ISSUE:

Is the prudency of SCE&G going forward with (i.e. continuing) the construction of VC Summer Units 2 and 3 in the "Updates and Revisions to Schedule" docket pending before the PSC in Docket No. 2016-223-E an issue for consideration in the docket?

CONCLUSION:

The prudency of continuing the construction of the new nuclear units at V.C. Summer is not an issue to be raised in the new update proceedings docket filed by SCE&G pursuant to S.C. Code Ann. § 58-33-270(E). Under the provisions of the BLRA and following the Supreme Court's decision in *S.C. Energy Users Comm. v. S.C. Elec. & Gas,* 410 S.C. 348, 764 S.E.2d 913 (2014) ("*SCEUC 2*"), the prudency determination made by the PSC in its Orders from Docket Number 2008-196-E is a final and binding determination that the plant is used and useful for utility purposes. The discussion which follows provides the analysis leading to this stated conclusion.

BACKGROUND:

- On May 30, 2008, SCE&G filed a Combined Application under the Base Load Review Act ("BLRA"), and that application was docketed at the PSC in Docket No. 2008-196-E. The Application was filed under S.C. Code Ann. § 58-33-260 and contained the contents required by that statute.
- Following notice and hearing on SCE&G's Combined Application, the PSC issued Order No. 200-104(A) and after Petitions for Reconsideration were filed, issued Order No. 2009-218. In its Orders, the PSC made findings and determinations pursuant to S.C. Code Ann. § 58-33-270(A), (B), (C), and (D).
- Appeals from the PSC's orders approving the Combined Application were filed with the Supreme Court of South Carolina. *See*, *Friends of the Earth v. PSC of S.C.,* 387 S.C. 360, 692 S.E.2d 910 (2010) and *S.C. Energy Users Comm. v. S.C. PSC,* 388 S.C. 486, 697 S.E.2d 587 (2010) ("SCEUC 1").
- In *Friends of the Earth,* Appellant alleged, among other issues, the PSC erred in finding SCE&G had established the proper need and prudency of building the facility. The Supreme Court disagreed and stated that "the record demonstrates the [PSC] adequately considered each of the requirements under the [BLRA], and its determinations are supported by substantial evidence in the records." *Friends of the Earth,* 387 S.C. 360, 369, 692 S.E.2d 910, 915 (2010).
- In affirming the orders of the PSC, the Supreme Court recited the statutory provisions addressing the statutory requirements the PSC is required to make pursuant to the BLRA, including Section 58-33-270(A), (B), (C), and (D). *Friends of the Earth,* 387 S.C. 360, 370-1, 692 S.E.2d 910, 915-6 (2010). The Supreme Court then concluded

  > the [PSC] addressed each and every concern Appellant presented, over and above the findings it was required to make under section 58-33-270 …

> [and] in a very through and reasoned order, determined SCE&G has appropriately established a need for the Facility, and thereafter approved SCE&G's proposed rate increases as reasonable costs to be passed on to the customers for the construction of the Facility. Without a doubt, these determinations are supported by substantial evidence of record.

Friends of the Earth, 387 S.C. 360, 372 692 S.E.2d 910, 916 (2010).

- One of the statutory determinations required to be made by the PSC and cited by the Supreme Court was Section 58-33-270(A)(1) which requires the PSC to determine "that the utility's decision to proceed with construction of the plant is prudent and reasonable considering the information available to the utility at the time." S.C. Code Ann. § 58-33-270(A)(1).
- The other appeal from the PSC's order in SCE&G's Combined Application docket was decided by the Supreme Court in *S.C. Energy Users Comm. v. S.C. PSC,* 388 S.C. 486, 697 S.E.2d 587 (2010) ("*SCEUC 1*"). While the Supreme Court reversed the PSC's decision to allow contingency costs in the orders on the Combined Application, the Supreme Court allowed the orders approving the Combined Application to stand.
- In 2014, the Supreme Court heard another appeal under the BLRA. This appeal arose from SCE&G's application for approval of a new milestone schedule reflecting at that time an approximately nine month delay in SCE&G obtaining the "Combined Operating Licenses ("COLs") issued by the Nuclear Regulatory Commission ("NRC"). *See*, PSC Docket No. 2012-203-E, and PSC Orders No. 2012-884 ("Order Approving SCE&G's Request for Modification of Schedules") and 2013-5 ("Order Denying Petitions"). This appeal was decided in *S.C. Energy Users Comm. v. S.C. Elec. & Gas,* 410 S.C. 348, 764 S.E.2d 913 (2014) ("*SCEUC 2*").
- SCE&G's application filed with the PSC in Docket No. 2012-203-E was filed pursuant to S.C. Code Ann. § 58-33-270(E) which provides in part, "As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section."

DISCUSSION:

In 2008, SCE&G filed a Combined Application under the BLRA. The PSC approved SCE&G's Combined Application, and the Supreme Court affirmed the PSC's approval in two appeals challenging the PSC's decision. Thus, the PSC's Orders approving the Combined Application have survived appeal, are final, and are binding.

Currently, SCE&G has filed a "Petition for Updates and Revisions to the Capital Cost Schedule and the Construction Schedule." This filing is made pursuant to S.C. Code Ann. § 58-33-270(E). This is the same code section under which SCE&G filed its 2012 application, and the PSC's orders entered in that 2012 docket are the orders appealed to the Supreme Court in *SCEUC 2*.

S.C. Code Ann. § 58-33-270(E) provides

> As circumstances warrant, the utility may petition the commission, with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:
>
> **(1)** as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that the changes are not the result of imprudence on the part of the utility; and
>
> **(2)** as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

S.C. Code Ann. § 58-33-270

In *SCEUC 2*, the Supreme Court addressed Appellants' challenge that the PSC "should have conducted a prudency evaluation of the entire construction project 'going forward' at the time of the modification request." The Supreme Court noted that "[p]ractically speaking, it would be nonsensical to include such a requirement at this stage." *SCEUC 2,* p. 359, 918. The Court continued by quoting from the PSC's order stating

> As the Commission aptly noted,
>
> [T]he BLRA was intended to cure a specific problem under the prior statutory and regulatory structure. ***Before adoption of the BLRA, a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant.*** The possibility of prudency challenges while construction was underway increased the risks of these projects as well as the costs and difficulty of financing them. In response, ***the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review before major construction of a base load generating facility begins.*** The BLRA order related to [the initial base load review order], is the result of such a process. It involved weeks of hearings, over 20 witnesses, a transcript that is more than a thousand pages long and rulings that have been the subject of two appeals to the South Carolina Supreme Court.

SCEUC 2, p. 359, 918-9 (Emphasis added).

Acknowledging the PSC's finding that the BLRA did not require it to reassess the prudency of the entire construction project at that base load order review stage, the Court adopted the logic of the PSC stating

> Update proceedings are likely to be a routine part of administering BLRA projects going forward (including future projects proposed by other electric utilities), such that under the Sierra Club's argument, the prudence of the decision to build the plant will be open to repeated relitigation during the construction period if a utility seeks to preserve the benefits of the BLRA for its project. ***Reopening the initial prudency determinations each time a utility is required to make an update filing would create an outcome that the BLRA was intended to prevent and would defeat the principal legislative purpose in adopting the statute.***

SCEUC 2, p. 359, 918 (Emphasis added).