STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF HAMPTON)	CASE NO.: 2017-CP-25-335
)	
Richard Lightsey, LeBrian Cleckley, Phillip Cooper, et al., on behalf of themselves and all others similarly situated,)	
)	
Plaintiffs,)	**ORDER GRANTING PRELIMINARY APPROVAL OF SETTLEMENT AND STAYING PRE-TRIAL PROCEEDINGS**
)	
v.)	
)	
South Carolina Electric & Gas Company, a Wholly Owned Subsidiary of SCANA, SCANA Corporation, and the State of South Carolina,)	
)	
Defendants,)	
)	
South Carolina Office of Regulatory Staff,)	
)	
Intervenor.)	
_____)	

I. INTRODUCTION

This matter is before the Court on the Motion of the Plaintiff Class for (1) preliminary approval of the settlement embodied in the class action Settlement Agreement and Addenda (the "Settlement Agreement"); (2) approval of the notice plan and notices; (3) the scheduling of a date for the fairness hearing on final approval ("Fairness Hearing); and (4) a stay of all discovery and pre-trial proceedings. For the reasons set forth herein, the Court hereby grants Plaintiffs' motion.

II. THE ACTION

Plaintiffs are current and former customers of Defendant South Carolina Electric & Gas Company ("SCE&G"), a wholly owned subsidiary of Defendant SCANA Corporation

("SCANA") (collectively "Defendants"). This case involves Plaintiffs' claims against the Defendants related to the construction of two nuclear units at the V.C. Summer site in Jenkinsville, South Carolina (the "Project"), for which Plaintiffs have paid advanced construction finance costs pursuant to S.C. Code Ann. § 58-33-210, *et seq*., known as the Base Load Review Act ("BLRA").

The instant action began as three separate class action lawsuits, which were ultimately consolidated in the Hampton County, South Carolina Court of Common Pleas. On August 22, 2017, Plaintiffs filed their Motion for Class Certification and subsequently filed their supporting memorandum. After briefing and a hearing, this court entered an Order granting Plaintiffs' Motion for Class Certification, finding that all of the prerequisites of Rule 23(a), SCRCP, were satisfied. *See* Order Granting Class Certification (Sep. 20, 2018).

In addition to the motion for class certification, the parties filed significant dispositive motions, including Defendant SCE&G's motions to dismiss and Plaintiffs' separate motions for partial summary judgment asking the court to declare the BLRA unconstitutional and challenging the Project-related costs as a result of the Project's abandonment. According to Plaintiffs' Motion, the parties engaged in extensive and time consuming discovery, including the exchange and review of hundreds of thousands of documents, the filing of multiple discovery motions, and conducting the depositions of twenty-five corporate representatives and material witnesses. In addition, Plaintiffs' Motion asserts, Plaintiffs retained consulting and testifying experts for purposes of providing opinions regarding the standard of care on nuclear construction projects, the considerations taken by a utility in adding a specific base load to its portfolio, and the nuclear construction project at issue in this case.

Beginning in November 2018, the parties engaged in negotiations mediated by the Honorable Joseph F. Anderson, Jr., Senior U.S. District Judge.

Though these negotiations broke down on several occasions, ultimately the parties reached the settlement now before this Court.

III. THE CLASS

Plaintiffs bring this action on behalf of a group of similarly situated persons. By order of this Court, the Class consists of: "All customers of Defendant SCE&G (including companies, corporations, partnerships, and associations) who have been assessed advanced financing costs for the construction of 2 nuclear reactor units at Defendant SCE&G and SCANA's Jenkinsville, South Carolina site from the first collection of any cost recovery associated with nuclear construction to present." All persons within the Class who do not request to exclude themselves from the Class are referred to as Class Members.

IV. STANDARD

Rule 23(c) and Rule 23(d)(2), SCRCP, afford the court the discretion to approve a class action settlement and to direct reasonable notice to the class. The Supreme Court of South Carolina and other South Carolina courts have found it instructive to compare Rule 23, SCRCP, to its federal counterpart, Fed. R. Civ. P. 23, *see*, *e.g.*, *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008), keeping in mind that Rule 23, SCRCP, is less restrictive than the federal rule. "[W]e are cognizant that our appellate decisions have relied on federal precedent with respect to class action cases, but have also noted the significant differences between the two rules." *Id.* at 454-55, 661 S.E.2d at 88 (citing *Littlefield v. S.C. Forestry Comm'n*, 337 S.C. 348, 354, 523 S.E.2d 781, 784 (1999) ("Our state class action rule differs significantly from its federal counterpart. The drafters of [South Carolina] Rule 23 . . . intentionally omitted from our state rule the additional requirements found in Federal Rule 23(B) . . .. By omitting the additional requirements, Rule 23, SCRCP, endorses a more expansive view of class action availability than

its federal counterpart.")); *see also McGann v. Mungo*, 287 S.C. 561, 570, 340 S.E.2d 154, 159 (Ct. App. 1986) (relying on federal precedent to interpret new Rule 23, SCRCP); *Chestnut v. AVX Corp.*, No. 2007-CP-26-7459, 2011 WL 11684474, at *3 (S.C. Ct. Comm. Pleas Aug. 30, 2011) ("It is well settled in South Carolina that the Class Action Rule (SCRCP 23) is more expansive than its federal counterpart . . .."). Accordingly, reliance on federal precedent as a baseline is appropriate here.

Judicial approval of a proposed settlement insures that the rights of absent class members are adequately protected. *See In Re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 158 (4th Cir. 1991); *Clark v. Experian Info. Sols., Inc.*, 219 F.R.D. 375, 378 (D.S.C. 2003); *see also* Rule 23, SCRCP, advisory committee note ("It is necessary to protect the rights of all members of the class."). It is well established that the law favors class action settlements. *See*, *e.g.*, *S.C. Nat'l Bank v. Stone*, 749 F. Supp. 1419, 1423 (D.S.C. 1990).

In assessing a proposed class action settlement, the federal precedent focuses on whether a settlement is fair, reasonable, and adequate. Fed. R. Civ. P. 23(e)(2). Courts generally bifurcate the process into two phases. During the preliminary approval phase, the inquiry before the court is whether the terms of the proposed settlement are "within the range of possible approval or . . . whether there is probable cause to give notice of the proposed settlement to class members." *Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994) (quoting *Armstrong v. Board of School Directors*, 616 F.2d 305, 314 & n.13 (7th Cir. 1980)) (internal citations omitted), *see also Central Wesleyan College v. W.R. Grace & Co.*, 143 F.R.D. 628, 646 (D.S.C. 1992) (order granting preliminary approval of a class action settlement serves only to allow the court to initiate proceedings to enable final adjudication of the appropriateness and fairness of the settlement). Following preliminary approval, and prior to final approval, the court conducts a

fairness hearing where class members may participate. Here, the parties seek an order for preliminary approval. Thus the only question before the Court at this stage, and prior to class notice, is whether the proposed settlement is within the range of possible approval so that the class should be notified of its terms.

V. FINDINGS OF THE COURT

A. Fairness

In assessing whether preliminary approval is fair and reasonable, the court may consider a number of factors, including the posture of the case at the time of the proposed settlement, the extent of the discovery, the circumstances surrounding the settlement negotiations, and the experience of counsel in litigating class actions. *Beaulieu*, 2009 WL 2208131 at *24 (citing *Jiffy Lube*, 927 F.2d at 158-59); *Horton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 855 F. Supp. 825, 827 (E.D.N.C. 1994). *See also* 4 Newberg on Class Actions, § 13:15 (5th Ed.).

Discovery in this case commenced following this Court's February 2018 order denying Defendant SCE&G's motions to dismiss. Since that time, according to Plaintiffs' Motion, the parties have exchanged and reviewed hundreds of thousands of documents and conducted numerous depositions. This Court has presided over a number of motions to compel related to discovery documents, privilege logs, and documents sought via subpoena. In addition, this Court has heard argument on Defendants' Motions to Dismiss, Plaintiffs' Motion for Class Certification, and Plaintiffs' Motion for Partial Summary Judgment to declare the BLRA unconstitutional on its face and as applied.

Based upon the filings in this case, along with this Court's familiarity with the proceedings, this Court finds that the parties have undertaken extensive efforts litigating this case

and this settlement is entered into at a time when the parties are in a position to be aware of the viability of Plaintiffs' claims, as well as the extent of the defenses asserted by Defendants.

In late October 2018, after this Court had indicated that it intended to issue its ruling on the Plaintiffs' motion regarding the BLRA, the parties agreed to mediate this case before Judge Anderson. These settlement negotiations began in November 2018 and lasted for several weeks. The negotiations broke down on a number of occasions. According to the representations made surrounding these negotiations, it appears that the settlement negotiations were conducted at arms'-length, were presided over by an extremely competent third-party neutral, and no collusion exists.

Class Counsel collectively have many decades of relevant experience litigating class actions nationwide, and Counsel for Defendants have comparable experience practicing in some of the most widely respected firms in South Carolina and across the country. As such, this Court finds that Counsel for the parties have the requisite level of experience to assess and recommend the terms of the proposed settlement.

B. Adequacy

In assessing whether a proposed settlement adequately serves to compensate the class, the court can consider the strength of the case, the strength of the defenses, the practical implications of continued discovery and trial, and whether a recovery is likely in the event of continued litigation, among other factors. 4 Newberg on Class Actions § 13:15 (5th Edition), "Standard for Granting Preliminary Approval – Substantive Requirements". Courts may compare the settlement amount to the relief the class could expect to recover at trial. *Id*. (internal citations omitted). In addition, courts may compare the amount of relief encompassed by the settlement against amounts plaintiffs may have recovered in similar cases. *Id*.

The proposed settlement provides a common benefit, which will create significant retrospective and prospective relief for Class Members, both by way of refunds (or bill credits) for prior payments assessed under the BLRA, as well as through substantial future rate relief to be administered in the contemporaneous proceeding pending before the South Carolina Public Service Commission ("PSC"). It is reasonably certain that if the settlement is not approved, the parties will continue to undertake rigorous discovery, depositions, and motions' practice, at great expense to all parties involved. In addition, this case presents legal issues that will likely necessitate appeal in the event no settlement is entered. According to Plaintiffs' Motion, in similar cases in other jurisdictions, the outcomes for the affected classes have been far less positive. [1]Thus, there is great uncertainty regarding the outcome of this matter in the event no settlement is entered, but certainty that the parties will continue to expend significant resources in preparing this case for trial and in arguing matters on appeal.

C. Conclusion

In light of the considerations set forth above, at this preliminary stage, the Court finds that the proposed settlement is within the realm of a fair, reasonable, and adequate resolution, and Class members should be notified of its terms.

VI. APPROVAL OF SETTLEMENT AGREEMENT AND PLAN OF NOTICE

The Parties have submitted to the Court their Settlement Agreement, which includes the plan for providing notice to the Class and attaches as an exhibit the form of notice to be mailed and/or e-mailed to the Class. The Court will not recite the terms of the Settlement Agreement,

[1] By way of example, see *Newton v. Duke Energy Florida, LLC*, C/A No. 0:16-cv-60341-WPD, where the District Court for the Southern District of Florida dismissed a class action complaint filed by a customer class finding that the Nuclear Cost Recovery provisions of the Florida Renewable Energy Technologies and Energy Efficiency Act, Fla. Stat. §§ 366.93, 403.519(4), did not violate the Dormant Commerce Clause and were not preempted by the Atomic Energy Act of 1954 or the Energy Policy Act of 2005, *id.* Dkt. Entry 42, Order Granting Defendants' Motion to Dismiss, pp. 2-3, and otherwise failed to state a private right of action to challenge the constitutionality of the statute or to otherwise state a claim against a state actor. *Id.*, pp. 4-10.

but refers to and relies on them herein. Based upon the Settlement Agreement, the record, and the proceedings herein, it appears to the Court upon preliminary examination that the settlement is within a range that could be approved as fair, reasonable, just, and adequate, subject to a final Fairness Hearing, and that notice should be issued to the Class.

In addition, this Court finds: (1) that the plan for giving notice and notices constitute the best practicable means of notifying the Class of the settlement, and one that complies with the requirements of due process; (2) that absent Class Members' interests have been adequately represented; (3) that the proceedings to date and as contemplated by the Settlement Agreement have afforded and will afford the absent Class Members all of the requisite due process protections; and (4) that following the class notice, the Fairness Hearing should be held to determine whether the settlement is fair, reasonable, and just, and whether final judgment should be entered in this action.

Accordingly, it is hereby **ORDERED** that:

1. The Settlement Agreement and its terms have been assessed and as such the settlement contained herein is preliminarily **APPROVED** as being within a range that could be approved as fair, reasonable, just, and adequate, subject to a final Fairness Hearing.

2. The proposed plan of providing notice contained in the Settlement Agreement is **APPROVED** and **DEEMED** to be adequate to protect the due process rights of Class Members. Further, the form of the notice to be mailed to the Class (attached as Exhibit C to the Settlement Agreement) is hereby **APPROVED**, and it is hereby **ORDERED** that, within the later of (i) forty-five days after the entry of this Order; or (ii) forty-five days after the PSC approves the distribution of the Class notice, the transfers of the properties in Settlement Agreement Exhibits A and B, and the merger of SCANA and Dominion Energy, Inc. ("Dominion"), Defendants and

the Claims Administrator shall cause notice of the settlement to be mailed and/or e-mailed to Class Members as set forth in the Settlement Agreement in substantially the same form as the summary notice attached as Exhibit C to the Settlement Agreement, and the Claims Administrator shall cause notice to be published as set forth in the Settlement Agreement in an abbreviated form consistent with the summary notice.

3. The Fairness Hearing will be scheduled for a date within the later of (i) one hundred thirty-five days after entry of this Order; or (ii) one hundred thirty-five days after the PSC approves the distribution of the Class notice, the transfers of the properties in Settlement Agreement Exhibits A and B, and the merger of SCANA and Dominion, to determine whether the proposed settlement of this action, as set forth in the Settlement Agreement, is fair, reasonable, just, and adequate and should be finally approved. [2]After the Fairness Hearing, the Court may enter a final order in accordance with the Settlement Agreement.

4. Any Class Member shall be allowed to make a Request for Exclusion from the settlement by mailing or delivering such Request for Exclusion to the Claims Administrator at the address set forth in the notice. Any Request for Exclusion must be in writing and postmarked or delivered no later than the date that is the later of (i) seventy-five days after entry of this Order; or (ii) seventy-five days after the PSC approves the distribution of the Class notice, the transfers of the properties in Settlement Agreement Exhibits A and B, and the merger of SCANA and Dominion. Requests for Exclusion must contain the following information and must be signed by the Class Member: (i) the full name of the Class Member; (ii) the current address of the Class Member; (iii) the SCE&G service address and/or account number for which the Class Member is requesting exclusion; (iv) reference *Lightsey, et al. v. South Carolina Electric & Gas*

[2] The Court will consult with the parties to schedule a date, time, and location for the Fairness Hearing, so this information can be included in the Class notice.

Company, et al., pending before the Court of Common Pleas for Hampton County, Civil Action No. 2017-CP-25-335; and (v) in express and clear terms state the Class Member's desire to be excluded from the settlement and from the Class.

No Request for Exclusion can be made on behalf of a group of Class Members or through an agent or attorney.

Failure to comply with these requirements and to timely submit the Request for Exclusion form shall result in the Class Member being bound by the terms of the settlement.

5. Any Class Member who submits a timely Request for Exclusion may not file an objection to the settlement and shall be deemed to have waived any rights or benefits under the Settlement Agreement.

6. Any living Class Member who does not request exclusion shall receive a payment (or bill credit) without the necessity of submitting a claim form. Because of the need to establish the proper payee for a deceased Class Member, the Personal Representative or next of kin of a deceased Class Member must file a claim and provide a death certificate, letters of appointment, and/or proof of next of kin status within the later of (i) one hundred five days after entry of this Order; or (ii) one hundred five days after the PSC approves the distribution of the Class Notice, the transfers of the properties in Settlement Agreement Exhibits A and B, and the merger of SCANA and Dominion.

7. The Parties shall jointly report the names of all individuals and entities who have submitted a Request for Exclusion to the Court no less than five (5) days prior to the Fairness Hearing.

8. Under certain circumstances, Defendants have the option to terminate the Settlement Agreement for up to five (5) days following the Request for Exclusion deadline. This

option is set forth in a separate letter agreement that permits Defendants to terminate the Settlement Agreement should a certain number of Class Member request exclusion. The referenced letter agreement will not be filed with the Court unless and until (1) the Court orders that the separate letter agreement be filed, or (2) a dispute among the parties concerning its interpretation or application arises. If either of the foregoing events occurs, the separate letter agreement will be filed under seal unless otherwise ordered by the Court. In the event that the exclusion request trigger is reached, Defendants may, but are not obligated to, void the Settlement Agreement, in which case the parties will return to their positions prior to the filing of the Motion for Preliminary Approval of the Settlement.

9. For any and all Class Members who timely request exclusion from the Class, the Defendants will receive a refund of those Class Members' share of the Common Benefit Fund computed as if they had they not requested exclusion.

10. Any Class Member may object to any aspect of the proposed settlement. Any objection must be in writing, must be filed with the Court and mailed to Class Counsel and Defendants' Counsel, as set forth in the notice, and must be postmarked no later than fifteen (15) days prior to the date of the Fairness Hearing. All objections must specifically refer to *Lightsey, et al. v. South Carolina Electric & Gas Company, et al.*, pending before the Court of Common Pleas for Hampton County, Civil Action No. 2017-CP-25-335, and must include the following information: (1) the full name of the Class Member; (2) the current address of the Class Member; (3) the SCE&G service address and/or account number; (4) all specific objections and the reasons in support thereof; and (5) any and all supporting papers.

If the objector intends to appear though counsel, the objector's counsel shall append a list of all prior objections to class action settlements previously filed by such counsel in state and

federal courts, and with respect to each provide (1) the case number; (2) the court where the prior objection was filed; and (3) the outcome of the objection. Any Class Member who files an objection must also appear at the Fairness Hearing in person or through counsel to show why the proposed settlement should not be approved as fair, reasonable, just, and adequate.

11. Any person who fails to object in the manner prescribed herein and in the notice without good cause shown shall be deemed to have waived any such objection with respect to the settlement, including, without limitation, any objection to the proposed settlement or any provision of the Settlement Agreement, by appeal, collateral attack, or otherwise.

12. All discovery and other pretrial proceedings in this action are stayed and suspended, except such actions as may be necessary to implement the Settlement Agreement and this Order.

If the proposed settlement as provided in the Settlement Agreement is not given final approval by the Court, or for any reason the parties fail to obtain a Final Approval Order as contemplated in the Settlement Agreement, or the Settlement Agreement is terminated pursuant to the terms of the Settlement Agreement or Orders of this Court, the Settlement Agreement and this Preliminary Approval Order shall become null and void and shall be of no further force and effect. In such event, the Settlement Agreement, any negotiations relating thereto, the Preliminary Approval Order, and any other matter relating to the settlement shall not be used or referred to for any purposes whatsoever in this or any other action, case, proceeding, or controversy.

AND IT IS SO ORDERED.

HONORABLE JOHN C. HAYES, III
PRESIDING JUDGE

Dated: _____, 2018

Hampton Common Pleas

Case Caption: Richard Lightsey VS South Carolina Electric & Gas

Case Number: 2017CP2500335

Type: Order/Approval Of Settlement

So Ordered

s/John C. Hayes III 2049