

STATE OF SOUTH CAROLINA

Petition of Tom Clements Requesting an Emergency Hearing Regarding South Carolina Electric & Gas Company's Nuclear Construction Project and Westinghouse Bankruptcy Impacts

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2017 - 99 - E

(Please type or print)

Submitted by: K. Chad Burgess

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DOCKETING INFORMATION (Check all that apply)

Emergency Relief demanded in petition Request for item to be placed on Commission's Agenda expeditiously

Other:

Table with 2 columns: INDUSTRY (Check one) and NATURE OF ACTION (Check all that apply). Includes categories like Electric, Gas, and various legal actions such as Affidavit, Agreement, and Petition.



K. Chad Burgess  
Director & Deputy General Counsel

[chad.burgess@scana.com](mailto:chad.burgess@scana.com)

March 31, 2017

**VIA ELECTRONIC FILING**

The Honorable Jocelyn G. Boyd  
Chief Clerk/Administrator  
**Public Service Commission of South Carolina**  
101 Executive Center Drive  
Columbia, South Carolina 29210

Re: Petition of Tom Clements Requesting an Emergency Hearing  
Regarding South Carolina Electric & Gas Company's Nuclear  
Construction Project and Westinghouse Bankruptcy Impacts  
Docket No. 2017-99-E

Dear Ms. Boyd:

Enclosed for filing is South Carolina Electric & Gas Company's Response in  
Opposition to Motion for an Emergency Hearing in the above-referenced docket.

By copy of this letter, we are also serving Mr. Clements and counsel for the  
South Carolina Office of Regulatory Staff with a copy of the enclosed document and  
attach a certificate of service to that effect.

If you have any questions, please advise.

Very truly yours,

  
K. Chad Burgess

KCB/kms  
Enclosure

cc: Dawn Hipp  
Shannon Bowyer Hudson, Esquire  
Tom Clements  
(all via electronic and U.S. First-Class Mail w/enclosures)

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2017-99-E**

IN RE:

Petition of Tom Clements Requesting an )  
Emergency Hearing Regarding South )  
Carolina Electric & Gas Company's Nuclear )  
Construction Project and Westinghouse )  
Bankruptcy Impacts )  
\_\_\_\_\_ )

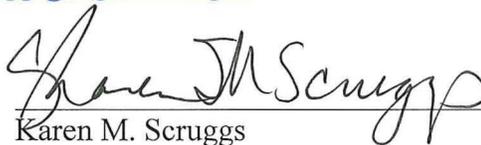
**CERTIFICATE  
OF SERVICE**

This is the certify that I have caused to be served this day one (1) copy of South Carolina Electric & Gas Company's **Response in Opposition to Motion for an Emergency Hearing** via electronic mail and U.S. First Class Mail to the persons named below at the addresses set forth:

Tom Clements  
1112 Florence Street  
Columbia, SC 29201  
[tomclements329@cs.com](mailto:tomclements329@cs.com)

Shannon Bowyer Hudson, Esquire  
Office of Regulatory Staff  
1401 Main Street, Suite 900  
Columbia, SC 29201  
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Dawn Hipp  
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\_\_\_\_\_  
Karen M. Scruggs

Cayce, South Carolina  
This 31st day of March 2017

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2017-99-E**

**IN RE:**

Petition of Tom Clements Requesting	)	<b>SOUTH CAROLINA ELECTRIC &amp; GAS</b>
An Emergency Hearing Regarding South	)	<b>COMPANY'S RESPONSE IN</b>
Carolina Electric & Gas Company's Nuclear	)	<b>OPPOSITION TO MOTION FOR</b>
Construction Project and Westinghouse	)	<b>AN EMERGENCY HEARING</b>
Bankruptcy Impacts	)	
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South Carolina Electric & Gas Company ("SCE&G"), in compliance with Order No. 2017-23-H, issued in the above-captioned docket, hereby responds as follows to the document filed with the Public Service Commission of South Carolina ("Commission") by Mr. Tom Clements on March 27, 2017, styled as a "Request for Emergency Hearing" (the "Request"). Mr. Clements attempted to file his Request in Docket No. 2008-196-E; however, the Clerk's Office instead assigned the Request to a new docket number, Docket No. 2017-99-E.<sup>1</sup> Thereafter, by Order No. 2017-23-H, the Commission's Standing Hearing Officer construed the Request as containing within it a motion for a hearing and directed SCE&G to respond to the motion. For the reasons

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<sup>1</sup> The Request sought additional hearings to be held in Docket No. 2008-196-E. As the Clerk's office correctly recognized, the issues raised and noticed in Docket No. 2008-196-E have been fully adjudicated for many years and are not subject to review or rehearing. Furthermore, the time to intervene in that docket expired on August 20, 2008, and Mr. Clements had not intervened at that time and was not a party in that docket. In light of these facts, the Clerk assigned a new docket number to the Request and did not accept it for filing in Docket No. 2008-196-E. SCE&G believes the Clerk's Office could have rejected the filing entirely. As indicated below, there is no statutory or legal basis for the filing in its current, stand-alone posture, and therefore, rejection of the filing would have been entirely justified.

stated below, SCE&G respectfully requests the Commission issue an order denying the motion for a hearing and dismissing the Request.

### ARGUMENT

On March 29, 2017, the same day that Westinghouse Electric Company, LLC (“Westinghouse”) filed bankruptcy, SCE&G requested authorization to conduct an allowable ex parte communication briefing (“Briefing”) before the Commission to discuss the status of its contractor, Westinghouse, as well as the current status of the project to construct two AP1000 Advanced Passive Safety Reactors in Jenkinsville, South Carolina (the “Project”).<sup>2</sup> The Commission has scheduled the requested Briefing for April 12, 2017. SCE&G currently plans for its presenters at this Briefing to include its Chairman and Chief Executive Officer, Mr. Kevin Marsh; its Chief Operating Officer and President of Generation and Transmission, Mr. Stephen Byrne; and its Executive Vice President and Chief Financial Officer, Mr. Jimmy Addison.

Specifically, they will, among other things, discuss the following:

1. What is known about the bankruptcy filing,
2. What is known about the next steps in the bankruptcy proceeding,
3. The steps that have been taken to date to ensure that construction continues on the Project without interruption,
4. The steps that have been taken to ensure that workers, contractors and subcontractors on the project are paid in a timely way,
5. The evaluation SCE&G is conducting of Westinghouse’s estimate of the additional costs needed to complete the Project beyond those provided for under existing agreements,
6. The resources available from Westinghouse and Toshiba to compensate SCE&G for Westinghouse’s estimate of additional costs,
7. The status of the processes for escrowing AP1000 intellectual property and software to support construction if Westinghouse leaves the project, and
8. The evaluations and steps SCE&G is taking to protect the interest of its customers, the Company and the State in light of this bankruptcy.

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<sup>2</sup> Prior to March 29, 2017, and by letters dated February 15, 2017, and March 22, 2017, SCE&G had informed the Commission that it would work with Commission Staff to schedule an allowable ex parte communication briefing before the Commission to discuss Toshiba’s financial status after Toshiba filed its 178th Securities Report.

To have scheduled a Briefing on these matters prior to Westinghouse's bankruptcy filing or prior to Toshiba having made public definitive financial disclosures concerning its nuclear business would have been untimely. Instead, SCE&G took the initiative to schedule the Briefing as soon as it was reasonably possible to do so. The situation related to the bankruptcy remains under intensive evaluation. Important facts will continue to be investigated and verified up to and beyond the April 12 Briefing. However, there would have been little concrete information to report about the bankruptcy had the request to schedule the Briefing been made any earlier than March 29, 2017.

In this context, the Briefing, not a contested case hearing, is the appropriate procedural vehicle for updating the Commission. An allowable *ex parte* communication briefing is specifically intended as a means to provide information to the Commission where no specific request for relief has yet been filed. Contested case hearings, such as the hearing Mr. Clements has made to be the substance of his Request, are adversarial proceedings specifically intended to consider and award or deny a request for statutory or other relief. As discussed below, in all cases a contested case proceeding requires a specific claim for relief to be before the Commission.

The Commission should deny Mr. Clements' motion for hearing for the following reasons:

**I. The Request Is Moot.**

The Request seeks the scheduling of an informational proceeding concerning the Westinghouse bankruptcy and its effects on the Project. The Briefing to be held on April 12, 2017, will be just such a proceeding. The scheduling of that Briefing provides the substance of the relief requested. Therefore, the Request is moot because Mr. Clements has "already received the appropriate procedural relief." *Seabrook v. Knox*, 369 S.C. 191, 197, 631 S.E.2d 907, 911 (2006); *see also Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

## II. No Relief Has Been Requested.

Under the Commission's statutes, a "proceeding" means "a contested case, generic proceeding, or other matter to be **adjudicated, decided, or arbitrated** by the commission." S.C. Code Ann. § 58-3-260 (emphasis added). Mr. Clements requests nothing from the Commission apart from the convening of a hearing. Therefore, there is nothing "to be adjudicated, decided, or arbitrated by the [C]ommission." Thus, there can be no "proceeding" as S.C. Code Ann. § 58-3-260 envisions.

Additionally, under the Administrative Procedures Act, a "contested case" means "a proceeding . . . in which the legal rights, duties, or privileges of a party are **required by law to be determined** by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(3) (emphasis added). At this time, there are "no legal rights, duties or privileges of a party that are required by law to be determined." Therefore, there can be no proceeding under the Administrative Procedures Act.

Furthermore, the South Carolina Supreme Court has ruled that the contested case process "is specifically defined and limited by our General Assembly," such that allowing its use in unwarranted circumstances would subject "[an agency] to an overwhelming number of contested matters on everyday decisions that the General Assembly did not see fit. . . ." *Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013). This is something the court does not permit. *Id.* Even a generic proceeding before the Commission requires that there be a specific question of statutory law or regulatory policy to be decided as it applies to regulated entities.<sup>3</sup>

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<sup>3</sup> A generic proceeding promotes consistency and efficiency by allowing a principle of law or regulatory policy that applies to multiple parties to be litigated in a single proceeding in which all parties can be heard. Once a generic legal or policy decision is reached, the application of that

### **III. The Request Does Not Comply with Any of the Rules for Initiating a Proceeding Before the Commission.**

Consistent with the statutory authorities cited above, the Commission's regulations require that "all pleadings shall . . . include . . . a statement identifying the specific relief sought by the person filing the pleading." 10 S.C. Code Ann. Regs. 103-819 (2012). This requirement applies to all pleadings. It is not met here. Furthermore, the three types of proceedings that the Commission's regulations authorize each individually contain a similar requirement:

**Applications** are pleadings that request "authorizations or permission which the Commission is empowered to grant under its statutory authority." *Id.* at 103-823. The regulations require that "[a]pplications . . . state clearly and concisely the authorization or permission sought, and . . . refer to the specific statutory provision or other authority under which Commission authorization or permission is sought." *Id.* at 103-823(A). No such statement or reference is found in the Request.

**Complaints** can be filed by "[a]ny person complaining of anything done or omitted to be done by any person under the statutory jurisdiction of the Commission in contravention of any statute, rule, regulation or order administered or issued by the Commission." *Id.* at 103-824. A

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principle or policy to individual situations or parties is then litigated in separate contested case proceedings specific to the individual situation or party. Thus, even in a generic proceeding, there is a statutory or regulatory issue to be decided; a valid request for such a decision constitutes the relief requested. *See, e.g. Petition of the Office of Regulatory Staff to Establish Generic Proceeding Pursuant to the Distributed Energy Resource Program Act, Act No. 236 of 2014, Ratification No. 241, Senate Bill No. 1189, Docket No. 2014-246-E (proceeding allowed pursuant to Distributed Energy Resource Program Act); Generic Proceeding Established to Investigate Emergency Services Continuity Plans, Docket No. 2005-100-C (proceeding allowed pursuant to Order No. 2003-218, establishing a generic docket regarding emergency-type services); Generic Proceeding to Consider Requiring All Telecommunications Carriers to File Annual Financial Data on an Intrastate Basis, Docket No. 2003-349-C (proceeding allowed pursuant to Order No. 2000-473).*

Generic proceedings are rare. In the past ten years, the Commission's docket index lists only two generic proceedings.

complaint must include “[a] concise statement of the nature of relief sought.” *Id.* No allegation of a contravention of statute, rule, regulation or order, nor any statement of relief requested is found in the Request.

**Petitions** “may be submitted to the Commission for any relief, other than for an adjustment of rates and charges, which the Commission is empowered to grant under its statutory authority.” *Id.* at 103-825. “Petitions shall state clearly and concisely the petitioner’s grounds of interest in the subject matter, the facts relied upon, and **the relief sought**. Petitions shall cite by appropriate reference **the statutory provision or other authority relied upon for relief.**” *Id.* at 103-825(A) (emphasis supplied). The required statement of relief requested by Mr. Clements and the required citation to the legal authority supporting that claim of relief are entirely missing from the Request.

By requesting a hearing and nothing more, the Request fails under each of these three regulations and the generic provision that applies to all of them. The Request does not qualify as an application, a complaint or a petition. It lacks a request for relief and a citation to the statutory or other authority relied upon to justify such relief. Accordingly, it cannot be the basis for initiating a proceeding before the Commission.

#### **IV. There Is No Legal Basis for Any Request for Relief at this Time.**

The Request’s failure to make any claim for regulatory relief or to cite any authority supporting relief is not accidental. At this time, any request for relief would be premature and improper.

As indicated above, the Westinghouse bankruptcy has only recently been filed. The implications of that bankruptcy for the future of the Project have not yet been fully ascertained. At this time, a request for relief by any party related to the Westinghouse bankruptcy would be factually premature.

Furthermore, there is no statutory basis for Mr. Clements to request relief. The Based Load Review Act (“BLRA”) makes it clear that the Commission’s prior BLRA orders are not subject to collateral attack by any party in subsequent proceedings before the Commission. S.C. Code Ann. § 58-33-275. To the extent that future events require a filing to update the schedules under which the Project is being built, the utility is the only party empowered to make those filings. *Id.* at § 58-33-280. Accordingly, the language of the BLRA affirmatively precludes Mr. Clements from requesting the Commission to reopen these orders, as his request might be taken to suggest. His failure to request relief is explained by the fact that he has no statutory basis to do so.

Nor is the citation to S.C. Code Ann. § 58-27-1930 availing. That provision allows the Commission to hold hearings not specifically provided for by statute but only “where required in the administration of the powers and duties conferred upon it by this chapter and other acts relating to electrical utilities.” In adopting the procedural regulations cited above, the Commission has defined the context in which the administration of its powers and duties require contested case hearings to be held. S.C. Code Ann. § 58-3-260 and S.C. Code Ann. § 1-23-310(3) fully support that definition. Quite logically, in all such cases, a party must at minimum make a claim of right to specific relief statutory or other legal relief for a hearing to be warranted.

**V. Following Contested Case Procedures Would Be Burdensome and Fraught with Delay.**

An allowable ex parte communication briefing is a prompt and efficient way to put important information before the Commission where specific regulatory relief is not requested or would be premature. Contested case proceedings are not an effective substitute. Contested case hearings require public notice, a time during which interested parties can file motions to intervene, a schedule for parties to pre-file written testimony of their witnesses (direct and rebuttal), and a thirty-day notice of hearing. S.C. Code Ann. § 1-23-320(A); *see also* S.C. Code Ann. Reg. 103-

837 (requiring public notice); S.C. Code Ann. Reg. 103-825 (allowing petitions to intervene); S.C. Code Ann. Reg. 103-845 (providing for prefiled testimony). None of these procedural requirements logically apply to an informational briefing.

Moreover, in a contested case, the absence of any claim for relief means that there is no reasonably discernable standard for determining the relevance of testimony or cross examination or any standard of proof to guide the witnesses in drafting prefiled testimony or testifying on the stand. Contested case procedures assume that a request for specific relief will define the scope of the adversarial process. Where no relief is requested, an adversarial proceeding has no clear boundaries. There is nothing to guide the parties concerning what evidence is relevant, what claims are contested, what proof is necessary, and what cross-examination is germane. For this reason, a claim for specific relief is recognized throughout the statutes and regulations as the necessary prerequisite for initiating an adversarial administrative proceeding. *See generally, Amisub of S.C., Inc. v. S.C. Dep't of Health & Env'tl. Control*, 403 S.C. 576, 596, 743 S.E.2d 786, 797 (2013). To eliminate this requirement for the convening of an adversarial proceeding is to invite chaos.

### **CONCLUSION**

Based on the foregoing, there is no basis to grant the motion for a hearing and therefore, SCE&G respectfully requests that the Commission issue an order denying the motion.

**[SIGNATURE PAGE FOLLOWS]**

Respectfully submitted,



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March 31, 2017