BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 92-023-R & 94-045-R - ORDER NO. 96-771

NOVEMBER 26, 1996

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

This matter comes before the Public Service Commission of South Carolina (the Commission) on two Petitions, one being a Petition for Clarification and/or Reconsideration of Order No. 96-639, filed by the Consumer Advocate for the State of South Carolina (the Consumer Advocate), and the other being a Petition for Rehearing and Reconsideration of the same Order, filed by South Carolina Electric & Gas Company (SCE&G). Order No. 96-639 was this Commission's Order pursuant to the remand of the 1992 SCE&G bus case by the Richland County Court of Common Pleas.

Our Order No. 96-639 affirmed our prior Orders in these Dockets, thus maintaining the current status of SCE&G's transit operations. The Consumer Advocate's Petition does not disagree with this holding, but, instead, simply asks this Commission to clarify our Order No. 96-639 as to several legal points.

The Consumer Advocate first asks that the Commission make a finding that this matter falls within the "extraordinary circumstances" exception to the "law of the case" doctrine. The

Consumer Advocate states thusly: "While it is well settled law in South Carolina that the mandate of a reviewing court becomes the law of the case on remand, the doctrine may be excused where there are extraordinary circumstances or where compliance with the mandate would result in grave injustice." In Re: Estate of Rochez, 146 Pa. Cmwlth 414, 606 A. 2d 563 (1992); 5 Am. Jur. 2d, Appeal and Error, Section 793. We expressed our concern in Order No. 96-639 that adoption of SCE&G's 1992 proposals prior to review by the South Carolina Supreme Court would create "irreparable harm to the public." Order No. 96-639 at 2-3. We certainly agree that this irreparable harm to the public constitutes a "grave injustice" that would result from compliance with the Order of the Circuit Court in this case, in that long-standing routes would be modified and fares would be increased to the bus riders. Should the Supreme Court rule that the Commission's view of the law was correct, it would be a near impossible task to refund such charges to the bus ridership.

Further, the procedural history of this case is certainly extraordinary. Subsequent to the issuance of Judge Rushing's May 12, 1995 Order, he observed on the record on November 1, 1995 that one of his main purposes in issuing the May 12, 1995 Order was to have the matter reviewed by the South Carolina Supreme Court. Judge Rushing expressed great disappointment with the fact that this end was not accomplished. (The South Carolina Supreme Court dismissed appeals of the Order, based on the fact that the Circuit Court had remanded the matter back to this Commission.) Unfortunately, Judge Rushing recused himself from the case

at the time, and was not able to take any action to further attempt to get the matter before the South Carolina Supreme Court. Attempts by the Commission Staff and Intervenors to move for a modified judgment before another Circuit Court Judge to accomplish this end were unsuccessful.

This Commission's aim, therefore, is in concert with Judge Rushing's, i.e., to get the matter before the South Carolina Supreme Court for review. However, we do not believe that Judge Rushing intended to subject the bus ridership to higher charges prior to that review. This resulted in the issuance of our Order No. 96-639, and, although we did not state it specifically at that time, we agree that the present scenario constitutes an "extraordinary circumstances" exception to the "law of the case" doctrine, and we so hold.

The Consumer Advocate also requests that this Commission make a finding that the public policy concerns giving rise to the law of the case doctrine are satisfied by Order No. 96-639, i.e. that our Order does not offend the desire to prevent endless litigation of the same issue and that no new examination of the issues has occurred. We certainly agree that our Order satisfies these public policy concerns. Clearly, we are attempting to prevent endless litigation of this matter by putting it in a posture for review by the South Carolina Supreme Court (which is in concert with the view taken by the Circuit Court). Further, absolutely no new consideration of the issues has occurred. As Order No. 96-639 specifically stated, we simply affirmed all prior Commission Orders

in this case. Therefore, we do believe that the public policy concerns giving rise to the law of the case doctrine are satisfied by Order No. 96-639.

Therefore, in so far as our holdings above constitute a granting of the Consumer Advocate's Petition for Clarification, it is so granted.

We now consider the Petition for Rehearing and Reconsideration filed by SCE&G. Based on our holding on the Consumer Advocate's Petition, SCE&G's Petition must be denied. However, further explanation follows.

SCE&G (or the Company) offers fourteen (14) separate grounds for its Petition. Our ruling on the Consumer Advocate's Petition mandates denial of almost all of SCE&G'S specific grounds.

First, SCE&G alleges that Order No. 96-639 fails to comply with the requirements of Judge Rushing's May 12, 1995 Order, in that Judge Rushing's substantive directions were not followed in Order No. 96-639. In essentially finding that carrying out the Circuit Court Order before Supreme Court review would cause irreparable harm to SCE&G's bus ridership, the Commission found that a grave injustice would occur, should Judge Rushing's Order be given full force and effect. Therefore, we have invoked the "extraordinary circumstances" exception to the "law of the case" doctrine.

This reasoning also applies to SCE&G's second ground, i.e., that the Commission's Order violated the doctrine of the law of the case. The Commission justifiably invoked an exception to the

doctrine under the circumstances, as explained above. The "extraordinary circumstances" exception also dictates denial of Paragraphs 8, 9, 10, 11, 12, 13 and 14 of SCE&G's Petition.

SCE&G also alleges that in ground 3 of its Petition the Order violates the substantial evidence rule and other applicable legal standards. The basis stated for this is that the Order is based in part on comments made by Judge Rushing "which are neither findings of law nor evidence, and were made at a time when Judge Rushing specifically recused himself from consideration of the case." It should be stated that the comments attributable to Judge Rushing were made in open court on November 1, 1995, at a time during which the parties were under the belief that they had come to Court to argue a Joint Motion to modify the May 12, 1995 Order. Only when the parties arrived did they realize that Judge Rushing was about to recuse himself from the case. The hearing was held after the certified record of the case was certified to the Court, but an official transcript of the hearing was furnished by a Certified Court Reporter. In our view, the fact that Judge Rushing recused himself at the time of the supposed motion hearing in no way detracted from the significance of his remarks with regard to his desire to see the matter presented to the South Carolina Supreme Court. We think that Judge Rushing's remarks were directly applicable to our consideration of what his true original intent was, and was thus reliable and probative. In fact, Judge Rushing's remarks were enough to compel us to invoke the "extraordinary circumstances" exception to the "law of the case" doctrine.

In SCE&G's fourth allegation of error, it states that the Order violates the rights of the parties in that it attempts to adjudicate issues of law based on an improper balancing of the equities, and does so without evidentiary basis or notice to the parties. Nothing is further from the case. We believe that we have properly balanced the equities and the law in this case. We have clearly stated our position in this case, and bolstered it with the appropriate law. It appears to us that this question is a matter of law, rather than one of fact, in any event. Further, as for notice to the parties, it should be noted that a full opportunity for oral arguments on all legal issues in this case was afforded all parties. During the oral arguments, various parties urged us to take the position that we took in Order No. 96-639, and that we take now. Therefore, the Company was fully on notice as to the possibilities for decision in this case. This exception is unavailing.

Paragraph 5 of SCE&G'S Petition alleges that Order 96-639 improperly seeks to exercise the Commission's stay powers without employing proper standards or procedures, and in fact without first entering an Order requiring a stay. We should point out that a stay was not an issue in the Commission's Order. We simply reaffirmed our belief in the law as stated in the Broad River and Coney cases, and took exception to the law of the case as published by the Circuit Court.

As stated above, the Commission has reviewed its Order No. 96-639 to see if any changes to that Order need to be made to

properly set forth the issues for appeal in light of the allegations, and concessions, that are set forth in SCE&G's Petition for Rehearing and Reconsideration. Upon review, the only allegations in SCE&G's Petition for Rehearing that particularly concern the Commission are in Paragraph 6 and 7.

In those Paragraphs, SCE&G asserts that the Commission improperly relies upon orders entered in unrelated electric dockets that were not relevant to this proceeding and were actually entered after the record closed in this proceeding. SCE&G further asserts that the electric orders in question and the testimony in the record of those dockets were not properly before the Commission and do not support the conclusions that the Commission sought to reach from them.

The Commission wishes to emphasize that any action that may be taken by the Commission in the future concerning the relationship of certain electric dockets and orders to this proceeding would be on a prospective basis only. There will be ample opportunity for all interested parties to be heard before any decision is made on this issue.

IT IS THEREFORE ORDERED THAT:

1. The Consumer Advocate's Petition is granted, as discussed above;

2. SCE&G's Petition is denied, except as clarified above; and

3. This Order and Order No. 96-639 shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Deputy Executive Director

(SEAL)