IN THE MATTER OF: 

Combined Application of South Carolina Electric & Gas Company for Certificate of Environmental Compatibility and Public Convenience and Necessity and for a Base Load Review Order for the Construction and Operation of a Nuclear Facility at Jenkinsville, South Carolina

SCEUC'S PETITION FOR RECONSIDERATION

The South Carolina Energy Users Committee ("SCEUC"), Intervenor in the above referenced proceeding, hereby petitions the South Carolina Public Service Commission ("Commission") for rehearing or reconsideration of Orders No. 2009-104 and 2009-104(A), dated February 27, 2009, and March 2, 2009, respectively, approving the combined application of South Carolina Electric & Gas Company ("SCE&G"). Specifically, SCEUC petitions the Commission pursuant to S.C. Code Ann. §58-27-2150 (1976) and Rule 103-854 of the Commission’s rules to reconsider certain of its findings and conclusions with respect to the capital cost contingency set out in its orders. For the reasons hereinafter set out, SCEUC would respectfully submit that the Commission overlooked and misapprehended the authority granted to it by the Base Load Review Act in this matter.

1) The Commission found and concluded that a capital cost contingency in the

\footnote{For the purposes of this petition all references are to Order No. 2009-104(A).}
amount of $438,293,000 was allowable as a component of SCE&G capital costs under the Base Load Review Act. The Commission found as follows:

An important part of evaluating the reasonableness of the Company’s price projection for the Units is evaluating the degree to which they include reasonable provisions for contingencies and inflation over the construction, as the Base Load Review Act envisions. Order No. 2009-104(A) Page 47.

The Commission further concluded:


The Commission’s order states:

…the Commission reads the statute as authorizing the Company to include a reasonable capital cost contingency in its filings, for evaluation and approval by this Commission. There is no logical or policy reason to read the statute. Order No. 2009-104(A) Page 97.

The Commission further ordered that a construction contingency pool of $438,293,000 be established. Order No. 2009-104(A) Page 124.

2) The Commission overlooked and misapprehended the nature of the authority granted it by statute to establish the anticipated components of capital costs under the Base Load Review Act. The Base Load Review Act defines capital costs as follows:

(5) “Capital costs” or “plant capital costs” means costs associated with the design, siting, selection, acquisition, licensing, construction, testing, and placing into service of a base load plant, and capital costs incurred to expand or upgrade the transmission grid in order to connect the plant to the transmission grid and includes costs that may be properly considered capital costs associated with a plant under generally accepted principles of regulatory or financial accounting, and specifically includes AFUDC associated with a plant and capital costs associated with facilities or investments for the transportation, delivery, storage, and handling of fuel. S.C. Code Ann §58-33-220(5).
A clear reading of this definition reflects that a capital cost contingency is not anticipated as a component of capital costs. Moreover, a close and careful reading of the Base Load Review Act itself reveals no definition for a capital cost contingency. There is no provision for a capital cost contingency authorized by the plain words of the statute and the Commission erred in reading such a definition or term into the statute. Nucor Steel v. South Carolina Public Service Commission 310 SC 539, 426 SE 2nd 319 (1992).

The Commission is a creature of statute and as such is possessed with only that authority specifically vested in it by the South Carolina General Assembly. South Carolina Electric and Gas Company v. Public Service Commission, 275 S.C. 487, 272 S.E.2d 793(1980). In Nucor Steel v. South Carolina Public Service Commission, the Commission, relying upon its reading of S.C. Code Ann §58-27 865(E), made adjustments to certain non recoverable fuel costs. The Supreme Court reversed the Commission holding that the Commission exceeded its statutory authority in adjusting non recoverable fuel costs. The Supreme Court holding in Nucor Steel is controlling here. Establishing a capital cost contingency, however reasonable, is beyond the Commission’s authority under the Base Load Review Act.

Nor may the Commission read S.C. Code Ann §58-33-270(B) to authorize it to establish a capital cost contingency as a component of capital costs. S.C. Code Ann §58-33-270(B) reads in part as follows:

The Base Load Review Order shall establish:

(1) the anticipated construction schedule for the plant including contingencies;
(2) the anticipated components of capital costs and the anticipated schedule for incurring them, including specified contingencies;

...
(6) the inflation indices used by the utility for costs of plant construction covering major cost components or groups of related cost components. Each utility shall provide its own indices, including: the source of the data for each index, if the source is external to the company, or the methodology for each index which is compiled from internal utility data, the method of computation of inflation from each index, a calculated overall weighted index for capital costs, and a five-year history of each index on an annual basis. [Emphasis added.]

The plain and unambiguous meaning of the statute is to authorize the Commission to establish specified contingencies for the anticipated construction schedule and the anticipated schedule for incurring capital costs. The phrase “including specified contingencies” modifies the term “anticipated schedule for incurring [anticipated components of capital costs]” and cannot be read to authorize the Commission to include a capital cost contingency as a component of capital costs. First, as stated above, the statutory definition of capital costs does not include a capital cost contingency. Second, when reading Sections 58-33-270(B)(1) and (B)(2) in harmony, it is clear that the General Assembly anticipated that construction schedules and payments schedules could not be firmly established and that scheduling contingencies were to be expected. Respectfully, the Commission’s construction of section 58-33-270(B)(1) and (2) violates the statutory intent. \(^2\) Simply put, if the General Assembly had intended for this Commission to establish a capital cost contingency as a component of capital costs, the General Assembly would have clearly and plainly authorized the Commission to do so under the Base Load Review Act.

3) The Commission erred in establishing a capital cost contingency in addition to the authorized inflation indices. The Commission found and concluded that

\(^2\) Grammatically, the phrase “including specified contingencies” found in §58-33-270(B)(2) is to be construed as relating to the noun or noun phrase adjacent to it, here “anticipated schedule for incurring them.” The American Heritage Book of English Usage. A Practical and Authoritative Guide to Contemporary English (1996), Section 47. Participles.
...these contingency percentages were determine as a matter of sound engineering judgment based on SCE&G's assessment of the potential for actual costs to be greater than the forecasted costs based on such things as the anticipated need for change orders, the potential work delays due to weather or unanticipated conditions, the potential for delays for receiving licenses and permits, the possibility that actual inflation would exceed applicable estimates or indices, and the possibility of the estimates of the units time and materials used to price the project might understate actual requirements. Order No. 2009-104(A) at Page 96.

Under the Base Load Review Act, as long as a plant is constructed in accordance with the approved schedules, estimates and projections as adjusted by the inflation indices approved by this Commission, the utility may recover its capital costs related to the plant through revised rate filings, S.C. Code Ann §58-33-280(C). The General Assembly anticipated that construction costs would increase over the life of the construction schedule and thoughtfully provided for this contingency by providing for inflation indices. There is no necessity for the Commission to take the unauthorized step of adding a capital cost contingency to satisfy a contingency already addressed by the General Assembly.

4) Moreover, the Commission erred in finding and concluding that the unauthorized contingency costs of approximately $438,293,000 were reasonable. Indeed, there exists no reasonable evidence to support the amount of the contingent costs, fixed adjustment costs and other similar costs, and for the reasons set out in its argument at trial and its brief of January 30, 2009, SCEUC respectfully requests that the Commission reconsider its findings that such costs are supported by this record.

5) The record reveals that the inflation indices approved by the Commission operate to inflate the unauthorized capital cost contingency. The capital cost contingency is not authorized by the Base Load Review Act and therefore any amounts owing to
inflation of the capital cost contingency are likewise unauthorized by the Act and should be removed from the Base Load Review Order.

6) The Base Load Review act anticipates the need for a utility, as circumstances warrant, to petition this Commission for an order modifying the Base Load Review Order, S.C. Code Ann §58-33-270(E). Unanticipated events may occur requiring a modification of the Base Load Review Order. Petitions for modification should not be considered a burden upon the Commission or the parties, but indeed, provide an added safeguard to both the utility and its rate payers. The Base Load Review Act does not vest the Commission with the authority to address unanticipated contingencies by the use of a capital cost contingency.

7) The Commission erred in concluding that the intervenors in this matter failed to meet their burden of proof with respect to the capital cost contingency. Order 2009-104(A) Page 96. SCE&G has the burden of proving that the capital cost contingency are recoverable in the Commission's Base Load Review Order. The intervenors such as SCEUC have no burden of proof of this issue. The Commission erred in so holding.
For the foregoing reasons, as well as those set out at trial and in its brief submitted January 30, 2009, the South Carolina Energy Users Committee respectfully requests that the Commission rehear those issues set out above, reconsider its orders respecting those issues and re-issue its order consistent with the arguments set out herein.

Respectfully submitted,

[Signature]

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