BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 92-023-R and 94-045-R - ORDER NO. 2000-942

NOVEMBER 16, 2000

IN RE:	Application of South Carolina Electric & Gas Company for Adjustments in the Company's Coach Fares and Charges, Rates, and Route Schedules	)))))	ORDER DENYING REHEARING AND RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on two Motions for Rehearing and Reconsideration of Order No. 2000-787, filed by various parties to this case. The Order in question was an Order on Remand concerning the transit system run by South Carolina Electric & Gas Company (SCE&G).

The first Motion was filed by the Intervenor the City of Columbia (the City). According to the City, SCE&G's divestiture of the Charleston, South Carolina transit operations may have significantly altered SCE&G's rate case. The City therefore requests that we hold a rehearing, and, in that context, more closely examine the effect of the divestiture in Charleston upon SCE&G. The City's Motion must be denied.

The South Carolina Supreme Court has clearly instructed us on when we may hold a new hearing on remand. The principle may be summarized succinctly in the following quote from Parker v. South Carolina Public Service Commission and Duke Power Company, 288 S.C.304, 342 S.E. 2d 403 (1986): "Unless this Court provides for the taking of additional evidence, no party may afford itself two bites at the apple." 342 S.E. 2d at 405. In the Parker case, the Court

held that the Commission must look at the language of the Court's opinion to determine what action it might take upon remand. For example, in that case, the Court stated that "the use of the word "consideration" (in the prior case) reveals that we intended the Commission merely to review the evidence which was admitted in the record of the hearing in 1980, not hold a new hearing for the admission of additional evidence." 342 S.E. 2d at 405.

The Order of the Honorable Allison Renee Lee in the case at bar at page 10 states that the Commission is to "consider the Company's various proposed fare and route changes and the elimination of the Low Income Discount Fare solely on the Company's transit operations without reference to the Company's electric and gas profits." Similar language is found at page 18 of the May 12, 1995 Order of the Honorable Don S. Rushing, which is referred to in Judge Lee's Order: "...the Commission is ordered to consider the fare increases, as well as the route and scheduling changes in the application SCE&G filed on March 12, 1992, based solely on the Company's transit rate base without any reference to the Company's electric or gas profits."

Obviously, since the word "consider" is a form of the word "consideration," we do not believe that we were authorized by the Circuit Courts in this case to hold a new evidentiary hearing or rehearing on this matter, pursuant to the language of the Parker case. The City's Motion is accordingly denied.

In addition, a Joint Motion for Rehearing and Reconsideration and Stay of Order No. 2000-787 was filed by the Intervenors the Woman's Shelter, the Columbia Council of Neighborhoods, South Carolina Fair Share, John C. Ruoff, Ph.D, pro se, South Carolina Department of Consumer Affairs, Rhodes, Hill, Seymour, Brown & Smith. (The Motion shall be referred to herein as the Joint Motion and the Intervenors stated above shall be referred to as the Joint Intervenors.)

First, we would note that, with regard to the portion of the Motion requesting a Stay, we have already granted a Stay of Order No. 2000-787 in our Order No. 2000-818. Therefore, we hold that this portion of the Joint Motion is moot.

The Joint Intervenors first allege that Order No. 2000-787 is not supported by findings of fact or conclusions of law. It should be noted that our Order was entered on remand, pursuant to the specific instructions of Judges Lee and Rushing as found in their respective Circuit Court Orders. A re-examination of that Order reveals that, although not labeled as such, we made specific findings as to both the law and the facts. The basis for our findings was clearly delineated. The conclusions of law to be applied were those outlined by Judges Lee and Rushing. The facts leading to those conclusions were also set out. The allegation of the Joint Intervenors is without merit.

Next, the Joint Intervenors generically state that our Order violates every one of the six areas possible to violate as seen in the Administrative Procedure Act, S.C. Code Ann. Section 1-23-380 (Supp.1999). However, there are no specific allegations of error noted in that paragraph of the Motion, or, in the alternative, none of the specific grounds mentioned in the later paragraphs of the Motion are alleged to violate any specific cited provision of the statute.

We believe that this particular section of the Motion is somewhat analogous to that seen in Smith v. South Carolina Department of Social Services, 284 S.C. 469, 327 S.E.2d 348 (1985), where the appellant to the Court basically stated that she was dissatisfied with the decision, and the Court had to "grope in the dark" in order to identify errors which in actuality may not have existed. Obviously, the Joint Intervenors in the present case have alleged other specific grounds of error which will be addressed in this Order, but a non-specific statement that we violated all of the areas of Section 1-23-380 (Supp. 1999) does not point to any specific

alleged "errors" that this Commission might address. Therefore, this ground for reconsideration must be rejected.

Next, the Joint Intervenors state that our Order is contrary to law as mandated in State ex rel. Daniel, Attorney General v. Broad River Power Co., 157 S.C.1, 153 S.E. 537 (1929) and Coney v. Broad River Power Co., 171 S.C. 377, 172 S.E. 437 (1933). The Joint Intervenors state that these cases mandate that the obligation to provide transit is tied to the electric franchise for the City of Columbia and that the Company may not abandon its obligation to provide transit while it has exclusive rights as the provider of electricity. Further, the Joint Intervenors state that both cases also stand for the proposition that the Company may not complain about losses in its transit operations as long as the Company as a whole is unimpaired.

Clearly, this has been our view of the law in the past. See Order 92-781, et al. However, Judges Rushing and Lee remanded this matter back to this Commission, based on the proposition that our view of the law is erroneous. Judge Rushing specifically held that we were ordered to consider the fare increases, as well as the route and scheduling changes in the Company's application based solely on the Company's transit rate base without any reference to the Company's electric or gas profits. Rushing Order at 18. Judge Lee's Order instructed us to implement the provisions of Judge Rushing's Order. Accordingly, we had no choice but to follow the instructions of the Circuit Courts, and we did so in Order No. 2000-787 at 2-3. Accordingly, this portion of the Joint Intervenors Motion is non-meritorious, and must be rejected.

The next allegation of error is that Order No. 2000-787 incorrectly stated in paragraph one, page 2 that "the Company operates its transit system at a substantial financial loss." The statement of error is based on the point that the joint intervenors and the Commission had argued

before the Court that SCE&G's losses were "de minimus" in light of the Company's earnings as a whole. The problem is that, pursuant to the rulings of Judges Rushing and Lee, this Commission may not view the Company's earnings as a whole when setting rates for SCE&G's transit system. We must view said rates based solely on the Company's transit rate base without any reference to the Company's gas or electric profits. When viewed in this way, the losses seen by the Company are substantial. Judge Rushing's Order substantiates this point. Judge Rushing found that even if this Commission had approved the application as submitted, the transit system would still have operated at a loss of $2.1 million per year. Our original Order No. 92-781 required SCE&G to charge rates generating a loss of $4,041,330 after taxes, and before other ordered discounts, again, based solely on the Company's transit rate base. Looked at in terms of our original view of the Broad River case, we did believe that this was not unreasonable, viewing the amount in terms of the Company as a whole. However, looked at in terms of the Company's transit rate base only as required by Judges Rushing and Lee, we believe that we were correct in calling these numbers a "substantial financial loss." Thus, we must reject this portion of the Motion.

In addition, the Joint Intervenors allege that we failed to consider or review when ordering relief the Company's various proposed fare and route changes and the elimination of the Low Income Discount Fare (based) solely on the Company's transit operations without reference to the Company's electric and gas profits. Such is not the case. When one considers our declaration found on page 4 of Order No. 2000-787, we had no choice but to consider the matter and implement the relief sought in the Company's original application, with the few exceptions noted. Our declaration, again issued in response to the Orders of Judges Rushing and Lee, reads as follows:

> "The Due Process and Taking Clauses of the United States and South Carolina Constitutions, along with sound regulatory practice, require that SCE&G's transit fares be set at a level providing a reasonable and nonconfiscatory rate of return on its transit operations standing alone. SCE&G is entitled to earn a compensatory rate of return on its transit operations standing alone and the Commission lacks authority to increase SCE&G's transit losses above the level the Company is voluntarily willing to sustain."

Given this declaration, we had no choice in Order No. 2000-787 but to implement the relief sought in SCE&G's original application, with the few exceptions noted, since the application stated the level of transit losses that the Company was willing to sustain. See Judge Rushing's Order at 3, wherein it is stated that approval of SCE&G's application as submitted would still have resulted in a loss of approximately $2.1 million per year. With this in mind, we had no choice but to review the matters of the fares, and scheduling changes, and to substantially grant the Company's application in Order No. 2000-787, which we did at pages 2-3. Further, since the low income fare clearly increased the level of transit losses beyond that which the Company was willing to sustain, we had no choice but to eliminate it. Accordingly, we again reject the allegation of error, since we acted in accordance with the principles stated in the Orders of Judges Rushing and Lee.

Further, the Joint Intervenors allege that this Commission must take into account the reductions in losses to the Company in light of the transfer of transit operations to the City of Charleston and how this transfer impacts any remaining transit losses to the Company. Additionally, since these losses are "only" $2.1 million annually after divestiture of the Charleston transit operations, and less than the amount requested by the Company in its original application to this Commission, the Joint Intervenors state that this Commission must evaluate each point in the original application to determine whether or not the relief requested is warranted based on the evidence in the record.

First, we would note that Order No. 2000-787 eliminates any fare, route and scheduling changes attributable to the City of Charleston. Order at 2. Second, the Order of Judge Rushing, endorsed by the Order of Judge Lee states that we were to "consider the fare increases, as well as the route and scheduling changes in the application SCE&G filed on March 12, 1992 (emphasis added)." We followed that mandate, and, under the Courts' orders, we may not review anything but the points in the original application. Further, under the Parker authority, supra, we may not hold an additional hearing to consider the effect of the divestiture of the Charleston transit system on the application. Accordingly, we did what we could under the narrow charge given us by the Court in this case, and simply eliminated any fare, route and scheduling changes attributable to the City of Charleston in Order No. 2000-787. Further, even if we accept the proposition of the Joint Intervenors, which state that the present losses are "de minimus," then the Charleston losses must also have been "de minimus," and, therefore, would have little or no effect on the Company's application in any event. We again reject the allegation of error.

Additionally, the Joint Intervenors allege that this Commission somehow conceded that the regulated transit and utility operations are inextricably bound together, by failing to note that the Company in its application to transfer the transit operations to the City of Charleston allocated costs of divestiture to its electric operations. Again, we would state that our traditional view of the matter has been that the transit and utility operations of SCE&G were inextricably bound together. However, once again, the Courts, through the Orders of Judges Rushing and Lee, have told us that we were wrong in that view. We were required to issue Order No. 2000-787 in compliance with the Orders of those Judges, which we did. Therefore, the contents of that Order should not be viewed as conceding anything, since that Order was issued strictly in

accordance with the views expressed by Judges Rushing and Lee in their Orders. Therefore, this allegation of error is non-meritorious.

In addition, the Joint Intervenors state that we failed to note that the Company never sought, nor is it entitled to eliminate the bulk low income discount coupon fare available to service providers, such as the Woman's Shelter, that was ordered by this Commission beginning in 1987. Once again, we must operate under the tenets of the declaration issued in Order No. 2000-787, which was issued pursuant to the Orders of the Circuit Judges: this Commission lacks authority to increase SCE&G's transit losses above the level the Company is voluntarily willing to sustain. See Order No. 2000-787 at 4. Clearly, SCE&G's application defines what losses the Company is voluntarily willing to sustain. Accordingly, under the declaration, we lack authority to order any fares or programs which increase SCE&G's losses beyond those which the Company is willing to sustain. Therefore, in the present case, we only possess the authority to grant the relief sought in the Company's application before us, which did not include the bulk low income discount coupon fare. Therefore, under the Court's holding we could not order this special fare. Thus, the allegation of error is without merit.

Next, the Joint Intervenors state that we erred in failing to make a specific finding that the Company could obtain the relief sought in reducing losses without eliminating the Low Income Rider Discount Fare. This statement of error is also non-meritorious, for the reasons given above, i.e. such a fare was not contained in the Company's application, therefore it would increase the Company's losses beyond a level that the Company is willing to sustain. Since our declaration states that we are without authority to grant any other relief, we had no authority to maintain the Low Income Rider Discount Fare.

In addition, an allegation is made that this Commission failed to make findings of fact and conclusions of law with regard to specific rates, charges and services in light of the Company's application to accept certain losses from transit operations. The Joint Intervenors go on to state that such relief, if otherwise proper, is available without eliminating the Low Income Rider Discount Fare, increasing rates and charges, and eliminating service. The Joint Intervenors give the example that the Low Income Rider Discount could be maintained by providing the Company with a different level of increase to other fares. Again, we must reject the allegation of error. Although not denominated as such, Order No. 2000-787 contained sufficient findings of fact and conclusions of law with regard to the adopted rates, charges, and services. This Commission held that "the Company is authorized to implement the fare, route, and scheduling changes attached hereto and made a part hereof as Attachment 1, except as delineated below." Order No. 2000-787 at 2. The findings were supported by a statement of the law as set out in the Orders of Judges Rushing and Lee. Id.

Further, even though it may be theoretically possible to maintain a Low Income Rider Discount Fare by providing the Company with a different level of increase in other fares, the Commission is not required to adopt the views of the Joint Intervenors. Our instructions from the Court were two-fold: (1) First, we were ordered to consider the fare increases, as well as the route and scheduling changes in the application SCE&G filed on March 12, 1992, based solely on the Company's transit rate base without any reference to the Company's electric or gas profits. (2) Second, we were cautioned that we lacked authority to increase SCE&G's transit losses above the level the Company is voluntarily willing to sustain. The Company obviously presented testimony to support its application, and which reflected the above-stated principles. See Order No. 92-781. The Joint Intervenors, however, have not cited us to any testimony in the

record that would support an adoption of the Low Income Rider Discount Fare with a different level of increase in other fares. Since our holding is supported by the substantial evidence of record, we decline to modify our holding to comport to a view not supported by such evidence. Again, we must reject the Joint Intervenors' contention.

Next, the Joint Intervenors state their belief that this Commission erred in granting the Company's relief as to routes and scheduling changes. We do agree that we made a previous statement to the effect that one of the Company's witnesses as to routes and scheduling changes was not credible. See Order No. 92-781. However, under the Court's mandates as stated above, we are required to consider routes and scheduling changes in the Company's original application based solely on transit rate base, and resulting in rates that do increase the Company's transit losses above a level that SCE&G is willing to sustain. Under this mandate, with the exception of some routes mentioned in Order No. 2000-787, we must essentially adopt the Company's routes as proposed in its application. In order to do this, we must rely on the testimony of Company witnesses Tudor and Kinloch as found in the record, no matter what our original beliefs may have been about the credibility of either witness. For this reason, we hereby rely on the testimony of Company witnesses Tudor and Kinloch to support our decision to adopt (with the stated exceptions) the SCE&G routes and scheduling changes. Obviously, Order 94-175 subsequently made some route changes which were somewhat different than those originally proposed, and these were made with the agreement of the parties. We reserved the Order No. 94-175 route changes in Order No. 2000-787. To the extent that the route changes in Order No. 94-175 were adopted by Order No. 2000-787, we hereby adopt the principles espoused by Order No. 94-175, and the testimony of the expert witness cited therein. In any event, we reject the allegation of error cited by the Joint Intervenors.

Lastly, the Joint Intervenors allege that this Commission erred in finding that it did not have jurisdiction over matters concerning Dial A Ride Transit Service (DART) for the disabled. According to the Joint Intervenors, federal statutes and regulations do not preempt state authority to regulate transit above and beyond federal minimum levels. Once upon a time, we would have agreed with this statement of the law. However, Judge Lee has issued a mandate to follow Judge Rushing's Order. Order of Judge Lee at 9. Judge Rushing states that this Commission has no jurisdiction over SCE&G's DART service areas, and that such jurisdiction is a matter of federal jurisdiction. Order of Judge Rushing at 18. Accordingly, we must reject the final allegation of error of the Joint Intervenors as an incorrect statement of the law.

Because of the reasoning stated above, the Motion of the Joint Intervenors for Rehearing and Reconsideration and Stay of Order No. 2000-787 is hereby 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)