

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE: Friends of the Earth and Sierra Club,)
Complainant/Petitioner v. South Carolina)
Electric & Gas Company,)
Defendant/Respondent)
)

IN RE: Request of the South Carolina Office of)
Regulatory Staff for Rate Relief to SCE&G)
Rates Pursuant to S.C. Code Ann. § 58-27-)
920)
)
)
)

EXPEDITED REVIEW
MOTION TO ADMIT
DEPOSITION TESTIMONY
FROM THESE AND OTHER
PROCEEDINGS AS
EVIDENCE

IN RE: Joint Application and Petition of South)
Carolina Electric & Gas Company and)
Dominion Energy, Incorporated for Review)
and Approval of a Proposed Business)
Combination between SCANA Corporation)
and Dominion Energy, Incorporated, as May)
Be Required, and for a Prudency)
Determination Regarding the Abandonment)
of the V.C. Summer Units 2 & 3 Project)
and Associated Customer Benefits and Cost)
Recovery Plans)

INTRODUCTION

The South Carolina Office of Regulatory Staff (“ORS”) respectfully requests the Commission issue an order permitting the use of any transcripts and/or videos of depositions taken in these proceedings and in related cases as evidence at the hearing in these proceedings. Objections would be preserved, except as to the form of the question, and must be raised in

response to the introduction of the deposition testimony. See Rule 26(c), SCRCP. This prehearing ruling allows the parties and Commission to plan and ensure testimony and evidence is available and presented most efficiently.

These consolidated docket proceedings present a number of challenges for the parties and the Commission. One of these challenges is identifying the best procedures for presenting evidence and which will allow the Commission to have the most complete and reliable record for its decision. The expedited nature of these proceedings and the broad and technically complex subject matter of the proceedings increases the difficulty the parties and the Commission face in efficiently and thoroughly preparing for the hearing and presenting evidence at the hearing.

One important step that the Commission should take that will further the interests of justice and promote a “just, speedy, and inexpensive determination”¹ by permitting the parties to introduce any testimony from witnesses taken in depositions in these proceedings or in related court litigation as evidence at the hearing. Permitting such evidence will further the interests of justice in several ways. First, it will allow the parties and the Commission a complete evidentiary record that includes testimony from all relevant witnesses. This will not only make the best use of the limited time available for testimony during the hearing but also a more complete presentation of that testimony.

Furthermore, this procedural rule will also further the interests of justice because it will allow the parties and their attorneys to avoid spending valuable time and expense obtaining unnecessary depositions and researching and litigating unimportant evidentiary issues under

¹ See Rule 1, Fed R. Civ. Proc. (“[These rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

uncertainty if the Commission will permit the evidence. The parties can avoid taking unnecessary depositions because many of the witnesses in these proceedings will be deposed in related litigation in State and Federal court. There is no point in spending significant time re-doing these depositions in these proceedings when the testimony of these witnesses should not vary based on the forum in which it is taken. Furthermore, a blanket rule permitting the use of deposition transcripts or videos as evidence in these proceedings will allow the parties and Commission to avoid researching and litigating issues such as the availability of witnesses to testify at the hearing and allow more time to be spent on the important substantive issues which must be resolved at this hearing.

The Commission and parties will benefit from allowing deposition testimony for the consolidated docket proceedings under the reasonable conditions described herein.

DISCUSSION

A. Depositions of Witnesses Are Being Taken in Related Proceedings in Circuit Court.

The mismanagement and abandonment of the Project has not only spawned numerous dockets before the Commission, it has also resulted in other litigation, including a consolidated state court lawsuit for damages against SCE&G. *See Lightsey et al. v. S.C. E. & G. Co.*, Case No. 2017-CP-40-0335, a putative class action assigned to Judge John C. Hayes, III. ORS has moved to intervene, and Judge Hayes granted the motion so ORS is a party in that case. The depositions of several witnesses have already been scheduled in the class action case in the summer and fall of 2018.

B. The Parties Should Be Permitted to Use Depositions of Witnesses Taken in These Proceedings and in the Related Class Action As Evidence at the Hearing.

1. Commission regulations and the hearing officer’s directives encourage the parties to present witness testimony and evidence in written form.

Commission regulations permit the parties to obtain evidence through depositions. *See* 10 S.C. Ann. Regs. 103-834 (“Any party of record to a proceeding may, by written request, ask the Commission or its designee for leave to take the testimony of any witness by deposition.”). “If the Commission or its designee deems the request meritorious, it may issue an Order designating the individual whose deposition may be taken, specifying the subject matter of the examination, and setting forth the time and place of such deposition, and whether it shall be written or oral examination.” *Id.* Concurrently with the filing of this motion, the South Carolina ORS is also requesting that the Commission deem meritorious ORS’s request to take the depositions of certain key witnesses in these proceedings.

Commission regulations also encourage the parties to use deposition transcripts as evidence in the hearing, particularly in expedited proceedings such as this one. *See* 10 S.C. Ann. Regs. 103-846 (“[W]hen a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form.”). The Hearing Officer’s scheduling order in these proceedings have encouraged the parties to avail themselves of this rule. *See* Order No. 2018-81-H (“I would ask the parties to confer and attempt to develop a list of documents or other matters that might be stipulated into the record without objection. This procedure could save time in the hearing. I would request that ORS lead this process.”); *id.* (“The Hearing Officer encourages the parties to attempt to resolve potential evidentiary issues in advance with likely opponents on the matter.”).

The use of a deposition transcript or video as evidence is also permitted under the South Carolina Rules of Evidence when a witness is unavailable to testify in person. *See* S.C. Rule of Evid. 804(b)(1) (“Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”). For example, the deposition transcripts of any witnesses who lives outside the state are admissible because such witnesses cannot be compelled to testify at the hearing by subpoena (and thus are unavailable to testify). Furthermore, all admissions by a party – such as admissions by high-level employees of SCE&G – in any form, like a deposition in another case or proceeding, are also admissible at the hearing. *See* S.C. Rule of Evid. 801(d)(2).

2. The admission of all deposition transcripts of witnesses as evidence will further the interests of justice.

The parties and the Commission have much to do and little time in which to do it. There is no possibility of extending the time period in which pre-hearing tasks must be accomplished – the hearing must occur before the end of this year. Joint Resolution 285, S.C. Acts and Resolutions 2017-18 (S.954) (“SECTION 1. ... The Public Service Commission must issue a final order on the merits for a docket in which requests were made pursuant to the Base Load Review Act no later than December 21, 2018. SECTION 2. No final determination of matters described in this joint resolution, whether by a final order issued by the Public Service Commission or by operation of law, shall occur earlier than the time period prescribed in SECTION 1. The Public Service Commission’s failure to issue a final order prior to the time period established in this joint resolution shall not constitute approval by the Public Service

Commission and a utility must not put into effect the change in rates it requested in its schedule.”).

Moreover, although the class action case involves discovery of many of the same issues as in these proceedings, the expedited nature of these proceedings means the discovery of many facts and documents will need to occur in these proceedings before it occurs in related litigation. To make the procedural challenges even more difficult, the substantive issues in these proceedings – the prudence of SCE&G’s decisions with respect to the Project – cover a broad time period and involve numerous documents that also have technically challenging subject matter. As the hearing officer’s scheduling order in the consolidated docket (Order No. 2018-81-H) suggests, these challenges make it important for the parties and the Commission to adopt and stipulate to procedures that would increase the efficiency of these proceedings. The admission as evidence of any transcripts or videos of depositions is one step that would most certainly further that goal.

There are several ways in which admitting deposition transcripts and videos would improve efficiency for the hearing. First, it would save time at the hearing. Due to the breadth of the subject matter at issue, there will be numerous witnesses in these proceedings. It is unlikely all the witnesses could testify in the limited time available. Thus, the Commission in the consolidated docket should permit the admission of deposition testimony as evidence, regardless of the availability of the witnesses, to limit the live testimony at the hearing to only necessary witnesses. Most importantly, this would allow the Commission to focus on the key witness testimony at the hearing, while still providing the Commission with the benefit of having all witness testimony in the evidentiary record. In addition, limiting the number of witnesses testifying in person at the hearing, will allow the parties and their attorneys focus their time on

preparing the critical testimony, which will result in a more efficient and skilled presentation of evidence.

Second, admitting deposition transcripts and videos would also save the parties and their attorneys valuable time in the months leading up the hearing. Most importantly, this motion would provide all parties with certainty about the admission of deposition testimony as evidence. This will also permit the parties to provide the Commission excerpts from deposition testimony to focus on issues that need to be decided by the Commission and avoid spending the Commission's limited time on issues regarding admissibility of various witnesses' deposition testimony and similarly avoid litigating disputes about these issues. The certainty of admission of deposition testimony now will save time and money—and allow a fuller presentation of evidence to the Commission more efficiently.

CONCLUSION

For the forgoing reasons, ORS respectfully requests that the Commission issue an order permitting the use of transcripts and/or videos of depositions taken in these proceedings and in the related cases—in which SCE&G is noticed and permitted to attend, question witnesses, and defend its interests—as evidence at the hearing in these proceedings.

Counsel for ORS consulted with the other parties and only SCE&G has not consented to the Commission making this prehearing order to allow deposition testimony.

(Signature block on following page)

Respectfully submitted,

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