BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2016-223-E - ORDER NO. 2017-118
FEBRUARY 28, 2017

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)

ORDER RULING ON PETITIONS FOR REHEARING OR RECONSIDERATION

On November 28, 2016, the Public Service Commission of South Carolina (“the Commission”) issued Order No. 2016-794 granting the relief sought in the Petition in this docket as modified by a Settlement Agreement entered into by the South Carolina Office of Regulatory Staff, South Carolina Electric & Gas Company (SCE&G), the South Carolina Energy Users Committee, Electric Cooperatives of South Carolina, Inc., Central Electric Power Cooperative, Inc., and Frank Knapp. On December 6, 2016, the Sierra Club timely filed its Petition for Rehearing or Reconsideration of Order No. 2016-794. On December 8, 2016, the South Carolina Coastal Conservation League (“CCL”) also timely filed its Petition for Rehearing or Reconsideration. Further, on December 12, 2016, Sandra Wright untimely filed a Petition for Rehearing or Reconsideration. Because Ms. Wright did not file her Petition within the time limits set by S.C. Code Ann. Section 58-27-2150, this Commission may not address the allegations therein, and this Petition must be denied.

With regard to the first two filed Petitions, the Sierra Club and CCL assert that the Commission’s findings and conclusions contained in Order No. 2016-794 are in error. These Petitions are without merit and are hereby denied.
I. STANDARD OF REVIEW

The purpose of a Petition for Rehearing and/or Reconsideration is to allow the Commission to identify and correct specific errors and omissions in its orders. Pursuant to S.C. Code Ann. § 58-27-2310, “[n]o right of appeal accrues to vacate or set aside, either in whole or in part, an order of the commission…unless a petition to the commission for a rehearing is filed and refused….“ Additionally, a party cannot raise issues in a motion to reconsider that were not raised during the proceeding. See Kiawah Prop. Owners Group v. Pub. Serv. Comm’n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).


A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:
(a) The factual and legal issues forming the basis for the petition;
(b) The alleged error or errors in the Commission order;
(c) The statutory provision or other authority upon which the petition is based.

Conclusory statements that amount to general and non-specific allegations of error do not satisfy the requirements of the rule. See In re S.C. Pipeline Co., Docket No. 2003-6-G, Order No. 2003-641, at 6 (“[A] conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support a [petition for reconsideration].“). While the requirement of specificity in post-trial motions is interpreted with flexibility, at minimum the decision-making body “must be able to both comprehend

II. ALLEGED ERRORS CONTAINED IN THE ORDER

A. The Sierra Club’s Allegations

The Sierra Club’s Petition for Rehearing or Reconsideration asserts eleven errors that it alleges the Commission committed in Order No. 2016-794. However, these allegations are presented in conclusory language unsupported by citations to the transcript of record or any sort of sustained legal or regulatory analysis. As such, in most instances, the allegations are inadequate to fairly indicate to the Commission precisely why the Sierra Club believes Order No. 2016-794 is in error. It further fails to adequately explain how those asserted errors can be addressed or corrected. Therefore, for reasons discussed more fully below, we find the Petition for Rehearing fails under 10 S.C. Code Ann. Reg. § 103-825(4) and the Camp v. Camp, supra, standard.

Nevertheless, the Commission has carefully parsed the Sierra Club’s Petition and reads it to assert the legal errors and procedural errors which are discussed below. Should the Sierra Club assert that it intended to raise challenges that are not discussed here, the Commission’s failure to discuss them would be the result of the Sierra Club failing to raise those challenges with clarity and specificity as 10 S.C. Code Ann. Reg. § 103-825(4) and Camp require. We consider these challenges to be abandoned.

1. Substantial Evidence

The Sierra Club’s Petition for Rehearing or Reconsideration questions the substantial evidence supporting only one of the findings contained in Order No. 2016-794.
Sierra Club Petition for Rehearing at 6. Specifically, the Sierra Club asserts in Item 11 that substantial evidence does not support the Commission’s finding that SCE&G’s decision to enter the October 2015 Amendment to the EPC Contract (the “Amendment”) at a cost of $137.5 million was not the result of imprudence on the part of the Company. The Sierra Club’s challenge to the Commission’s evidentiary finding reads as follows:

ORS’s expert Jones testified [that]. . . “detailed auditable estimates to back up changes” in plant capital costs are necessary for approval of such new costs under the Base Load Review Act, yet such documentation for the negotiated dispute settlement, for the most part “do[sic] not exist.” Such costs are imprudently incurred and the Commission’s approval of such cost increases is not supported by substantial evidence.

Sierra Club Petition for Rehearing at 6. As this language indicates, one aspect of the Amendment was that it resolved some 65 individual claims and payment disputes among the parties. Tr. at 394, 613.

The Sierra Club asserts that Mr. Jones’ testimony states a binding standard under the Base Load Review Act (“BLRA”) that changes in capital cost forecasts must be based on “detailed, auditable estimates.” Sierra Club Petition at 6. That language, however, appears nowhere in the statute or in the cases or orders construing it. In fact, it is inconsistent with the language of the statute, which imposes a different standard.

S.C. Code Ann. § 58-33-270(E) sets forth the applicable standard which the Commission must apply in this docket. Specifically, under S.C. Code Ann. § 58-33-270(E), the Commission must determine whether “the evidence of record justifies a finding that the changes [proposed to BLRA approved cost schedules] are [or are not] the result of imprudence on the part of the utility.” As it has done in prior proceedings, the Sierra
Club cites to “cost overruns” terminology addressed by the “material and adverse deviation from the approved schedules” standard appearing in S.C. Code Ann. § 58-33-275(E). Sierra Club Petition at 3. In formulating its challenge to SCE&G’s Petition, the Sierra Club again confuses the statutory standard that applies to this proceeding; something we have previously addressed in Order Nos. 2015-661 and 2016-794. Simply put, in proceedings to amend cost or construction schedules that have been previously approved under the BLRA, the statutory standard is found in S.C. Code Ann. § 58-33-270(E). The South Carolina Supreme Court has affirmed this view. See South Carolina Energy Users Committee v. South Carolina Electric and Gas, et al, 410 S.C. 348, 764 S.E. 2d 913 (2014).

Contrary to the Sierra Club’s position, the evidence of the record shows that the statutory standard is clearly met regarding the $137.5 million capital cost schedule adjustment associated with the Amendment, and SCE&G’s decision to incur the cost of the Amendment was not the result of imprudence on the part of the Company. The evidence supporting the Commission’s decision on this point is copious, consistent and fully persuasive to us. In 2015, SCE&G and Santee Cooper were presented “with a unique, short-term opportunity to negotiate significant benefits for [their] customers” when Chicago Bridge & Iron (“CB&I”) decided to exit their involvement in new nuclear construction. Tr. at 57.

For CB&I to leave the Consortium (created pursuant to the agreement that it had entered into with Westinghouse to build the Units), CB&I would need to obtain a release of the parental guarantee it gave SCE&G and Santee Cooper when it joined the Consortium. Using the leverage that this provided, SCE&G and Santee Cooper pursued
two principal goals in the ensuing negotiations: One was to restructure the EPC Contract to support the timely and efficient completion of the Units. The second was to limit SCE&G’s and Santee Cooper’s exposure to future price increases under the EPC Contract. *Id.* at 59-60.

To achieve those objectives, SCE&G and Santee Cooper negotiated the Amendment as a single integrated package of costs and benefits, instead of attempting to quantify the value of individual concessions by Westinghouse or to allocate the $137.5 million cost of the Amendment among the specific terms negotiated in an item by item discussion of the 65 disputed claims between the companies. Tr. at 455. As a result, we find that SCE&G’s approach to these negotiations was not the result of imprudence on the part of the Company, particularly in light of the importance of obtaining the package of benefits found in the Amendment and how it supported the strategic goals that SCE&G and Santee Cooper were pursuing. Bogging the negotiations down in an item by item discussion of the 65 disputed claims may not have been as effective as the approach taken by SCE&G and Santee Cooper. More to the point, the fact that the process by which the $137.5 million figure was negotiated did not result in “detailed, auditable estimates” of individual costs related to the 65 payment disputes is not in and of itself determinative of the issue presented to the Commission. The question before the Commission is this: Was it the result of imprudence on the part of the Company for SCE&G to pay $137.5 million to obtain the package of benefits it obtained by signing the Amendment? The Commission finds that it was not the result of imprudence on the part of SCE&G.
The benefits flowing from the Amendment are explained in detail in the testimony of SCE&G’s witnesses Mr. Byrne (Tr. at 418-21, 424-30, 445-47), Mr. Marsh (Tr. at 58-62), and Dr. Lynch (Tr. at 783, Hearing Exhibit 12), and we find that the testimony of these witnesses is credible and persuasive. Specifically, the evidence of record establishes that the Amendment provides the following benefits in addition to the resolution of the 65 payment disputes:

a. **Restructuring the Consortium:** Prior to the Amendment, the divided nature of the Consortium caused inefficiency, confusion and delay in the project. It fostered payment disputes between Consortium members which hindered the adoption of schedule mitigation plans. Disputes spilled out into the supply chain. Tr. at 392, 421-22. The Amendment ended the divided nature of the Consortium and made Westinghouse the single point of accountability for all aspects of the project. To achieve that end, it was necessary to settle the 65 outstanding claims so that CB&I could make a clean exit from the project. Accordingly, there is a direct relationship between the settling of these claims and the restructuring of the Consortium, which is a major benefit to the project.

b. **Replacement of CB&I with Fluor:** In the years leading up to the Amendment, CB&I had demonstrated that it lacked the experience needed to control costs and meet schedule commitments for a mega-project of this scope. Tr. at 392, 421-22, 503; see also Order No. 2015-661 at 18-19, 21. The Amendment allowed CB&I to exit the project and for Fluor Corporation to become construction manager in CB&I’s place. Fluor is a highly experienced power generation mega-projects contractor with global reach, deep nuclear experience and strong South Carolina roots. Tr. at 425-26. Fluor has already
begun to make important schedule and efficiency improvements at the site. Tr. at 425-28. The substitution of Fluor for CB&I is a major benefit to the project, one which required the resolution of the 65 claims so that CB&I could leave the project.

c. **Restoring Liquidated Damages:** Prior to the Amendment, the actual forecasted completion dates for the Units had advanced beyond the point where the cap on liquidated damages was reached. Additional completion delays would have resulted in no additional liquidated damages. Tr. at 428. The Amendment reset the liquidated damages and increased them four-fold, giving Westinghouse a package of payments at risk for timely completion of the project which totals nearly $1 billion on a 100% basis (Santee Cooper and SCE&G’s share). *Id.* at 810-11. This increase in liquidated damages constitutes a major benefit to the project, for which a reasonable contractor would expect compensation.

d. **Changes in EPC Contract Terms:** The Amendment made multiple changes in the EPC Contract that clearly benefit SCE&G, Santee Cooper and their customers at Westinghouse’s expense. Those changes created a dispute resolution board, prohibited lawsuits while construction is on-going, tightened up key contractual terms to limit future change orders, and created a milestone-based payment system where Westinghouse is only paid when key aspects of the job are complete. Tr. at 37-40, 418-21. All of these changes limit costs to SCE&G and Santee Cooper and their customers while at the same time limiting future disputes that could side-track the project. A contractor would expect compensation for these changes.
e. **The Fixed Price Option:** The largest single benefit of the Amendment gave SCE&G and Santee Cooper the unilateral and irrevocable right to fix the costs to be paid to Westinghouse after June 20, 2015, with limited exceptions, to $3.345 billion. The Commission finds Dr. Lynch’s analysis and testimony to be credible and persuasive when he calculates that this fixed price option is likely to save SCE&G and its customers between $363 million and $981 million over the life of the project.\(^1\) Exhibit 12 at 9, 10. Accordingly, by securing this irrevocable option, the Amendment confers a benefit worth many hundreds of millions of dollars to SCE&G and its customers. Granting this type of unilateral and irrevocable option is a concession for which a contractor would expect compensation.

f. **The Settlement of the 65 Claims:** As to the 65 claims that were resolved by the Settlement, Mr. Kochems has prepared an analysis showing that the 9 most clearly documented claims alone can be conservatively valued at approximately $224 million. The Commission finds that this analysis is probative of the fact that there was substantial monetary value associated with the claims themselves, enough in fact to justify SCE&G paying $137.5 million to resolve them.

In light of the magnitude of these benefits and the preponderance of the evidence establishing them, this Commission cannot find that it was imprudent for SCE&G to enter into the Amendment or that the costs associated with the Amendment are the “the result of

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\(^1\) In Order No. 2016-794, the Commission stated that the Option will save SCE&G’s customers between $118 million and $981 million. Order No. 2016-794 at 17-18. However, upon further review of the testimony of Joseph Lynch, the Commission revises this statement and concludes that the Option will save SCE&G’s customers between $363 and $981 million. See Hearing Exhibit No. 12 at Appendix B.
imprudence on the part of the utility.” S.C. Code Ann. § 58-33-270(E). To enter such a ruling based on the absence of “detailed auditable estimates” surrounding certain of the 65 claims would elevate form over substance in this case. The record shows that the strategic benefits to the project that SCE&G extracted from Westinghouse and the cost reductions embedded in the Option far exceed the $137.5 million paid for the Amendment. Accordingly, SCE&G’s decision to pay the $137.5 million cost of the Amendment was not the result of imprudence on the part of the Company.

2. Known and Measurable Values/Negotiated Values/Fixed Price Values

Six of the 11 itemized grounds on which the Sierra Club seeks rehearing (Paragraphs 1, 3, 4, 5, 9 and 10) allege in one way or another that the Company’s cost adjustments reflect costs which are not 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 capital [sic] costs within the meaning of the Baseload [sic] 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’ provisions of its amended EPC contract . . . .

Sierra Club’s Petition for Rehearing or Reconsideration at 1-2. The individual components of this allegation are discussed below.

a. Known and Measurable Values

The known and measurable standard is not, as the Sierra Club claims, a general purpose standard for evaluating all utility costs. Such a standard cannot be used when assessing costs which are anticipated and prospective. For that reason, the known and

In two prior orders, the Commission has explained this distinction. See Order No. 2015-661 at 60-61; Order No 2016-794 at 29-30. The prior orders point out that the known and measurable standard applies in rate making proceedings where the historical test period method is used to set utility rates. In such cases, changes occurring after the close of the test period may be recognized only if they are known (there is a high degree of certainty that change will in fact occur) and measurable (the effect of the change can be accurately quantified in advance). Hence the full name of the standard is the known and measurable standard for recognizing out of period adjustments to historical test-period data.

This known and measurable standard does not apply here because there is no historical test period and the costs that the Commission are measuring are all anticipated and prospective costs. “Where forward-looking forecasts under the BLRA are concerned, the anticipated costs are all forecasted costs, they are prospective, and have some degree of uncertainty as to timing and amount.” ² Order No. 2016-794 at 30. It would be a mistake of regulatory policy to apply rules intended to govern historical test-period ratemaking when assessing such prospective costs.

² This does not mean that speculative or uncertain costs may be recognized for rate making purposes. Revised rates to recover financing costs during the construction of a plant are set under S.C. Code Ann. § 58-33-280(C). Only actual capital costs are considered, specifically capital costs that have been incurred and reflected in the “outstanding balance of construction work in progress” as shown on the utility’s books. S.C. Code Ann. § 58-33-280(B). For that reason, revised rates never reflect speculative or uncertain items.
In fact, there are a number of different proceedings where the Commission sets rate components or rate riders based on prospective cost information, including annual proceedings to set electric fuel factors and demand-side management riders. In none of these proceedings does the known and measurable standard properly apply. Doing so would make the regulatory approach unworkable since the rate components or rate riders established by these proceedings are based on reasonable forecasts of future fuel costs or program expenses, none of which would meet the known and measurable standard. For these reasons, the Commission has consistently ruled that the known and measurable standard does not apply in proceedings under S.C. Code Ann. § 58-33-270(E) just as it does not apply in other proceedings involving prospective costs.

b. Values Negotiated by the Company in Settlement of Disputed Claims

The Sierra Club asserts that cost “values negotiated by the Company and its contractor in settlement of disputed claims” or “to induce completion of the units pursuant to the exercise of the so-called ‘fixed price option’ provisions of its amended EPC contract”

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3 There are a number of instances in which the Commission does set rates based on forecasts of prospective costs. Examples are proceedings where the Commission sets forward-looking electric fuel cost recovery factors, demand-side management (“DSM”) riders and distributed energy resource (“DER”) program costs. S.C. Code Ann. 58-27-860 (electric fuel clause); S.C. Code Ann. 58-39-130 (DER Program).

Where the Commission bases rates on prospective costs, it calculates those rates using reasonable forecasts, projections or budgets of future costs, which by nature are not precisely known and measurable. Where rates are set based on forecasted or projected costs, the Commission typically trues up those rates annually, based on actual costs incurred during the prior period, and reflecting any over or under-recovery of actual costs given actual sales during the period. That is not a concern under the BLRA since revised rates filings are made only on costs that have been spent by the Company, audited and verified by the ORS.
are not capital costs of a project that can be recognizable under S.C. Code Ann. § 58-33-270(E). Sierra Club’s Petition for Rehearing or Reconsideration at 1-2. The Sierra Club offers no support for these assertions either in law or regulatory policy (see Camp, supra) and the Commission finds that there is none.

The BLRA defines the capital cost of a plant to include all “costs that may be properly considered capital costs associated with a plant under generally accepted principles of regulatory or financial accounting.” S.C. Code Ann. § 58-33-220(5). Accounting rules make no distinction between costs which are disputed and then settled versus costs that are accepted and paid as invoiced. Nor do they make distinctions between costs that are paid under fixed price contracts or to obtain such contracts and costs paid under cost-plus contracts or to obtain cost-plus contracts. Generally accepted principles of regulatory or financial accounting recognize all such costs as potentially valid capital costs of the assets with which they are associated. By incorporating those standards, the BLRA makes it clear that all costs of a construction project are recognized as capital costs under it as long as the statutory standards set forth in the BLRA are met. S.C. Code Ann. § 58-33-220(5).

The Commission has applied this rule consistently from the earliest proceedings under the BLRA. Three specific orders are relevant:

**Order No. 2009-104(A):** In the initial SCE&G BLRA proceeding, the largest single group of costs was the EPC Contract costs in the Fixed and Firm cost category. See Order No. 2009-104(A) at 78-79. These Fixed and Firm costs represented 54% of the original EPC Contract price. In formalizing the EPC Contract, SCE&G negotiated with
the Consortium to accept the price risk for these cost categories and paid a reasonable premium to the Consortium to do so. See Order No. 2009-104(A) at 73-74. Their inclusion in BLRA cost forecasts for the Units was approved by the Supreme Court in Friends of Earth v. Public Service Comm’n of South Carolina, 387 S.C. 360, 692 S.E.2d 910 (2010) and S.C. Energy Users Committee v. S.C. Public Service Comm’n, 388 S.C. 486, 697 S.E.2d 587 (2010) (disallowing contingency costs but allowing all other forecasted costs). They constitute precisely costs “to induce completion of the units” pursuant to fixed and firm price provisions of its EPC contract, such as the Sierra Club now would have the Commission rule to be impermissible.

Order No. 2011-345: In the 2011 update proceeding, the Commission approved Change Order No. 8, which shifted an additional $315 million in costs to the Fixed and Firm cost category. Order No. 2011-345 at 29-31. To fix this additional $315 million in costs, SCE&G paid the Consortium $10 million as “negotiated risk compensation,” as Order No. 2011-345 indicates. Id. at 30. Witnesses for the ORS agreed that this risk compensation payment was a valid and beneficial capital cost of the project and should be included in the BLRA capital cost forecasts. Id. at 31. The Commission agreed. Id. There was no appeal of this Order.

Also included in this $10 million payment, and not in any way itemized and broken out from it, was settlement of claims for additional costs that the Consortium had brought against SCE&G for a larger derrick to serve the project than had been originally priced. Id. Thus, Order No. 2011-345 involved both costs “to induce completion of the units” pursuant to Fixed and Firm price provisions of its EPC contract, and “values negotiated by
the Company and its contractor in settlement of disputed claims” such as the Sierra Club now argues are impermissible.

**Order No. 2012-884:** In the 2012 update proceeding, Change Order No. 16 was the largest single item presented for review with a cost of $137.5 million. Order No. 2012-884 at 33. That change order resolved disputed claims made by the Consortium for additional compensation due to (a) the redesign of the shield building, (b) the Nuclear Regulatory Commission’s delay in issuing the combined operating licenses for the Units, (c) costs associated with redesign of the structural modules for the Units and (d) unanticipated rock conditions at the site. *Id.* at 34-37. These claims were resolved through negotiations with the Consortium agreeing to fix the price of these items at approximately 64% of the Consortium’s original demand. *Id.* at 38-39.

The Commission found that “Change Order No. 16 reflects the cost of a reasonable and well-negotiated resolution to a complex and difficult set of claims.” *Id.* at 39. It also found that “the benefits of such a settlement to the project . . . are considerable particularly compared to the potential divisiveness, distraction and expense of litigating claims of such complexity.” *Id.* at 39.

Along with the South Carolina Energy Users Committee, the Sierra Club appealed Order No. 2012-884, specifically asserting that the costs associated with Change Order No. 16 had not been shown to be prudent. The court upheld the Commission’s findings. “[T]he Commission parsed all of the evidence presented during the hearing and provided a detailed summary of all of the testimony on which it based its very technical findings.” *South

This regulatory history shows that the established policy and practice under the BLRA, as well as the language of the statute itself, are fully consistent: There is no rule disfavoring costs associated with negotiated settlements of disputed claims or disfavoring agreements to fix the price of future work. In major base load construction projects, settlements and fixed cost agreements can be exceedingly beneficial to customers and the State of South Carolina by reducing litigation risk and cost risk and creating certainty. There is no reason in regulatory policy to disfavor them.

As Order No. 2016-794 indicates, the Commission has carefully reviewed the evidence of record supporting the costs which the Sierra Club challenges. There is no need to repeat those findings here. The evidence of record supports the finding that the change in costs of the Units is not the result of imprudence on the part of SCE&G.

3. Speculative or Un-Itemized Expenses

At various points in its Petition for Rehearing (Items 4, 5, and 9), the Sierra Club asserts that the costs associated with the Fixed Price Option are “speculative” and “un-itemized” costs such as were ruled inadmissible contingency costs in South Carolina Energy Users Committee v. Public Service Commission, 309 S.C. 486, 697 S.E.2d 587 (2010). The Commission finds that this is not the case.

The “speculative” and “un-itemized” costs which the Court disallowed in South Carolina Energy Users Committee were owner’s contingencies of between 5% and 20% imposed on the seven principal cost categories contained in the EPC Contract, plus
Owner’s Cost and Transmission Cost. In the *Energy Users* case, the Court was particularly concerned by testimony from the Company’s witnesses indicating that the Company did not in fact plan to spend the funds that these contingencies represented. *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm’n*, 388 S.C. 486, 495, 697 S.E.2d 587, 592 (2010). For this reason, the Court found the contingency amounts to be “speculative” and disallowed them.

The costs presented in this proceeding are the opposite of speculative. The $137.5 million cost adjustment associated with the Amendment and the additional $505 million increase in the EPC Cost under the Option will fix at precisely $3.345 billion (with limited exceptions) the cost that SCE&G will pay Westinghouse for invoices paid after June 30, 2015. Thus, SCE&G is committed to pay Westinghouse a sum certain of $3.345 billion for the work covered by the Option. That payment is as devoid of speculation as any cost projection in a project of this type can be.

By contrast, in Order No. 2009-104(A) and every subsequent order until Order No. 2016-794, only one category of costs, Fixed with No Adjustment, was fully fixed, as effectively all EPC costs are today. In the prior proceedings, the eight other cost categories were subject to potential increases due to things such as changes in escalation rates, labor rates, required units of labor, material costs, required units of materials, and subcontractor’s costs. As a result of the Amendment and the Option, the costs approved in this proceeding are certain to a level that has not been present in any of the other cost projections approved in previous BLRA orders.
Nor are the EPC Costs approved here un-itemized. The effect of the Option is to transfer the existing schedules of costs and scopes of work in the EPC Contract from the Target and Firm with Adjustment cost categories to the Fixed with No Adjustment category. Tr. at 812. A new payment schedule is being prepared that ties the remaining EPC payments to the completion of specific construction milestones, further itemizing the payment of costs. Tr. at 809-10. There has been no loss of itemization in this process.

4. Used and Useful Costs

The Sierra Club claims in Item 7 that the costs under review in this proceeding “are not used and useful in providing utility service” and so should not be approved by the Commission.” Sierra Club’s Petition for Rehearing or Reconsideration at 4. This claim represents a fundamental confusion about what the term “used and useful” means in the context of utility regulation.

The used and useful standard applies when setting rates to generate a specified return on a utility’s rate base. The “used and useful” standard distinguishes the “property which it [the utility] necessarily devotes to rendering the regulated services” from non-utility property which is not included in rate base and so is not used in determining rates. *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286 n. 1, 422 S.E.2d 110, 112 n. 1 (1992) (quoting *Southern Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n of S.C.*, 270 S.C. 590, at 600, 244 S.E.2d 278, at 283 (1978)).

Proceedings under the Base Load Review Act are not concerned with calculating a return on rate base. They are concerned with the capital costs of yet to be completed base load units as those costs are reflected in construction work in progress accounts, which the
BLRA defines as the utility’s investment in assets that “have not been included in plant-in-service,” i.e. property which has not yet closed to rate base. S.C. Code Ann. § 58-33-220(5) and (8). By definition, the capital costs of a plant under construction are not “used and useful . . . in rendering the regulated services.” Hamm, supra. They cannot be “used and useful” until they are completed and put into service. To require costs to be used and useful before being included in a schedule of “anticipated components of capital cost” under S.C. Code Ann. § 58-33-270(E) would make nonsense of the BLRA.

Moreover, the Base Load Review Act specifically addresses the used and useful issue: “A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes” so long as it is completed in compliance with the schedule approved by the Commission. S.C. Code Ann. § 58-33-275(A). Thus plants built according to the BLRA become used and useful when completed according to an approved schedule. But used and useful is not a standard that applies in updating anticipated capital cost schedules under S.C. Code Ann. § 58-33-270(E) while construction is ongoing.

5. The Sierra Club’s Due Process Rights

The Sierra Club asserts that the Commission violated its due process rights “by accepting a settlement agreement to which the Sierra Club was not a party, and failing to resolve all issues disputed by the non-settling parties, including Sierra [sic], through the normal adjudicatory process . . . .” Sierra Club Petition for Rehearing at 2. This is not accurate.
The BLRA provides that:

The commission promptly shall schedule a hearing to consider any settlement agreement entered into between the Office of Regulatory Staff, as the party representing the public interest in the proceedings, and the utility applicant, provided that all parties shall have been given a reasonable opportunity to conduct discovery in the docket by the time the hearing is held. 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.


In this case, to ensure full protection for the rights of non-settling parties, the Commission conducted the settlement hearing contemporaneously with the full evidentiary hearing that it had scheduled shortly after the docket was opened. All parties were given full opportunity for discovery as if there had been no settlement. No limit was imposed on the evidence that the Sierra Club and other non-settling parties could offer or the cross examination they could conduct at the hearing. The Sierra Club did not present any witnesses. The settlement in no way affected the course of the proceedings before the Commission.

As to its order, the Commission evaluated the evidence and applied the appropriate standard of review to each issue which it was required to decide in this matter. It did so independently of and prior to its consideration of the Settlement Agreement. See Order No. 2016-794 at 14-22. Only when the operative issues had been decided based on the evidence adduced at hearing did the Commission take up the Settlement Agreement and approve it. Id. at 22-25.
In the Settlement Agreement, SCE&G agreed to several items which provide valuable benefits and protections to its customers. They include the moratorium on update dockets until Unit 2 is nearing completion, the “guarantee” of the Fixed Price Option as set forth in the Settlement Agreement, the reduction in prospective return on equity and enhanced reporting requirements. By adopting the terms of the Settlement in its Order, the Commission ensured that the terms of the Settlement which benefit customers would become binding on SCE&G.

In no way were the Sierra Club’s due process rights violated by the Commission’s consideration and approval of the Settlement Agreement. All procedural rights of the Sierra Club and other parties have been protected. Further, no violation of the due process principles elucidated in *Leventis v. SCDHEC*, 340 S.C. 131-135, 530 S.E. 2d 643 (S.C. App., 2000) has occurred, since the Sierra Club was afforded a full opportunity to participate in this proceeding.

6. Expert Testimony

Item 8 of the Sierra Club’s Petition for Rehearing or Reconsideration alleges that the Commission erred in approving the additional capital costs because the “only, uncontested, expert testimony of record in this proceeding, presented by the Office of Regulatory Staff (ORS), 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 [sic] Review Act and established law.” Sierra Club Petition for Rehearing at 4. This is not accurate. In this docket, the Commission received testimony from ten
individual utility, ratemaking and financial experts, and senior utility executives, many of whom testified based on their unique experience and expertise as to the reasonableness and prudency of the costs and other matters presented for review here. Multiple witnesses provided opinions as to matters within their specialized expertise and knowledge and entirely without objection. Tr. at 80 (Marsh); Tr. at 416, 443, 461-62 (Byrne); Tr. at 487-89, 548 (Addison); Tr. at 836 (Kochems); Tr. at 783-84 (Lynch). The Sierra Club never objected to any of this testimony.

It is well established that “[t]he failure to make a timely and proper objection to the introduction of testimony waives the right to object to such testimony on [rehearing].” Calcutt v. Calcutt, 282 S.C. 565, 569, 320 S.E.2d 55, 57 (Ct. App. 1984).

In fact, given the technical nature of the issues that come before the Commission, almost all witnesses who testify before the Commission do so as experts. For obvious reasons of procedural economy, it is not the practice before the Commission to formally qualify witnesses as experts in these types of proceedings. This has been the case in all of SCE&G’s prior BLRA dockets. See, e.g., Transcript of Record, Docket No. 2015-103-E (July 21-22, 2015) (no witnesses were formally qualified as experts); Transcript of Record, Docket No. 2012-203-E (Oct. 2-3, 2012) (no witnesses were formally qualified as experts); Transcript of Record, Docket No. 2010-376-E (Apr. 4, 2011) (no witnesses were formally qualified as experts); Transcript of Record, Docket No. 2009-293-E (Nov. 4, 2009) (no witnesses were formally qualified as experts). Indeed, ORS witness Gary Jones, who was formally qualified as an expert in this proceeding, has provided similar testimony in the

Additionally, even if ORS’s witness was the only expert in the case, his testimony would not compel denial of the Petition and rejection of the Settlement Agreement. ORS’s witness, Gary Jones, testified in support of costs associated with the Petition and the Option. Tr. at 895-96. He stated that he “fully support[s] the settlement agreement,” which endorses all of the findings made in Order No. 2016-794. Id. at 932.

Considering all of the testimony presented, including the testimony of ORS’s witness Gary Jones, such testimony compels acceptance, not rejection, of the Petition and Settlement Agreement. Therefore, the Sierra Club’s arguments in this respect must be denied.

B. Coastal Conservation League’s Allegations

CCL alleges that it was error for the Commission to approve the increase in the estimated capital cost of the units without requiring changes in the Company’s energy efficiency programs as approved under S.C. Code Ann. § 58-37-10 et seq. and as adopted and modified by Order No. 2010-472 issued in Docket No. 2009-261-E, Order No. 2013-826 issued in Docket No. 2013-208-E, and Docket No. 2016-40-E. CCL also takes the Commission to task for ignoring the recommendations CCL made for changes to SCE&G’s efficiency programs in Order No. 2016-794.

CCL’s position lacks merit for two reasons. First, the relief requested is outside the statutory scope of this proceeding, and it is more appropriate for the Commission to consider CCL’s recommendations in SCE&G’s annual demand-side management
proceeding. Second, the evidence in the record in this proceeding does not support modifying SCE&G’s programs as CCL suggests. As discussed below, this second finding does not prejudice or preclude CCL from presenting its recommendations in SCE&G’s annual demand-side management proceeding.

1. CCL’s Requested Relief is Outside the Scope of this Proceeding

This is a proceeding to determine whether “the evidence of record justifies a finding that the changes [proposed to BLRA approved construction and capital cost schedules for the Units] are [or are not] the result of imprudence on the part of the utility.” S.C. Code Ann. § 58-33-275(E). At the hearing in this matter, CCL’s witness, Alice Napoleon, testified exclusively concerning SCE&G’s energy efficiency programs and recommended changes to those energy efficiency programs that she believes the Commission should require SCE&G to adopt. Tr. at 305. In its Petition for Rehearing, CCL argues that the Commission should take up its request and order the expansion of those programs. Nothing in Ms. Napoleon’s testimony or the CCL’s arguments on rehearing has any relationship to the construction schedule or capital cost schedule for the Units, which were the sole matters referenced in the Petition.

Accordingly, it would be improper for the Commission to grant the relief that CCL requests in this docket. Rather, the Commission has set up a separate regulatory process to address the precise issues CCL raised. Pursuant to S.C. Code Ann. § 58-37-10 et seq. and in compliance with Order No. 2010-472 issued in Docket No. 2009-261-E as affirmed and modified by Order No. 2013-826 issued in Docket No. 2013-208-E, the Company comes before the Commission annually to report on developments regarding its demand-
side management activities and to update its rate rider for demand-side management costs, including energy efficiency programs. The appropriate venue for this type of request and testimony is the annual review of SCE&G’s demand-side management programs.

The most recent such proceeding was concluded less than six months ago. See Annual Update on Demand Side Management Programs and Petition to Update Rate Rider, Docket No. 2016-40-E. CCL submitted comments in that review along with a number of other parties. Considering demand-side management activities in the present docket would result in piecemeal review of the Company’s demand-side management program and would prejudice other parties who would appropriately question why these issues would be relevant in a proceeding to update nuclear construction schedules.

2. The Evidence in the Record Does Not Support CCL’s Position

As to substantive issues raised by CCL’s petition, the Commission has fully considered the evidence of record and finds that even if these issues were appropriate for consideration in this docket, CCL has not met its burden of proof in showing that the changes it proposes to SCE&G’s DSM programs are appropriate in this proceeding.

Ms. Napoleon recommended that (1) SCE&G should reinstate its Energy Star New Homes and Home Performance with Energy Star Programs and should examine whether the changes it made to the residential Energy Star Lighting Program should be reconsidered; (2) SCE&G should consider expanding the offerings available through the Neighborhood Energy Efficiency Program; and (3) SCE&G should consider new programs to promote high-efficiency new manufactured housing, increased access to financing for commercial and industrial customers, and should incentivize residential high-efficiency
appliances. *Id.* at 296-97. To support these initiatives, Ms. Napoleon offered recommendations to overcome barriers to these programs, specifically financing options, and recommendations to improve customer outreach and education efforts, specifically advertising and community events. *Id.* at 307-10.

The Company’s Witness, Mr. Keller Kissam, responded that SCE&G had carefully tailored its offerings and approach to the needs and expectations of customers in its service territories. Ms. Napoleon’s suggested changes to SCE&G’s current programs would be duplicative or ineffective. While Ms. Napoleon based her recommendations on data and studies from distant states and regions, SCE&G had based its program offering on its first-hand knowledge of the needs of its customers within its service territories and the approaches to promoting energy efficiency towards which its customers are most receptive. *Id.* at 266-68.

Ms. Napoleon suggested that SCE&G be ordered to reinstate the aspect of its Energy Star Lighting program under which SCE&G paid retailers like Lowes and Home Depot to discount compact florescent light bulbs and LED light bulbs and associated fixtures. These discounted bulbs and fixtures were available for sale to the general public on the retailer’s shelves.

However as Mr. Kissam testified there was no practical way to limit the sale of discounted bulbs solely to SCE&G customers. For that reason, the program “provided no assurance that the purchasers of these bulbs were SCE&G customers.” *Id.* at 266. This led to SCE&G subsidizing discounts “without a reasonable assurance that these energy efficiency bulbs were being plugged into the Company’s electric system.” *Id.* at 254. In
addition, assumptions as to energy savings on SCE&G’s system were likely to be overstated because the subsidized bulbs were often being used elsewhere.

In response, SCE&G developed a program to market energy saving light bulbs to its customers through an online-retail store, at business offices or through telephone orders. *Id.* at 254, 266. This allows SCE&G to verify that the subsidized bulbs are going to SCE&G customers. *Id.* at 255. Mr. Kissam testified that the Company should be allowed to continue to market the program as currently structured. The Commission finds Mr. Kissam’s testimony persuasive.

Ms. Napoleon recommended that SCE&G reinstate the Energy Star New Homes Program and Home Performance with Energy Star program. However, Mr. Kissam testified that SCE&G terminated those programs because they were found to “duplicate efforts that home builders and appliance dealers were making regarding energy efficiency anyway.” *Id.* at 267. Mr. Kissam testified that the Company has strong lines of communication with builders in its service area who themselves questioned the value of these two programs because the market was already requiring homes and appliances that met those standards without additional incentives. *Id.* at 255. He testified that these programs were not providing a benefit to customers, the environment or the electrical system commensurate with their cost. *Id.* The Commission finds Mr. Kissam’s testimony in this regard to be persuasive.

Ms. Napoleon questioned whether SCE&G’s Neighborhood Energy Efficiency Program (“NEEP”), was targeted with sufficient precision on low income areas and proposed additional studies to determine whether this was the case. Mr. Kissam testified
from his personal experience at multiple NEEP neighborhood meetings that the NEEP program very accurately targets economically disadvantaged communities and works through SCE&G’s relationships with leaders and institutions in those communities to develop trust with customers who would otherwise be unlikely to participate in energy efficiency programs. *Id.* at 268. *Id.* He testified that Ms. Napoleon’s criticism of the program as not including a broad enough range of energy conservation measures showed a misunderstanding of the program and how it works through education and community outreach to build trust with disadvantaged customers to the point where they will allow trained energy efficiency personnel from SCE&G to visit their homes to evaluate energy savings opportunities. These customers are then encouraged to participate in SCE&G’s other programs which are fully open to them. *Id.* at 256-57, 268.

Moreover, SCE&G already offers advertising and community events, including, as Ms. Napoleon suggested, bill inserts. *Id.* at 297. SCE&G’s website has a large amount of information regarding renewables, SCE&G has sent out bill inserts regarding the recycling of appliances, and SCE&G has worked with the Urban League to develop a “Bill of Rights” for customers. *Id.* at 274-75.

The Commission finds Mr. Kissam’s testimony credible and persuasive that the Company has in place energy efficiency programs that are carefully tailored to the needs and predilections of customers in its service territory. The Company continues to monitor and adjust these programs to make certain that its customers and system receive a benefit from them that is commensurate with the investment in them. The Commission finds that there is no basis to order the Company to make additional changes or revisions to its
program as a result of the evidence in this proceeding. This ruling, however, does not preclude or prejudice the right of CCL to raise these or other demand-side management related issues in the Company’s annual demand-side management proceeding.

3. The Motion to Strike

In its Petition for Rehearing, CCL argues that when the Commission denied SCE&G’s Motion to Strike Ms. Napoleon’s testimony, it concluded that CCL’s positions concerning potential changes to SCE&G’s energy efficiency programs were relevant to this proceeding. Therefore, CCL argued that the Commission erred when it failed to take those matters up in its orders.

CCL reads more into the Commission’s ruling not to strike Ms. Napoleon’s testimony than the Commission intended. It is the Commission’s policy to hear a broad range of perspectives on the matters before it, both as a matter of accommodation to those who wish to be heard, and because the Commission is open to hearing all perspectives on a given matter. For those reasons, the Commission may look with some disfavor on motions to strike testimony. It is the Commission’s position that in many cases it does little harm to hear from an additional witness, even one whose testimony may be quite remote from the legal issues at hand. And so it often exercises its discretion in favor of admitting and not striking testimony. That was the case here.

That said, it would be incorrect to read into the denial of a motion to strike an affirmative endorsement of the relevance of CCL’s position and testimony to the issues before the Commission.
Based on the foregoing reasons, the Commission denies CCL’s Petition for Rehearing or Reconsideration.

C. Petition of Sandra Wright

According to this Commission’s Docket Management System ("DMS"), Sandra Wright accepted service of Order No. 2016-794, the Order at issue, on November 28, 2016. Also, according to the DMS, Mrs. Wright filed a Petition for Rehearing or Reconsideration on December 12, 2016. S.C. Code Ann. Section 58-27-2150, the governing statute, states that any application for rehearing must be made within ten days after service of notice of the entry of the applicable order or decision (emphasis added). Accordingly, Mrs. Wright’s time to file her Petition for Rehearing or Reconsideration expired on December 8, 2016. Since she filed her Petition on December 12, 2016, Mrs. Wright’s Petition is untimely and must be denied. This Commission has no authority to waive the provisions of this Code Section.

III. CONCLUSION

The Commission has considered the issues presented in the Petitions for Rehearing or Reconsideration filed by the Sierra Club and CCL. For the reasons stated above, it finds that those petitions do not present it with grounds to modify, amend or rehear the matter decided in Order No. 2016-794. Therefore, the Commission denies those petitions. Further, the Petition of Sandra Wright is denied, since it was untimely filed under the applicable statutory rule.
This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:

Swain E. Whitfield, Chairman

ATTEST:

Comer H. Randall, Vice Chairman