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*Shannon Bowyer Hudson*  
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April 28, 2017

**VIA ELECTRONIC FILING**

Jocelyn G. Boyd, Esquire  
Chief Clerk & Administrator  
**Public Service Commission of South Carolina**  
101 Executive Center Drive, Suite 100  
Columbia, South Carolina 29210

Re: Petition of the South Carolina Office of Regulatory Staff Petition to Revoke  
Confidential Treatment of the Engineering, Procurement, and Construction  
Contract and Pricing Information  
**Docket No.: 2017-\_\_\_-E**

Dear Ms. Boyd:

Please find enclosed the Petition of the South Carolina Office of Regulatory Staff ("ORS") to revoke the confidential treatment of the Engineering, Procurement, and Construction Contract and pricing information for the construction of the two nuclear units near Jenkinsville, South Carolina.

Respectfully submitted,

Shannon Bowyer Hudson

cc: K. Chad Burgess, Esquire (via e-mail)

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

IN RE:

South Carolina Electric & Gas Company	)	<b>PETITION TO REVOKE</b>
Construction and Operation of a	)	<b>CONFIDENTIAL TREATMENT</b>
Nuclear Facility in Jenkinsville,	)	<b>OF THE ENGINEERING,</b>
South Carolina	)	<b>PROCUREMENT, AND</b>
	)	<b>CONSTRUCTION CONTRACT</b>
_____	)	<b>AND PRICING INFORMATION</b>

**Introduction**

1. Pursuant to 10 S.C. Code Ann. Regs 103-825 and S.C. Code Ann. §§ 58-4-50, 58-33-230(F), 58-33-277(B), and other applicable law, the South Carolina Office of Regulatory Staff (“ORS”) respectfully submits this Petition requesting the Public Service Commission of South Carolina (“the Commission”) to:

- a. revoke all confidential treatment of the Engineering, Procurement, and Construction (“EPC”) Contract wherein Westinghouse Electric Corporation, LLC (“WEC) or its previous successors is a contractor for the construction of two nuclear units (“the Units”) to be located at the VC. Summer Nuclear Station near Jenkinsville, South Carolina;
- b. revoke the confidential treatment previously applied to pricing, expenditures, and anticipated expenditures for the Units and presented by South Carolina Electric & Gas (“SCE&G”) to the Commission; and,
- c. order SCE&G to file unredacted in this docket 1) a full copy of the EPC Contract, 2) current and future executed EPC Contract amendment(s), 3) current and future

executed change orders<sup>1</sup>, and 4) any exhibits or attachments to the EPC Contract, amendments and change orders.

### **Background and Support for Petition**

2. SCE&G is a public utility regulated by the Commission.

3. SCE&G is 55% owner of the Units and Santee Cooper, an entity not regulated by the Commission, owns the remaining 45%.

4. ORS is a statutory party pursuant to S.C. Code Ann. § 58-4-10(B) in all matters before the Commission and is charged by law with the duty to represent the public interest of South Carolina in utility matters.

5. SCE&G requested and was granted a Base Load Review Order for the construction of the Units pursuant to the Base Load Review Act (“BLRA”), S.C. Code Ann. § 58-33-210 *et seq.*, in Commission Docket No. 2008-196-E, Order No. 2009-104(A).

6. The BLRA specifically addresses ORS’s charge of safeguarding the public interest. S.C. Code Ann. § 58-33-230(F).

7. The BLRA entitles SCE&G to charge its customers financing costs during the construction based on the Units’ current construction costs.

8. Since the issuance of Order No. 2009-104(A) and through today’s date, SCE&G has filed five petitions with the Commission to modify the Units’ budget and/or completion dates for the Units because of numerous delays, cost overruns, and other factors that have been found not to be the cause of imprudence by SCE&G.

9. The most recent petition to modify the budget and completion dates was approved on November 28, 2016<sup>2</sup> which increased the budget by approximately \$831.3 million for a new

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<sup>1</sup> SCE&G is not barred from requesting confidential treatment of change orders, for example, those on which bidding for services is not final. ORS will respond at the time such a request is made to the Commission.

total cost for the Units of \$7.658 billion. Of the \$831.3 million, a large portion was related to an October 2015 EPC Contract Amendment (“2015 EPC Contract Amendment” or “Amendment”) which moved many of the EPC costs to a fixed price category and not subject to further increases. New completion dates were also set based on information provided by WEC as follows: Unit 2 - August 31, 2019 and Unit 3 - August 31, 2020.

10. WEC is currently the primary contractor for the Units, and is a signatory to the EPC Contract and the 2015 EPC Contract Amendment.

11. On information and belief, the WEC signees to the 2008 and 2015 contracts are no longer with WEC.

12. The original EPC Contract was filed with the Commission in 2008, but unavailable to the public in its entirety due to a protective order issued pursuant to exemptions allowed by the Freedom of Information Act (“FOIA”), S.C. Code Ann. § 30-4-10 *et seq.* A redacted EPC Contract is available as Exhibit C to the testimony of SCE&G witness Stephen A. Byrne in Docket No. 2008-196-E. SCE&G requested that the unredacted EPC Contract be granted confidential treatment because:

The EPC Contract contains confidentiality provisions that require SCE&G to protect proprietary information that the Contractor believes to constitute trade secrets and to be commercially sensitive. The Contractor has requested that SCE&G maintain the confidentiality of certain information contained in the EPC Contract. Accordingly, this confidential information has been redacted by the Contractor from the Confidential Version of the EPC Contract. In keeping with the Contractor’s request and the terms of the EPC Contract, SCE&G respectfully requests that the Commission find [the EPC Contract] contains protected information and issue a protective order barring the disclosure of this exhibit under the Freedom of Information Act, S.C. Code Ann.

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<sup>2</sup> Docket No. 2016-223-E via Order No. 2016-794. After Order No. 2016-794 was issued, Petitions for Reconsideration were filed and subsequently denied by Commission Order No. 2017-118 dated February 28, 2017.

§§ 30-4-10 et seq., S.C. Code Ann. Regs. 103-804(S)(1), or any other provision of law, except in its public form.<sup>3</sup>

13. The Commission issued orders granting SCE&G's request for confidential treatment for the EPC Contract along with its request for confidential treatment for testimony and exhibits containing pricing information. In the orders, the Commission cited S.C. Code Ann. § 30-4-40(a)(1) protecting trade secrets and (5)(c) "confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed." Order Nos. 2008-467 and 2008-696 in Docket No. 2008-196-E.<sup>4</sup>

14. In contrast to the original EPC Contract, the 2015 EPC Contract Amendment was not requested to be confidential and is available for public viewing in Commission Docket No. 2016-223-E as Exhibit No. 3 to the testimony of SCE&G witness Stephen A. Byrne.

15. Both the EPC Contract and 2015 EPC Contract Amendment contain a parental guarantee from WEC's parent company, Toshiba Corporation ("Toshiba"), to guarantee certain payment obligations of WEC. The parental guarantee is located in Exhibit I-1 to the original EPC Contract in Docket No. 2008-196-E; however, its language is redacted, and in Exhibit F to the 2015 EPC Contract Amendment in Docket No. 216-223-E.

16. On December 27, 2016, Toshiba, issued a press release indicating losses of approximately \$6.1 billion related to WEC's nuclear business in Georgia and South Carolina.<sup>5</sup> See also the March 29, 2017 bankruptcy Declaration pgs. 23-24, para. 58 listing the components of the \$6.1 billion estimate.

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<sup>3</sup> SCE&G letter dated September 16, 2008 filed in Docket No. 2008-196-E.

<sup>4</sup> Orders granting confidential treatment to the EPC Contract or its data are located in the following Commission dockets: 1) Docket No. 2008-196-E; 2) Docket No. 2009-293-E; 3) Docket No. 2010-376-E; 4) Docket No. 2012-203-E; and, 5) Docket No. 2015-103-E. No requests for confidential treatment were made in Docket No. 2016-223-E.

<sup>5</sup> Toshiba also received permission to delay its earnings release originally scheduled for February 14, 2016. Toshiba, however, did release brief information on February 14, 2016 indicating an approximately \$6 billion loss from its U.S. nuclear business. See <https://www.toshiba.co.jp/about/ir/en/pr/pdf/tpr20170214.pdf> and <http://www.reuters.com/article/us-toshiba-accounting-idUSKBN15T033>.

17. Three months later on March 29, 2017, WEC filed for bankruptcy in the United States Bankruptcy Court Southern District of New York.

18. The bankruptcy Declaration states WEC intends to isolate its unprofitable business – the nuclear construction business for the construction of nuclear power plants in Georgia and South Carolina – from its profitable businesses and that its continued involvement in the Units remains uncertain. Declaration pg. 3, para. 5; pg. 4, para. 8.

19. As part of bankruptcy, WEC may choose to reject the EPC Contract or continue to abide by its terms.

20. On April 11, 2017, after missing two prior reporting deadlines, Toshiba released unaudited financial data and news of over \$9 billion in expected losses for its fiscal year.<sup>6</sup>

21. On April 12, 2017, SCE&G provided an allowable ex parte briefing to the Commission. In that briefing, SCE&G stated that it is currently evaluating four options for the Units: 1) continue with construction of the Units; 2) focus on construction of one of the two Units and delay construction of the other; 3) continue with construction of one unit, abandon the other, and seek recovery of the abandoned unit under the BLRA; or 4) abandon both Units and seek recovery under the BLRA.

22. During the April 12, 2017 briefing, SCE&G emphasized that the \$1.5 billion in additional cost estimate provided by WEC to complete the Units is being evaluated, but that if WEC rejects the EPC Contract as part of its bankruptcy options, the damages to be owed by WEC and Toshiba to SCE&G and Santee Cooper are greater than the currently estimated additional \$1.5 billion cost. Transcript, pgs. 12 and 17.

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<sup>6</sup> <http://www.toshiba.co.jp/about/ir/en/pr/pr2016q3.htm>  
<https://www.usatoday.com/story/money/business/2017/04/11/toshiba-reports-unaudited-results/100316480/>

23. As to the damages, SCE&G explained during the briefing that under the parental guarantee it can pursue damages from WEC or Toshiba up to a cap of 25% of the payments made to WEC at the time WEC breaches the EPC Contract, and if the breach occurred today the amount of the cap would be \$940 million for SCE&G's 55% of the Units and \$760 million for Santee Cooper's 45% share. Transcript pgs. 18-19.

### FOIA

24. Exemptions from disclosure contained in FOIA do not create a duty of nondisclosure; rather, exemptions, at most, simply allow a public agency the discretion to withhold exempted materials from public disclosure. Campbell v. Marion County Hosp. Dist., 354 S.C. 274, 281, 580 S.E.2d 163, 166 (S.C. App. 2003). Protection under FOIA is permissive and not a right.<sup>7</sup> The granting authority, in this case the Commission, may choose to revoke the exemptions allowed by FOIA. SCE&G could also choose to waive the protective orders.

25. Sweeping changes have occurred in the 9 years since the 2008 EPC Contract was executed, and the FOIA protections provided to it and its related pricing information should be removed. SCE&G ratepayers should be afforded the opportunity to see the full EPC Contract, including the parental guarantee, due to the changed circumstances. Publication of the EPC Contract is in the public interest and will assist ORS in determining remedies available to aid South Carolina ratepayers.

26. The pricing in the EPC Contract is no longer accurate. The 2015 EPC Contract Amendment revised the pricing and caused most of the EPC Contract costs to become fixed. The EPC Contract pricing should not be afforded protection. See paragraph #2 to the EPC Contract Amendment.

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<sup>7</sup> Although the Commission has previously ruled that sensitive information is entitled to protection under FOIA, it is ORS's position that FOIA's protections are permissive. See Order No. 2013-251 issued in a non-nuclear matter.

27. The remaining terms of the EPC Contract remain valid unless they were modified by the 2015 Amendment. It is ORS's position that these terms should no longer be protected as trade secrets or as proprietary information for economic development or contract negotiations under S.C. Code Ann. § 30-4-40(a)(1) or (5)(c). WEC's bankruptcy declaration states it intends to isolate itself from the nuclear construction business, and SCE&G stated in the allowable ex parte briefing that WEC will likely no longer be the lead construction manager. Transcript pg. 9. In short, whatever trade secrets were in the EPC Contract are now moot.

28. Lastly, it follows that because the 2015 amendment is a public document, the underlying EPC Contract should be made public.

#### Conclusion

29. WHEREFORE, ORS respectfully requests the following relief from the Commission that:

30. All confidential treatment be revoked for the EPC Contract wherein WEC or its previous successors is a contractor for the construction of the Units to be located at the V.C. Summer Nuclear Station near Jenkinsville, South Carolina;

31. All confidential treatment previously applied be revoked for pricing, expenditures, and anticipated expenditures of the Units and presented by SCE&G;<sup>8</sup>

32. SCE&G be ordered to immediately file unredacted in this docket 1) a full copy of the EPC Contract, 2) current and future executed EPC Contract amendment(s), 3) current and future executed change orders, and 4) any exhibits or attachments to the EPC Contract, amendments and change orders; and,

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<sup>8</sup> For confidential documents already filed with the Commission, ORS is only requesting that the EPC Contract (and executed change orders if any have been filed and deemed confidential) be published in its unredacted format. ORS is not seeking the re-filing of other documents or testimony previously filed and redacted with the Commission. However, if the content of those documents or testimony is included in a future filing, then the previous confidential status should no longer apply.



33. Any other action the Commission may deem necessary or appropriate.

Respectfully submitted,

SOUTH CAROLINA OFFICE  
OF REGULATORY STAFF

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Columbia, South Carolina  
April 28, 2017

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

IN RE: South Carolina Electric & Gas Company ) **CERTIFICATE OF SERVICE**  
Construction and Operation of a Nuclear )  
Facility in Jenkinsville, South Carolina )

This is to certify that I, Karen D. Elliott, have this date served one (1) copy of the **PETITION TO REVOKE CONFIDENTIAL TREATMENT OF THE ENGINEERING, PROCUREMENT, AND CONSTRUCTION CONTRACT AND PRICING INFORMATION** in the above-referenced matter to the person(s) named below by causing said copy to be Electronically Mailed as shown below:

K. Chad Burgess, Director & Deputy General Counsel  
South Carolina Electric & Gas Company  
220 Operation Way - MC C222  
Cayce, SC 29033-3701  
chad.burgess@scana.com

  
\_\_\_\_\_  
Karen D. Elliott

April 28, 2017  
Columbia, South Carolina