

# SCAARLA BRIEFS

SOUTH CAROLINA ADMINISTRATIVE AND REGULATORY LAW ASSOCIATION

South Carolina Administrative and Regulatory Law Association

Spring 2009

Volume 1, Issue 3



## Special points of interest:

- SCAARLA Awards Scholarships to Law Students.
- Chief Administrative Law Judge Marvin F. Kittrell announces pending retirement.
- Significant Changes in Regulatory Procedures at the Public Service Commission .
- Shealy and Ellerbe Bios.

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On behalf of Linda McDonald, Neal Rashly and myself, we are pleased to provide the Spring 2009 issue of the SCAARLA Newsletter. This issue contains information on the SCAARLA Scholarship Recipients from the state's two law schools and an article on "Significant Changes in Regulatory Procedures at the Public Service Commission" by Bonnie Shealy and Frank Ellerbe.

## SCAARLA SCHOLARSHIP RECIPIENTS



Dean Benfield presents McLeod with scholarship check along with Professor Want

The Charleston School of Law has awarded Mr. Yancy McLeod, a third year law student, with this years SCAARLA Scholarship. Law Professor William Want, recommended McLeod for the honor.

Mr. McLeod graduated with a B.S. in Biology from the University of South Carolina. He is seeking a Masters Degree in Environmental Legal Studies from the Vermont School of Law along with his J.D. from the Charleston School of Law. He has worked as a legal intern with the Charleston District of the Corps of Engineers.

At the University of South Carolina School of Law, Dean Pratt presented Malinda McAleer, a third year law student, with a \$1,000 SCAARLA Scholarship for her interest in the field of administrative law. Ms. McAleer is also pursuing a Masters of Environmental Law and Policy from the Vermont School of Law



Dean Pratt presents scholarship award to Ms. McAleer

## Chief Administrative Judge, Marvin F. Kittrell Announces Pending Retirement

Item of note: The Chief Administrative Law Judge, Judge Marvin F. Kittrell, has announced his pending retirement from the Administrative Law Court.

Judge Kittrell was a driving force in establishing the Administrative Law Court and in expanding its scope of duties with the support of the branches of state government. Judge Kittrell has also helped establish SCAARLA and has led this organization since its inception.



**REMINDER: PLEASE REMEMBER THE SCAARLA SEMINAR THAT IS PLANNED FOR SEPTEMBER 2009...DETAILS WILL SOON FOLLOW.**

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## SIGNIFICANT CHANGES IN REGULATORY PROCEDURES

By: Bonnie D. Shealy, Esquire and Frank R. Ellerbe, III, Esquire

The last two years have seen significant statutory changes in several regulatory areas including cable television franchising and the recovery of costs associated with new electric generation plants. In addition, the Public Service Commission has initiated several rulemaking proceedings to revise and add new regulations.

### Cable Television State-Issued Franchises

On May 23, 2006, cable franchising in South Carolina completely changed. A state level franchising system administered by the Secretary of State's Office replaced the former local franchising process. Under the new South Carolina Competitive Cable Services Act, a cable franchise cannot be renewed or issued at the local level. The new law does not affect local authority to control rights-of-way and streets through the local police powers. A company can obtain a state-issued certificate of franchise authority from the Secretary of State's Office in three circumstances. First, once a franchise expires, the company must apply for a certificate from the Secretary of State's Office in order to continue to provide service in South Carolina. Second, a provider who does not currently hold a franchise for an area may obtain a state-issued franchise for that area. Finally, an incumbent cable service provider may exercise the option to terminate an existing franchise once a new entrant cable provider obtains a state issued certificate for the same area served; and the new provider gives notice of the date on which it will begin providing service.

Applications are available on-line at the Secretary of State's website at [www.scsos.com](http://www.scsos.com) under "Cable Franchise Authority." Once the application is filed, the Secretary of State has five days to notify each affected municipality of the application and request information regarding the franchise fee imposed on the incumbent, the number of public, educational, and governmental access channels activated under the incumbent's franchise, and whether the municipality consents. A municipality or county must respond to the Secretary of State's request within 65 days of the date of the request. The Secretary of State's Office has 80 days from the date of its notice to the municipality or county to issue the certificate or deny the application. The South Carolina Department of Consumer Affairs is

designated as the agency to receive complaints from customers. The Act was revised in 2007 to broaden the coverage to include video service providers.

### Base Load Review Act

The Base Load Review Act ("BLRA") became law without the Governor's signature on May 3, 2007. The BLRA allows investor-owned electric utilities to recover prudently incurred costs associated with the construction of new base load nuclear or coal plants through rates. The regulatory framework for the construction of new generation plants prior to enactment of the BLRA did not connect the approval to build a facility with a determination that the cost should be included as part of the rate base. An electric utility obtains approval to build generation plants over 75 MW under the Utility Facility Siting & Environmental Protection Act ("Siting Act"). Once the generation plant was complete, the company would then apply to the Public Service Commission for approval to recover its investment in the generation plant in a rate case.

The BLRA requires an electric utility to file a combined BLRA and Siting Act application if the new plant is to be located in South Carolina. The application may be combined with a general rate proceeding application at the utility's option. A base load review order is a final and binding determination that a plant is used and useful for utility purposes, that its capital costs are prudent utility costs and expenses and are properly included in rates as long as the plant is being built within the approved construction schedule and capital costs estimates. Once this determination is made, it may not be challenged in any subsequent rate proceeding. The base load review order establishes the anticipated construction schedule, capital costs, the return on equity, the choice of the specific type of unit, the qualifications of principal contractors and suppliers, and inflation indices used for costs of construction.

The BLRA also provides that a utility may file a project development application seeking approval to incur preconstruction costs of a nuclear-powered facility. The preconstruction costs include the cost of evaluation, design, engineering, environmental and geotechnical analysis and

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(continued)

permitting and other associated permitting costs. The project development order rules on the prudence of the decision to incur preconstruction costs for the nuclear project, not on the prudence of specific items of cost. Unless the record in a subsequent proceeding shows that an individual cost item was imprudently incurred, or that other decisions were imprudently made after the project development order was issued, then all preconstruction costs are recoverable through future rates. If the utility abandons the project after a project development order is issued, the preconstruction costs may be included in rates if the utility proves that the decision to abandon the plant was prudent.

The Office of Regulatory Staff monitors the plant's construction and capital expenditures.

The BLRA authorizes the Office of Regulatory Staff to create additional positions to assist it in performing its duties. The utility filing an application under the BLRA pays the costs associated with the positions created.

### Public Service Commission Regulations

In 2004, the General Assembly restructured the Public Service Commission ("PSC") and created the Office of Regulatory Staff ("ORS"). Several duties of the Commission were transferred to ORS. As a result over the last few years the Commission initiated rulemaking proceedings to revise its regulations to conform to the new statutory standards. The Commission first revised its regulations governing practice and procedure and telecommunications which became effective April 27, 2007. The revised telecommunications regulations also adopted the FCC's "truth-in-billing" requirements and revised requirements for responding to customer complaints.

The Commission currently has pending regulations which establish eligibility standards and annual certification requirements for eligible telecommunications carriers. State commissions have the primary authority to determine whether a telephone company is designated as an "Eligible Telecommunications Carrier" ("ETC"). The "ETC" status enables local telephone companies to receive Federal Universal Service Fund support. The Commission is also considering new regulations regarding bonding or other security for prepaid local exchange telephone service providers.

Revised water and sewer regulations became effective in May 2007. Proposed electric and gas system and motor carrier regulations were submitted for legislative review and are pending at the General Assembly. In December 2007, the Commission issued a notice of drafting additional proposed amendments to the Commission's regulations regarding representation of persons, electronic service of pleadings, emergency procedures, interruption of service for water and wastewater utilities, and certain transportation regulations, including drug testing for passenger drivers, transportation of household goods by storage container, maximum rate tariff system and "stretcher vans".

*Bonnie D. Shealy and Frank R. Ellerbe, III, practice with Robinson, McFadden & Moore, PC, in Columbia where they represent a variety of regulated industries.*

## ABOUT THE AUTHORS



### Education:

University of South Carolina School of Law, Columbia, SC; J.D.

Honors: Order of Wig & Robe Clemson University, Clemson, SC; B.A.

Honors: Magna Cum Laude  
Major: English

### BONNIE D. SHEALY

Ms. Shealy's areas of practice include administrative law, communications law, public utility law, transportation law, transfers of structured settlement payment rights, and probate administration. Ms. Shealy has represented communications companies in litigation involving theft of cable television services, defamation, constitutional and contract claims and claims involving the Fair Credit Reporting Act. She has represented publishing companies in sweepstakes

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## SHEALY BIO (Continued from Page 3)

claims. Ms. Shealy represents transportation, water, sewer, electric and telecommunications companies seeking certification from the Public Service Commission of South Carolina.

Ms. Shealy is a member of the South Carolina Public Service Commission's Advisory Committee and a volunteer with the South Carolina Bar LAMP Program which provides pro bono legal advice and assistance to members of the armed services and their families. In 2006, she participated as a panel member representing South Carolina during the joint meeting of the Cable Associations of SC, NC, Tennessee and Georgia. She is on the Humanities Advancement Board for the College of Architecture, Arts & Humanities at Clemson University and a member of Clemson's Second Century Society. Ms. Shealy is a member of Epting Memorial United Methodist Church in Newberry, South Carolina where she is a Director of Family Ministries and a member of the choir.

Member: Richland County and South Carolina Bar Associations, South Carolina Bar Probate, Estate Planning & Trust Section, South Carolina Women Lawyers Association, South Carolina Administrative and Regulatory Law Association, and Federal Communications Bar Association.



FRANK R. ELLERBE, III

### Education:

University of South Carolina School of Law, Columbia, SC, J.D.  
Washington & Lee University, Lexington, VA, B.A.

Mr. Ellerbe graduated from Washington & Lee University in 1979 and received his J.D. in 1982 from the University of South Carolina School of Law. His practice is complex litigation with an emphasis in telecommunications, utility and environmental law.

Mr. Ellerbe's litigation practice includes regulatory and administrative matters as well as jury trials and appeals. He has had considerable recent experience in class action litigation involving various industries including life insurance, cable television, replacement glass, securities and forest resources.

Mr. Ellerbe's telecommunication and utility practice has included matters involving telephone, electricity, gas and water regulation before the South Carolina Public Service Commission where he has appeared for twenty years. Mr. Ellerbe's environmental practice has included water and wastewater regulation matters as well as hazardous waste practice and CERCLA litigation.



**South Carolina Administrative  
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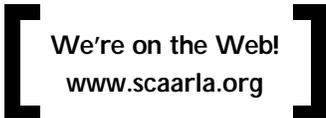
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