November 3, 2016

Ms. Jocelyn D. Boyd
Chief Clerk
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, SC 29211

In Re: Petition of South Carolina Electric & Gas Company for Updates and Revisions to Schedules Related to the Construction of a Nuclear Base Load Generation Facility at Jenkinsville, South Carolina
Docket No. 2016-223-E

Dear Ms. Boyd:

Enclosed please find for filing and consideration the Post Hearing Memorandum of Sierra Club, together with Certificate of Service reflecting service upon all parties of record.

With kind regards I am

Sincerely,

Robert Guild

Encl.s
CC: All Parties
STATE OF SOUTH CAROLINA

(Caption of Case)
In Re: Petition of South Carolina Electric & Gas Company for Updates and Revisions to Schedules Related to the Construction of a Nuclear Base Load Generation Facility at Jenkinsville, South Carolina

BECOME THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2016 - 223 - E

(Please type or print)
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NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

☐ Emergency Relief demanded in petition  ☐ Request for item to be placed on Commission's Agenda expeditiously

☐ Other:

INDUSTRY (Check one)
☐ Electric  ☐ Gas
☐ Electric/Gas  ☐ Telecommunications
☐ Electric/Telecommunications  ☐ Water
☐ Electric/Water  ☐ Water/Telecom.
☐ Electric/Water/Telecom.  ☐ Electric/Water/Sewer
☐ Electric/Water/Sewer  ☐ Sewer
☐ Gas  ☐ Telecommunications
☐ Railroad  ☐ Transportation
☐ Sewer  ☐ Water
☐ Telecommunications  ☐ Water/Sewer
☐ Transportation  ☐ Administrative Matter
☐ Water  ☐ Other:

NATURE OF ACTION (Check all that apply)
☐ Affidavit  ☐ Agreement  ☐ Letter
☐ Answer  ☐ Memorandum  ☐ Motion
☐ Appellate Review  ☐ Objection  ☐ Petition
☐ Application  ☐ Petition for Reconsideration  ☐ Petition for Rulemaking
☐ Brief  ☐ Petition for Rule to Show Cause  ☐ Petition to Intervene
☐ Certificate  ☐ Petition to Intervene Out of Time  ☐ Prefiled Testimony
☐ Comments  ☐ Petition to Intervene  ☐ Promotion
☐ Complaint  ☐ Petition to Intervene  ☐ Proposed Order
☐ Consent Order  ☐ Petition to Intervene  ☐ Protest
☐ Discovery  ☐ Petition to Intervene  ☐ Publisher's Affidavit
☐ Exhibit  ☐ Reduced Testimony  ☐ Report
☐ Expedited Consideration  ☐ Request
☐ Interconnection Agreement  ☐ Request for Certification
☐ Interconnection Amendment  ☐ Request for Investigation
☐ Late Filed Exhibit  ☐ Resale Agreement
☐ Other: 

Print Form:  Reset Form:
In Re: Petition of South Carolina Electric & Gas Company for Updates and Revisions to Schedules Related to the Construction of a Nuclear Base Load Generation Facility at Jenkinsville, South Carolina

POST HEARING MEMORANDUM OF SIERRA CLUB

The Sierra Club, on behalf of its members who will be adversely affected by the approval of the subject Petition, hereby submits its Post Hearing Memorandum in support of its position that the record in this matter and the pertinent law requires that the Commission deny the subject Petition and reject the Settlement Agreement proposed by the Office of Regulatory Staff, South Carolina Electric & Gas Company and the other settling parties.

The Commission should reject the approximate $852 million in additional capital costs claimed by the Company to complete the proposed new nuclear generating units, where such costs are not sufficiently known and measurable values but are merely values negotiated by the Company and its contractor in settlement of disputed claims; where such costs are not capitol costs within the meaning of the Baseload Review Act, but are merely values negotiated by the Company and its contractor to induce completion of the units pursuant to the exercise of the so-called “fixed price option”
provision of its amended EPC contract; where incurring the proposed additional costs to complete the units pursuant to the negotiated amended EPC contract and so-called “fixed price option” represent the exercise of utility management judgement and risk appropriately borne by Company stockholders and not appropriately subject to endorsement by the Commission or borne by ratepayers; and, where, such additional costs to complete the units represent imprudent costs which should have been avoided by the Company and, therefore, must be borne by its stockholders and not its ratepayers. For these foregoing reasons, the subject Petition should be denied.

Denial of this petition and rejection of the proposed settlement Agreement does not preclude the Company from acting on the amended EPC contract or exercising the so-called “fixed price option” at its own management and stockholders’ risk. Sierra Club does not fault ORS and the settling parties for seeking to improve the risk to ratepayers from further project cost overruns and schedule delays. However, this Commission should not insulate Company management and stockholders from the legitimate management risk that they must bear for the bargain they have negotiated with their contractor. Furthermore, the proposed settlement by ORS and the settling parties of the many disputed issues presented by the Company petition does not relieve the Commission of its duty to adjudicate those disputed claims based on the evidence and applicable law.

Prior to hearing in this matter, the Company, ORS and some, but not all of the intervening parties to this proceeding, entered into a Settlement Agreement, resolving the disputed issues among them and proposing a resolution of such issues by the Commission in a manner proposed by such Agreement. Sierra Club is not a party to
such Settlement Agreement, objects to its terms and opposes approval and adoption of such Agreement by the Commission. Of course, a settlement agreement by some parties does not bind non settling parties such as Sierra in any way. Due process requires the Commission to resolve all issues disputed by the non settling parties, including Sierra, through the normal adjudicatory process—applying pertinent law to the evidence of record, employing the appropriate burden of proof and rules of evidence. Leventis v. SCDHEC, 530 S.E.2d 643, 340 S.C. 118,131-135 (S.C. App., 2000).

The Baseload Review Act (BLRA), while contemplating proposed settlements by ORS and the utility as was the case for the agency in Leventis, Supra, nonetheless requires that the Commission determine the issues in the proceeding in accordance with the requirements of due process, Leventis, Supra, and the terms of the BLRA.

The commission may accept the settlement agreement as disposing of the matter, and issue an order adopting its terms, if it determines that the terms of the settlement agreement comport with the terms of this act.

SC Code Section 58-33-270 (G).

As a request by the utility to modify the approved BLRA capital cost and construction schedules for the proposed nuclear units, the proceeding is governed by the following BLRA provision:

As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:

(1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility;
SC Code Section 58-33-270 (E).

In this request for approval of cost overruns and schedule delays the Company bears the burden of proving that these capital cost increases are sufficiently itemized and non-speculative to permit challenge to their prudence and, then, that such new costs could not have been originally anticipated, avoided or minimized in order to be prudent. South Carolina Code (Supp. 2009) § 58-33-275(E). As the Supreme Court has held, Commission approval of such speculative new costs under the BLRA is improper:

Thus, in effect, the Commission has allowed SCE&G to increase rates so that it can recover ... speculative, un-itemized expenses with no mechanism in place to challenge the prudence of SCE&G's financial decisions.


Approval of such speculative or imprudent new capital costs contravenes the legislative purpose of the BLRA of balancing the interests of the utility with the protection of its ratepayers. The BLRA purpose is "two -fold: (1) to allow SCEG to recover its 'prudently incurred costs' associated with the nuclear facility; and (2) to protect customers 'from responsibility for imprudent financial obligations or costs."


Changes in the approved capital budget and construction schedule may be
approved only where they are not the result of the Company’s failure to anticipate, avoid or minimize such changes which are, therefore, deemed imprudent. South Carolina Code (Supp. 2009) § 58-33-270(E)(1).

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

Finally, in evaluating the Company’s proposed cost overruns to complete the subject nuclear units the Commission must impose the appropriate responsibility upon utility management to prudently manage a project of such technical complexity. Protecting the interests of ratepayers requires that the utility be held responsible for an especially high duty of care to prudently manage and bear excessive costs of nuclear plant construction.

The standard by which management action is to be judged is that of reasonableness under the circumstances, given what was known or should have been known at the time the decision was made or the action was taken. The concept of prudence implies a standard or duty of care owed to others. In building a nuclear power plant, the Nuclear Regulatory Commission requires the utility to exercise a high standard of care in order to protect the public health and safety. Similarly, given the costs involved and the rate impact of those costs on monopoly customers, this commission finds that the utility should be held to a high standard of care in making decisions and taking actions in its planning and constructing such a project. Thus, while the standard to be applied is reasonableness under the circumstances, where the risk of harm to the public and ratepayer is greater, the standard of care expected from the reasonable person is
higher. Given this standard ..., a reasonable person is one who is qualified by education, training and experience to make the decision or take the action, using information available and applying logical reasoning processes." (Indention omitted.)

The PSC also noted that excessive or unreasonable costs could result from a decision that was prudent when made, but that "[t]he determinative issue is not whether the decision to incur the costs was prudent, but who should bear such costs. Such an expenditure represents an additional expense to the project which is certainly more in the control of utility management than the ratepayers. Therefore, it is only appropriate that such excessive or unreasonable costs become the responsibility of the utility and not the ratepayer.

Georgia Power Co. v. Georgia Public Service Comm’n, 196 Ga. App. 572, 578-579, 396 S.E.2d 562 (1990). The Commission’s decision here must employ a reasoned application of the accepted BLRA prudence standard, as well as the appropriate recognition of the" high standard of care" owed to ratepayers by a monopoly utility building a nuclear power plant in "making decisions and taking actions in its planning and constructing such a project." Id.

Neither the Commission nor the utility’s ratepayers are responsible for guaranteeing that the utility will profit from its investments in constructing a generating facility; but only that it be given the opportunity to earn a fair rate of return on its prudent investment in generating plants used and useful in providing utility service within the meaning of those traditional public utility regulatory terms. South Bell Tel. & Tel. Co. v. Pub. Ser. Comm., 270 S.C. 590 at 595, 244 S.E.2d 278 (1978), citing, Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 63 S.Ct. 675, 67 L.Ed. 1176 (1923), and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944). The Commission’s
role is not to insulate utility management or its stockholders from the normal management risk borne by non-monopoly enterprises in a non-regulated marketplace. Management decisions such as those presented here to renegotiate the EPC contract with Westinghouse, to settle disputed claims with Westinghouse involving plant construction costs, or to negotiate and exercise the so-called "fixed price option" to induce completion of the subject units represent utility management judgements for which the utility and its stockholders must be held uniquely responsible. It is not the Commission's lawful responsibility under the Baseload Review Act or traditional regulatory principles to protect the Company from bearing the normal risks of its management judgement.

The only, uncontested, expert testimony of record in this proceeding, presented by the party charged by statute with monitoring, reviewing and auditing the construction schedule and expenditures for this nuclear project, compels denial of the Company's Petition and rejection of the proposed Settlement Agreement as contrary to the Baseload Review Act and established law.

Pursuant to S.C. Code Section 58-4-10 (2015), the Office of Regulatory Staff (ORS) is a statutory party of record to this proceeding. As provided specifically in the Baseload Review Act, ORS is charged with monitoring expenditures for construction of the subject plant through review and auditing of the utility's quarterly progress reports on plant construction as well as through inspection of books and records and observing actual construction progress.

The Office of Regulatory Staff shall conduct on-going monitoring of the construction of the plant and expenditure of capital through review and audit of the quarterly reports under this article, and shall have the right to
inspect the books and records regarding the plant and the physical progress of construction upon reasonable notice to the utility.


In accordance with this statutory role ORS offered the expert testimony of Gary C. Jones who was qualified by the Commission as an expert in “nuclear design, engineering and construction.”

Mr. Nelson: Thank you, Mr. Chairman. We would also ask that the Commission qualify Mr. Jones as an expert in the areas of nuclear design, engineering, and construction, based on his education, over 45 years’ experience in the nuclear power industry, and as shown on his curriculum vitae, which in now part of the record in this case. We would ask he be qualified as an expert by the Commission.
Chairman Whitfield: So ordered.

Tr. 893. Indeed, Mr. Jones has abundant experience in the design and construction of nuclear power plants and has been employed by ORS as its primary expert in monitoring the progress and costs of this project. Mr. Jones was employed in a senior position by a prominent international architectural-engineering firm, Sargent & Lundy, where he was responsible for leading engineering in the construction of some six new nuclear power plants, the restart of three additional units and leading the design review for nuclear units in China and Korea. He is a licensed professional engineer in Missouri and South Carolina. He has been employed by ORS since August 2011 to monitor the construction and budget for these units and previously presented allowable ex parte briefings and testified before the Commission on schedule and budget changes in Docket No. 2012-203-E. Jones Direct Testimony, pp. 1-3. But for the proposed Settlement Agreement by ORS, the Company and the other settling parties, Gary
Jones's expert testimony fatally condemns the Commission's approval of the capital cost increases proposed by the Company. Crediting that uncontested expert testimony of Mr. Jones notwithstanding the proposed settlement, as the Commission must, requires rejection of the Company's petition and rejection of the Settlement Agreement.

Simultaneously on September 1, 2016, ORS filed the critical Direct Testimony of Gary C. Jones and executed, along with the other settling parties, the proposed Settlement Agreement. H. Ex. 1. Mr. Jones prepared his testimony in contemplation of that settlement, in which he participated; recognizing that, by its terms, he was bound to defend it before the Commission. Tr. 940-941. Notwithstanding the terms of that proposed Settlement Agreement, Mr. Jones stands by his prefilled Direct Testimony. Tr. 943.

Fundamentally, Mr. Jones and ORS fault the Company Petition as departing from prior project cost overrun petitions through seeking approval for an entirely new EPC contract, the costs of which are not adequately documented, justified, or subject to ORS standards for verification, auditing and approval. Jones Direct Testimony, pp. 8-26.

The ORS expert characterizes the Petition's principal $505.5 million cost of exercising the so-called "fixed price option" as a negotiated value reflecting the Company's "subjective analysis....with little objective evidence of the what the actual cost savings from those subjective benefits would be," Jones Direct Testimony, p. 12, justified primarily by "forecasts" of what Westinghouse would charge to complete the project under the existing contract as compared to the "fixed cost" option. Such forecasts are presented by Company witness Lynch in his sensitivity studies indicating
the many hundreds of millions of dollars in losses which would likely be charged to Westinghouse to complete the project under the option. While recognizing the benefits of the option, "ORS does not have sufficient documentation to justify a specific list of costs making up the Option." Moreover, support by ORS for these costs is expressly contingent upon approval of the proposed Settlement Agreement with its asserted Company "Guarantee" of the option's fixed price. "Absent such a guarantee from SCE&G, ORS could not support the $505.5 million cost associated with the Option." Jones Direct Testimony, pp. 12-13. Thus, laying aside the contingency of the proposed settlement, and evaluated on its merits alone, as required by the terms of the BLRA,, SC Code Section 58-33-270 (G), traditional regulatory principles and the evidentiary standards properly relied upon by ORS, the Commission must reject the $505.5 million costs associated with the fixed price option. These negotiated costs are not "capital costs" of the units within the meaning of the BLRA, SC Code Section 58-33-220 (5); they are "speculative" and "un-itemized expenses, SC Energy Users Committee v. SC Public Service Commission, 388 S.C. 486 at 496, 697 S.E. 2d 587 (2010); and they fail to meet traditional regulatory principles requiring utility demonstration that ratepayers costs be "known and measurable within a degree of reasonable certainty." Hamm v. S.C. Pub. Serv. Comm'n, 309 S.C. 282, 291, 422 S.E.2d 110 (1992). While exercising the fixed price option may be beneficial to the Company and its stockholders, notwithstanding the reservations of ORS as to the capacity and willingness of Westinghouse and its parent Toshiba to actually bear the substantial losses imposed by the option for project completion, Jones Direct Testimony, pp. 12-13. 32-34, the costs of exercising the option may not be approved as prudent changes to the project capital cost schedule to be borne

The Commission should deny approval of the $505.5 million in costs associated with the fixed price option and decline to approve this contract option negotiated by the Company and Westinghouse.

Much of the balance of cost overruns sought in the Company petition suffer from the same evidentiary and legal flaws identified by the ORS expert Jones with respect to the fixed price option costs: they are merely negotiated values, unsupported by sufficient documentation to be verifiable and auditable capital costs of the project and should, therefore, be rejected by the Commission. Jones Direct Testimony, pp.13-26.

The second largest increment of the total $852 million in cost overruns proposed in the Company Petition is the $137.5 million “in costs to resolve outstanding disputes.” Jones Direct Testimony, p.13. This cost element represents a negotiated value which comprehensively settled a range of disputed claims; but which “did not credit specific amounts to specific items.” Jones Direct Testimony, p.14. As ORS’s expert Jones testified adequately “detailed, auditable estimates to back up changes” in plant capital costs are necessary for approval of such new costs under the BLRA; yet
such documentation for this negotiated dispute settlement, for the most part, “do not exist.” “Jones Direct Testimony, p14.

Moreover, the ORS review of components of these resolved disputes casts even further doubt on the basis for their approval as prudent plant capital costs under the BLRA. ORS witness Jones rejects two components of $8.7 million and $3.6 million caused by project delay associated with poor labor productivity and escalation, respectively, attributable to Westinghouse consortium. Jones Direct Testimony, p15. ORS rejects approval of $45.9 million in additional costs associated with “regulatory revisions and changes in law,” which it deems “not justified,” and “an overreach by the Consortium.”

In many cases, the Consortium maintained that meeting the requirements specifically stated in the Final Safety Analysis Report represented a change in law, or that the Nuclear Regulatory Commission’s (“NRC”) practice of rigorous and literal interpretation of codes and standards represented a change in law and should not be accepted as such. Therefore, ORS cannot support accepting all of the claims by the Consortium for disputes associated with regulatory revisions and changes in law and crediting their full value.

Jones Direct Testimony, p15-16. A third component of the costs of resolved disputes is the $47.5 million involving “work charged to the Target Price category of the EPC Contract when it should have been charged to the Firm Price category.” ORS expert witness Jones rejects these costs where they involved “working on-site to correct or complete sub-modules that were shipped to the site with defects or were incomplete, or were transferred to the site because they could not be completed at the fabrication facility in time to meet construction needs.” Jones Direct Testimony, p15-16. Such imprudently incurred costs should have been absorbed by Westinghouse; or, if not, by
Company stockholders. A fourth component of the resolved disputed costs is $27.5 million "for producing as-built drawings versus the Consortium's plan to produce only as-designed drawings" of the plant. ORS rejects approval of these costs:

However, the EPC Contract clearly states that as-builts will be provided. As-built drawings are also required by NRC regulations and by the Final Safety Analysis Report. Therefore, ORS cannot support accepting this value as justification for the increased costs in the Amendment.

Jones Direct Testimony, p16. Such imprudently incurred new plant costs must be the responsibility of either Westinghouse or the utility, and not ratepayers. A fifth component of disputed costs is $66.0 million for extending the warranties on plant equipment for an additional two years beyond the approved unit completion dates. SCE&G could only provide a verbal estimate to support this value; and ORS rejects it as lacking adequate documentation. Jones Direct Testimony, p16. In addition, as yet another cost direct attributable to the project's delay caused by Westinghouse, this additional cost must be rejected as imprudently incurred.

"The Company proposes to include 50% of some $78.8 million in disputed invoices already paid to Westinghouse. While settling these disputes was worth millions according to the Company, "ORS cannot verify any specific amount." Jones Direct Testimony, p17. Moreover, examples of these disputed invoices cited by ORS witness Jones, evidence the additional basis for their rejection as imprudently incurred costs for which ratepayers should not be responsible. SCE&G would have ratepayers pay for the additional costs "to identify and label subcomponents so that they could be specifically identified during plant operations and maintenance." According to the ORS nuclear expert, such a requirement "is an industry practice that has been in effect for at least
twenty years and has been applied on every plant with which I am familiar.” Jones Direct Testimony, p18. ORS cites additional examples of costs imprudently accepted by the Company: “timely access to technical manuals to assist SCE&G with developing plans and procedures to operate the plant,” deemed by ORS as “certainly an obligation” of Westinghouse under the original contract and “not a basis for increased costs.” Jones Direct Testimony, p18. Another example: costs to build walls and doors on the annex building to meet the NRC’s 2009 Aircraft Impact Assessment Rule, which “were included in the cost increases associated with Order No. 2012-884” and should not be included here. A final example of resolved disputed costs is the $67.6 million in withheld progress payments deemed by ORS “not justified because WEC was the cause of unwarranted delays in the Project . . .” Jones Direct Testimony, p18. These costs should have been originally borne by Westinghouse and must be rejected by the Commission as imprudently incurred costs for which ratepayers should not be responsible.

The Company proposes to include $52.5 million in increased project costs for eleven Change Orders, for which ORS determined the supporting documentation was “generally insufficient.”

During our review, documentation supporting the bases of these estimates was lacking and was by no means as rigorous and detailed as ORS expected to be presented for review.

Jones Direct Testimony, p. 20. While ORS, charitably noted the belated provision of some minimal documentation and identified its future expectation of needed support for approval of costs associated with change orders, the present record of “insufficient”

Lastly, ORS proposes, illogically, to allow inclusion of an additional project capital cost of $85.5 million for reversal of the liquidated damages previously credited by SCE&G to ratepayers in the Commission cost overrun Order No. 2015-661. The only justification for this proposed reversal is "that the terms of the EPC Contract have now changed," to slip the project completion dates and provide new liquidated damages provisions. While ORS says that it is "concerned that this credit has been reversed," it, nevertheless, illogically supports reversal of this credit. Jones Direct Testimony, pp. 25-26. The proposed Settlement Agreement, characterizes this $85.53 in liquidated damages as "fully earned by SCE&G based on the Consortium’s failure to meet the forecasted completion dates of Units 2 and 3 had the Amendment to the EPC Contract not been executed." The proposed Settlement obligates ORS "not to contest the inclusion of these costs, previously credited to ratepayers, ..." H. Ex. 1, pp. 6-7, Para. 4. Such agreement does not negate the objections to reversal of this vested benefit to which ratepayers remain entitled. Having been approved by the Commission to the benefit of ratepayers, these damages were no longer the Company’s entitlement to bargain away in negotiation with the Westinghouse Consortium. While the Company was free to bargain away its own property in negotiation with its contractor, the Commission should reject inclusion of the reversal of earned liquidated damages as approved additional project costs and impose such costs on the Company and its stockholders.
In this Petition and the proposed Settlement Agreement the Company and the other settling parties ask the Commission to approve the Company’s execution of the so-called “fixed price” option in the amended EPC contract as well as the proposed Settlement Agreement which would substantially grant the relief sought by the Company. Sierra Club objects to both requests as unwarranted on their merits and in excess of the Commission’s statutory authority. While the Company should be free, at its own risk and expense, to renegotiate its contract with the Westinghouse consortium, including exercising the option at its own risk; all costs negotiated between the Company and its contractor must be borne by the Company and its stockholders and not by the ratepayers for the reasons argued herein. Further, it is improper as a matter of law for the Commission to relieve the utility, its management and its stockholders, of the management risk properly borne by them and, in turn, to impose those management risks on utility ratepayers. BLRA, SC Code Section 58-33-270(E), (G); Georgia Power Co. v. Georgia Public Service Comm’n, 196 Ga. App. 572, 578-579, 396 S.E.2d 562 (1990; Sou. Bell Tel. & Tel. Co. v. Pub. Ser. Comm., 270 S.C. 590 at 595, 244 S.E.2d 278 (1978), citing Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679,43 S.Ct. 675, 67 L.Ed. 1176 (1923), and Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591,64 S.Ct. 281, 88 L.Ed. 333 (1944).

Moreover, on its merits, the Commission should reject approval of the so-called “fixed price option” and the $505.5 million costs associated therewith, as imprudent and not properly borne by ratepayers. As the ORS nuclear witness Jones testified, there is substantial doubt that Westinghouse and its troubled parent Toshiba can and will fulfill
their obligations under that option when faced with absorbing some $981 million in potential losses to complete the project. "ORS is concerned about WEC's ability to absorb potential losses that SCE&G's sensitivity studies identify as possible if productivity and production are not significantly improved." Jones Direct Testimony, p. 11. The Company's witness Lynch projects that such losses may be some $981 million, Marsh, Tr. 148, employing assumptions regarding labor growth rates and a range of performance factors to complete the project deemed "reasonable," "appropriate and meaningful" by the ORS nuclear expert Jones. Jones Direct Testimony, p. 34. Faced with the reasonable likelihood that Westinghouse and Toshiba may, indeed, be unable to "absorb" such catastrophic losses to fulfill its fixed prince contract obligations, ORS insisted that SCE&G agree to a "Guarantee" that fixed the project price and insulated ratepayers from facing the likely additional costs to complete the project. "Absent such a guarantee from SCE&G, ORS could not support the $505.5 million cost associated with the Option." Jones Direct Testimony, p.13. Indeed, however, that fixed project price as well as any assumed SCE&G "Guarantee" are illusory; and, therefore, the Commission must reject approval of the option as imprudent.

First, to be clear, the proposed Settlement Agreement contains no "Guarantee-" no such term of art appears anywhere in the agreement itself. H. Ex. 1. Instead, the agreement employs only a moratorium on seeking further BLRA project cost increases, subject to a significant series of exceptions, such as for inevitable cost increases attributable to a "change in law" and "costs associated with the decisions of the Dispute Review Board adverse to SCE&G." Settlement Agreement, He. Ex. 1, pp. 10-12, Paras. 12 and 13.
Second, and even more troubling, the evidence in this record raises even more concerns of the likelihood that Westinghouse and its parent Toshiba will be unwilling and unable to complete the project as promised. Such evidence has not been meaningfully evaluated by SCE&G or ORS, or accounted for in their embrace of the fixed price contract and settlement agreement. While acknowledging the public disclosure of a massive accounting fraud determination and record penalty by Japanese authorities against Toshiba, reportedly tied to the fraudulent understatement of losses incurred by its U.S. Westinghouse subsidiary in connection with its abandoned Florida nuclear project, Marsh, Tr. 173-175; Jones, Tr. 944-945, neither ORS nor SCE&G could offer any meaningful evidence of assessing the impact of such practices by Toshiba on the likelihood of Westinghouse default on the fixed price contract. Marsh, Tr. 151, Jones, Tr. 948-949.

There may be additional cost above and beyond the EPC contract, some of which are addressed in the agreement. There's potential, as we've discussed - as has been discussed several times in the hearings; changes in law. But, also, if, in fact, the option was selected to choose another contractor, there might be costs above and beyond the EPC contract included there, also.

Jones, Tr. 948. In short, in the event the very contingency anticipated by ORS in insisting on an SCE&G guarantee to support the fixed price option - default by Westinghouse - ORS concedes that the price of project completion would no longer be fixed; and, indeed, could increase project costs to ratepayers "considerably." Jones, Tr. 949.

Third, and finally, facing the well-grounded concerns of a Westinghouse default on the amended EPC contract, with its "fixed price" provisions - only heightened by the
evidence undermining Toshiba capacity and integrity—neither SCE&G nor ORS present any meaningful evidence of the project cost impacts on ratepayers of project abandonment by Westinghouse. Marsh, Tr. 150-151.

Q: All right. And how much would those additional costs be? Order of magnitude best estimate?
A: I cannot say, because it is totally dependent on the status of the project at the time. ...the costs could range considerably, based on the timing of when such an event occurred.

Jones, Tr. 948-949.

In light of this evidence, the Commission must reject any approval of the fixed price option of the Amended EPC contract and the Settlement Agreement which purports to endorse that option.

CONCLUSION

For the foregoing reasons, Sierra Club urges the Commission to deny the subject Petition, reject the Settlement Agreement proposed by the Office of Regulatory Staff, South Carolina Electric & Gas Company and the other settling parties, and protect ratepayers from these imprudent project costs which must be borne by SCE&G and its stockholders.

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ATTORNEY FOR SIERRA CLUB

November 3, 2016
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the above Memorandum by placing copies of same in the United States Mail, first-class postage prepaid, addressed to:

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