable to Defendant, the party that did not draft the document.

3. Stipulations to Dismiss

As discussed more fully in Defendant's Response Memorandum, and in detail herein below, **Rule 41(a)(1)(ii) and rule 43 (k) S.C.R.C.P** provide that an action may be dismissed **by the Plaintiff** without order of the Court, by filing a stipulation of dismissal signed by all parties who have appeared in the action. **Rule 41 (a)(2)** provides that an action shall not be dismissed at the Plaintiff's instance save upon order of the Court and upon such terms and conditions as the Court deems proper.

Note that these rules refer specifically to the Plaintiff, not Defendants, who may initiate the dismissals. Having agreed to a compromise and settlement agreement and to dismiss, it is incumbent legally, for Plaintiff to timely prepare, and file the Stipulations to Dismiss.

Paragraph 3 refers specifically to matters pending before the Commission as of September 18, 2007. All three parties to the Release agreed they "**will dismiss**" any complaint, etc.

Paragraph 4 states that the three parties "will mutually release" each other as to any matter, action, etc., that may exist as of September 17, 2007.

Pursuant to **Rule 41 (a)(1)(ii)** and **Rule 43 (k)** the onus, obligation and legal duty is for Plaintiff, not Defendants, to prepare any stipulations for dismissal provided for in para.3 and 4, **as a matter of law**. It is also customary for any such dismissals to be immediate or filed within a reasonable time.

Plaintiff has failed its legal duty and obligation to initiate the stipulations and in fact as refused to initiate any of the five paragraphs of the Release. In addition to breach of contract, torts and damages, **Plaintiff is in violation of the law** and must be held accountable. **Sanctions are called for at the very least in this instance.**

4. Declaratory or Summary Judgment or Mandamus for Paragraphs 3 and 4.

As noted, Plaintiff has refused to initiate notices of dismissal to any of the regulatory and judicial bodies pursuant to paragraphs 3 and 4.

Given that fact and the ambiguities associated with paragraphs 3 and 4, Defendant has concluded that a motion for summary judgment would not be appropriate for remedy. The factual evidence and the actions and conduct of Plaintiff, supports the conclusion and inference that there are genuine issues of material facts as to the implementation of paragraphs 3 and 4. A declaratory judgment action is an "action at law." See, **Wilson vs. Wilson, (S.C. App.1993) 312 S.C. 172, 439 S.E. 2d 323, 461 S.E. 2d 816.**

There is also the complication that Plaintiff being in breach of the contract, refusing to connect electric power as agreed, and refusing to file the stipulations to dismiss, as to whether or not a **Declaratory Judgment** is an appropriate remedy. Here we respectfully direct the Court's attention to Defendant's **Motion for Enforcement** filed on or about October 25, 2007 and/or the Writ of Mandamus discussed herein below, as the more likely vehicles to enforce the said dismissals subject to Court discretion..

5. Declaratory Judgment Defined

Black's Law Dictionary defines a Declaratory Judgment as one which simply declares the rights of the parties or expresses the opinion of the Court on a question of law, without ordering anything to be done. Its distinctive characteristics are that no executory process follows as of course, nor is it necessary that an actual wrong, giving rise to action for damages, should have been done, or be immediately threatened.

It must deal with real dispute of real fact. It is distinguished from other actions in that it does not seek execution or performance from the parties **Op Cit. p.496**

Keeping this definition in mind, Defendants have three objectives as to a Declaratory Judgment relief subject to the discretion of the Court:

1. Defendant seeks relief by having the Court declare Plaintiff to be in clear violation of its legal duty to timely manage the filing of the stipulations to dismiss pursuant to paragraphs 3 and 4 of the Release agreement, and Rules 41 and 43 SCRCF as discussed below.

2. Declare categorically for the record that Plaintiff, not Defendants, have the legal duty to file the dismissals pursuant to Rules 41 and 43 SCRCF as discussed below.

3. Declare that Defendants are not liable for any delays and ramifications thereof, caused by Plaintiff's negligence in this matter.

6. **Summary**

1. Paragraphs 3 and 4 contain both ambiguous and unambiguous language.

2. Said paragraphs call for filing of stipulations to dismiss agreed to by all three parties in this action.

3. Pursuant to **Rule 41 (a)(1)(ii)** and **Rule 43 (k) SCRCF**, the onus, obligation and legal **duty** is for Plaintiff, not Defendants, to prepare any stipulations for dismissal provided for in para.3 and 4, as a **matter of law**. It is also customary for any such dismissals to be immediate or filed within a reasonable time (see below).

4. Plaintiff has refused to prepare said Stipulations

5. Plaintiff claims Defendants are responsible for filing said dismissals.

6. Summary Judgment on this issue would not be appropriate.

7. As an alternative or in conjunction with a Writ of Mandamus, at the discretion of the Court, a Declaratory judgment is appropriate for purposes of establishing Defendant's rights and liabilities for performance of the Release conditions. Also for supporting Defendant's claims against Plaintiff for its breach of contract, torts, etc, taking the Release document on its merits as a whole, and for any appeal.

8. The Declaratory Judgment is not executory. Therefore to effectuate the dismissals, Defendant's **Motion to Enforce** and a possible Writ of Mandamus may be the appropriate vehicle for remedy for the Court's consideration.

7. **Conclusion**

The foregoing discussion requests the Court's consideration of a Declaratory Judgment as to the duty, responsibility and liability for the status of the dismissals pursuant to paragraphs 3 and 4 of the Release. Summary Judgment or a writ of Mandamus may be more appropriate, but there is a question as to whether or not there are genuine issues of material facts re para. 3 and 4 of the release. Finally, the Court may wish to handle this matter in conjunction with Defendant's Motion to Enforce filed on October 25, 2007 and Writ of Mandamus as discussed below.

On that note, it is stated that a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue. See, **Holden vs. Cribb**, (S.C. App 2002) 349 S.C. 132, 561 S.E. 2d 634

Accordingly, Defendant respectfully leaves the disposition of this relief request to the discretion of the Court as to liability of the respective parties under the law. Finally, Defendant respectfully submits that sanctions against Plaintiff are appropriate under the facts and circumstances relating to its refusal to honor its legal duty and contractual obligations under the Release.

V. **THE LEGAL DUTY TO FILE STIPULATIONS TO DISMISS**

According To The Legal Authorities And The Law Of The State, It Is The Legal Duty For The Plaintiff, NOT the Defendants, To File The Stipulations For Dismissal With The Court And The Commission.

1. **A Stipulation To Dismiss Is Required And It Is A Contract**

This Defendant's Memoranda on file have demonstrated conclusively that a compromise and settlement agreement is treated as a contract under the law, and that the Plaintiff in this case is in serious breach of the Mutual Release agreement in various respects. Similarly, it is to be noted for the purposes of this Memorandum and the proposed amendments to Defendant's motion for enforcement of the Mutual Release, that a stipulation for dismissal of an action is also treated as a contract.

A stipulation is an agreement, admission, or other concession made in a judicial proceeding by the parties or their attorneys. See, **Porter vs. S.C. Public Service**

Commission, 507 S.E. 2d 328, 333 S.C. 12. (1998); C.J.S. Stipulations, Sect. 2, p. 5.

In essence a contractual stipulation as in this case, is a contract, or a type of contract, or is at least akin to a contract **Ibid, p.6**. But stipulations as obligations are unlike ordinary contracts. **C.J.S. Contracts, Sect. 12**. Stipulations are designed to simplify, shorten or settle litigation and save costs to the parties. But it is not the duty or function of the trial Court to require one of the parties to litigation to stipulate with an adversary. **Ibid. That is the central question before this Court with respect to Plaintiff's claims.** As discussed below, State law requires a stipulation for dismissal to be filed for a settlement agreement to be enforceable. Thus we confront the main issue: Who is responsible to file the stipulation for dismissals with the Court and the commission?

2. It is Plaintiff's Legal Duty to File Stipulations for Dismissal.

The parties have executed a settlement agreement which specifically **calls for all three parties to dismiss matters** before the Court and the Commission. Note that a stipulation for dismissal is approved at the sound discretion of the Court, and is not an agreement which the Court can carry into effect until requested to do so. **27 C.J.S. Dismissal and Nonsuit, Sect. 9, p.234; 24 Am. Jur. 2d. Dismissal, Sect. 10,11. p.13**

So, pursuant to the Release Agreement, **whose duty is it to file a stipulation for dismissal?** We must look to the law and the established legal authorities for guidance, and review the actions of the parties and the plain ordinary usage of the language used in paragraphs 3 and 4 of the Release. Any ambiguity is interpreted against Plaintiff who drafted the Release document. Plaintiff has implied by its actions and its correspondence that it recognizes its legal duty to prepare, process and file stipulations, and has not done so. See **Exhibits L-1, L-2, G-1, and G-2** hereto, wherein it specifically states it will not file.

The Court apparently lacks the authority to order the execution of a stipulation for dismissal by the parties. But it has the authority to act under the laws of the State that refer to the filing of stipulations for dismissal as a precondition to any enforcement of a settlement agreement placed before it.

It is stated that where the procedure to be followed to obtain a dismissal is prescribed by statute, as in this State, the **Plaintiff** must follow that procedure in order to obtain the requested relief. **27 C.J.S. Sect. 30, p.260**. And notice of an application to

dismiss should be given to the Defendant. **Op Cit. Sect. 31. p.261. No such action or notice of any attempt to file with the Court has been received by this Defendant.**

The law of the State requires that a settlement agreement or voluntary dismissal be effectuated **by the Plaintiff** filing a stipulation for dismissal signed by all parties who have appeared in the action. **See Rule 41 (a) (1) (ii) discussed below.**

The general rule for stipulations is that stipulations must be filed and recorded. There must be compliance with statutes or rules of Court requiring stipulations to be filed with the clerk or entered in the minutes of the Court or otherwise made a part of the record unless it is provided that the stipulation is in writing and duly signed, as in this State. Failure to comply with the law has been held to deprive the Court of power to act on the stipulation. **Op cit, Sect 15, p.24.**

In this case, we do not have any stipulations filed by the Plaintiff, per se, and that is the dispute. However, we noted that the Plaintiff did file a notice of the Release with the Commission, which act could be deemed to conform to the provision “...or **otherwise made a part of the record...**” concerning any matters before the Commission that may possibly exist. But that qualification does not comport with **Rule 41 (a)(1)(ii)** SCRCF requiring a stipulation in writing, etc.

Not to put too fine a point on the issue, in the event the Court or the Jury should hold that Plaintiff's act of filing for the record the Notice of the Release with the Commission on September 27, 2007, may be deemed to have the same force and effect as a stipulation to dismiss; then it may be deemed to have been properly entered into the record of the Commission and therefore is an effective and enforceable settlement and in compliance with paragraphs 3 and 4 of the Release by all three parties.

Finally, notwithstanding Plaintiff's erroneous complaint that Defendants have not filed dismissals with the Commission as justification for its violation of the agreement and the law, this Defendant submits that Plaintiff is clearly in error and denied due process to Defendants. As matters now stand, pursuant to Rule 43 (k) the settlement agreement is non-binding. See discussion below. Plaintiff should have filed the stipulation for dismissal with the Court under Rule 43 (k) and made the settlement agreement a binding document as intended by the parties, and a summary motion for the

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Court to deliberate on whether or not Defendants have any legal duty as to filing with the Commission, also Plaintiff's duty.

Since a stipulation is also treated as a contract, all parties would have been protected as to the enforceability of the settlement and the stipulation. And a stipulation must be construed like a contract; i.e., in a manner consistent with the parties' intentions. "Because the Court construes a stipulation that is unambiguous and explicit, it must be construed according to the terms the parties have used as those terms are understood in their plain, ordinary and popular sense. See, **Porter vs. S.C. P.S.C.**, 333 S.C.112, 507 S.E. 2d 328.

In this case we have a settlement agreement with ambiguity of language and intent as to paragraphs 3, 4 and 5. **As matters now stand, there are no stipulations for dismissal of record and hence no binding settlement agreement. Any of the parties or the Court may order rescission of the document and send the matter for trial.** See discussion below on **Rule 43 (k) SCRPC.**

3. Time for Filing a Stipulation

An essential feature of the dispute in this case revolves around the timing of the filing of stipulations for dismissal. Plaintiff complains that Defendants did not timely file a dismissal with the Commission and that Defendant Beatrice Weaver filed a letter requesting closure of any matters that may have existed before the Commission and initiated enquiries with the Commission related to initiation of action under paragraph 5 of the Release.

Notwithstanding, it is Defendant's view that the legal duty to file dismissal lies with the Plaintiff, not Defendants.

Coming to the nub of the situation in this case, dismissal of a case by stipulation may occur at any time and is not on its merits. **Flanagon, Op cit. p. 344.** It seems that **there is no fixed time for filing or entering a stipulation. It seems that this may be done at any time as long as it is capable of being properly and conveniently carried into effect by the parties and the Court.** Furthermore, mere delay in filing a stipulation will not prevent its enforcement where no injury results by reason thereof. **Op Cit, Sect. 16, p.26.**



However, apart from the Plaintiff's filing a copy of the Release with the Commission on September 27, 2007 Plaintiff specifically refuses to file a stipulation for dismissal with this Court and then erroneously charges Defendants to be at fault. In such case there is no culpability for a reasonable delay occurring while Defendants reasonably seek closure of proceedings that may exist. But Plaintiff has no such excuse for any delay and is in violation of the law.

4. **Ambiguity and Stipulations**

Based on case law and commentators it may be postulated that Plaintiff's legal duty to file a stipulation for dismissal with the Court and the Commission is the logical extension of the compromise and settlement agreement. (Mutual Release in this case). While motive is not normally an issue with respect to enforcement of a stipulation agreement (as opposed to a settlement agreement as in this case), the contents of the stipulation relative to the settlement are of relevance for a judicial decision on enforcement or rescission and trial on the merits. Note that this action relates to enforcement of a settlement agreement, not of a stipulation agreement which Plaintiff has neglected to file on spurious and suspect grounds..

This Defendant claims that paragraphs 3, 4 and 5 of the Release document drafted by Plaintiff, are ambiguous and imprecise. Under established case law they must be interpreted in the light most favorable to Defendants. While there appears to be no specific guidelines for the contents of settlement agreements (reflecting the multitude and variety of case histories), there are specific guidelines for stipulations that may be applied in this case as to what Plaintiff should have ensured in the Release document. It is to be expected that the stipulations to be prepared and filed by Plaintiff would refer to and incorporate the terms and conditions of the settlement agreement.

Thus with respect to this case, it has been stated that if a stipulation agreement is ambiguous, and uncertain in its terms, it should be disregarded by the Court. See, **C.J.S. Stipulations, Part II, Sect. 13, p. 22**. The same argument can be extended to the Court's interpretation of the Mutual Release which governs any required stipulation to be binding under **Rule 43 (k) SCRCF**. It is said that a stipulation agreement (in this case based on the Mutual Release) should discuss the who, what, where and why of the

contested matter; and should specify the terms of the settlement and any conditions or sequence of events that attach thereto. **Ibid, citing Federal cases.**

The Mutual Release does this in paragraphs 1 and 2, which justifies this Defendants request for summary judgment as there is no ambiguity involved in the plain Language of the paragraphs. Moreover, this Defendant has complied in full with the paragraphs and Plaintiff has not as a deliberate decision..

But as discussed at length in this Defendants Memoranda, the wording of paragraphs 3, 4 are ambiguous as to the who, what, where and why of the agreements to dismiss, which are contested matters now before this Court. The facts show that these are moot issues supporting this Defendant's requested summary dismissal of Plaintiff's motion. If there were even a scintilla of evidence that Defendants have failed in some way as alleged by Plaintiff, the interpretation of the ambiguity of paragraphs 3, 4 and 5 would favor Defendants' position on these issues. Paragraph 5 is presently under process with the Commission, as discussed herein.

Finally, we note another dictum for stipulations that may be of relevance to the Court in this case. Where a stipulation is an entirety, and is invalid in part, the stipulation is void in toto. **Ibid, FN. 15, p.23.** Since under **Rule 43 (k) SCRCF** the Mutual Release appears to be non-binding, it is for the Court to decide the law, and the Jury to decide facts and damages as requested by this Defendant in part or in toto..

VI. RULE 41 (A) (1) (II)

Rule 41 (a)(1)(ii): Plaintiff Has Willfully Violated its Legal Duty to File Stipulations For Dismissal With The Court and the Commission.

As discussed in Defendant's pleadings, **Rule 41 (a) (1) (ii) S.C.R.C.P.** provides for voluntary dismissal by the Plaintiff effectuated by filing a **stipulation for dismissal signed by all parties who have appeared in the action.** See discussion **24 Am. Jur. 2d. Dismissal, Discontinuance, and Nonsuit, SubSect. 21, 33-36.**

Rule 41 (a) (1) SCRCF further provides as follows:

"Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is **without prejudice, except that a notice of dismissal operates as an adjudication upon the merits** when filed by a **Plaintiff** who has once dismissed in any Court of the United States or of any state an action based on or including the same claim." (emphasis added).

With respect to Plaintiff's compliance with this **Rule 41 SCRC**P there are several aspects to be considered by the Court and the Jury with respect to this Defendant's claims.

1. As discussed herein above, it is Plaintiff's, **not Defendants'** legal duty to file stipulations to dismiss pursuant to paragraphs 3 and 4 of the Mutual Release, with both the Court and the Commission pursuant to **Rule 41(a) (1) (ii)**.

2. **This Defendant has received no information from the Plaintiff or the Court that a "notice" of the Mutual Release has or has not been formally filed in writing with the Court. However, this Defendant understands that a verbal "notice" of the Mutual Release was given to the Court, but this has not been confirmed by this Defendant.**

3. It is on record that Plaintiff refuses its legal duty to file a formal stipulation of dismissal with the Court on spurious grounds that it knew of and should have known to be incorrect. See **Exhibit L-1, L-2 and G-1** attached hereto and this Defendant's Memoranda of record.

4. On or about September 27, 2007, the in-house Counsel for the Plaintiff duly filed a copy and "notice" of the Mutual Release with the Commission. **Exhibit** hereto.

5. Based on these factors relating to Plaintiff's deliberate failure and negligence to file a formal stipulation of dismissal with the Court and the Commission, the question arises as to whether or not the alleged "verbal" notice, if any, reportedly filed with the Court, and the written "notice" filed with the Commission, may be interpreted by the Court under **Rule 41(a) (1)** as stipulations having a reciprocal procedural effect, operating as an adjudication upon the merits. We submit that would be stretching the logic somewhat.

6. In which case, if the Court within its discretionary powers decides affirmatively on that question, then in addition to the other arguments presented by this Defendant against the Plaintiff, the Court may summarily dismiss Plaintiff's motion to enforce as being redundant and frivolous in the first place. In any event, it is the legal obligation and duty of Plaintiff to file the stipulations for dismissal and it has no legal justification for its negligence in not doing so.

VII. RULE 43 (K) S.C.R.C.P.

Plaintiff Has Violated The Dictates Of Rule 43 (K) SCRCP And Thereby Rendered The Mutual Release To Be Non-Binding As A Matter Of Law And Defendants Are Entitled To Enforcement Of The Mutual Release And For Equitable Relief, And Plaintiff Is Liable For Damages Caused By Its Violations Of The Law, Breach Of Contract And Tortious Acts.

Plaintiff's violation of **Rule 41 (a) (1) (ii) S.C.R.C.P.** in refusing and neglecting to file stipulations for dismissal in this action, has been discussed in this Defendant's Memoranda and herein above. Based on that fact, we now turn to Plaintiff's violation of **Rule 43 (k) S.C.R.C.P.**, and as a consequence thereof, its further denial of Defendants' legal rights.

Rule 43 (k) states clearly and categorically as follows:

"No agreement between counsel affecting the proceedings in an action shall be binding **unless** reduced to the form of a consent order or **written stipulation signed by counsel and entered in the record**, or unless made in open Court and noted upon the record." (emphasis added).

Based on this Rule, the question arises as to **whether Plaintiff's negligent and calculated denial of its legal duty and deliberate written refusal to file formal stipulations for dismissal with the Court and the Commission pursuant to Rule 41 (a) (1) (ii) apparently renders the Mutual Release to be non-binding as to the parties, as a matter of law.**

It also causes Defendants to be involuntarily violating Rule 43 (k).

This Defendant's pleadings have shown clearly and convincingly that the compromise and settlement agreement designated as a "Mutual Release" is a valid, enforceable agreement under the law of contract by and between the **three parties** in this action. Thus the question arises as to whether or not Plaintiff's continued refusal to file the stipulations for dismissal in violation of both Rule 41 (a) (1) (ii) and Rule 43 (k) is further proof of Plaintiff's unilateral breach of the contract and tort law, subject to damages as argued in this Defendant's pleadings.

It also directs our attention to the doctrine of specific performance, the legal and equitable enforceability of the Mutual Release agreement, and Plaintiff's liability to Defendants for injury and breach, notwithstanding Plaintiff's violations of the two cited SCRCF Rules 41 and 43 (k), and the possible non-binding status of the document as a matter of law.

On the one hand we have Plaintiff's violations of **Rule 41 (a) (1) (ii) and Rule 43 (k)** rendering the Mutual Release to be non binding as a matter of law. This is juxtaposed on the other hand to the document being an enforceable contract and Plaintiff's liability to Defendants for damages.

Thus the question arises: Is the Mutual Release non-binding under Rule 43 (k), and if so, does that status render it unenforceable as a matter of law as a consequence of Plaintiff's deliberate violations of both Rules?

The corollary question is: To what extent is Plaintiff liable to Defendants for damages as a result of its negligence and direct violation of the two laws of the State?

Further research of case law on the subject as discussed below suggests that the Mutual Release may be non-binding by the negligent and deliberate omission and inaction of Plaintiff, but still enforceable under the law of contract. Defendants are entitled to enforcement of the Mutual Release and for Equitable Relief, and Plaintiff is liable for damages caused by its violations of the law, breach of contract and tortious acts.

Case Law on Enforcement Supports Defendant's Claims

1. Case law confirms that out of Court settlement agreements should be reduced to writing as is the case of the subject Mutual Release, and submitted to the Court, as Plaintiff has **not done** under Rule 41 (a)(1) and Rule 43 (k) S.C.R.C.P. See, **Small vs. Small, (1985) 286 SC 87, 332 SE 2d 769; Bell vs. White, (1983) 279 SC 153, 303 SE 2dm 242.**
2. The South Carolina Supreme Court and Court of Appeals have confirmed lower Courts' enforcement of settlement agreements in several cases that are relevant to the motions to enforce in this case and this Defendant's claims for equitable relief.

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3. In **Cox vs. Fleetwood Homes of Georgia, Inc., et al**, Supreme Court Op. No. 24893 (1999) the issues of enforcement of a settlement agreement, fraud in the inducement, and the jurisdiction of the lower Circuit Court bounced back and forth between the two higher Appellate Courts and two lower Circuit Courts between 1995 and 1999. The buyer of a mobile house (Cox) filed an action in the 12th Judicial Circuit, Florence County, seeking to recover damages for the purchase and installation of an allegedly defective mobile home. Subsequently the sellers (Fleetwood) alleged that the parties had settled the case and asked the circuit Court to enforce the settlement. As in this case, the Buyer opposed the motion arguing, among other things, that the sellers had **fraudulently procured the settlement**. The 12th Circuit Court granted the motion to enforce, but did not specifically rule on the allegations of fraud, and denied a motion to reconsider, again without specifically addressing the allegations of fraud. On appeal, the Court of Appeals reversed and **remanded the case to the circuit Court for a determination whether the settlement agreement was procured by fraud**. See, Op.No. 95-UP-202 (S.C. Ct.App. filed July 10, 1995).

On remand, the same Judge now presiding at the 7th Judicial Circuit, made specific findings that the settlement had not been fraudulently procured. By post trial motion (denied), the buyers then challenged the Judge's jurisdiction to issue the order since the Judge was not then assigned to hold Court in the 12th Judicial Circuit.

The Court of Appeals vacated the order and remanded concluding the Judge lacked jurisdiction because he was not assigned to the 12th Judicial circuit at the time of the motion. The Supreme Court disagreed citing several cases, reversed the opinion of the Court of Appeals and reinstated the order enforcing settlement. **Op cit. p.3 para. 2.**

In addition to the enforcement of a settlement agreement, per se, application of the decisions in **Cox** to this case involving the Mutual Release, relates to the issue of this Defendant's claim for damages resulting from Plaintiff's fraudulent inducement, fraudulent intention, and fraudulent act related to Defendants' execution of the compromise and settlement agreement on September 18, 2007. The Supreme Court and the Appeals Court both remanded **Cox** to the Circuit Court to specifically rule on the issue of fraud where it had originally declined to do so on two occasions.

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Based on this Supreme Court decision, this Defendant respectfully brings to the attention of the Court that a specific finding on Plaintiff's fraudulent acts of inducement are relevant and specifically directed by the upper Courts in Cox as precedent for this Defendants claim for a finding of fraud and damages therefrom.

The issue of the jurisdiction in Cox is not directly related in this case as to the enforcement per se of the Mutual Release. However, with respect to paragraph 5 providing for a change of providers, the subject of jurisdiction may become an issue. In this case, the jurisdiction question would revolve around whether or not this Court would have simultaneous jurisdiction as discussed herein, and/or jurisdiction superseding the Commission's jurisdiction under the laws of Administrative Relief, and specifically the doctrines of futility and exhausting administrative relief.

In this motion, this Defendant is specifically requesting the Court to exercise its superior jurisdictional discretion and powers, to take control of the paragraph 5 matters as provided in the Release document. See discussion below. The Court will have to decide whether or not take control and order enforcement or issue a Writ of Mandamus to the Commission, or leave the Commission to exhaust the administrative process first. It is this Defendant's view that the issue will likely end up on appeal before this Court and the Court may just as well take control now as later and eliminate waste of time and treasure.

4. Certain similarities concerning the facts and the issue of enforcement in **Farnsworth vs. Davis Heating & Air Conditioning, Inc.** apply to this case. See, **Supreme Court, Op. No. 261320, March 6, 2006.** The Circuit Court ordered Farnsworth to comply with a settlement agreement between herself and Davis. Farnsworth appealed (reversed) and Davis cross-appealed (affirmed). Both appeals involved the issues addressed by the Supreme Court.

As in this case, Farnsworth brought an action against Davis **for breach of contract and negligence.** During discovery, Farnsworth's attorney sent a letter to Davis's attorney indicating that Farnsworth would release Davis of all liability if Davis were to pay \$22,000 to Farnsworth. There was no dispute that Farnsworth authorized her attorney to offer the settlement. Davis's attorney accepted the offer by signing the letter. Soon thereafter, Farnsworth decided that she wanted a trial, notifying her attorney she was rescinding the agreement. Davis thereafter filed a motion to compel Farnsworth to

comply with the agreement. The circuit Court granted the motion, holding that Rule 43 (k) SCRCP, governed the enforcement of agreements and that the requirements of the rule had been satisfied. Thus the two issues addressed by the Supreme Court were:

1. **Whether Rule 43 (k), SCRCP was satisfied.**

2. **Whether Rule 43 (k) applies.**

This issue has been raised by this Defendant as applied to this case herein above.

The Court's Analysis.

Citing Rule 43(k) in pertinent part, the Supreme Court stated that "Rule 43 (k) is intended to prevent disputes as to the existence and terms of agreements regarding pending litigation," citing **Ashfort Corp. vs. Palmetto Constr. Group, Inc., 318 S.C. 492, 493-94, 458 SE 2d. 533, 534 1995).** Prior to filing the motion to compel, Davis admittedly received the actual notice that Farnsworth was withdrawing her assent. It was for that reason Davis filed the motion. Referring to Rule 43 (k) the Court states that "(n)o agreement ...shall be binding **unless**" one of the **three conditions** listed above is met. In other words, **an agreement is non-binding until a condition is satisfied.** Until a party is bound, she is entitled to withdraw her assent, stating that Farnsworth rescinded the agreement before Davis filed the motion to compel. Upon the receipt of the letter of rescission signed by Counsel, by Davis, the letter ceased representing an agreement. The circuit Court therefore ordered Farnsworth to comply with an agreement that did not exist. **Ibid p.2. Thus Rule 43 (k) was not satisfied.**

Progressing to the question of applicability, the Supreme Court went on to disagree with Davis' claim that compliance with Rule 43 (k) was not required because Rule 43 (k) does not apply to a written settlement agreement that the parties **admit was** duly executed. **Ibid.** The Court referred to its previous decisions that Rule 43 (k) applies to settlement agreements, again citing **Ashfort. Op Cit.**

Referring to Davis' argument that Rule 43 (k) does not apply because the agreement is an "admitted" agreement relying on dictum of the Court and holdings of the Court of Appeals that Rule 43 (k) "does not apply where the agreement is admitted or has been carried into effect, the Court found no merit to the argument. **Ibid. p.3**" Davis,

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citing a number of cases, relied on **Ashfort** to which the Court declared: "The Ashfort dictum does not comport with the language of Rule 43 (k)." **Ibid.**

The Court went on to state that the rule is plainly worded: "No agreement...shall be binding unless", one of the three requirements is met. "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." Citing **State vs. Muldrow**, 348 S.C. 264, 559 S.E. 2d 847, 849 (2003). "In interpreting the meaning of the S.C.R.C.P, the Court applies the same rules of construction used to interpret statutes." Citing **Maxwell vs. Genez**, 356 S.C. 617, 620, 591 S.E. 2d 26,27 (2003). Because Rule 43 (k) plainly applies to all settlement agreements signed by counsel, the Court found no merit in the argument that Rule 43 (k) did not apply in **Farnsworth. Ibid.**

The significance of **Farnsworth** is that the Supreme Court argues this Defendant's case that Rule 43 (k) applies to the Mutual Release, and that three conditions have to be met before an agreement becomes binding on the parties. However as noted, in this case both parties have filed motions to compel rather than for rescission of what may in fact be a non-binding Mutual Release document.

As discussed herein above, the Mutual Release is an agreement between respective counsel, as well as the parties. The Release has not been reduced to the form of a consent order or written stipulation signed by counsel, and has not been entered into the record, and has not been made in open Court and has not been noted upon the record.

According to the Supreme Court, even though the parties have "admitted" the existence of the Mutual Release agreement in their respective motions to enforce, such an agreement is non-binding until a Rule 43 (k) condition has been met. **The fact that none of the conditions have been met in this case is a direct result of Plaintiff's negligence and fraud upon Defendants.**

The record shows clearly and convincingly that Plaintiff has deliberately neglected to file stipulations for dismissal with the Court or the Commission pursuant to its legal obligation under Rule 41 (a)(1)(ii) SCRPC to conform paragraphs 3 and 4 of the Release.. And in so doing, Plaintiff has not met any of the three conditions provided for in Rule 43 (k) SCRPC as discussed by the Supreme Court.

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Accordingly, based on the Supreme Court's decision in **Farnsworth**, Rule 43 (k) applies to the subject Mutual Release agreement and Plaintiff by its deliberate actions has not satisfied the three requirements of Rule 43 (k) SCRPC, rendering it non-binding **at no fault of Defendants.**

Thus the question arises as to whether the Release is enforceable by any of the three parties. The corollary question is whether it would become binding if Plaintiff conforms to Rule 43 (k) before the hearing on the motions, and what damages have accrued in favor of Defendants as a result of the passage of time under the doctrine of laches (Plaintiff's delay, sitting on unclean hands.)

5. The following case supports this Defendant's claim for damages under the doctrine of laches, fraud and Plaintiff's negligence and contravention of the law in refusing to file stipulations. In **Mace vs. Chevy Chase Bank**, the bank appealed to the South Carolina Court of Appeals a circuit Court order enforcing a settlement agreement entered into by the parties. See, **S.C. Court of Appeals, Unpublished Op. No. 2004-UP-643, December 20, 2004.**

Following mediation of a dispute between the parties over a mortgage, on September 11, 2001, they entered into a written settlement agreement wherein the bank agreed to pay Mace \$20,000 and to refinance the principal loan on his home. The settlement agreement provided the refinancing was "contingent upon the submission and approval of an application by Mace." The parties signed the agreement as well as both attorneys. The Agreement document was neither filed with the Court nor entered into the record. This is the same situation in this case.

In November 2001 the Bank paid the \$20,000 and sent Mace a credit application. Following a delay in processing of the credit application, in August 2002 (11 months later) Mace commenced the litigation by filing a motion to compel settlement.

At the hearing, Mace argued the bank improperly refused to refinance his home as agreed on the basis of negative credit history that developed some time after the date of the settlement agreement on September 11, 2001 and caused in part by the Bank's delay. Mace argued that the settlement contemplated approval for the refinancing at the time of the settlement, **not five months later.**

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In a similar situation, in this case under paragraphs 1 and 2, Plaintiff was obligated to immediately connect electricity to Defendant Beatrice Weaver's residence following this Defendant's compliance with the requirements of paragraphs 1 and 2 which the record shows was promptly accomplished. Plaintiff still has not performed as required, some four months later thus prejudicing Defendants and breach of contract.

The bank presented two reasons why the settlement should not be enforced. First the bank argued Rule 43 (k) SCRPC specifically applied to the settlement, and because the settlement was not filed with the Court nor entered into the record, it was not enforceable. Alternatively, the Bank asserted the condition precedent to the refinancing-submission and approval of an application-was not met. The Bank averred it reviewed the credit history and was unable to approve because of the negative credit history.

On May 2003 the circuit Court issued an order granting the motion to compel settlement. **It ruled that Rule 43 (k) did not apply to the settlement agreement** and the Bank could not, by its own delay, prejudice Mace's application. Accordingly the Court ordered the Bank to grant the refinancing. The Bank argued on appeal these rulings were in error.

The Standard of Review

The Appellate Court's stated standard of review is that an action to determine liability under a settlement agreement is an action at law. Citing **Pruitt vs. S.C. Medical Malpractice Liability Joint Underwriting Ass'n**, 343 S.C. 335,339, 540 S.E. 2d 843, 845 (2001). "(I)n an action at law, on appeal of a case tried **without a jury**, the findings of fact of the judge will not be disturbed upon appeal, unless found to be without evidence which reasonably supports the judge's findings." Citing **Townes Assocs., vs. City of Greenville**, 266 S.C. 81,86, 221 S.E. 2d 773,775 (1976). (emphasis added)

Note that in this case this Defendant has filed a motion for bifurcation of the issues between the Court (liability) and the Jury (damages).

Law/Analysis

The Court of Appeals disagreed with the Bank's assertion that the circuit Court erred in finding Rule 43 (k) did not prevent enforcement of the settlement agreement.

Citing the specific wording of the rule, the Court noted the Bank's assertion the rule applies and therefore the settlement agreement is unenforceable because it was neither entered into the record nor filed with the Court.

The Court recognized that while it is true the actual agreement was not entered into the record, the Bank admitted there was an agreement, citing the Bank's testimony to the Judge during trial: "sure, Your Honor, we don't contend that this isn't a binding settlement by any means," and further, " (w)e're not trying to get out of, of the settlement agreement here, Your Honor." **S.C. Court of Appeals, Unpublished Op. No. 2004-UP-643, December 20, 2004. p.3. In this case, all three parties admit to the existence of the written Mutual Release.**

The Court goes on to refer to the Bank's second contention that the circuit court erred in failing to rule that a condition precedent to the refinancing had not been fulfilled and in ruling that the Bank unreasonably delayed examining Mace's application. The Court disagreed with that argument. The Court noted, that even assuming a condition precedent existed, the change in Mace's credit history occurred during the delay between the settlement and the loan approval. **The circuit Court found the Bank caused the delay, and it would be improper to allow the bank to gain from its wrongdoing. Ibid. p. 4**

Further, the Court went on to state that included in every contract, including settlement agreements, is an implied covenant of fair dealing. Citing **Boddie-Noell Properties, Inc. vs. 42 Magnolia P'ship, 344 S.C. 474, 484, 544 S.E. 2d 379, 284 (Ct. App. 2000); also Allen vs. Allen, 301 S.E. 2d 514, 515-16 (N.C. Ct. App. 1983).**

The Court found the Bank's unreasonable delay prejudiced Mace's application. It took over two months from settlement date for the Bank to provide Mace with an application, which Mace properly filed on December 18, 2001. the Bank took no action and its Counsel conceded that what amounted to a five months delay between settlement and denial of the loan application was unusual but insisted the delay was not deliberate. The Court discarded that argument and found that there is ample evidence to support the Court's determination that **the bank unreasonably delayed processing Mace's application. Ibid.**

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On the foregoing grounds that Rule 43 (k) was enforceable under the circumstances, and the bank's deliberate or negligent delay, the Court affirmed the circuit Court's order enforcing the settlement agreement.

Applied to this case, this Defendant submits that its claim for damages under the doctrine of breach of contract, fraud and laches and violation of the law as to paragraphs 3 and 4, is justified where Plaintiff having admitted the existence of the Mutual Release agreement, has deliberately delayed any effort to comply with both Rule 41 (a)(1)(ii) and Rule 43 (k) SCRCF. Further, that immediate summary enforcement of paragraphs 1 and 2 in favor of Defendants is also justified. Finally, we submit that Plaintiff has not dealt fairly with Defendants who executed the Mutual Release in good faith.

Summary and Conclusion

Rule 43 (k) SCRCF is a companion Court procedural rule to **Rule 41 (a)(1)(ii) SCRCF** that govern the processing of settlement agreements and stipulations for dismissal as provided for in the Mutual Release, the subject of this action before the Court and Jury.

As discussed above and in Defendant's pleadings, **Rule 41 (a) (1) (ii) S.C.R.C.P.** provides for **voluntary dismissal by the Plaintiff** effectuated by filing a **stipulation for dismissal** signed by all parties who have appeared in the action. Further that "(U)nless otherwise stated in the notice of dismissal or stipulation, the dismissal is **without prejudice...**"

Expanding on Rule 41 (a)(1)(ii), **Rule 43 (k) SCRCF** states clearly and categorically that no settlement agreement shall be binding **unless** four conditions are met: (1) a stipulation is in writing; (2) signed by counsel; (3) entered in the record, or (4) made in open Court and noted on the record.

Based on these rules of procedure constituting the law, with regard to the respective motions for enforcement posed to this Court and Jury, we ask as follows:

1. Whether Rule 43 (k) SCRCF applies.
2. If so, whether Rule 43 (k), SCRCF was satisfied.
3. Was it Plaintiff's legal duty to file a stipulation for dismissal with both this Court and the Commission
4. If so, why did it not do so.

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5. Was there any legal justification for this neglect.
6. Is Plaintiff liable to Defendants for damages.
7. Does the violation of Rule 43 (k) render the Mutual Release a non-binding agreement as a matter of law?

Based on **Rule 43 (k)** and the case law cited, this Defendant concludes and respectfully submits that Plaintiff's negligent and calculated denial of its legal duty and deliberate written refusal to file formal stipulations for dismissal with the Court and the Commission (pursuant to Rule 41 (a) (1) (ii)) apparently renders the Mutual Release to be non-binding as to the parties, as a matter of law.

It also causes Defendants to be involuntarily violating Rule 43 (k).

VIII. RELIEF AND ENFORCEMENT OF PARAGRAPH 5 OF THE RELEASE

1. Introduction

During the settlement negotiations held on September 18, 2007 this Defendant agreed to execute the Mutual Release drafted by Plaintiff's Counsel for three purposes:

1. To compromise and settle to accommodate Mrs. Weaver who was under extreme stress and undue influence resulting from the impending surgery scheduled for September 20, 2007 just two days following the settlement, and to relieve the burden of the scheduled trial scheduled on or about October 2, 2007. (Because Plaintiff subsequently refused and neglected to connect the electricity as agreed, Mrs. Weaver deferred the surgery to a later date following connection of the electric power.)

2. To ensure Mrs. Weaver had electricity connected to her residence **immediately** as a medical necessity pre and post operation on September 20, 2007. (Plaintiff promised this Defendant that upon his conforming with paragraph 1 and 2 of the Release which he did, that Plaintiff would immediately connect the power as agreed. Plaintiff's subsequent negligent and willful, wanton and reckless breach and denial has endangered Mrs. Weaver's life and imposed further economic and personal burdens.)

3. As a specific condition of executing the release, to ensure that Plaintiff agreed to and would initiate a change of providers as provided for in paragraph 5 of the Release document prepared by Plaintiff.

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Subsequent to the September 18, 2007 execution of the Mutual Release, Mrs. Weaver made enquiries of the Commission as to its administrative policies and practices pertaining to initiating process for a change of providers, and to seek closure on any matters outstanding as alleged by Plaintiff. Inter alia, one specific purpose was to exhaust administrative relief and mitigate any damages for the record and possible future appeal and resort to this Court for relief, given the six year "track record" of the Commission in accommodating the Plaintiff's demands at every step.

To initiate formally the mandate of paragraph 5 of the Release, on or about September 27, 2007, Mrs. Weaver filed a formal "Application for Change of Providers" with the Commission, **Docketed as No. 2007-401-E**, with copy filed with this Court for the record. Correspondence with Marlboro Electric Cooperative on the issue was initiated also during this period, with copies filed with this Court. Note that the Commission initiated a new docket since by its own admission and confirmation, all matters in the previous Docket No. 2004-219-E had been dismissed on May 3, 2007. **Exhibit B-1, B-2 and D.**

Eventually, some four months later, the Commission promulgated its administrative procedures for processing the application to change the providers. See, **Exhibit J hereto**. Note that the stated preliminary process will not be completed until March 31, 2008, some six months after the execution of the Mutual release providing for immediate connection of the power to Mrs. Weaver's residence as agreed. This period will then be followed by a formal Hearing on a date as yet to be specified. Assuming another 60 days for the Commission to act administratively, this means a delay forced by Plaintiff in violation of the Release, of some 8 to 9 months, not allowing for any appeals.

In addition to initiating the process for change of provider, Mrs. Weaver also attempted to mitigate any damages resulting from Plaintiff's refusal to install electricity to her residence, with the Commission, and with the Plaintiff. This included seven requests to connect pertaining to paragraph 5, and added an **incentive** by filing a claim for **Late Penalty** in the amount of \$100.00 per day, commencing October 2, 2007. Attached hereto as **Exhibit E** is a copy of correspondence with Plaintiff, the seventh attempt to mitigate damages.

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Given the Plaintiff's deliberate violation of the terms of the Mutual Release, its blatant breach of contract, tortious acts and violation of administrative law, this Defendant filed a motion for enforcement on October 25, 2007 seeking enforcement and relief. Having addressed the issues pertaining to paragraphs 1 through 4 above, we now turn to relief and enforcement of paragraph 5, of the Release. As noted in Defendant's Memoranda on file, this paragraph 5 raises issues of jurisdiction and equitable relief on the one hand by this Court, and administrative jurisdiction and relief on the other.

2. Equitable vs. Administrative Relief for Defendants.

At first glance, review of the commentators, authorities and the case law would suggest that the Court may in its discretion leave the issue of paragraph 5 run its course through the administrative procedures associated with the doctrine of exhausting administrative relief. On the other hand we have the jurisdiction of this Court as to enforcement of paragraph 5, as a contractual obligation, and the request for damages, etc. There is also the "doctrine of futility" to consider concerning the Commission's handling of the change of providers, as discussed below.

Before this Court and the Jury for adjudication are this Defendant's claims that Plaintiff has committed a fraud upon this Court (see below) and engaged in fraud, fraudulent inducement, and a fraudulent act in breach of contract as to paragraph 5, and thus subject to punitive and other damages. See Defendant's Memoranda in Reply and Support of the motions. The Commission has no legal authority, nor jurisdiction to impose or rule on damages or other equitable relief falling outside its limited authority under the specific statutes, or paragraph 5, controlling change of providers. See below. Also refer to **Exhibit D** hereto, a letter dated November 7, 2007 from the Commission Hearing Officer confirming the Commission's lack of enforcement authority in this action. See, **para. 5.**

Therefore the question arises: **What is the correct or appropriate motion for relief pertinent to paragraph 5, of the Mutual Release, given the facts and circumstances of this case, and especially Plaintiff's deliberate violation of the obligations relating to a change of provider?**

3. The Alternatives

While stating a preference, on balance, this Defendant has decided to rely on the experience and discretion of the trial judge and the jury as appropriate given the facts and circumstances and following witness' testimony at the Hearing on the motions. The following options are respectfully presented for consideration of the Court:

1. The Court has inherent jurisdiction and authority to enforce paragraph 5, impose damages, sanctions, etc., irrespective of any consideration of any administrative relief that may emanate from the Commission. In theory, this Court may ignore administrative relief as an option on its own initiative and at its discretion.

2. The Court has the inherent jurisdiction, authority and discretion to unilaterally, and/or upon this motion of this Defendant to assume control of the case from the Commission to enforce the provisions of paragraph 5.

3. The Court can permit the case to run its course to exhaust administrative relief by the Commission, which process has been initiated and expected to be completed around June 2008, some nine months after execution of the Mutual Release. Is this fair, reasonable or a burden for Defendants?

4. Pursuant to the "doctrine of futility" immediately assume control of the case as above, or in the alternative, issue a **writ of mandamus** ordering a ministerial act in advance rather than after completion of any administrative relief processes; said writ to order the Commission to enforce paragraph 5 as may be appropriate to the Court following hearing of the respective motions for enforcement.

5. Defendant has already moved for this Court to retain jurisdiction and supervision of this case following disposition of the requested summary judgments, until all provisions of the Mutual Release have been accomplished, particularly paragraph 5, irrespective of whether the Court or the commission disposes of the change of provider issue.

6. Finally, Defendant has moved for this Court to take jurisdiction from the Commission, and order Plaintiff to pay for all costs (approximately \$125,000 according to Marlboro) that may be involved in effectuating the change of providers or providing alternative energy sources. See, Defendant's Memoranda in Reply and Support of Motion to Enforce.

Conclusion

Based on the foregoing discussion, and as discussed further herein below, it is this Defendant's preference, and respectfully moves that the Court exercise its authority and discretion as follows pertaining to relief and enforcement of paragraph 5 of the Mutual Release:

Pursuant to the "doctrine of futility" under Administrative Law, and in the interests of judicial economy and administrative efficiency, issue an order, decree directive, or injunction as may be appropriate, and immediately assume control of the case and relieve the Commission from any further duty to process the change of providers pursuant to paragraph 5;

Order Plaintiff to immediately affect the change of providers and deposit the sum of \$125,000 with the Court under Rule 67 SCRCF to pay for costs of the change of providers under Court supervision;

Issue a writ of mandamus to the Commission instructing it to enforce the Court Order as requested herein, and within its ministerial powers under **S.C. Code Ann. 1976 Sect. 58-27-650 and Sect. 58-27-660** to order both the Plaintiff and Marlboro Electric Cooperative, Inc to effect and expedite the change of providers or provide alternative energy sources under the supervision of and satisfactory to the Court; and if necessary,

At the Court's discretion, pursuant to **Rule 19, SCRCF**, order joinder of Marlboro Electric to be a Party in the action as may be necessary.

Note: This Defendant submits that a writ of mandamus is the appropriate relief in this circumstance, rather than motions for a declaratory judgment or injunction. Further, that it is not necessary to enjoin Marlboro Electric Coop. in this action. The Commission has the authority and jurisdiction to order Marlboro pursuant to the cited Statutes and the authority of the requested Court Order to it from this Court as a ministerial rather than a discretionary act.

The remaining question to be addressed in moving for the requested Court Order and a Writ of Mandamus is whether or not such a writ is appropriate. Upon review of the cases and the law, Defendant respectfully submits that the Court has the authority and it is appropriate in this case given the circumstances and need to avoid unnecessary costs

and expenditure of time and to promote efficient administrative of justice. For Defendant Beatrice Weaver, time is of the essence for connection of electricity to her residence.

IX. THE ISSUE OF DISMISSAL "WITHOUT PREJUDICE."

Plaintiff's Filing the Mutual Release with the Commission, the Facts and Circumstances of the Case Foreclose Any of the Three Parties in This Action from Subsequently Pleading or Filing a New Suit on the Same Cause of Action under the Caveat "Without Prejudice" in Commission Orders.

In addition to its failure to file stipulations of dismissal with the Court and the Commission relative to paragraphs 3 and 4 of the Mutual Release, Plaintiff's redundant motion to enforce also chose to ignore the fact that the Commission had already dismissed all matters pending before it by and between the parties in May 2007 and reconfirmed in November 2007 at Defendants request for closure pursuant to the Mutual Release. See **Exhibits B-1, B-2 and D.**

Note that the Commission's Orders and directives (and stipulations for dismissal) are "without prejudice." See **Exhibits B-I, B-2 and D.** It is well established in the law and common place to the Court and learned counsel that "without prejudice" means **any of the three parties** in this action may subsequently file pleadings or file a new suit on the same cause of action. See, **Black's Law Dictionary, Rev. 4th Edit. West Pub. Co., 1968. p.1778.** Where a motion is denied or a suit dismissed "without prejudice," it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost except in so far as may be expressly conceded or decided. Ibid.

All three parties did concede and decide to dismiss any and all action before September 17, 2007 in paragraphs 3 and 4 of the Mutual Release. On that basis, the Commission's "without prejudice" caveat is null and void as to further action in this case by any of the three parties.

Add to this the statutes and cases relative to appeal of Commission decisions (see below), and Plaintiff's argument recedes further into the realm of deliberate fraud and deception to camouflage its negligence, harassment and abuse in violating its obligations as claimed by this Defendant seeking damages in the motion to enforce, etc.

A further distinction relative to this case, is that the concept and words "without prejudice" as used in judgment, ordinarily import the contemplation of further proceedings , and when they appear in an order or decree, it shows that the judicial act is not intended to be res Judicata of the merits of the controversy. **Ibid. In this case, it is the Commission that issued a decision that contemplated further proceedings by recognizing the rights of all three parties involved to appeal, move for reconsideration, etc.**

These definitions suggest the door remains open for any of the three parties in this case and before the Commission, or the ORS, to reopen or continue processing matters or issues that may or may not exist up to September 17, 2007. Any such action of course must be in accord with statutes and regulations governing reconsideration, appeals, etc.

Consequently we need to put to rest the possible question that disposition of the matters by the Commission "without prejudice" is sufficient to meet the dictates of paragraph 3 of the Mutual Release **wherein all three parties agreed to dismiss any matters before the Commission, and paragraph 4 to dismiss all matters between the Parties as of September 17, 2007.**

Note that the subject compromise and settlement agreement does not apply to any issues or matters that Defendants may have pending or may become issues between the Commission, the Office of Regulatory Staff of South Carolina ("ORS") and Defendants, unrelated to the Plaintiff in this case.

The Parties' Right of Reconsideration and Appeal Relative to the Mutual Release.

The foregoing discussion disposes of the "without prejudice" caveat in the Commission's Orders and Directives preventing any of the three parties from further process on the matters at large up to September 17, 2007.

There remains the question of any rights for reconsideration or appeal of the three parties vis a' vis paragraphs 3 and 4 of the Release that may need to be recognized in adjudicating the respective motions before the Court, particularly Plaintiff's argument that the Defendants have not dismissed the matters with the Commission. Thus we now turn to any legal rights that the respective parties may have with respect to "reconsideration," "rehearing" and "appeal" of the Commission's decisions as possible justification for Plaintiff's negligent and deliberate violation of the Mutual Release and

its liability to Defendants for damages as claimed in this Defendant's motion to enforce. See **Defendants Memoranda re this point.**

To reiterate, **S.C. Code Ann. Sect 58-27-2150** provides for "Rehearings" as follows:

"After an order or decision has been made by the Commission any party to the proceedings may within ten days after service of notice of the entry of the order or decision, apply for a re-hearing in respect to any matter determined in such proceedings and specified in the application for re-hearing, and the Commission may, in case it appears to be proper, grant and hold such rehearing. The Commission shall either grant or refuse an application for re-hearing within twenty days, and a failure by the Commission to act upon such application within that period, shall be deemed a refusal thereof...." (emphasis added)

Pursuant to this statute, several arguments arise supporting the view that the three parties to the Mutual Release have waived (in writing and by actions) their respective legal rights to any further process relating to matters before the Commission up to September 18, 2007 pursuant to paragraphs 3 and 4, and as evidenced by their respective actions prior to and subsequent to execution of the Mutual Release.

First, **Plaintiff has produced no evidence that there were any matters pending before the Commission as of September 18, 2007.** In fact there were none, and Plaintiff knew or should have known of this fact. For Plaintiff to claim protection for its negligence as discussed above and in this Defendant's Memoranda, under the caveat "without prejudice," is begging the question.

Second, none of the three parties exercised the right "within ten days" to a "rehearing" of the May 2007 Commission Order dismissing all matters before the Commission; (notwithstanding its violation of several Statutes and Regulations itself in doing so.) Specifically, Defendants chose not to exercise any rights under this statute and there is nothing of record that indicates the Plaintiff took any action.

Third, if there were any matters still pending before the Commission, it did not act "within twenty days" and thus represented a refusal of any such matters by statute.

Fourth, as discussed above, Plaintiff duly filed a formal "notice" of the execution of the Mutual Release with the Commission on or about September 27, 2007. That act

was acknowledged by the Commission on several occasions recognizing the dismissals of any outstanding action. See Exhibits G-1, G-2, and D.

In the event any of the three parties to the Mutual Release were to initiate any action before the Commission adhering to matters pending before September 18, 2007, the Commission on its own initiative would not grant such pleadings to be heard. Evidence of this view resides in the Commission's canceling Item 9 on its Meeting Agenda for October 17, 2007 on grounds that this Defendant was planning to attend the meeting, and had informed the Commission that the Plaintiff was in violation of the Mutual Release and its continued validity may be questionable.

S.C. Code Ann. Sect 58-27-2310 provides for Appeal of Commission Orders and the necessity of prior petition for rehearing. See this Defendant's discussion of this statute relating to the Mutual Release in the **Memorandum in Response**. In summary, this statute, any of the three Parties may appeal any Commission Order to vacate or set aside in whole or in part any order on the ground that the Order is unlawful or unreasonable. Any such appeal is conditioned on filing within thirty days of service of the Order, refusal to hear, and the necessity of filing for rehearing prior to filing for appeal.

In this case, the Commission's Order relating to matters pending was in fact unlawful and unreasonable. Notwithstanding, the two Defendants did not file for a rehearing as noted above, and did not file for appeal within thirty days. Neither did the Plaintiff of course, since the Commission illegally and unreasonably denied Defendant Beatrice Weaver's counterclaim against the Plaintiff on spurious grounds related to her illnesses preventing appearances at hearings on the issues.

Here again, the caveat of "without prejudice" is countered by the fact that any and all legal rights under the two cited statutes were not exercised by any of the three parties before the Commission.

Conclusion.

Based on the foregoing analysis, the evidence is clear and convincing that pursuant to the caveat "without prejudice" the issue of any outstanding legal right by any of the three Parties to this case, to reactivate any proceeding or initiate new suit based on the matters before the Commission prior to September 18, 2007, is

moot and without any standing as an excuse for Plaintiff's documented deliberate and malicious violation of the Mutual Release. Nor is it any justification for Plaintiff's willful, wanton and reckless violation of the Release and imposing injury on Defendants.

X. WRIT OF MANDAMUS FOR RELIEF

1. Introduction

Paragraphs 3, 4 and 5 of the Release comprise "Part Two" of the compromise and settlement agreement. As such any matters that may be pending before the Commission as alleged by Plaintiff, would fall under the doctrine of exhausting administrative relief. It is a matter of record in this case, that Defendants have made every reasonable effort to exhaust administrative remedies and seek closure of all matters before the Commission that Plaintiff alleges to exist without any evidence to support the claim.. See **Exhibits D. E. G-1, G-2, and I-3** hereto, and **Application for Change of Providers**, pursuant to paragraph 5 of the Release.

Notwithstanding, given the Court's broad and inherent jurisdictional authority over the issues and subject matters related to enforcement of the Release, it is not clear to Defendant if the Court has or may assume direct jurisdiction over the enforcement of paragraph 5 providing for a change of electric service providers. Accordingly, **Defendant files this request for Writ of Mandamus to order the Commission to enforce the provisions of paragraph 5 of the Release as discussed above.** In doing so, Defendant relies on the Court's broad discretion to assume jurisdiction, or not, as it deems appropriate.

As of this writing, it is not clear when the Commission will conclude the subject matter of paragraph 5, or if it will even enforce the changeover. Defendants commenced the process for changeover on or about September 22, 2007, some four months ago, and it appears the process will take about another six months or so to run its course, not allowing for any appeal by any party. Nothing has yet been accomplished to date due primarily to the Commission's bureaucratic processes and inaction on the part of the Plaintiff. Marlboro Electric Cooperative, Inc (Marlboro) and Plaintiff have respectively declined and opposed participation in the change of providers. See **Exhibits C and H** hereto and this Defendants **Affidavit** hereto. This means Defendants have to rely on the

Commission to order it to do so. That is an exercise in futility based on the influence the Plaintiff and the Cooperative has on the Commission, and the Commission's past demonstrated permissive bias and attitude towards the utilities where consumer interests are concerned.

It is this Defendant's objective and a major intent and purpose for the compromise and settlement, to expedite the changeover, notwithstanding Plaintiff's obligation and negligent refusal to timely expedite connection of electric service to Mrs. Weaver's residence as agreed in paragraphs 1 and 2 of the Release.

2. **Legal Authority for the Proposed Change of Providers.**

Paragraph 5 of the Release provides that Plaintiff "**will consent**" to a changeover. During the settlement conference Plaintiff was informed by Defendant that he had previously discussed the subject with an officer of Marlboro Electric Cooperative and Plaintiff should contact that provider concerning the change of providers. See Defendant's Affidavit hereto.

S.C. Code Ann. Section 58-27-650 provides for reassignment of service areas or portions thereof. Its powers seem to be discretionary in this instance as opposed to ministerial, if the issues under paragraph 5 are left to the Commission. This statute provides in part that in determining public convenience and necessity the Commission **shall consider** among other things, the adequacy and dependability of the service of the affected electric suppliers. This whole case is about the inadequacy and undependability of Plaintiff's service not to mention its violations of governing statutes and regulations of record.

S.C. Code Ann. Section 58-27-660 governs provision of service. **Sub Sect. 1** of the statute provides the changeover can be granted by the Commission, "upon agreement of both affected electric service providers." Under **Sub Sect. 2**, in the event Plaintiff and Marlboro reach no agreement on the changeover, the Commission **may order** the change in accordance with certain standards. Given the acrimonious relations between Plaintiff and Defendants, the experience of past service, and its reaction to the Mutual Release, the evidence is clear and convincing that the "conditions of service ... are unreasonably discriminatory" and is inadequate and undependable, and cannot or will not be made

adequate. Moreover, Defendants want the change. See the **Application for Change of Providers**; copy filed with the Court.

If this Court issues an order and a writ of mandamus as moved herein the Commission's administrative role metamorphoses from discretionary to ministerial, as required under case law relating to writs of mandamus. See, **Redmond vs. Lexington County School Dist. No. 4**, 314 S.C. 431, 445 S.E. 2d 441 (1994). Mandamus is used merely to compel action and to coerce the performance of a preexisting duty. **55 C.J.S. Mandamus, Sect. 3, (1948)**. To warrant its use, it must appear that the writ will be effectual as a remedy and of substantial or practical benefit to the petitioner. **52 Am. Jur. 2d Mandamus, Sect. 36 (1970)**. Defendants have no other legal remedy under the circumstances and the doctrine of futility. **Willimon vs. City of Greenville**, 243 S.C. 82, 132 S.E. 2d 169 (1963); **Ex Parte Mackey**, 15 S.C. 322.

Notwithstanding these legal provisions, Defendant is at the mercy of three entities none of which is in its control: the Commission, the Plaintiff and Marlboro Electric Cooperative. Paragraph 5 provides Plaintiff a "loophole" wherein it is not guaranteed that Plaintiff will agree to the changeover if it involves any potential loss of business for Plaintiff. Marlboro has no economic incentive or obligation to Defendants to agree to a changeover. See, **Exhibit** hereto. And given the acrimonious relationship between the Defendants and the Commission there is no guarantee of approval, whether or not both providers do or do not agree. See **Exhibit** hereto.

It is therefore appropriate under the **doctrine of futility** for Defendants to look to this Court as the only realistic source for relief, recognizing that the questions of timing and delay arise given the **doctrine of exhausting administrative relief**. On that question, Defendants believe that **S.C. Code of Laws. Ann. 1976, Sect. 15-77-50** and case law supports the contention that on any given administrative issue, it can be adjudicated **simultaneously or contemporaneously** by both the Court and the Commission. Moreover, the Court's broad authority enables it to assume jurisdiction in its discretion, given the facts and the circumstances as described in this case. Case law supports this Defendant's contention that the Court may consider paragraph 5 contemporaneously with the Commission if it so decides, and issue appropriate orders to the parties and the commission it deems necessary to expedite the rights of the parties.

S.C. Code of Laws. Ann. 1976, Sect. 15-77-50 provides for Jurisdiction and venue of actions affecting State agencies and officials. "The circuit Courts of this State are hereby vested with jurisdiction to hear and determine all questions, actions and controversies, other than those involving rates of public service companies for which specific procedures for review are provided in Title 58, affecting boards, commissions, and agencies of this State, and officials of the State in their official capacities in the circuit where such question, action or controversy shall arise."

Case Law.

The question of contemporaneous or simultaneous jurisdiction of a Public Utility Commission and a senior Court relating to a regulatory and a legal matter was addressed in two cases that would apply to this case.

1. See, **Begley vs. Philadelphia Electric Co, et al, (CA3 Pa) 760 F2d46, 83 ALR Fed 195 (1985)**. The case presented the question whether Section 366 of the Bankruptcy Code (11 U.S.C.S. Sect. 366) pre-empts state public utility regulations which provide consumers with certain protective procedures, prior to termination of service. The district Court found no pre-emption and ordered the Phil. Elect. Co (PECO) to comply with the state regulations and effect an amortization schedule for post-petition arrearages incurred by the Begleys. The U.S. Court of Appeals affirmed that lower Court decision.

It may reasonably be claimed that application of this Federal precedent to this case is that this superior Court of Common Pleas and the Commission may entertain the same case and issues either simultaneously or contemporaneously. We assert that the Court has the discretionary legal authority to consider the disposition of paragraph 5 of the Mutual Release and issue an order and writ or decree to the Commission as requested herein. This is especially relevant in view of the fact that time (and delays) are of the essence for Mrs. Weaver due to her health and quality of life, and that the Commission's regulatory administrative process will take another six months or so, making it some nine months to achieve the purpose of paragraph 5 of the Release. Moreover this delay is caused in large part by Plaintiff's unconscionable delay in connecting electric power to Mrs. Weaver's residence pursuant to its unwarranted violation of Paragraphs 1 and 2.

In passing, we might also comment that had this case gone to trial, **Begley** addresses one of the issues, in that the Plaintiff violated Regulations by denying a payment plan to Defendants when requested, and the Commission ignored the issue. That is one of the issues that Defendants may include in the legislative program discussed in Appendix D to this Defendant's Supplemental Memorandum and underlie Defendant Beatrice Weaver's post-Release enquiries of the Commission relating to closure of matters before the Commission as required by paragraphs 3 and 4 of the Release.

2. See, **Wegman's Food Markets, Inc. et.al. vs. Scrimsher, et. al., 17 B.R. 999, U.S. Bankruptcy Court, N.D. New York. (1982).** This somewhat complicated and interesting case has application to this case in several respects, particularly had this case gone to trial on the merits, and probably on appeal. The case involved collection of checks "NSF" under Federal Bankruptcy laws, Federal Fair Debt Collection Practices Act, and the State of New York General Business law.

One of the several issues is whether the Federal Bankruptcy Court had simultaneous or contemporaneous jurisdiction to adjudicate the subject matter of the case. The Court ruled that it had jurisdiction under both Federal and State laws simultaneously, which is the point as far as application to this case is concerned. This Court may address and dispose the issues of paragraph 5 of the Release at its discretion.

However the **Wegman** case also addressed the issue of partial summary judgment on the liability issues as this Defendant has moved for in this case. This Defendant submits that it has met all the requirements for grant of partial summary judgment as discussed in **Wegman**. That case also addressed the federal fair debt collection practices that this Defendant has accused Plaintiff of violating under the doctrine of vicarious liability, and would have been an issue had this case gone to trial. In this instance it is part of Plaintiff's pattern and practice of violating laws, rules and regulations which is the essence of this case for the Court and the Jury to adjudicate.

Conclusion

Based on the foregoing, Defendant respectfully requests the Court to approve a Writ of Mandamus (or alternatively declaratory judgment or injunction) to order the Commission, and through the ministerial act of the Commission, order Plaintiff and Marlboro to effect the change of providers forthwith as recommended herein above.

3. **Justification for a Writ of Mandamus.**

Rule 65, S.C.R.P provides for issuance of a Writ of Mandamus under certain conditions. It is stated that Mandamus is the highest judicial writ and is issued **only** when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy. See, **City of Rock Hill vs. Thompson** 349 S.C. 197, 563 S.E. 2d 101 (2002). Defendant's case clearly qualifies under the first two conditions, and as discussed above, there is a question as to timing and delay related to exhausting administrative relief, and whether the Court at its discretion may assume jurisdiction as discussed above, given the facts and circumstances of the case.

Under case law, to obtain a writ of mandamus requiring the performance of an act, the applicant must show (1) a duty of respondent to perform the act; (2) the ministerial nature of the act; (3) the applicant's specific legal right for which discharge of the duty is necessary; and (4) a lack of any other legal remedy. See, **Holden vs. Cribb**, (S.C. App. 2002) 349 S.C. 132, 561 S.E. 2d 634. Mandamus is somewhat of a hybrid proceeding; it is not strictly a law case, nor is it one in equity. **Ibid.** Mandamus is based on the theory that an officer charged with a purely ministerial duty can be compelled to performed that duty in case of refusal. **Ibid.**

The facts and circumstances herein together with the requested Court Order discussed herein above, would clearly show that the Commission would have a duty to perform the act of granting the change of providers; in such circumstances that it is a ministerial rather than a discretionary act by a government agency; that Defendant's have a specific legal right to request a change of providers under the cited statutes and paragraph 5 of the Release, and the alternative remedy of administrative relief is questionable because Marlboro does not wish to participate, and the Commission generally has a history to favor the utilities at the expense of consumers..

There is no legal obligation for Marlboro to agree to a change of providers, unless and until the Commission on order of this Court, orders the change. Nor is there any guideline or definition as to what constitutes "any potential loss of current or future customers" of Plaintiff, as cited in said paragraph 5 of the Release. **The ambiguity is too indefinite and unpredictable, open to abuse of discretion at any level.** Who makes that determination and when? The imprecision, vagueness and ambiguity of the language

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is a result of Plaintiff's drafting of the Release, and **interpretation is to be in the light most favorable to Defendants in this matter**. Thus, Defendant is justified in requesting this Court to take charge of the issue, issue an Order and a Writ of Mandamus to the Commission as requested and bring the matter to a timely close now, rather than some unpredictable time in the future, if ever.

4. Joinder of Marlboro Electric Cooperative as a Party

As noted, Marlboro Electric Cooperative (Marlboro) is this Defendant's designated service provider in lieu of Plaintiff. Defendant submits that to process this pleading, Marlboro is not an indispensable party, but recognizes that it has an interest in the pleading for a change of providers. In good faith, Marlboro has been timely informed of the situation and its requested role. A copy of the formal Application for Change of Providers has been duly and timely filed with Marlboro. Marlboro has responded to Defendants several communications. See **Exhibits C and H**. Marlboro has informed the Commission it does not wish to take any action on its own initiative, nor participate in the exchange for economic reasons. This current position is at odds with contrary information received by this Defendant some two years ago when enquiring about a change of providers. See **Exhibits K, L, M and N** hereto and this Defendant's **Affidavit** hereto.

The subject matter is such that Marlboro's interests are protected by the Court and/or the Commission pursuant to its procedures. Therefore, Defendants believe it is not necessary, but are willing, upon direction of the Court, or as noted above, the Court may on its own initiative, enjoin Marlboro as a party pursuant to **Rule 19, Rule 20, S.C.R.C.P. Rule 21** SCRCF provides that the Court may add a party by order of the Court on its own initiative or on motion of a party at any stage of the action and on such terms as are just.

Further, Defendants submit that the Court may order Marlboro not to impose any conditions in any agreement for the changeover that impairs Plaintiff's concerns about its present or future customers. **Defendant respectfully requests the Court to effectively and conclusively close that "loophole."**

5. **The Exhaustion Doctrine**

This section of the Memorandum is not intended to be an in-depth discussion of Administrative Law relative to the change of providers under paragraph 5 of the Release. Defendant's review of commentary in **Lowell & Bates, South Carolina Administrative Practice and Procedure, S.C. Bar CLE 2004** suggest exceptions to the doctrine may be applicable to this case. And that the Court has discretion to over-ride the doctrine in particular situations such as presented herein. See, discussion on exhaustion doctrine. **Ibid. pp. 83-106.**

Thus Defendants face the question, **where does the exhaustion doctrine stop, in the event the Commission denies the change of providers?** Does it have to be appealed to the Administrative Law Judge for adjudication before appeal to this Court?

Here, we are proposing a Court action in advance or in lieu of exhaustion by the Commission on the grounds that the facts are indisputable, and the issue is one of law only. Given the facts and circumstances of this case, there seems little purpose for any party to pursue the "ripeness" and "finality" doctrine requirements of exhausting administrative relief with respect to this motion.

The Doctrine of Futility.

Thus we resort to the "futility" exceptions under the doctrine of exhausting administrative relief. **Ibid. p.86.** Exhaustion is not required if it would be futile, and excuses cases involving pure issues of law as exists herein. **Ibid. p.87** In this case, the Court will have a better vision of the facts and circumstances of the case than will the Commission as to the limited issue before it, paragraph 5 only. There seems little purpose in wasting time, energy or expense for all parties involved when the Court can dispense of the issue at hand in its deliberations on all the issues in this case, as requested by Defendants. There should be no objections from any of the parties with the exception that Plaintiff has more influence over the Commission and O.R.S. than it does over this Court, even though the latter has been lenient with Plaintiff in the past.

Finally, in South Carolina the Courts have broad discretion whether to grant declaratory relief which extends to discretion to consider whether declaratory relief is sought for non-final agency action. **Ibid p.103**

6. **Conclusion**

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The changeover of providers provided for in paragraph 5 of the Release falls with in the jurisdiction of the Commission, a government agency, under the cited statutes and the doctrine of exhausting administrative relief. Being a **discretionary** situation, it is therefore appropriate for Defendants to seek process for relief from this Court by way of a Writ of Mandamus, by jurisdictionally converting the Commission's role to that of a **ministerial** action which is within the Court's authority. A Declaratory Judgment or Injunctive procedure may also apply at the discretion of this Court..

The respective duties of the Commission and Plaintiff to perform are not in doubt for any reason, the obligation to perform is imperative, and administrative remedy is in doubt, as is the performance of the two service providers. Time is of the essence, delay is a burden and an injury to Defendants, and as a matter of law and equitable relief Defendants are entitled to the issuance of a writ as requested herein.

Based on the foregoing discussion, it is clear the Court has the jurisdiction at its discretion to issue a writ of mandamus to the Commission ordering it to effect the change of providers immediately without further deliberation or delay, on order of the Court. Defendants recognize the uncertain status of the application of the doctrine of administrative relief in this case, at this juncture.

The doctrine of futility is more predictable given the history of the case and the Commission's past performance. However it is submitted that the Court would be fulfilling the dictates of justice, administrative efficiency, and prevention of delays and unnecessary waste of resources, by issuing a writ and order now as requested, rather than later in mid or late 2008. To delay will deny Defendants in this case considerable injustice as to this issue.

Defendants are seeking a "legal preemptive strike" by order and writ of the Court that is available for relief. Since September 18, 2007, Plaintiff has delayed any performance of the five paragraphs of the Release without any justification. There is no guarantee to Defendants that the other three entities involved will come to any reasonably quick or timely decision or agreement on the changeover to which Defendants have a legal right under the statutes and paragraph 5 of the Release.

Wherefore, Defendants respectfully request this honorable Court to exercise its discretion, take administrative jurisdiction of the subject matter of paragraph 5, and issue

a Writ of Mandamus (or Declaratory Judgment or Injunction) ordering the Commission to **immediately**, without further administrative delays effect the change of providers for Defendants according to the requested order. Plaintiff to pay any costs that may or may not be necessary to implement the changeover, in the manner provided for herein.

And to order that Plaintiff's interests are protected in any agreement with Marlboro as cited in paragraph 5 of the Release.

Such an order will relieve the Commission, and all parties of the burden and expense of having to process Defendants application.

Further for the Court's consideration, Defendant's leave it to the Court to direct or determine whether or not Defendants are required to enjoin Marlboro Electric Cooperative as a party in this action, pursuant to **Rules 19, 20 and 21 S.C. R.C.P.**

Finally, for the Court to retain jurisdiction and supervision of the parties until such time as the changeover has been effected, and Plaintiff has performed its obligations pursuant to paragraph 5 of the Release.

XI. PLAINTIFF'S FRAUD AND BAD FAITH

There is a thin line between the concepts of fraud and fraudulent intent or inducement and bad faith, negligence, malicious intent and deceit, all of which are often used synonymously. It is submitted that Plaintiff in this case has crossed that line in all respects with regard to two matters, calling for sanctions and damages:

1. Breach of contract, and
2. Fraud upon this Court.

1. Fraud Defined.

To present the case we must first define the concepts of fraud as applied to the two claims in this action. We again resort to **Black's Law Dictionary, Rev. 4th Edit.**

According to Black, fraud in the sense of a Court of equity, properly includes all acts, omissions, and concealments, which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of and resulting in damage to another. Ibid. p.788. And includes anything calculated to deceive, whether it be a single act or combination of circumstances whether the suppression of truth or the suggestion of what

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is false, whether it be by direct falsehood, or by innuendo, by speech or **by silence**, by word of mouth, or by look or gesture. **Id.** Applied to contracts, fraud is the cause of an error bearing on a material part of the contract, created or continued by artifice with design to obtain some unjust advantage to the one party or to cause an inconvenience or loss to the other. **Id.**

Several distinctions of fraud are applicable to argument in this case and bear recording for the Court and Jury. Fraud is either **actual or constructive**. The former consists in deceit, artifice, trick, design, some direct and active operation of the mind; It is something said, done or **omitted** by a person with the design of perpetrating what he knows to be a cheat or deception. **Id.** **Constructive** fraud consists in any act of commission or omission contrary to legal or equitable duty, trust or confidence justly reposed which is contrary to good conscience and operates to the injury of another. **Id.**

Fraud is also classified as **fraud in fact, and fraud in law**, both of which apply here. The former is actual, positive intentional fraud, disclosed by matters of fact as distinguished from constructive fraud or fraud in law. Fraud in law is fraud in contemplation of law; fraud implied or inferred by law; fraud made out of construction of law, as distinguished from fraud found by a jury from matter of fact. **Id.**

Fraud is also said to be **legal or positive**. The former is fraud made out of legal construction or inference, or the same thing as *constructive fraud*. Positive fraud is the same thing as *actual fraud*. **Id.** See above.

2. **Plaintiff's Fraud Applied to Paragraph 5 of the Release.**

As noted on several occasions in this Defendant's pleadings, his execution of the Mutual Release was conditioned on Plaintiff agreeing to a change of provider which condition is the subject matter of paragraph 5 of the Release. The request was made on the basis of information received from a senior officer of Marlboro Electric to the effect that the change was feasible involving an exchange of power, with Marlboro undertaking the field work if any in return. Further that the matter would have to go to the commission for approval and that Marlboro would take a neutral position in the matter as a matter of course.. See **Defendant's Affidavit** hereto.

Plaintiff is a sophisticated, experienced major interstate conglomerate that knew or should have known of any technical difficulties, costs, and related matters that it

should have disclosed fully to this Defendant during the settlement conference. Plaintiff made no reference to the administrative procedures, time and costs involved and had an obligation to do so.

Instead it sat on its hands, remained silent and induced both Defendants to execute the Mutual Release knowing it would be unlikely to occur. Plaintiff has a small army of attorneys, and operational and administrative staff that deals with the Commission and Marlboro on a regular basis. Indeed, Marlboro has referred to its existing good will relationship with Plaintiff and not wanting to disturb that relationship.. See **Exhibit C**. Plaintiff made no mention during negotiations of any likely costs and the likelihood that Marlboro would incur costs and would not likely agree to the changeover. Nor did it discuss the regulatory environment that would be involved. In short Plaintiff knowingly and deliberately sat on its hands and came to the negotiations with unclean hands making it liable to Defendants under the doctrine of laches and fraudulent inducement in breach of contract. See Defendants **Memorandum In Support**.

It may be a reasonable inference and conclusion from the facts and circumstances that Plaintiff knew of the likely adverse position of Marlboro and the lengthy, complicated and costly administrative procedures involved. This Defendant looks to the Jury and the Court for a finding of fraud in breach of contract and for damages and especially punitive damages as discussed in Defendant's Memoranda.

3. Plaintiff's Fraud On the Court.

It has been shown above and in Defendant's Memoranda, that Plaintiff has deliberately violated **Rule 41 (a)(1)(ii) and Rule 43 (k) SCRCP**. Plaintiff knew and should have known its legal duty, obligations and responsibilities as a matter of law that as Plaintiff the law required it to prepare process and duly file for the record stipulations for dismissal with the Court and the Commission.

It failed to do so as a deliberate act, claiming instead that Defendants had an obligation to file the stipulations. See, **Item 3, p.1, Plaintiff's Motion to Enforce Settlement**. Plaintiff in fact acknowledged its responsibility to file stipulations. **Exhibits G-1 and G-2**. Plaintiff knew and should have known that the Commission is subject to application of Rules 41 and 43 (k) SCRCP. Its attorneys deal with the Commission on a daily basis.

Plaintiff fraudulently states in **Item 2, p.1** and **Item 4, p.2** of the Motion that Defendants have failed to comply with the terms and conditions set forth in the Mutual Release. Plaintiff knows and should know this to be an incorrect statement. Plaintiff further omits any reference in its motion to the fact that Defendants complied in full with the requirements of Paragraphs 1 and 2 of the Release; that Plaintiff has not, and sat on its unclean hands refusing to connect power to Defendant Beatrice Weaver's residence as agreed, causing her mental anguish and distress, and endangering her life as discussed elsewhere in the pleadings.

Plaintiff further deliberately misleads this Court by claiming incorrectly that Defendant initiated action with the Commission following execution of the Release. See, **Item 3, p.1. of the Motion**. In fact as pointed out in Defendants' pleadings, any such communication was to seek confirmation of closure of matters before the Commission, to initiate administrative procedures relating to paragraph 5 of the Release and to complete the record of Commission activities relative to Defendant's proposed activities with the state legislature concerning regulation of utilities and related matters. See **Exhibit I-3, paragraph 7**. Nothing related to the mutual release was involved. See, **Appendix D**, Defendant's Memorandum In Support.

Finally, Plaintiff fraudulently and misleadingly claims that it has complied with the terms of the settlement agreement, stretching credulity by claiming an "acknowledgement" relating to a change of providers. **Item 5, p.2.**

Plaintiff further claims fraudulently that this Defendant was represented by Counsel during the settlement conference, when it knew and should have known this Defendant is appearing in this action, Pro Se. **Item 6, p2.**

In conclusion, the tenor of Plaintiff's motion is fraught with fraud and deception covering up Plaintiff's violation of the mutual release. it has subjected itself to liability for damages to Defendants as requested and to sanctions from the Court.

XII. RELIEF

Wherefore, based on the pleadings, this Memorandum in Support, this Defendant's Affidavit attached hereto, the records and exhibits herein, for good cause

shown, Defendant prays for relief as sought in this Defendant's Memoranda and as follows:

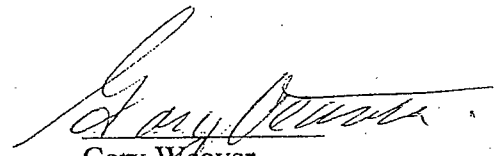
1. For grant of summary judgment for enforcement as discussed herein above.
2. For denial and summary dismissal of Plaintiff's Motion for Enforcement.
3. Declare Plaintiff's Motion to be fraudulent, frivolous, a nuisance and redundant, and find for Defendants on Plaintiff's fraud.
4. For actual or general damages, special and punitive damages for breach of contract, incidental and consequential damages, particularly tortious damages and fraud, all as discussed in this Defendant's pleadings. To be determined at trial.
5. For fair and reasonable compensation to this Defendant for time and effort and being forced to file pleadings resulting from Plaintiff's breach of contract, etc. To be determined by the Court and/or Jury at trial. (recommended at the same rate as Plaintiff's Counsel charges its client.)
6. For Late Penalty charges against Plaintiff (violating paragraphs 1 and 2)
7. For administrative relief as to enforcement of paragraph 5 of the Mutual Release as requested.
8. For and order to Plaintiff to re-classify the present electric account from "Commercial" to "Residential" status at the property located at 1249 (formerly 1253B) Harlees Bridge road, Dillon, and for reimbursement of overcharges in the amount of 2.5 cents per Kwh since 2004 (approximately \$2,000.00); (pursuant to paragraph 4 of the Mutual Release).
9. Order Plaintiff to prepare and file the Stipulations to Dismiss with the Court and the Commission, as deemed necessary by the Court.
10. For sanctions against Plaintiff for knowingly and negligently violating **Rules 41 and 43 SCRCP**, and filing a fraudulent, frivolous and nuisance motion in the first place.
11. For Plaintiff to correct the credit history of both Defendants.
12. For such other relief as the Court may deem just and proper, including but not limited to reasonable attorneys fees, compensation to this Defendant, and cost of Court.

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WHEREFORE, based on the foregoing premises, Defendant's Affidavit, pleadings on record, exhibits and records in this case, for good cause, Defendant prays for the relief claimed herein above.

DATED: Florence, S.C. January 19, 2008.

Respectfully submitted.


Gary Weaver
Defendant Pro Se

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
)
Plaintiff,)
)
vs.)
)
Gary Weaver and Beatrice Weaver.)
)
Defendants.)
_____)

AFFIDAVIT OF GARY WEAVER;
EXHIBITS A-R

AFFIDAVIT OF GARY WEAVER

County of Dillon)
)
State of South Carolina)
_____)

SS.

GARY WEAVER, being first duly sworn upon his oath, hereinafter "Affiant",
deposes and says as follows:

1. Affiant is a Defendant Pro Se in the above titled case.
2. This Affidavit is respectfully submitted as supplemental support for Affiant's
**Pleading Titled Memorandum In Support Of Supplementary Argument, Law And
Amendments For Defendant's Motion To Enforce, and Defendant Pro Se Gary
Weaver's Supplemental Memorandum In Support Of Defendant's Motion To Enforce
Settlement And For Redress Of Wrongs And For Equitable Relief**
3. During the month of November 2004, Affiant met with Mr. Jimmy McColl, V.P.
Operations and an experienced senior officer of Marlboro Electric Cooperative, Inc.
("MEC") now retired. Affiant invited Mr. McColl to meet with him at 1253 Harlees

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Bridge Rd, Dillon S.C., the residence of Mrs. Beatrice Weaver a Defendant in this case.

The purpose of the meeting was to discuss two matters related to electric service.

4. The first subject related to a proposed Planned Development District subdivision located in Dillon County and which is situated within MEC designated market territory for providing electric service. The subject matters included discussion of the territory, planning and costing for underground electric distribution within the proposed, subdivision, feasibility of alternative energy systems, electricity rates for residential, commercial and agricultural uses, and other related matters, etc. On November 15, 2004, Mr. McColl mailed Affiant a colored Map of the MEC territory showing its coverage of the proposed project site. See, **Exhibits M and N** hereto.

5. The second subject Affiant addressed to Mr. McColl was the feasibility of changing from Progress Energy (Plaintiff) to MEC as the electricity provider for Mrs. Weaver. Mr. McColl informed Affiant that subject was regulated by the Public Service Commission, and would have to be addressed to the Commission for approval pursuant to the applicable statutes that governed territories and related matters. He also suggested Affiant should contact Mr. O'neal Hamilton in Bennettesville. Affiant chose not to in recognition of the ex parte communication rule and the potential economic harm to Progress Energy from the changeover.

6. Affiant discussed the issues related to a change of provider at length and was given to understand that MEC policy would be to remain neutral on the issue when it came before the Commission since it was a matter between Affiant and Progress Energy.

Further, that technically the changeover would not be a complicated matter and probably would involve only an exchange of power between the two companies and marginal costs, if any.

7. The MEC map provided to Affiant seemed to show that the designated MEC territory also covered the residence of Mrs. Weaver located in Little Rock, although Mr. McColl had informed Affiant that it was in Progress Energy's protected domain. See **Exhibit H**. Affiant then exercised due diligence, and contacted the Office of Regulatory Staff (ORS) and received its version of the designated territories. See, **Exhibits O and P** hereto. The ORS map clearly showed that Progress Energy's designated territory included Mrs. Weaver's residence.

8. Given the existing dispute between Affiant and Progress Energy, and the demonstrated ineffectiveness of the Commission and the ORS in dealing with consumer affairs, Affiant decided to wait until this case went to trial, and the proposed subdivision was initiated and to bring up the subject of changeover at time with MEC and the Court. The matter is now before the court for adjudication under paragraph 5, of the Mutual Release (**Exhibit A**).

9. Attached is a true and correct copy MEC's and Progress Energy's respective positions on the proposed changeover. Both are opposed. See, **Exhibits C and H** hereto.

10. Affiant does not know the real situation as to the technology or costs of the proposed changeover. MEP claims some \$100,000.00. Accordingly, Affiant has filed a claim with this Court for a partial award for punitive damages against Plaintiff to cover any such costs with continued supervision of the Court until accomplished.

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11. Additionally, Affiant is willing to consider installing an alternative energy sources for power supply under the supervision of the Court, and thus relieve both providers of the burden of a changeover that Progress Energy fraudulently agreed to at the settlement conference in this action.

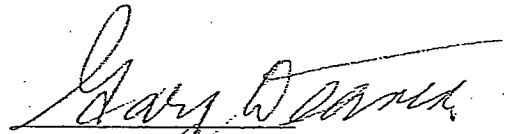
12. Affiant states that the matters in Docket No.2004-219-E previously before the Public Service Commission of South Carolina (PSC) were dismissed in May 2007 by the Commission before the September 18, 2007 execution of the Mutual Release the present subject of the above entitled action. That fact has been recently confirmed by the Commission. See **Exhibits B-1, B-2, D and K** hereto and part hereof.

13. Affiant makes this affidavit from personal knowledge and belief of the facts of the case, and not for any improper purpose or to cause unnecessary delay in proceedings, or needless increase in the costs of this case; that he is competent to make this deposition; that he alleges and avers that the facts are well grounded as stated herein, and the exhibits attached hereto are true and correct copies of the original documents and by reference are made part hereof.

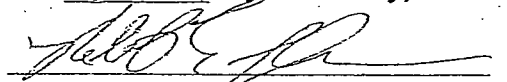
14. Affiant reserves the right to submit further evidence as may be necessary to support said memoranda and motion.

Further, Affiant sayeth naught.

DATED: Florence,, January 22, 2008.


Gary Weaver, Affiant

Subscribed and sworn to before me
this 25th day of January, 2008


Notary Public, State of South Carolina

My Commission expires: 2/5/12

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284
PO Box 7682
Florence SC 29502
Ph/Fax: 843 841 1606

November 29, 2007

The Hon. Gwen T. Hyatt
Clerk of Court, Dillon County
P.O. Drawer 1220
Dillon SC 29536

Dear Ms. Hyatt:

Subject: Recordation of Pleadings
Ref: Case No. 2004 CP-17-00232

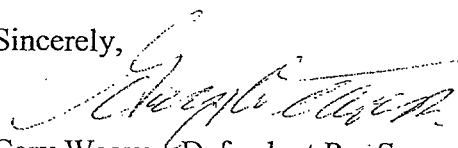
Enclosed please find two copies of the following pleading for recordation:

Memorandum In Response to Plaintiff's Motion to Enforce Settlement (filed on or about October 24, 2007) and In support of Defendant's Motion to Enforce Settlement (filed on or about October 25, 2007)

Please mail me return a time stamped copy in the enclosed return stamped and addressed envelope.

Best Regards.

Sincerely,


Gary Weaver, Defendant Pro Se

Cc: Counsel for Plaintiff
Counsel for Def. Beatrice Weaver

Encl: Stamped addressed envelope for return copy.

Shook Daniel
843-2606842 (C)
774-4166 (O)

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96 PAGES OF ATTACHMENTS OMITTED

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~~SECRET~~

Mr Buysck

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OFFER OF PROOF

DEFENDANT'S EXHIBITS D-1 TO D-56

CASE NO. 2004-CP-17-232

**HEARING
JANUARY 30, 2008 (9.30 A.M.)**

THE HON. PAUL M. BURCH PRESIDING

242A

83 PAGES OF EXHIBITS OMITTED

2428

29

P.O Box 7682
Florence, S.C. 29502
Ph: 843 841 1606

March 10, 2008

The Hon. Paul M. Burch
Judge, Dillon Court of Pleas
P.O. Box 276, Pageland S.C. 29728

Dear Judge Burch:

Subject: Letter of Transmittal
Ref: Docket No. 2004-CP-17-232 Progress Energy vs. Weaver
Motion/Hearing Roster January 30, 2008
Mutual Release dated September 18, 2007.
Exhibits D-1 to D- 56, Offer of Proof Filed Jan. 30, 2008

On March 7, 2008 I received a copy of the Court's Order dated February 28, 2008 relating to disposition of the parties' respective motions to enforce the Mutual Release executed on September 18, 2008 in the referenced case.

After careful deliberation on the Order I concluded that it was necessary and relevant to request further clarification of the Order so as to be able to comply, and to formally file objections for the record. Based on past experience, it is my belief the Plaintiff will delay compliance inordinately, and find a way to evade the legal and operational impacts of the Order requiring further litigation on my part. I respectfully remind you that I have already requested the Court to retain jurisdiction or supervision of the Case until its ultimate conclusion.

Accordingly, I am transmitting herewith my formal letter dated March 7, 2008 entitled "Request for Clarification of Order dated February 28, 2008, and Formal Objections to the Order for the Record," together with copies of the following attachments:

Form 4 received on March 7, 2008

Defendant's letter to Judge James E. Lockemy dated November 14, 2007

Commission Notice dated January 11, 2008

Exhibits D-25, D-26, Offer of Proof filed January 30, 2008.

Also I am respectfully bringing to your attention the following matters for your further information and consideration.

1. The ambiguity question: I respectfully remind you that paragraphs 3, 4 and 5 of the Mutual Release prepared by Plaintiff's counsel, are ambiguous on several levels as discussed in my several pleadings. I cite case law which establishes the dictum that ambiguous agreements are to be construed in the light most favorable to the non-drafting party, in this case the Defendants. The Order seems to have reversed the application of that dictum and favors the Plaintiff instead. The question of ambiguity of the agreement is one that I wish to present to the jury for a finding of facts and damages.

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2. Jury Trial: From the outset I have requested a jury trial in this case for findings of facts and damages, and again during the January 30, 2008 Hearing. So there are no surprises, I am respectfully informing you that I am preparing alternative motions for jury trial to be filed before the 45 day date certain for compliance as cited in the Order. The main reason relates to the current developments in Mrs. Weaver's medical condition as discussed below.

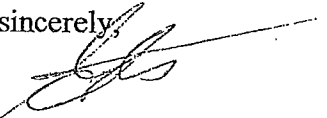
However, there is also the fact that the Commission is scheduling process for the para. 5 conditions relating to change of providers. While I personally consider that administrative/regulatory process to be a waste of taxpayer's dollars and everyone's time, under the doctrine of futility, I assume the Court has decided to let the administrative relief process run its course. However, it is my intention to present aspects of this issue to the jury for deliberation as well as to the Commission with respect to its administrative processes. I will keep the Court informed on a timely basis since there are overlapping jurisdictional questions as discussed in my pleadings and I want to be certain that the Court's compliance dictate is covered since Defendant's have no control over that process or the outcome. The Plaintiff does have influence over the Commission.

3. Material Witnesses: I wish to inform the Court that it is my intention to subpoena as material witnesses for the jury trial, a number of Progress Energy's corporate directors, officers and employees. It is believed that these persons are all located in Raleigh, N.C. I also plan to have several medical experts appear as witnesses. These are located in Durham, N.C. and Charleston, S.C. There will be witnesses from the Commission and the O.R.S. Mrs. Weaver will also be a material witness, her medical condition permitting. There may be as many as twelve or so material/expert witnesses at the jury trial. This situation raises certain logistical problems as to coordination with the trial date and appearances, transportation, issue of the subpoenas, etc. Given the circumstances of this case, I wish to bring these administrative matters to the attention of the Court for consideration.

4. Defendant Beatrice Weaver's Medical Condition: During the January 30, 2008 Hearing I informed the Court that Mrs. Weaver's medical condition has seriously deteriorated recently. Thus based on the most recent medical tests, consultations and treatments Defendants expect to be out of state on a periodic basis for medical reasons. Accordingly we may need to request the Court's consideration from time to time in that respect.

5. Finally, it is clear that it is necessary to respectfully request the Court to expedite a response to the attached request for clarification of the Order, if possible by March 17, 2008.

Yours sincerely,


Gary Weaver, Defendant Pro Se

Cc: Parties of Record
Clerk of Court

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(30)

PO Box 7682
Florence SC 29502
Ph/Fax: 843 841 1606

March 10, 2008

The Hon. Gwen T. Hyatt
Clerk of Court, Dillon County
P.O. Drawer 1220
Dillon SC 29536

Dear Ms. Hyatt:

Subject: Recordation of Pleadings
Ref: Case No. 2004 CP-17-00232

Enclosed please find two copies of the following pleadings for recordation:

1. Request for Clarification of Order dated February 28, 2008 and Formal Objections to the Order for the Record, with enclosures.
2. Letter of transmittal dated March 19, 2008 to Judge Burch.

Please mail me return a time stamped copy in the enclosed return stamped and addressed envelope.

Best Regards.

Sincerely,



Gary Weaver, Defendant Pro Se

Cc: Counsel for Plaintiff
Counsel for Def. Beatrice Weaver

Encl: Stamped addressed envelope for return copy.

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P.O Box 7682
Florence, S.C. 29502
Ph: 843 841 1606

29

March 7, 2008

The Hon. Paul M. Burch
Judge, Dillon Court of Pleas
P.O. Box 276, Pageland S.C. 29728

Dear Judge Burch:

Subject: Request for Clarification of Order dated February 28, 2008,
and Formal Objections to the Order for the Record

Ref: Docket No. 2004-CP-17-232 Progress Energy vs. Weaver
Motion/Hearing Roster January 30, 2008
Mutual Release dated September 18, 2007.
Exhibits D-1 to D- 56, Offer of Proof Filed Jan. 30, 2008

Introduction

On Friday March 7, 2008 I received a copy of the Court's Order dated February 28, 2008. After careful consideration of the Order, and in light of the facts, the testimony, and the law, I decided it appropriate to respectfully bring the following matters to your attention; more specifically, to seek clarification of the Order, particularly since the Order stipulates a date certain for compliance by the parties, which I believe is April 14, 2008.

Further, I respectfully remind the Court of the **ambiguity of paragraphs 3, 4 and 5** of the Mutual Release prepared by Plaintiff's Counsel as to respective responsibilities, obligations and duties for performance by the signatories. Under the law, circumstances and facts I respectfully submit to the Court that Defendants have complied with all five paragraphs to the best of their abilities and find it necessary to request clarification of the Order as discussed below. Also it is appropriate under these circumstances to respectfully file this formal objection to the Order as to its reference to Defendants, for the record.

Finally, I remind the Court that the Mutual Release applies only to any alleged matters between the three signatories that existed up to September 17, 2007. Any matters that occur between the three parties commencing from September 18, 2007 are not covered by the Release.

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Requests for Clarification and Objections

1. First, the Order states that "all parties" are to abide by the terms of the Mutual Release, a copy of which was filed by the Plaintiff on October 24, and myself on October 25, 2008.

As noted, supported by the record, it is my position that in good faith, both Defendants have complied in full with the terms of all five paragraphs of the Mutual Release to the extent possible under the statutes, the appropriate rules under SCRCF and the Administrative procedures of the Public Service Commission ("Commission"). Reviewing the Order, I note that the Court took the narrow view of the parties' respective motions to enforce, and in particular, declined to comment on the issues raised in my pleadings relating to disposition of the issues I raise as to enforcement, Plaintiff's liabilities and the requested jury trial for finding of facts and damages, etc.

I also respectfully remind the Court that my testimony at the January 30, 2008 Hearing was terminated by the Court before I had completed testifying on issues related to paragraph five of the Mutual Release pertaining to enforcement of the change of providers provision. That matter is presently being processed by the Commission during March 2008. See the attached copy of the Commission's Notice dated January 11, 2008

As I see it, there are two outstanding matters under paragraphs 1 and 5 to be addressed with respect to the Order, and two outstanding matters pursuant to paragraph 4. All of these matters require action of Progress Energy to comply with the Order, not Defendants.

2. The first immediate issue to be addressed is paragraph 5 relating to the Change of Providers. Immediately following execution of the Mutual Release on September 18, 2007, Defendant Beatrice Weaver initiated that process with the Public Service Commission on or about September 22, 2007. As of this date, the matter is basically beyond any control of the Defendants. See the attached copy of the Commission Notice dated January 11, 2008.

As I informed the Court at the Hearing on January 30, 2008, I consider the para. 5 change of provider process to be an administrative and regulatory exercise in futility. My motion and Memoranda requested this Court to take administrative control of the matter

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in the interest of judicial and administrative efficiency since the matter eventually is going to end up back before this Court.

Note in Exhibit D-25 of the Offer of Proof, (copy attached) the Commission's position that enforcement of the Mutual Release "... should be pursued in the Court of Common Pleas for Dillon County." (Paragraph 3, page 2.). This refers to both the change of providers under para. 5, and connection of electricity under paragraph 1 and 2 which Plaintiff has manifestly ignored. In short, it is a matter of record that the Defendants have done all they can with respect to dismissing the matters before the Commission by exhausting the administrative and court procedures.

So as discussed herein below, the question is: specifically, what else does the Court want the Defendants to do with respect to para. 3 and 4 and 5. To repeat, it is the Plaintiff that is in violation, not the Defendants.

Finally, Progress Energy has already reneged on its position with respect to the proposed changeover under paragraph 5. Given its proven and demonstrated influence with the Commission I see no prospect of the Commission taking any stance on the issue other than to support Progress Energy as it always does in these matters.

As I evaluate the situation and the Order, I foresee the only recourse Defendants have is to take the matter to the Jury as I have already requested **on the record** since the outset of this case. Appropriate pleadings on that matter will be filed in due course.

Therefore, under the circumstances it seems logical to herein seek clarification from the Court as to exactly what is required of both Defendants by the Court, if any, in order to be in compliance with the Order on or before April 14, 2008 with respect to paragraph 5 of the Mutual Release.

3. The second immediate issue relates to **compliance with paragraphs 1 and 2** of the Release. Defendants are in full compliance with the terms of these two paragraphs and it is a matter of record that Plaintiff has deliberately violated both the letter and the spirit of the terms. Please refer to the attached copy of my letter dated November 14, 2007 addressed to Judge Lockemy relating to para. 1 terms and Plaintiff's violation thereof. As of this date I have not received any instructions from the Court concerning the deposit with the Clerk of Court. Please refer to Exhibits D-14 to D-20 in the Offer of Proof.

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On this point, please note my reference to State case law in my pleadings that when one party violates a contractual agreement, in this case Progress Energy, the other parties are relieved of any obligations or duty to further observe the terms of the agreement. I have claimed that right under case law which the Order declined to address. Pursuant to the cited case law and Plaintiff's documented violation of para. 1 and 2 of the Release, the Plaintiff has forfeited any claim to further payments and is liable for refund of payments already made.

Therefore I respectfully request the Court to state with specificity exactly what is expected of Defendants with respect to para. 1 and 2 of the Release, to be in compliance with the Order on or before April 14, 2008.

Defendants will timely comply in good faith with the Court's instructions.

4. Stipulations to Dismiss.

The Order refers to Defendants' compliance with paragraphs 3 and 4 of the Mutual Release. It is my position supported by the record that this order is in error. Both Defendants have complied in full with the terms of both paragraphs 3 and 4 and it is the Plaintiff that has violated the agreement and the law on the subject.

Subsequent to the January 30, 2008 Hearing I conducted further research into the matter preparatory to filing motions relating to the requested jury trial. In addition to Progress Energy violating Rule 41 (a)(1)(ii) and Rule 43 (k) SCRPC, it also is in violation of Rule 40 (j) SCRPC. This rule applies only to the Plaintiff in this case, not the Defendants since there are no counterclaims, cross-claims or third party claims. Rule 40 (j) further supports my position that it is the Plaintiff that has the legal duty and obligation, not the Defendants, to initiate and file the Stipulations to Dismiss.

Furthermore, even for the sake of argument, under these rules the Defendants do not have the legal right to prepare and file any stipulations for voluntary dismissals, only the Plaintiff, particularly as to filing with this Court. Otherwise Defendant Beatrice Weaver's legal counsel would have done so if it was called for. The Court Order appears to ignore this important legal fact.

5. Paragraph 3 of the Mutual Release:

With respect to paragraph 3 relating to the Public Service Commission, I respectfully refer the Court to review the Commission's written confirmation that all

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matters between the parties have been dismissed. Exhibit D-2 at page six in the Offer of Proof I filed with the Court is the Commission Order dated May 3, 2007 dismissing the action some five months before the execution of the Mutual Release on September 18, 2007.

Exhibit D-3 dated May 24, 2007 is the Commission Hearing Officer's dismissal of Defendants' claims. The Commission further dismissed the action on November 13, 2007 relating to pleadings that had been filed on May 17, 2007 five months prior to the September 18, 2007 signing of the Mutual Release. See Exhibit D-9, Page 4. Again, as noted above, on November 8, 2007, the Commission's Hearing Officer, Mr. Dong confirmed to Mrs. Weaver that "...the Commission has already ordered Docket No. 2004-219-E closed...." And a new Docket No assigned to the petition for change of providers under paragraph 5 of the Release. See attached copy of Exhibit D-25, paragraph 2, page 2.

Finally, notwithstanding the Commission's several confirmations of dismissal on the record, Defendants forfeited any further claims by forgoing any appeal pleadings pursuant to S.C. Code Sect. 58-27-2150 (Rehearings) and Sect. 58-27-2310 (to vacate order). See Exhibit D-32.

Please refer to Exhibit D-10, my letter dated January 24, 2008 wherein I confirmed to the Commission the existence of the Mutual Release and dismissal of all matters as follows:

" 6. Thus I confirm for the record to the best of my knowledge and understanding that all matters previously before the Commission under Docket No. 2004-219-E were dismissed by the Commission in May 2007; at Mrs. Weaver's request, confirmed again in November 2007, by Mr. Dong in his recent November 2007 correspondence with Mrs. Weaver, and by Progress Energy with its filing a certified, true copy of the Mutual Release with your Office on or about September 27, 2007.

"7. Pursuant to paragraphs 3 and 4 of said Release it is my understanding, belief and position that as Petitioner to the Commission, and Plaintiff/Signatory to the Release, that Progress Energy has the legal duty to file stipulations for dismissal with the Court and the Commission under Rule 41(a)(1)(ii) and Rule 43 (k) SCRCF which under your regulations and the statutes also apply to the Commission." (To which I have now added Rule 40(j))

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On September 27, 2007 Progress Energy filed a copy of the settlement agreement with the Commission, which of course is signed by all three parties to the agreement. See Exhibit D-26 of the Offer of Proof, copy attached.

On October 15, 2007, Defendant Beatrice Weaver requested the Plaintiff's draft Stipulation for Dismissal from her attorney that the Plaintiff's attorney had neglected to send as stated in his letter dated September 24, 2008. See Exhibit D-29, para. 3, page 1.

Plaintiff refused to process the stipulation on the fatuous claim that Mrs. Weaver had not complied with the Mutual Release, erroneously claiming that "your clients" (sic) should "send a request to withdraw the counterclaim". See Exhibit D-28 and D-29, para 3, page 1. (Note that I am not a "client" of Mr. Shine in this case.)

To repeat my notice to the Court at the Hearing on January 30, 2008, Defendant Mrs. Weaver should not have been made a party under the doctrine of necessities, to any claim of Plaintiff for an alleged debt of mine. Quite apart from the constitutionality issue I raised to the Court, at all times I have acknowledged on the record on numerous occasions that any alleged debt that may possibly be due was my responsibility and liability if proven, subject to a proper accounting and reconciliation of the accounts which Plaintiff would not and could not provide even to this date. Plaintiff knew and should have known of that fact and should have provided the accounting.

Mrs. Weaver should not have been placed in the position relating to counterclaims, and threats, etc. by the Plaintiff. Moreover, Plaintiff's refusal to comply with para. 1 and 2 of the Mutual Release, has caused Mrs. Weaver serious economic damages, seriously impaired her health, denied her access to home care, quality of living, etc. Inter alia, I wish to take these and related issues to the jury for finding of facts, damages, etc.

As noted above, all matters including Mrs. Weaver's counterclaim filed with the Commission had already been dismissed back in May 2007, five months before. The plaintiff and its attorney knew and should have known of that fact. And as already noted above and at the Hearing, the rules under SCRCF required the Plaintiff not Defendants to file the stipulations. Even so, as noted above Defendants have complied with the five paragraphs to the best of their ability.

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Therefore with respect to compliance with the Order as to Para. 3 of the Mutual Release, under the facts and circumstances cited above, the Defendants are at a loss to know what the Court demands of them with respect to further compliance.

Accordingly, Defendants hereby respectfully request the Court to state specifically, precisely and exactly what it requires Defendants to do, to be in compliance with para. 3 of the Release and the Court Order on or before April 14, 2008.

6. Paragraph 4 of the Mutual Release:

This paragraph provides that **all three parties** shall mutually release each other as to any matter, action, potential action or any matter whatsoever which may exist between the parties as of September 17, 2007. As I explained at the Hearing, the Plaintiff is, and continues as of this writing, to be in violation of the terms of this paragraph on two issues which the Release was intended to cure:

1. Change of Status.

For ten years from 1994 to 2004, the status of electric service to the residential property located at 1249 Harlees Bridge Road in Dillon was classified under the regulations as "residential" which was and remains to this day, its use. In 2004, when Defendant Beatrice Weaver was absent during her stay in North Carolina at the Morris Cancer Center, and subsequently, the groundskeeper lived in that building which has a kitchen, bathroom, bedroom and regular living quarters, telephone, TV etc. The illegal change of status was Progress Energy's retaliation for Defendant Beatrice Weaver's filing of a complaint against Progress Energy with the Commission in 2004. The executive staff of Progress Energy unilaterally and arbitrarily without the required notice or justification, changed the status of the premises from "residential" to "commercial."

As explained at the Hearing, this resulted in an additional two cents per kilowatt hour of electricity used (some \$2,000.00 since 2004) and inconvenient billings every two weeks instead of once per month. Beatrice Weaver's continued formal objections to this unjustified and discriminatory action by Defendant Beatrice Weaver have been ignored by the Plaintiff (and the regulatory agencies). Progress Energy continues to refuse to change the status back from "commercial" to "residential," and the Order has ignored this issue which was discussed at the Hearing.

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2. Plaintiff's Continued Refusal to Provide Proper Accounting.

The second issue intended to be resolved under para. 4 of the Release relates to Plaintiff's continued incorrect billings and provide proper accounting for its electric service to a property referred to as the "Little Rock Stables" account located at 1261 Harllees Bridge Road, Dillon, since 2004. While the account is active, Defendant Beatrice Weaver has not used any electricity on that account since before 2004. Yet Progress Energy continues to incorrectly bill and account for alleged use of power from that account that has been in dis-use for the past four years. Many requests have been made for proper accounting to no avail.

These two remaining matters were supposed to be cured under paragraph 4 of the Release. Defendant Beatrice Weaver has made many demands, requests and much effort to have these matter resolved expeditiously. Progress Energy continues to refuse to change status of property at 1249 Harllees Bridge Road, Dillon back to "residential" and refuse to provide proper accounting on the "Little Rock Stables" account.

Based on the facts and evidence, it is clear that Progress Energy is the party in violation of para. 4, not the Defendants, who have no control over Plaintiff's actions on these issues. The record shows that Defendants' efforts at Administrative Relief have been exhausted in the past, and as noted herein above, it is the Commission's position that enforcement of the terms of the Mutual Release is the domain of this Court, not the Commission.

Therefore, Defendant hereby respectfully requests the Court to clarify its Order and instruct Progress Energy to change the status of the premises at 1249 Harllees Bridge Road, Dillon back to "residential" retroactively and reimburse Defendant Beatrice Weaver for the 2.5 cent/kwh overcharges. And provide a proper accounting for the second "Little Rock Stables" property.

In the alternative, the Court can wait for the forty five day time constraint for Plaintiff's compliance as ordered. If Progress Energy does not comply with para. 4 as requested and agreed by April 14, 2007, Defendants will file a motion for sanctions and contempt of court by Plaintiff as stated in the Order.

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Finally, to repeat, the Court is respectfully requested to instruct Defendants as to what it expects of them to be in compliance with paragraph 3 and 4, of the Release.

Time of the Essence.

Due to the 45 day time constraint for compliance imposed by the Court, and Mrs. Weaver's medical condition which has seriously deteriorated since the January 30, 2008 Hearing, the Court is respectfully requested to expedite a response to the above requests for clarification of the Order at its earliest convenience. Due to the recent developments concerning Mrs. Weaver's medical conditions, Defendants expect to have to spend considerable time out of state over the next two months visiting hospitals and doctors.

Moreover, the issues of para.5 of the Release are scheduled for processing by the Commission during March 2008. See attached copy of the Commission Notice dated January 11, 2008. It would be greatly appreciated and relevant if the Court could expedite a response to this request for clarification as soon as possible before March 23, 2008. Defendant/Petitioner's Rebuttal Testimony is to be filed on or before March 24, 2008. (Please refer to Commission Notice, Item 3).

Given the combined constraints and stress imposed by the Court's 45 day deadline, the Commission's processing dates, and the increased demands related to Mrs. Weaver's serious medical situation, an undue economic, physical and time burden is placed on the undersigned with respect to compliance and regulatory processes.

Summary and Conclusion

1. Defendants do not understand the Court's Order as to what the Court expects them to do for each of the five paragraphs, and especially para 3 and Para. 4 of the Mutual Release, in order to be in compliance by April 14, 2008.
2. Accordingly, Defendants respectfully request the Court's clarification as to what they are specifically expected to do for each of the five paragraphs.
3. Defendants have no control over the Commission's processing of para. 5 for change of providers, nor over the actions of the Plaintiff as discussed above with respect

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to the five paragraphs. Defendants' only recourse for remedy is to rely on the Court system including the requested jury trial.

4. Defendants do not wish to be placed in a position of any non-compliance as a result or consequence of the inactions of the Plaintiff or other third parties.

5. Based on the facts, circumstances, laws, rules, argument, pleadings, and testimony at the January 30, 2008 Hearing, I respectfully submit to the Court that the question of Defendants' compliance with the terms of the Mutual Release is a moot issue.

6. The record clearly shows that the Defendants are in compliance and have done all they reasonably can to be in compliance with the Release Agreement.

7. Based on the above, I respectfully object and submit for the record that the Court Order is in clear error, a discretionary aberration, and denial of process.

8. If the Court grants this request for clarification of the Order as to exactly what is expected of Defendants to comply as instructed, Defendants stand ready in good faith to implement whatever it is the Court wants them to do under each of the five paragraphs, in order to be in compliance on or before April 14, 2008.

9. Meanwhile I respectfully inform the Court that to the best of their ability Defendants have been and are now in full compliance as ordered and the Plaintiff is not, as of this writing. Plaintiff's non-compliance has undermined the whole purpose and motive for Defendants' entering into the agreement in the first place, which was to relieve the economic, quality of life, emotional, physical and mental stress on Mrs. Weaver.

10. If the Court does not grant this request for clarification, I respectfully request a written notice of such by March 17, 2008 if possible at the Court's earliest convenience in light of the 45 day constraint and the Commission's processing of the para. 5 changeover provision.

11. Finally, I am respectfully filing herein notice to the Court that if Plaintiff does not comply with the Order as discussed herein above on or before April 14, 2008, I shall immediately file a motion for sanctions and contempt as provided for in the Order. In particular, this applies to Plaintiff's expeditious connecting electric power to Mrs. Weaver's residence at 1253 Harllees Bridge Road, Dillon.

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As a final comment, I wish to remind the Court that the Plaintiff comes to the Court with unclean hands, committed fraudulent abuse of the legal process and amoral conduct in negotiating the settlement agreement. Plaintiff's frivolous and nuisance motion was a fraud on the Court and an unnecessary, timely, costly and improper imposition on Defendants and the Court.

Also that Mrs. Weaver is an 81 year old woman with a serious continuing cancer condition who faced serious surgery just two days after the settlement conference on September 18, 2007. The issue before this Court related to an alleged consumer debt which was my obligation if any. She should not have been involved in the first place. The objective of settlement was to close the case and ensure immediate connection of electricity for Mrs. Weaver which she needed for post operation reasons. Five months later, Defendants having complied with the terms of the settlement, that objective has not been achieved due to Plaintiff's violation of the agreement and bad faith negotiations.

Plaintiff took advantage of the situation and the conditions and introduced matters for settlement that were totally unrelated to the settlement of my alleged consumer case with the Plaintiff that commenced in 2000 and 2001. The matters with the Commission were related to Mrs. Weaver's complaint in 2004 against Progress Energy's Mr. Anthony, Mr. Cagle and Ms. Hardy. That matter had absolutely nothing to do with Progress Energy's 2001 consumer claim against this Defendant, in this Court.

All of the 2004 matters before the Commission had already been dismissed by the Commission in May 2007 five months earlier before the date of the settlement in September 2007 and were not before this Court. Plaintiff knew and should have known that Mrs. Weaver was in no way liable to it for my alleged consumer debt since I had stated on numerous occasions that any such matter would be settled by me upon receipt of a proper reconciliation and an accounting.

I fail to see how the Court can excuse such behavior by the Plaintiff, and I intend to hold Plaintiff accountable before a jury with the approval of the Court, and if necessary go to the S.C. Supreme Court.

Respectfully submitted,

Cc: Parties of Record


Gary Weaver, Defendant Pro Se

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STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2004CP- 17- 232

PLAINTIFF(S) *Progress Energy Carolinas*DEFENDANT(S) *Weaver, Gary
Pro/se*

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. *on 1/30/08.* The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(l), SCRCP (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other:

IT IS ORDERED AND ADJUDGED:

- ☐ See Attached order.
☒ Statement of Judgment by the Court:

The Court heard testimony and arguments concerning the motion to enforce settlement agreement and finds that said agreement shall be enforced and that all parties are to abide by its terms. The defendant shall within 45 days of the date (2/28/08) come into compliance with the terms of paragraphs 3 and 4 of the Mutual Release Agreement dated or filed with the Clerk of Court on October 25, 2007. Failure to comply shall subject

Dated at *11:00a* South Carolina, this *28th* day of Feb. 2008

The parties to this Contempt Proceeding of the Court, and it is so ordered.

RESIDING JUDGE

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

MARK W. Buyck, Jr.
ATTORNEY(S) FOR THE PLAINTIFF(S)
*PO Box 1909
Florence SC
29503*

*DAN SHINE
GARY WEAVER*
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

FILED
GIVEN T. HYATT
2008 FEB 28 PM 12:29
CLERK OF COURT
DILLON COUNTY

*DAN SHINE
205 W. HANCOCK ST
DILLON SC 29536
GARY WEAVER
PO Box 7682
Florence SC 29502*

Received on
March 7, 2008.

SCCA SCRCP Form 4 (Revised 12/07)

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P.O Box 7682
Florence, S.C.
29502

November 14, 2007

The Hon. James E. Lockemy
Judge, Court of Pleas
Dillon County
P.O. Box 750
Dillon S.C. 29536

Dear Judge Lockemy:

Subject: Mutual Release-Third Payment

Ref: Docket No. 2004-CP-17-00232
Progress Energy vs. Weaver
Letter dated Oct. 18, 2007 Re Rule 67 SCRC
Deposit in Court.

This letter is respectfully filed with the Court relating to the third payment due on or before November 18, 2007 pursuant to paragraph 1 of the subject Mutual Release compromise and settlement agreement executed by the three parties on September 18, 2007. The second payment was deposited with the Court pursuant to my letter dated October 18, 2007.

Plaintiff in this case continues to be in violation of all five paragraphs of the Mutual Release, and both parties have filed memoranda seeking enforcement. Given the facts and circumstances of the case since September 18, 2007, I consider Plaintiff's motion to be frivolous and a nuisance, if not fraudulent, which issues shall be addressed to the Court in due course.

Meanwhile, in attempted mitigation of damages, Defendants have continued to give Plaintiff regular notices of its breach of the agreement. See attached Exhibit A, the latest in a series of such notices. Note also that a claim for a Late Penalty of \$100.00 per day, commencing October 5, 2007 shall be lodged with the Court, along with other claims for damages. All parties associated with Plaintiff have been given due notice on October, 5, 11, 15, 22, and Nov. 14, 2007. See attached Exhibit A.

Accordingly, because of Plaintiff's continued breach of the agreement and refusal to connect electric power as agreed, I have decided in good faith as a matter of prudence to withhold a deposit with the Court of the third payment as a set off to the claim for Late Penalty and other damages claimed against Plaintiff.

If this procedure is not acceptable to the Court, or if the Court may consider it to be in any way a breach of the agreement, please be advised that I stand ready, willing and

able to deposit the said third payment due on November 19, 2007, (allowing for Sunday the 18th), upon notice of the Court. Alternatively, the Court may consider extending the payment date until completion of the hearings on pending motions on or about December 10, 2007.

Respectfully submitted,

Gary Weaver, Defendant Pro Se

Attachments: Copy of letter to Plaintiff dated Nov. 14, 2007.
Copy of Mutual Release dated Sept. 18, 2007

Cc: Daniel H. Shine, Esq.
Mark W. Buyck, Jr, Esq.
Mr. Charles L.A. Terreni
Chief Clerk/Administrator
S.C. Public Service Commission

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*The Public Service Commission
State of South Carolina*

Charles L.A. Terreni
Chief Clerk/Administrator
Phone: (803) 896-5133
Fax: (803) 896-5246

COMMISSIONERS
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David A. Wright, Second District
Randy Mitchell, Third District
Elizabeth B. "Lib" Fleming, Fourth District
Mignon L. Clyburn, Sixth District

Docketing Department
Jocelyn G. Boyd, Deputy Clerk
Phone: (803) 896-5100
Fax: (803) 896-5199

January 11, 2008

IN RE: DOCKET NO. 2007-401-E -- Beatrice Wallenstein a/k/a Beatrice Weaver,
Complainant/Petitioner v. Progress Energy Carolinas, Inc. and Marlboro Electric
Cooperative, Inc., Defendants/Respondents

TO: ALL PARTIES OF RECORD

Pursuant to 26 S.C. Code Ann. Regs. 103-845:

1. The Petitioner must prefile with the Commission 25 copies of the direct testimony and exhibits of the witnesses it intends to present and serve the testimony and exhibits of the witnesses on all Parties of Record on or before March 3, 2008 (may be post-marked on this date).
2. The Respondents and the Office of Regulatory Staff (ORS) must prefile with the Commission 25 copies of the direct testimony and exhibits of the witnesses they intend to present and serve the testimony and exhibits of the witnesses on all Parties of Record on or before March 17, 2008 (may be post-marked on this date).
3. The Petitioner filing Rebuttal Testimony must prefile with the Commission 25 copies of the testimony and exhibits of the witnesses it intends to present and serve the testimony and exhibits of the witnesses on all Parties of Record on or before March 24, 2008 (Rebuttal testimony and exhibits must be in the offices of the Commission and in the hands of the parties on this date).
4. The Respondents and the ORS filing Surrebuttal Testimony must prefile with the Commission 25 copies of the testimony and exhibits of the witnesses they intend to present and serve the testimony and exhibits of the witnesses on all Parties of Record on or before March 31, 2008 (Surrebuttal testimony and exhibits must be in the offices of the Commission and in the hands of the parties on this date).

Please be advised that failure to comply with the instructions contained herein could result in your proposed witnesses' testimony and exhibits being excluded in the subject proceeding.

Yours Truly,

Docketing Department

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Randall Dong
Staff Counsel

The Public Service Commission State of South Carolina

COMMISSIONERS
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Elizabeth B. "Lib" Fleming, Fourth District
Mignon L. Clyburn, Sixth District

Phone: (803) 896-5176
Fax: (803) 896-5231
Randall.Dong@psc.sc.gov

November 8, 2007

VIA FACSIMILE TRANSMISSION AND U.S. MAIL
FAX (843) 774-2050

Mrs. Beatrice Weaver
1253 Harlees Bridge Road
Dillon, South Carolina 29536

Re: Recent Correspondence Regarding Docket No. 2004-219-E

Dear Ms. Weaver:

As Hearing Officer in Docket No. 2004-219-E, I am responding to your letters to Mr. Terreni dated October 17, October 29, and November 1, 2007, along with the accompanying memoranda and supporting documents.

In the memorandum faxed to us with the October 17 letter, you request that we identify the statutes governing the change of electric service providers, that we clarify the consumer's role in the process, and that we address your allegations concerning Progress Energy's conduct in connection with the mutual release and settlement agreement executed by you and Progress Energy on or about September 18, 2007. You further request that the Commission state in advance (1) whether it would approve a future petition for change of electric service provider prior to the petition being filed; and (2) that there will be no "complications" caused by Progress Energy in having your electric service provider changed. Subsequently, in your letters dated October 29 and November 1, 2007, you asked whether the Commission has jurisdiction to enforce the terms of the September 18, 2007 settlement agreement or to order Progress Energy to connect power to your residence.

The specific statute governing whether your electric service may be provided by a provider other than Progress Energy is found at S.C. Code Ann. §58-27-660. Subsection 1 of the statute provides that the change in service providers you would be requesting could be granted upon agreement of both affected electric service providers. In the event that the affected providers reach no such agreement, the Commission may, pursuant to Subsection 2 of the statute, order the change "upon a finding that service to such consumer by the electric supplier which is then furnishing service...is or will be inadequate or undependable, and cannot or will not be made adequate and dependable within a reasonable time, or that the rates, conditions of service or service regulations, applied to such consumer, are unreasonably discriminatory." I would:

EXHIBIT D

D-25
Approved by [Signature]
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encourage you to seek legal counsel to advise you as to the meaning and effect of the statute upon your prospective request for a change of electric service providers. As you know, we cannot offer any legal advice to you.

Your petition for a change in electric service providers should be filed with our office in the same manner as any other complaint or petition for relief. Because this request was not a part of the initial claim and counterclaim contained in Docket No. 2004-219-E, and because the Commission has already ordered Docket No. 2004-219-E closed, it would be appropriate for the new petition to be assigned a new docket number. The Commission cannot prejudge your petition, just as it cannot promise any particular result to any party appearing before it. The Commission is bound to fairly adjudicate every case based upon the facts presented and the applicable law.

It would appear that action seeking interpretation or enforcement of the terms of the settlement agreement should be pursued in the Court of Common Pleas for Dillon County. The Commission generally has the authority to enforce its regulations concerning the prerequisites for discontinuance of service and to order reconnection where those prerequisites have not been met. However, actions regarding the enforcement of the September 18, 2007 settlement agreement in the Court of Common Pleas, even though pertaining to reconnection of your electric service, would appropriately be brought before that court.

I hope this information has been helpful and responsive to your inquiries.

With continued kind regards, I am

Very truly yours,


B. Randall Dong
Hearing Officer

cc: Len S. Anthony, Esquire
Shannon B. Hudson, Esquire

Adm.
Remedy
Exhausted
JP

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September 20, 2007

Mr. Charles Terreni
Chief Clerk and Administrator
Public Service Commission of South Carolina
P. O. Drawer 11649
Columbia, South Carolina 29211

RE: Docket No. 2004-219-E

Dear Mr. Terreni:

Please find attached a settlement agreement entered into between Progress Energy Carolinas, Inc., Gary Weaver and Beatrice Weaver.

THIS DOCUMENT IS AN EXACT DUPLICATE, WITH THE EXCEPTION OF THE FORM OF THE SIGNATURE, OF THE E-FILED COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS.

Yours very truly,

Len S. Anthony

Len S. Anthony
Deputy General Counsel-Regulatory Affairs

LSA:mhm

Attachment

256168

Progress Energy Service Company, LLC
P.O. Box 1551
Raleigh, NC 27602

(See Exhibit "A")

EXHIBIT G-1 Memo In Response.
Amend Memo

D-26

2-6-2

STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
Plaintiff,)

vs.)

Gary Weaver and Beatrice Weaver,)
Defendants.)

NOTICE OF PLAINTIFF'S NON-
COMPLIANCE WITH COURT
ORDER FILED FEBRUARY 28, 2008
AND CONTEMPT OF COURT;
AFFIDAVIT OF GARY WEAVER;
CERTIFICATE OF SERVICE

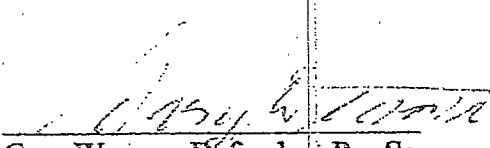
JURY TRIAL REQUESTED

**NOTICE OF PLAINTIFF'S NON-COMPLIANCE WITH COURT ORDER
FILED FEBRUARY 28, 2008 AND CONTEMPT OF COURT**

Comes now Gary Weaver Defendant Pro Se ("Defendant") and files this Notice of Plaintiff's Non-Compliance In Toto With Court Order Filed February 28, 2008 and Contempt of Court.

Pursuant to Rules 8, 9, and 46 of the South Carolina Rules of Civil Procedure ("SCRCP") this Defendant claims relief as provided in said Order, this Defendant's Motion for Enforcement filed on October 25, 2007 and the pleadings filed attendant thereto and Affidavit attached hereto.

DATED: Florence, April 14, 2008


Gary Weaver, Defendant Pro Se

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTH JUDICIAL CIRCUIT
COUNTY OF DILLON	)	CASE NUMBER 2004-CP-17-232
Progress Energy Carolinas, Inc.,	)	MOTION FOR DECLARATORY
	)	JUDGMENT AS TO STATUS OF
Plaintiff,	)	DOCKET AND FOR SANCTIONS
	)	FOR PLAINTIFF'S NON-COMPLIANCE
vs.	)	WITH COURT ORDER AND CONTEMPT
	)	OF COURT; MEMORANDUM IN
Gary Weaver and Beatrice Weaver.	)	SUPPORT; AFFIDAVIT OF GARY
	)	WEAVER; EXHIBITS A-D; NOTICE OF
	)	MOTION; CERTIFICATE OF SERVICE
	)	

**MOTION FOR DECLARATORY JUDGMENT AS TO STATUS OF DOCKET
AND FOR SANCTIONS FOR PLAINTIFF'S NON-COMPLIANCE WITH
COURT ORDER AND CONTEMPT OF COURT**

Comes now Defendant Pro Se Gary Weaver, and pursuant to **Rules 40 (j), 41 (a) (1) (ii), 43 (k), 57 and 79, S.C.R.C.P., and S.C. Code 1976 Ann. As Amended, Sections 15-53-10 through Section 15-53-140**, hereby moves this Court, for good cause, for a declaratory judgment as to the status of the above entitled Docket and pursuant to **Rule 79 (g) S.C.R.C.P.** for sanctions and damages for Plaintiff's non-compliance with the Court Order filed February 28, 2008, copy attached hereto as **Exhibit A**.

This motion is based on the Memorandum in Support of Motion, the Affidavit of Gary Weaver, the Exhibits attached hereto, made part hereof, and the records and files herein, and such other and further oral and/or documentary evidence as may be presented.

DATED: Florence County, S.C. April 30, 2008.

Gary Weaver, Defendant Pro Se

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Progress Energy Carolinas, Inc.,)
)
Plaintiff,)
)
vs.)
)
Gary Weaver and Beatrice Weaver.)
)
_____)

MEMORANDUM IN SUPPORT OF
MOTION; EXHIBITS A-D

MEMORANDUM IN SUPPORT OF MOTION

Introduction

The motion is for a declaratory judgment to establish the present status of Docket No. 2004-CP-17-232, and for sanctions for Plaintiff's non-compliance and contempt of court with respect to the court Order filed on or about February 28, 2008. **Exhibit A** attached hereto. Authority for the motion includes **Rules 40 (j), 41 (a) (1) (ii), 43 (k), 57 and 79, S.C.R.C.P., and S.C. Code 1976 Ann. As Amended, Sections 15-53-10 through Section 15-53-140**

In deliberating this motion, the Court is respectfully requested to take judicial notice of Movant's pending pleadings including the Demand for Jury Trial, Motion for Summary Judgment, Notice of Plaintiff's Non-compliance and Contempt of Court, and the on-going process before the Public Service Commission of South Carolina ("Commission") of the Application for Change of Provider filed pursuant to paragraph 5 of the Mutual Release which pleading has been duly filed for the record with this Court..

Discussion

1. On or about February 28, 2008 The Honorable Paul M. Burch, the Presiding Judge at a January 30, 2008 hearing on two motions to enforce the Mutual Release filed in this case, filed an Order ("first Order") requiring all parties to comply, etc. See, **Exhibit A** hereto and made part hereof. Nowhere in that Order is there a "final judgment"

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entered into the record. Indeed, the Court stipulated a date certain for compliance; viz., 45 days from February 28, 2008. That date certain fell on Monday, April 14, 2008.

Defendants complied in full with all the requirements of the Mutual Release and the said Order. Plaintiff has not.

2. As of that date Plaintiff had not complied with any of the terms and conditions of the said first Order and had not communicated with Defendants concerning its compliance with that Order. Note in the attached **Exhibit A** (marked in red) that Judge Burch did not mark the Order as "dismissed" or "stricken." He set certain conditions to be met by all three Parties to this action. Plaintiff did not comply.

3. In his second Order filed on or about March 28, 2008 in response to Movant's Request for Clarification of the first Order, Judge Burch said his order was "crystal clear." See, **Exhibit B** hereto. So Plaintiff has no excuse for its non-compliance with the Order and contempt of court.

4. On or about April 24, 2008, Counsel for the Plaintiff, Mr. Buyck filed a letter with the Court making certain claims. See **Exhibit D** attached hereto and made part hereof. Movant has filed a formal Response in rebuttal to the claims in Mr. Buyck's letter of even date, and the Court is respectfully requested to take judicial notice of the Response with respect to deliberating this motion.

5. Inter alia, Mr. Buyck claims that Judge Burch has dismissed the case. (p.1. para. 2, line 2). This claim (together with Movant's discussion with the Clerk of Court on or about April 22, 2008 referred to herein below), raises the issue of the status of the Docket and interpretation of Judge Burch's Orders.

6. Apparently Mr. Buyck interprets Judge Burch's first Order as dismissing the case. I do not believe that is correct. The first Order was to enforce the Mutual Release or face contempt of court, and the second Order related to Movant's request for clarification of the first Order, deemed by the Court to be the "only issue" before the Court at this time. Movant does not see the words provided in **Rule 79 (f) SCRCF** anywhere in the two Orders, marked "dismiss," "ended," or "strike." **Movant's interpretation is that Plaintiff is in non-compliance and contempt of court pursuant to the two Orders.**

7. Thus we have more than one interpretation of the first Order, and hence a legally defined "ambiguity" on that and several other matters addressed by the first Order. That

is why Judge Burch was respectfully requested for a clarification to settle any ambiguities of this nature. There is also the specter of possible appeal on grounds of clear error, abuse of discretion and denial of process, to be considered.

8. On or about April 21, 2008, Movant filed with the office of the Clerk of Court a Motion for Summary Judgment requesting an order for connection of electric power pursuant to Para. 1 and para. 2 of the settlement agreement, Plaintiff's contempt of court and sanctions.

9. This filing was just one day before an April 22, 2008 telephone call from Plaintiff's Ms. Hill to Mrs. Weaver (as discussed in the formal Response document noted above), stating "out of the blue" that Progress Energy was ready to connect "tomorrow," on April 23, 2008. Whether or not that arrangement was convenient or practicable for Mrs. Weaver given her medical condition was typically of no concern to Plaintiff displaying its usual arrogant disdain for its customers' welfare. The unexpected phone call without prior notice to her attorney or Movant as party to the action and the Mutual Release, was obviously motivated by other considerations requiring prompt action to comply with the Court's Orders. This was too little, too late. Plaintiff should have connected the power initially in mid-September 2007, then the first days of March, 2008, not the third week of April following Judge Burch's first Order of February 28, 2008..

10. At the filing of the said Motion for Summary Judgment, the Clerk of Court informed the undersigned that the Docket had been removed from the Court's File Book and there was some question as to the filing of the motion for summary judgment and other pleadings under the Docket. The Clerk of Court was informed that the undersigned knew nothing about the situation, having had no formal notice or Order from the Court or any other party to that effect.

11. Conducting due diligence, the undersigned has since checked the file records of the case dating since September 18, 2007, the date the parties executed the compromise and settlement agreement. No reference was found in the undersigned's files to a dismissal of the Docket from the File Book.

12. The only reference found in the court record is that a copy of the Mutual Release compromise and settlement agreement was filed as an Exhibit in the two motions for enforcement that were filed respectively on October 24 and 25, 2007, by Mr. Buyck and

the undersigned. Subsequently, several additional pleadings were filed, then the hearing on January 30, 2008 of the two motions was conducted, and Judge Burch's two orders on February 28, and March, 28, 2008 were filed under the same Docket Number. See Exhibits A-C. Subsequently Movant has filed a demand for jury trial, a Notice of Plaintiff's Non-compliance and Contempt of Court, and a motion for summary judgment under the same Docket Number.

13. On Friday, May 2, 2008, Movant continued due diligence and enquired of the Clerk of Court again of the status of the Docket. A search of the record found the Court Order dated October 1, 2007, copy attached here as **Exhibit C. This was the first time that Movant had seen this Order. Until obtaining a copy of this Order, Movant did not know when, or how the case was officially removed from the Docket File Book.**

14. Apparently Form 4, Exhibit C, was filed by the Court on October 1, 2007 on the basis of informal notice of attorneys: "per attorneys case settled." Movant did not receive a copy of any formal notice to the Court from any of the attorneys. The Order then states: "Formal Order Forthcoming." Nor was Movant listed as a Defendant Pro Se.

15. Since October 1, 2007 to the present date, no such "formal Order" has been forthcoming, since Plaintiff's attorney did not follow through pursuant to the rules of Procedure cited herein. That has been Movant's complaint from the outset in the post settlement proceedings. Plaintiff has not carried out its legal duty under the Rules of Procedure to file formal stipulations of dismissals with the Court or the Commission.

16. In addition to not complying with the terms of the settlement agreement, ignoring the first and second orders, Plaintiff's attorney has also not complied with the initial Order on October 1, 2007 to formalize the dismissal of the case. Said Order does not state that the case is dismissed (see red markings). It simply states that "per attorneys, case settled -Formal Order Forthcoming."

17. Based on the rules, it is the responsibility of the Plaintiff's attorney to file the stipulations of dismissal as a formal requirement before the Court can file a "final; order."

18. Based on the undersigned's research, the situation is covered by **Rule 79 (f) S.C.R.C.P.** It provides that no action listed in the File Book which thereafter is settled or

disposed of in any manner, shall be dismissed, marked ended, or stricken from the File Book unless and until:

1. Plaintiff, in this case, Progress Energy, shall file and service a notice of dismissal or stipulation of dismissal pursuant to the provisions of Rule 41, S.C.R.C.P (which has been Movant's position from the outset, pursuant to para 3 and 4 of the release).; or

2. Counsel in the action shall have prepared and filed an order signed by the appropriate judge, or the Clerk of Court, and bearing the written consent of all interested parties to the action showing that it has been ended; (again Movant's position); or

3. Dismissal is ordered by the Court. (I have no record of a formal court dismissal, if any, having been filed as a follow through by the court pursuant to Exhibit C.). Judge Burch's three orders contain no markings as to being a "final order" dismissing the case.

19. This matter goes to the heart of the dispute over compliance with paragraphs 3 and 4 of the Mutual Release, and the undersigned's disagreement with Judge Burch's first Order on that issue; (dated February 28, 2008).

20. In this case, it is a matter of record that Plaintiff Progress Energy's counsel refused to prepare any stipulations for dismissal to file with this Court and the Public Service Commission, pursuant to **Rule 41 (a)(1)(ii); Rule 43(k) and Rule 40 (j), and now the newly discovered (by Movant) Rule 79.** Nor did they prepare and file an order signed by the appropriate judge, bearing the written consent and signatures of all interested parties, (Defendants.) Nor is there any record that Movant can find that the Docket was finally dismissed by order of the Court following up on the October 1, 2007 Order. Violation of rule 43 (k) renders the settlement non-binding.

21. Thus it seems the Docket is in some kind of procedural limbo. The Clerk of Court cannot accept the undersigned's pleadings to be filed under this Docket; which has been removed from the File Book pursuant to an Order; that was not a "final order." The Order was ignored by the Plaintiff whose responsibility it is to file formal stipulations of dismissal pursuant to Rule 40, 41 and 43 (k) and Rule 79, since the Court did not issue its Order as a "final order." On the other Hand, the Court's subsequent two Orders and a

hearing on two motions to enforce, were all processed under the same Docket. This is a clear signal that the Docket was not a "final order" of dismissed in October 1, 2007.

22. The situation has been brought on by Plaintiff's initial refusal to comply with paragraphs 3 and 4 of the Mutual Release since September 18, 2007, their gross negligence in not complying with Judge Burch's orders of October 1, 2007, February 28, 2008, March 28, 2008 and their violation of the cited Rules of procedure.

23. **Moreover, given the absence of a final order from the Court, Plaintiff is in violation of Rule 79 (g) which provides that failure to comply with the requirements of this Rule, shall subject the party so failing to penalties as for contempt of Court; which contempt shall be enforced by the Court on motion of any aggrieved party, or by the Court on its own motion. In addition to filing this motion, Movant has previously filed the said motion for summary judgment on this and related issues.**

24. The Mutual Release was a voluntary dismissal by the parties and is covered by Rule 41. See, Code Of Laws, Of S.C. 1976, S...C.R.C.P, Reporter's Note, Rule 79, last paragraph, p.206. **This has been my argument to the Court from the outset and my continued respectful disagreement with Judge Burch's first Order as to para 3. and 4. of the Release. The legal onus and duty is on Plaintiff, not Defendants as to filing the dismissals and the Court is not responsible to follow up on its October 1, 2007 Order.**

25. Thus we face two issues:

1. To promptly determine the present status of the Docket with respect to pleadings pending before the Court, and any additional pleadings that are necessary and will be filed, and

2. Plaintiff's continued refusal, gross negligence and non-compliance with the dictates of para. 3 and 4 of the Mutual Release, the Court's Rules of Procedure as cited, and Judge Burch's order to comply, and is thus in serious contempt of Court and in continued breach of two agreements with Defendants.

26. Based on the forgoing discussion, and especially **Rule 79 (g)**, the Court is respectfully moved for enforcement of Plaintiff's contempt of Court, for sanctions, penalties and censure, under **Rule 79(g)**, and Judge Burch's orders.

27. Since all pleadings to date have been processed under the subject Docket it remains for the Court to decide whether the existing and the proposed pleadings shall be filed under the existing Docket having been dismissed in error as a final order. Or whether or not the Court needs to re-instate the Docket on its own initiative and authority. If there is a procedural crisis or conundrum related to this matter, it is not of Movant's making.

28. Moreover, the Court is respectfully requested to take note that connecting electric power to Mrs. Weaver's residence is only one of the several matters outstanding that require Plaintiff's compliance under paragraph 4 of the settlement agreement.

29. Finally, because we are filing a contempt of court action against the Plaintiff, it is necessary to determine the documentary proof of the exact date and origin of the Order (endogenous -in-house, or exogenous -by the Court) for Progress Energy to connect electric power to the new Beatrice Wallenstein account, pursuant to para. 1 and 2 of the Mutual Release, seven months after it should have complied.

WHEREFOR, for good cause, Movant hereby moves this Court, for a declaratory judgment establishing the status of the above entitled Docket, processing of the pleadings on file, and pursuant to **Rule 79 (g)** S.C.R.C.P. for sanctions and damages for Plaintiff's non-compliance with the Court Order filed February 28, 2008, copy attached hereto as Exhibit A.

Respectfully submitted.

DATED: Florence, May 2, 2008.

Gary Weaver, Defendant Pro Se

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STATE OF SOUTH CAROLINA)
COUNTY OF DILLON)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
CASE NUMBER 2004-CP-17-232

Progress Energy Carolinas, Inc.,)
Plaintiff,)

AFFIDAVIT OF GARY WEAVER

vs.)

Gary Weaver and Beatrice Weaver.)
Defendants.)

AFFIDAVIT OF GARY WEAVER

County of Dillon)
State of South Carolina)

SS.

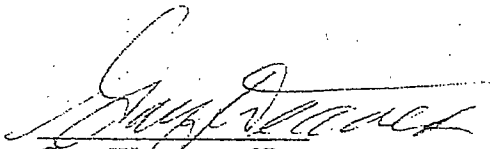
GARY WEAVER, being first duly sworn upon his oath, hereinafter "Affiant",
deposes and says as follows:

1. Affiant is a Defendant Pro Se in the above titled case.
2. There are contradictory views and some confusion among the parties as to the status of the above entitled Docket and interpretation of the Court Order filed February 28, 2008. The situation requires clarification given Affiant's existing pleadings pending disposition of the Court and additional pleadings to be filed.
- 3 Affiant can find no record of any "Final Order" of the Court dismissing the case as claimed by Plaintiff's attorney pursuant to Rules 79, 41 (a)(1)(ii), 43 (k), or 40 (j). Plaintiff has not timely complied with the terms and conditions of the Mutual Release or the said Order and is in contempt of court pursuant to Rule 79.
4. On Friday, May 2, 2008, at approximately 4.00. p.m, Affiant decided to conduct further due diligence on the issue. Upon enquiry of the Clerk of Court office, Affiant received a copy of Form 4, dated October 1, 2007. Exhibit D hereto.

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5. That is the first time in these proceedings that Affiant became aware of the existence of this Form 4 Order. It was filed prematurely on notice to the Court by Plaintiff's attorney who knew and should have known that Plaintiff was in violation of the Mutual Release.
6. No formal order has been forthcoming from the Court, Plaintiff's attorney failed to file formal stipulations as noted above, and pleadings have been processed under the same Docket implying consent of the Court, and no final dismissal or rescission of Exhibit D has been processed by any party. See Exhibits A, B, C and D.
7. Affiant makes this affidavit from personal knowledge and belief of the facts of the case, and not for any improper purpose or to cause unnecessary delay in proceedings, or needless increase in the costs of this case. This pleading is intended to accelerate, rather than delay the proceedings. Affiant is competent to make this deposition, and alleges and avers that the facts are well grounded as stated herein, and the exhibits attached to his pleadings of record are true and correct copies of the original documents and by reference are made part hereof.

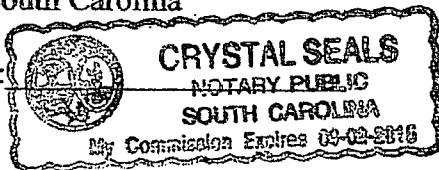
Further, Affiant sayeth naught.


Gary Weaver, Affiant

Subscribed and sworn before me
this 2nd day of May, 2008.


Notary Public, State of South Carolina

My Commission expires:



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184 (C)

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF DILLON)

Progress Energy Carolinas)

ORIGINAL

PLAINTIFFS,)

-vs-)

200)-CP-17-0232

Gary Weaver, pro se)

DEFENDANT.)

EXCERPT OF NON JURY PROCEEDINGS HELD BEFORE

THE HONORABLE PAUL M. BURCH;

COMMENCING AT THE HOUR OF 10:15 AM, ON THE 30TH DAY OF
JANUARY, 2008, AT THE DILLON COUNTY COURTHOUSE, 4TH JUDICIAL
DISTRICT, CIRCUIT COURT, DILLON, SOUTH CAROLINA.

REPORTED BY: H. EUGENE BUCKNER, CVR

ORIGINAL

EXHIBIT B

H. Eugene Buckner
Official Court Reporter at Large
15th Judicial Circuit
PO Box 1462, Conway, SC 29528-1462

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APPEARANCES:

Mark W. Buyck, Jr., Esquire
Willcox Buyck & Williams, PA
P.O. Box 1909
Florence , SC 29503

(843) 662-3258

..... ON BEHALF OF THE PLAINTIFF

Gary Weaver, pro se
P.O. Box 539
Little Rock, SC 29567

(843) 841-1606

..... ON BEHALF OF THE DEFENDANT

ALSO APPEARING:

Daniel Holt Shine, Esquire
Shine Law Offices
211 W. Hampton St.
Dillon , SC 29536

(843) 774-2400

NO WITNESSES TESTIFIED IN THESE PROCEEDINGS AND NO EXHIBITS
WERE MARKED BY THE COURT REPORTER.

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1 THE COURT:

2 Listen, I've heard enough.

3 MR. WEAVER:

4 Okay..

5 THE COURT:

6 I've got a question.

7 MR. WEAVER:

8 Yes sir.

9 THE COURT:

10 Does anybody here deny the execution
11 of this agreement?

12 In other words, Mr. Weaver, is this
13 your signature on this agreement, dated --

14 MR. WEAVER:

15 Yes, it is.

16 THE COURT:

17

18 -- uh -- September -- September

19 17th, 2007?

20 Mr. Shine, is that your client's
21 signature?

22 MR. SHINE:

23 Yes sir; and my signature.

24 THE COURT:

25 Mr. Buyck, is that yours?

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1 MR. BUYCK:

2 Yes sir, Your Honor; that's my
3 signature.

4 THE COURT:

5 All right. All this other stuff's
6 not before The Court today.

7 This agreement right here is before
8 The Court today.

9 Everybody's acknowledged it. The one
10 thing that we're here before was the situation about the --
11 uh -- the pending matters that were before the Public
12 Service Commission -- uh -- at the time of the execution of
13 this agreement that was raised by Mr. Buyck.

14 Apparently, there's some other
15 problems.

16 I'm going to stop this hearing right
17 now; because I am going to issue an order that I'm going to
18 draw myself.

19 And I am going to tell you ahead of
20 time that I am going to enforce this agreement; and I am
21 going to give a time limit in there.

22 And if everything under this
23 agreement hasn't been met by that time limit, there is going
24 to be nothing humorous about this matter.

25 Now you can appeal it.

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1 You decide.

2 And I am going to warn everybody
3 now:

4 If they come in here and on any
5 further petition or rule to show cause in this court after I
6 issue this order that there has been a refusal to abide by
7 these terms, or there's been a violation after that order of
8 any of these terms, it's not going to be funny; because I am
9 going to come down as hard as I can with contempt powers.

10 Mr. Buyck, you understand that goes
11 to your folks?

12 MR. BUYCK:

13 Yes, sir.

14 THE COURT:

15 And I don't want to have to put you
16 in jail, but I want some officers of that company down here
17 if and when that happens; because somebody is going to jail,
18 most likely; because there's no sense in anything dragging
19 out as long as this has.

20 And as I said:

21 There is nothing humorous about
22 this whole matter.

23 You got taxpayers money involved in
24 this through the court system; whether it's the public
25 service commission or whether it's This Court.

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1 MR. BUYCK:

2 I can understand, Your Honor.

3 THE COURT:

4 It's not cheap to run the court
5 system and you have to keep going round and round.

6 And Mr. Weaver?

7 MR. WEAVER:

8 Yes sir.

9 THE COURT:

10 And Mr. Shine, you better relay
11 this to your client.

12 MR. SHINE:

13 Yes sir.

14 THE COURT:

15 They can violate whatever I order
16 that's coming down and they can appeal it. ?

17 But I can tell you this, if they
18 appeal it, they can go to Columbia and try to get an appeal
19 bond because I don't want to see you; do you understand me?

20 MR. SHINE:

21 Yes sir.

22 THE COURT:

23 Now the last thing I want to do is
24 have to pop somebody with Contempt; but I will do it.

25 Now enough's enough.

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1418

1 This courtroom is not to play games
2 in, gentlemen.

3 I don't know what's going wrong
4 with this court -- the courts in this country right now.

5 It seems like people have been
6 using it to play games; and I'm not having any part of it.

7 So on the sole issues before The
8 Court that have been brought here today, I will issue an
9 order.

10 And if you don't agree with the
11 order, either appeal or abide by it; but either way, if you
12 lose, something is going to happen; and it is not going to
13 be funny. I can assure you of that.

14 Any questions Mr. Buyck?

15 MR. BUYCK:

16 No sir, Your Honor.

17 THE COURT:

18 Mr. Weaver?

19 MR. WEAVER:

20 Yes sir. Uh -- Will that include
21 -- uh -- submitting to the jury on damages?

22 THE COURT:

23 That's not before me today.

24 MR. WEAVER:

25 Okay.

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1 THE COURT:

2 Mr. Shine?

3 MR. SHINE:

4 I have no questions, Your Honor.

5 THE COURT:

6 I'm only concerned with this
7 agreement. And I don't want to penalize anybody at this
8 point; because I already see there's been some
9 misunderstandings; and I want to give everybody an
10 opportunity to do what they agreed to do; okay?

11 All right.

12 MR. WEAVER:

13 Thank you, Your Honor.

14 MR. BUYCK:

15 Thank you, Judge.

16 MR. SHINE:

17 Thank Your Honor.

18 (WHEREUPON: There being nothing
19 further in this matter, these proceedings were ended at
20 12:41 p.m., January 30th, 2008.)

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CERTIFICATE

I, the undersigned, H. Eugene Buckner, CVR, Official Court Reporter at Large in and for the State of South Carolina, do hereby certify that the foregoing proceeding was taken on the 30th day of January, 2008;

That the within judicial proceedings are, to the best of my ability, an accurate and verbatim transcription of the hearing;

I further certify that I am neither Counsel nor Solicitor to any of the parties in said suit, nor interested in the event of the cause.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 7th day of May, 2008.

H. Eugene Buckner

H. EUGENE BUCKNER, CVR
OFFICIAL COURT REPORTER AT LARGE
15TH JUDICIAL DISTRICT
STATE OF SOUTH CAROLINA

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

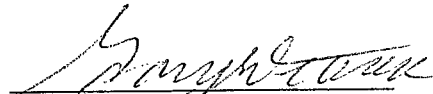
Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

**MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL
PURSUANT TO RULES 212 (b)(c) SCACR**


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Attorney for Respondents
Progress Energy Carolinas, Inc

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

**MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL
PURSUANT TO RULES 212 (b)(c) SCACR**

Comes now Appellant Pro Se Gary Weaver and respectfully files this **Motion for Leave to Supplement the Record on Appeal** pursuant to **Rules 212 (b) and (c) SCACR**.

Authority.

1. **Rule 212 (b) SCACR** provides that a party desiring to supplement the record on appeal must move the Appellate Court to do so.
2. Appellant hereby complies with the said rule in order to file supplemental material argument in support of the appeal relating to the lower court's serious errors of law in awarding attorney's fees to Respondents as discussed in Appellant's Initial Brief

3. **Rule 212 (c) SCACR** provides that supplemental materials filed under Rule 212 (b) herein, shall be included in an Appendix to the Record on Appeal. The Appendix shall be compiled, served and filed by the party initially proposing it (Appellant).

4. Accordingly this motion has been included in the Supplemental Appendix to the Record on Appeal filed separately as ordered by the court.

Grounds

1. In its Order dismissing the case, the lower court granted attorney fees to Respondents. (See, Supplemental Appendix to the Record, Index, p.1)

2. Thus the grounds for this motion are the lower court's willful and knowing violation of the so-called "American Rule" which denies an award of attorney's fees against Appellant. (See discussion of the "American Rule" in the attached Memorandum in Support of Motion.)

3. Consequently, the lower court has committed a serious error of law additional to the related errors of law cited in Appellant's Initial Brief.

Relief

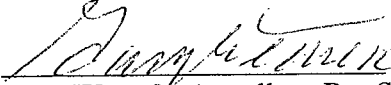
Wherefore, for good cause, having set forth the legal grounds for the motion, Appellant respectfully moves this Honorable Court for an Order, reversing the lower court's granting of attorney's fees to Respondents in violation of the so-called "American Rule."

Basis for this motion is the cited law that justifies Appellant's claim for a judgment as a matter of law to correct the lower court's error of law and reversing the award of attorney's fees to Respondents.

This motion is based on the discussion herein and the attached Memorandum In Support of Motion, the facts and records and case files herein, and such other and further oral and/or documentary evidence and supplementary argument as may be presented or demanded.

Respectfully submitted.

DATED: Little Rock S.C. February 3, 2012


Gary Weaver, Appellant Pro Se
P.O. Box 539, Little Rock
S.C. 29567
Ph: 843 841 1606; Fx: 843 774 2050

**MEMORANDUM IN SUPPORT OF MOTION
FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL
PURSUANT TO RULES 212 (b)(c) SCACR**

Background.

1. By Order of the Court dated on or about November 29, 2011, Appellant was instructed to file a Supplemental Record on Appeal. Compliance was deferred due to Appellant's hospitalization for an unexpected serious heart attack resulting in four by-pass surgeries and subsequent rehabilitation treatments.
2. Appellant has been released from hospital and is presently undergoing cardiac rehabilitation treatments although he is not permitted to drive a vehicle for several weeks.
3. Meanwhile Appellant has managed to compile, serve and file under separate cover, the Supplemental Appendix to the Record on Appeal as ordered by the Court.
4. While in hospital, Appellant managed to undertake a computerized research relating to the lower court's errors of law in awarding attorney's fees to Respondents.
5. Accordingly, in accordance with **Rules 212 (b) (c) SCACR**, Appellant hereby respectfully moves for leave of the Court to file supplemental materials relating to the serious errors of laws perpetrated by the lower court in awarding attorney's fees to Respondents.
6. To that end, in the interests of court administrative efficiency, cost reductions, and redundancy, Appellant has taken the liberty of including this motion with the previously ordered Supplemental Appendix to the Record on Appeal, assuming the court's approval with this procedure.

Argument.

1. In the lower court's Order Dismissing the Case and Granting Attorneys Fees to Defendant Progress Energy et al, dated November 25, 2009, subsequent research by Appellant reveals that the lower court committed gross errors of law in awarding Respondents attorney's fees. (See, **the lower court's Order, Supplemental Appendix to the Record on Appeal, pp.1-5; Transcript, pp. 6-24**)
2. In the United States the losing party in a case does not generally pay the winner's legal fees. (See, **Mary F. Derfner & Arthur D. Wolf, Court Awarded Attorney Fees, Sect.1.02 (1) at 109 (1992)**). Each party is only obligated to pay is or her own attorney's

fees, regardless of the outcome of the litigation. **Ibid.** This practice is called the "American Rule." **Ibid.** The practice that allows shifting of legal fees is called the "English Rule." (See, **Herbert M. Ktitzer, The English Rule, A.B.A.J., Nov. 1992, at 54, 55, Note 9, at 55.**) The English Rule requires the loser of a lawsuit to pay the winner's legal fees. **Ibid.**

3. It is argued that the American Rule affords the greatest access to justice, especially for the small plaintiff. Legal authorities claim that if plaintiffs must consider the financial consequences of a possible loss against a defendant for whom cost is no object, they might be intimidated into avoiding even the most meritorious of cases for fear of potentially ruinous costs, thus thwarting the cause of justice.

4. There is little historical information about the judicial policies of the American Rule. In 1796, the Supreme Court set forth the American Rule in **Arcambel vs. Wiseman**, where the Plaintiff received damages and an award of \$1,600 for attorney's fees. The Court struck the attorney's fees from the judgment by remittitur. In the nineteenth century, payment of attorney's fees by the client rather than through recovery from a defeated opponent seemed so natural that no justification appeared necessary. The modern view of the policy indulging the American Rule has been expressed by the U.S. Supreme Court in 1967:

"(S)ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents counsel....Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." See, **Fleishmann Corp. vs. Maier Bewing co., 386 U.S. 714, 718 (1967)**

5. It has been stated by judicial scholars that the Supreme Court's reasons seem to reflect the earlier beliefs about American democracy and individualism. This reverence for the individual and the belief that litigation was a "fair fight" (but not in this case as discussed in Appellant's Initial Brief)) precluded placing any penalties on a losing party. Litigation of basic rights was not to be discouraged by rules that denied access to courts. The outcome of litigation was believed to be equally dependant on merits and initiative of

parties. These beliefs in American democracy are reflected by the modern views on access to justice. (See, **Monroe, supra note 15 at 152-54.**)

6. The American Rule is a default standard, overruled in some cases by statute. However the legal authorities generally agree that in most cases though, each party to a lawsuit pays its own attorney's fees. Appellant has found no cases or statutes that abrogate the American Rule in jurisprudence in this state.

Conclusion

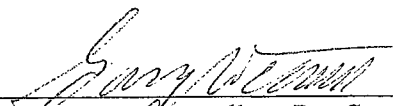
1. The American Rule requires that each party to a suit pays its own legal fees and an award of fees to the winning party is not to be granted, as it was in this case.
2. Appellant has found no statute or cases that abrogate application of the American Rule in this State.
3. The lower court has violated the American Rule, and committed an error of law in this case, in addition to its other errors of law as cited in Appellant's Initial Brief.
4. If the Court does not reverse the lower court's grant of attorney's fees to Respondents then the Court may set a precedent for the violations of the American Rule.

Relief.

Wherefore, for good cause, pursuant to Rule 212 (b) SCACR Appellant seeks leave of the Court to file this motion, and to reverse the lower court's grant of attorney's fees to Respondents pursuant to the American rule.

Respectfully submitted.

DATED: Little Rock S.C. February 3, 2012


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SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DILLON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2008-CP-17-0180

Gary Weaver, BEA Wallenstein, and
B.E.A. Wallenstein Hospice Inter Vivos Trust.....Plaintiffs,

Of whom Gary Weaver is the Appellant,

vs.

Progress Energy Carolinas, Inc, William
Johnson, and John Does 1-20.....Respondents.

**NOTICE OF MOTION FOR LEAVE TO SUPPLEMENT RECORD ON APPEAL
PURSUANT TO RULES 212 (b)(c) SCACR**

TO:

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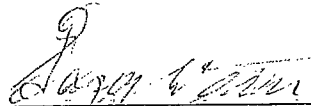
Notice is hereby given that the above-identified Appellant's Motion for Leave to Supplement Record on Appeal in this action, has been timely filed with the above entitled court on or before February 10, 2012.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a notice and copy of the foregoing Appellant's Motion for Leave to Supplement Record on Appeal was served upon the above identified counsel at the stated address by means of United States regular mail, on or before February 10, 2012.

DATED: Little Rock S.D. February 6, 2012



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