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Mr. Mark O. Webb
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Dominion Energy, Inc.
120 Tredegar Street
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Opinion Letter re: Constitutionality of BLRA and Proposed Legislation

Dear Mr. Webb:

As you know, I have recently been asked by representatives of Dominion Energy, Inc. ("Dominion") to address several legal issues that have great bearing on Dominion's proposed merger with SCANA Corporation ("SCANA"). On July 31, 2017, the South Carolina Electric & Gas Company ("SCE&G") – a wholly owned subsidiary of SCANA – announced its intention to abandon construction of two nuclear power generating units in Fairfield County (the "V.C. Summer Project" or "Project"). I understand that the South Carolina General Assembly, in reaction to SCE&G's abandonment of the V.C. Summer Project, is considering legislation that would repeal or significantly amend the Base Load Review Act ("BLRA"). I understand that passage of such laws could materially affect Dominion's decision whether to merge with SCANA pursuant to the terms of the parties' current arrangement.

In light of these circumstances, Dominion seeks my opinion as to the answers to the following four questions:[1]

QUESTION #1: Is the BLRA, including its abandonment provision,[2] constitutional?

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[1] I want to acknowledge that two of my law partners, Kirsten Small and Andrew Mathias, provided valuable assistance to me in researching the pertinent case and statutory law.

[2] The BLRA provides, "[w]here a plant is abandoned after a base load review order approving rate recovery has been issued, the [costs] related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance

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QUESTION #2: Would a repeal of the BLRA, in which SCE&G is required to refund past revenues collected for the V.C. Summer Project and/or prohibited from future recovery of its $5 billion investment in the Project, survive constitutional challenge?

QUESTION #3: Could the General Assembly constitutionally amend the BLRA in a prospective manner, *i.e.*, not affecting the previously approved V.C. Summer Project and associated rates, but doing away with the BLRA's funding mechanism going forward?

QUESTION #4: If the BLRA is retroactively amended or repealed, who would have standing to bring a legal challenge, and against whom would a claim be brought? Would such a suit be filed in state or federal court? Approximately how long would the litigation last? How would the litigation affect SCANA and SCE&G's customers?

EXECUTIVE SUMMARY

I have reached these conclusions, which are explained in detail in the following pages of this Opinion Letter:

ANSWER TO QUESTION #1: Yes. The BLRA, including its abandonment provision, is constitutional.

ANSWER TO QUESTION #2: No. A repeal of the BLRA in which SCE&G is required to refund past revenues collected for the V.C. Summer Project and/or prohibited from future recovery of its $5 billion investment in the Project would not survive legal challenges.

ANSWER TO QUESTION #3: Yes. The General Assembly could constitutionally amend the BLRA in a prospective manner, *i.e.*, not affecting the previously approved V.C. Summer Project and associated rates, but doing away with the BLRA's funding mechanism going forward.

ANSWER TO QUESTION #4: If the BLRA is amended or repealed in a retroactive manner SCE&G would have standing to bring a legal claim in state court. This litigation would be hard-fought and expensive,

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of the evidence that the decision to abandon construction of the plant was prudent." S.C. Code Ann. § 58-33-280(K).

and would have a negative impact on economic development in South Carolina.[3]

RELEVANT BACKGROUND

The South Carolina Constitution establishes that "[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, ***and privately owned utilities serving the public as and to the extent required by the public interest.***" Article IX, § 1 (emphasis added). The Committee to Make a Study of the South Carolina Constitution of 1895 (the "West Committee"), which proposed revisions to the South Carolina Constitution in the 1960s, completely rewrote Article IX and proposed the aforementioned language which was later duly ratified. *See* Memo No. 11, Tr. of the West Committee, Feb. 1, 1968. With respect to Article IX, the West Committee explained that it had "fully discussed the need for regulation of corporations and utilities in the Constitution," and that it "believe[d] that the regulation of common carriers, public utilities and corporations ***is a matter for statute not the Constitution.***" (Final Report of the Comm. to Make a Study of the S.C. Const. of 1895 at 106-07 (1969) (emphasis added)).

Prior to 2007, ***statutes*** in South Carolina established that utility rate-making was governed by the "used and useful" standard, which restricts rate-making to "'the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services.'" *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 311 n.1, 313 S.E.2d 290, 291 n.1 (1984) (quoting *Southern Bell v. Pub. Serv. Comm'n*, 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978)). That is, under the "used and useful" standard, an electric utility could ***not*** include in its rates money for construction of new electricity generation plants until those plants were actually in service and providing electricity.

The General Assembly Passes the BLRA

In 2007, in light of growing demand for increased generation of nuclear electricity, the South Carolina General Assembly passed the BLRA and Governor Mark Sanford allowed it to become law without his signature. As noted in the September 26, 2017 Attorney General's Advisory Opinion, "Enactment of the [BLRA] in South Carolina was part of a much larger effort throughout the nation to incentivize construction of new nuclear power plants by utilities as a means of establishing energy independence." Att'y Gen. Adv. Op. at 2. As you are undoubtedly aware, passage of

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[3] While I have not made an independent economic impact study, I am informed and believe that retroactive repeal or amendment of the BLRA would have a very significant negative impact on SCE&G's solvency. Further, such an action would send a signal to any company that is considering investment in South Carolina that the General Assembly is willing to disrupt settled economic expectations if – as is apt to occur in business – circumstances change.

the BLRA was driven by real and practical concerns, and as the Attorney General noted:

> The legacy of the last significant build-out of baseload generation is billions of dollars of cost disallowances when plants were cancelled before going into service (*i.e.*, before becoming "used and useful") or when [state utility] commissions otherwise found imprudence. After this experience, utilities were understandably reticent to undertake the types of capital-intensive projects that are necessary to provide new, cleaner, and more efficient baseload power. Consequently, a number of states passed statutes and implemented accompanying regulations to mitigate the risks utilities assume for such projects.

Id. (quoting Galloway and Cousineau, *Cost Recovery for Pre-Approved Projects*, 151 NO. 6 PUBL. UTIL. FORT. 54, 55 (June 1, 2013)). South Carolina joined the ranks of other states seeking to encourage development of new nuclear power generation by enacting the BLRA, which coupled a fully litigated pre-construction prudency review with statutory safeguards against the results of that pre-construction review being second-guessed. It was well within the General Assembly's constitutional authority to establish a method of ratemaking in South Carolina that differed from the "used and useful" standard.

The South Carolina General Assembly apparently believed (as did the legislatures of many other states) that the BLRA's funding mechanism was necessary to encourage construction of nuclear baseload plants. South Carolina's electrical utilities are duty-bound to "furnish adequate, efficient and reasonable service" to their customers, S.C. Code Ann. § 58-27-1510 (2015), and must keep pace with growing energy demand. But despite the many advantages of nuclear power generation, the construction of such plants is risky due to their cost and the amount of time it takes to build them. In passing the BLRA, the General Assembly determined–in accordance with Article IX, Section 1 of the South Carolina Constitution—that it was in the public interest for utilities to build nuclear plants and that investors and ratepayers should share the risks in funding these projects. *See* S.C. Bill History, 2007 Reg. Sess. S.B. 431 ("An act to protect South Carolina ratepayers by enhancing the certainty of investments in the infrastructure of electric utilities serving consumers in this State.").

As the Public Service Commission ("PSC") remarked years after the General Assembly passed the BLRA:

> [T]he principal benefit of nuclear construction, in addition to lower forecasted costs, is the fact that it helps insulate customers from the price volatility and supply risk that are increasingly associated with fossil fuel fired generation. Nuclear generation also insulates customers from future CO2 and other environmental compliance costs associated with fossil fuels, which are likely to be significant.

PSC Order No. 2009-104(A) (Mar. 9, 2009), at 56. In passing the BLRA, the General Assembly promoted the availability of nuclear power and in so doing, exercised what the Attorney General's Advisory Opinion recognizes as its "considerable latitude to determine what the 'public interest' is in a given instance." Br. of Att'y Gen. in Opp. To Mot. to Dismiss at 26, *In re: Request of S.C. Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920*, PSC Docket No. 2017-305-E (filed Nov. 21, 2017).

As noted by the South Carolina Supreme Court, the unreviewability of the PSC's initial prudence determination is a critical aspect of the BLRA:

> [T]he BLRA was intended to cure a specific problem under the prior statutory and regulatory structure. Before adoption of the BLRA, a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant. The possibility of prudency challenges while construction was underway increased the risks of these projects as well as costs and difficulty financing them. In response, the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review ***before*** major construction of a base load generating facility begins.

S.C. Energy Users Comm. v. SCE&G, 410 S.C. 348, 359, 764 S.E.2d 913, 918 (2014) (emphasis added).

SCE&G Applies for and Receives a Base Load Review Order

After the passage of the BLRA, on May 30, 2008, SCE&G submitted a Combined Application ("the Application") for a Base Load Review Order ("BLRO") related to the construction and operation of V.C. Summer Units 2 and 3 ("the Units"). SCE&G was a 55% partner in the endeavor, with the South Carolina Public Service Authority ("Santee Cooper") having a 45% stake. Notice of the proceedings was published in papers of general circulation in SCE&G's service area, and SCE&G customers received written notice via an insert in their bills. Before issuing the BLRO ten months later, the PSC considered, *inter alia*, written comments from some 87 members of the public, briefs from 12 individuals or groups who formally intervened in the proceedings. Additionally, the Office of Regulatory Staff ("ORS") "conducted an extensive audit and examination of SCE&G's decision to construct the Units and the contracts, designs, and permits under which they will be constructed," aided by "outside consultants with extensive experience in power plant construction, construction contracting, resource planning, transmission planning, load modeling, economics, and environmental and nuclear permitting." BLRO at 9. Eight of these experts testified during a multi-day hearing the PSC conducted in December 2008,

which also included the testimony SCE&G's senior leadership and 26 public witnesses. BLRO at 5-6, 9. The transcript of the hearing was more than 2,500 pages long.

On March 2, 2009, the PSC issued the BLRO. PSC Order No. 2009-104(A). In the 126-page order, the PSC analyzed multiple aspects of the prudence and reasonableness of the proposed Project, including:

- The accuracy of SCE&G's forecasts of future demand;
- The potential impact of the Project on the environment;
- The selection of the location and the reactor design;
- The selection of Westinghouse and Stone & Webster as the principal contractors for the construction;
- The terms of the engineering, procurement, and construction contract ("EPC Contract") for the construction;
- The reasonableness and practicality of SCE&G's financing plan;
- Internal and external oversight of the Project; and
- Schedule and cost forecasts.

As required by the BLRA, *see* S.C. Code Ann. § 58-33-250(8) (2015), the PSC also considered various risks posed by the Project, including risks that might result in cost overruns or construction delays and "the risks of constructing these units compared to the risks of meeting the energy needs of SCE&G's customers by other means." BLRO at 90-91.

Ultimately, the PSC concluded,

> There is no risk-free means to meet the future energy needs of SCE&G's customers or of the state of South Carolina. Based on the evidence of record, ***the [PSC] finds that it is reasonable and prudent to proceed*** with the construction of Units 2 and 3 in light of the information available at this time and the risks of the alternatives.
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> . . .
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> [Our] approval of the reasonableness and prudency of [SCE&G's] decision to proceed with construction of the Units rests on a thorough record and detailed investigation of the information known to the [SCANA] and the parties at this time. Once an order is issued . . . the statute does not allow the [PSC] to shift risks back to [SCE&G] . . . . In addition, ***risk shifting could jeopardize investors' willingness to provide capital for the project*** on reasonable terms which, in turn, could ***result in higher costs to customers***.

PSC Order No. 2009-104(A), p. 92 (emphasis added). The South Carolina Supreme Court affirmed the BLRO, describing it as "very thorough and reasoned" and noted that "the [PSC] addressed each and every concern" presented to it. *Friends of the Earth v. Pub. Serv. Comm'n of S.C.*, 387 S.C. 360, 372, 692 S.E.2d 910, 916 (2010).

Base Load Review Order and SCE&G's Oversight Reviewed on Multiple Occasions

Even after issuance of the BLRO, the V.C. Summer Project continued to be the subject of intense scrutiny by the PSC, the ORS, and members of the public. In addition to scrutiny by the courts, the PSC has examined SCE&G's prudence in management of the Project on a regular basis since issuance of the BLRO on March 2, 2009:

- **July 21, 2010**: PSC issues order updating construction schedules;
- **May 16, 2011**: PSC issues order removing $438 million in contingency and adding $174 million;
- **November 15, 2012**: PSC issues order revising construction schedule and approving $283 million in additional capital costs;
- **September 10, 2015**: PSC issues order further revising construction schedule and approving $698 million in additional capital costs;
- **November 28, 2016**: PSC issues order further revising construction schedule.

The PSC issued these orders only after examining all the evidence presented at a public hearing and finding that the requested changes were ***not*** the result of imprudence on the part of SCE&G. This process is required by S.C. Code Ann. § 58-33-270(E), a critical provision of the BLRA intended to protect the ratepayer.[4]

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[4] That provision reads:

> (E) As circumstances warrant, the utility may petition the [PSC], with notice to the Office of Regulatory Staff, for an order modifying any of the schedules, estimates, findings, class allocation factors, rate designs, or conditions that form part of any base load review order issued under this section. The commission shall grant the relief requested if, after a hearing, the commission finds:
>
> (1) as to the changes in the schedules, estimates, findings, or conditions, that the evidence of record justifies a finding that ***the changes are not the result of imprudence on the part of the utility***; and
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> (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates the proposed class allocation factors or rate designs are just and reasonable.

Significant Change in Circumstances

On March 29, 2017, the project's prime contractor, Westinghouse, and certain of its affiliates petitioned for Chapter 11 bankruptcy protection and informed SCE&G and Santee Cooper that it was rejecting its obligations under the parties' contract pursuant to provisions of the Bankruptcy Code. *See* Pet'n of SCE&G at 4, *In re: Pet'n of SCE&G for Prudency Determination Regarding Abandonment*, PSC Docket No. 2017-244-E (filed Aug. 1, 2017) ("Abandonment Petition"). On July 27, 2017, Westinghouse's parent company, Toshiba Corporation ("Toshiba"), agreed to pay SCE&G approximately $1.2 billion to satisfy all claims for damages arising out of Westinghouse's bankruptcy and rejection of the parties' contract. *Id.* at 5. In light of the significant change in circumstances, SCE&G and Santee Cooper began to create amended cost and completion schedules. But, on July 31, 2017, Santee Cooper announced that it was abandoning the project. *Id.* at 9.

SCANA Abandons V.C. Summer Project

Soon after Santee Cooper abandoned the Project, SCANA announced that SCE&G "will cease construction of the [V.C. Summer Project] and will promptly file a petition with the [PSC] seeking approval of its abandonment plan." Press Release, SCANA Corp., *South Carolina Electric & Gas Company to Cease Construction and Will File Plan of Abandonment of the New Nuclear Project* (July 31, 2017), *available at* http://bit.ly/2uTpF2h (last visited Jan. 24, 2018). SCE&G made the decision to abandon the Project after "conclud[ing] that it would not be in the best interest of its customers and other stakeholders to continue construction," specifically citing:

> . . . additional costs to complete the Units, the uncertainty regarding the availability of production tax credits for the [P]roject, the amount of anticipated guaranty settlement payments from Toshiba . . . and other matters associated with continuing construction, including the decision of the co-owner of the project, [Santee Cooper], to suspend construction of the project.

Id. Kevin Marsh, then the Chairman and CEO of SCANA ("Chairman Marsh"),[5] went on to say:

> We arrived at this very difficult but necessary decision following months of evaluating the project from all perspectives to determine the

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S.C. Code Ann. § 58-33-270(E) (emphasis added).

[5] On October 31, 2017, SCANA announced leadership changes, including the retirement of Chairman Marsh and the appointment of Maybank Haygood to Non-Executive Chairman of the Board of Directors and Jimmy Addison to CEO. *See* Press Release, SCANA Corp., *SCANA Corporation and South Carolina Electric & Gas Company Announce Leadership Changes* (Oct. 31, 2017), *available at* http://bit.ly/2Dw7OCg (last visited Jan. 24, 2018).

> most prudent path forward. Many factors outside our control have changed since inception of this project. Chief among them, the bankruptcy of our primary construction contractor, Westinghouse, eliminated the benefits of the fixed-price contract to our customers, investors, and other stakeholders. Ultimately, our project co-owner Santee Cooper's decision to suspend construction made clear that proceeding on our own would not be economically feasible. Ceasing work on the project was our least desired option, but this is the right thing to do at this time.

Id.

Given the risky nature of nuclear construction projects, the General Assembly anticipated the possibility of abandonment in 2007, and included in the BLRA a provision expressly permitting a utility to abandon a project and still recover some of its costs:

> Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC[6] related to the plant ***shall nonetheless be recoverable*** . . . provided that the utility shall bear the burden of providing by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. . . . The [PSC] ***shall order the amortization and recovery through rates*** of the investment in the abandoned plant as part of an order adjusting rates under this article.

S.C. Code Ann. § 58-33-280(K) (emphasis added). This type of recovery was necessary to induce utility companies to undertake such risky projects and undoubtedly contained in the BLRA to protect utilities from the inherent risks associated with such construction. Notwithstanding that these projects are financially precarious, the General Assembly determined that they were in the public interest, and that in the event of prudent abandonment a utility should recover its investment.

On August 1, 2017, SCE&G filed the Abandonment Petition with the PSC. On August 15, 2017, however, SCE&G voluntarily withdrew its Abandonment Petition in order to "accommodate the legislative review process." Press Release, SCANA Corp., *South Carolina Electric & Gas Company to Voluntarily Withdraw its New Nuclear Abandonment Petition to Accommodate the Legislative Review Process* (Aug. 15, 2017), *available at* http://bit.ly/2vZFkAl (last visited Jan. 24, 2018). In announcing the withdrawal, SCANA noted that "SCE&G management has met with various stakeholders and members of the South Carolina General Assembly, including legislative leaders, to discuss the abandonment of the new nuclear project and to hear

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[6] "'AFUDC' means the allowance for funds used during construction of a plant calculated according to regulatory accounting principles." S.C. Code Ann. §58-33-220(1).

their concerns. SCE&G's withdrawal decision was in response to those concerns, and to allow for adequate time for governmental officials to conduct their reviews." *Id.* Chairman Marsh, at an August 16, 2017 press conference, indicated that the Abandonment Petition would be refiled at "an appropriate time." *SCE&G withdraws petition to scrap Summer project*, World Nuclear News (Aug. 16, 2017), *available at* http://bit.ly/2E1TUsA (last visited Jan. 24, 2018).

Attorney General's Advisory Opinion Regarding Constitutionality of the BLRA

On September 26, 2017, the Attorney General published an advisory opinion addressing the constitutionality of the BLRA "in light of the recent problems that have occurred with [the] V.C. Summer Nuclear Plant." Att'y Gen. Adv. Op. at 1. Notwithstanding his acknowledgment that legislation is presumed constitutional, the Attorney General opined that "as applied, portions of the [BLRA] are constitutionally suspect" because "[the BLRA] fails to strike the constitutionally required balance between investors and ratepayers." *Id.* At its core, the basis for this opinion is that the Attorney General reads Article IX, Section 1 of the South Carolina Constitution to require the "used and useful" standard in utility rate-making, and "[t]hus, [the Attorney General] believe[s] that Art. IX, § 1 renders the abandonment provision . . . constitutionally suspect."[7] Att'y Gen. Adv. Op. at 57.

Proposed Legislation

Prior to the 2018 Legislative Session, several members of the General Assembly pre-filed legislation proposing significant revisions to the BLRA, including its abandonment procedures:

- **H. 4375**: Proposing a *de facto* repeal of the BLRA by requiring that rates be set using the "used and useful" standard and expressly prohibiting a utility from charging as part of its rate an amount associated with construction costs until the PSC determines that the generation facilities are then "used and useful."

- **H. 4380**: Establishing procedures for the PSC to "order a refund to ratepayers of all amounts collected for costs attributed to a project construction under the provisions of the [BLRA]."

[7] The Attorney General does not opine that the BLRA is unconstitutional, only that it is "constitutionally suspect."

Proposed Merger of Dominion and SCANA and Request for a Prudency Determination Regarding Abandonment of the V.C. Summer Project

As you are well aware, on January 3, 2018, Dominion and SCANA issued a joint press release in which they announced:

> . . . an agreement for the companies to combine in a stock-for-stock merger in which SCANA shareholders would receive 0.6690 shares of Dominion . . . common stock for each share of SCANA common stock, the equivalent of $55.35 per share, or about $7.9 billion based on Dominion['s] . . . volume-weighted average stock price of the last 30 trading days ended Jan. 2, 2018. Including assumption of debt, the value of the transaction is approximately $14.6 billion.

Press Release, SCANA Corp. and Dominion, *Dominion Energy, SCANA Announce All-Stock Merger With $1,000 Immediate Cash Payment To Average South Carolina Electric & Gas Residential Electric Customer After Closing* (Jan. 3, 2018), *available at* http://bit.ly/2E4abx6 (last visited Jan. 24, 2018).

On January 12, 2018 SCANA and Dominion filed a "Joint Application and Petition . . . for review and approval of a proposed business combination between SCANA Corporation and Dominion Energy, Inc., as may be required, and for a prudency determination regarding the abandonment of the V.C. Summer Units 2 & 3 Project and associated merger benefits and cost recovery plans." Docket No. 2017-370-E. This petition describes critical terms of the merger, namely: (1) a one-time credit to SCE&G's customers totaling $1.3 billion, (2) post-merger, SCE&G would write-off $1.4 billion in project costs and approximately $320 million in regulatory assets, removing any future customer obligation for these costs, (3) Dominion would "underwrite a $575 million refund pool for refunding amounts previously collected that, along with the benefit of recent federal income tax reform, will allow SCE&G to provide an immediate reduction in customer bills of at least 5% on a customer class basis, and will keep the portion of the bill reduction that is not attributable to federal tax reform in place for approximately eight years" (Petition at 4-5), and (4) other material benefits to ratepayers and South Carolina. These proposed benefits would be material to SCE&G's ratepayers and are only available to them if the previously described transaction – worth $14.6 billion – is effectuated.

SCANA and Dominion state that without the PSC's approval of the proposed merger and its terms, "the Merger will not occur" (Petition at 3). In that event, SCANA requests approval of one of two proposed alternatives: (1) "the [PSC] adopt a rate mitigation plan that can be funded by SCE&G alone, but as a matter of financial necessity cannot provide customers with all the benefits associated with the Merger (the 'No Merger Benefits Plan'), or (2) the [PSC] issue an order providing for the recovery of all costs and investments associated with the . . . project allowable by law without any present rate increase (the 'Base Request')" (Petition at 6). If the merger is

not approved and neither of the alternative proposals is implemented, but rather the PSC implements the course of action proposed by the Office of Regulatory Staff, "it would be unlikely that SCANA could recapitalize SCE&G to restore its creditworthiness and SCE&G's ability to continue to finance its utility operations outside of bankruptcy." Petition, at 50. Additionally, SCANA has repeatedly and publicly stated that if the proposed legislation currently before the General Assembly is passed it will be impossible for SCE&G's ratepayers to receive any relief.

It is with this background in mind that I analyze the following issues that are of such importance to South Carolina.

ANALYSIS

QUESTION #1: Is the BLRA, including its abandonment provision, constitutional?

ANSWER: Yes.

Historically, in South Carolina as elsewhere in the nation, utility rates have been based only on property that is "used and useful" in the production of electricity. Under the "used and useful" standard, a public utility cannot begin to recover the cost of constructing a new power plant until it is fully built and operational. This creates an economic barrier to the construction of new nuclear power plants, which are expensive[8] and require long construction periods. Few (if any) public utilities have the financial ability to carry the cost of a new nuclear plant during the years it takes to build one.

In the mid-2000s, numerous states responded to this dilemma, and sought to encourage new nuclear construction, by enacting laws allowing utilities to begin recovering costs associated with construction of nuclear power plants that are not "used and useful" (and, in the case of abandoned projects, will never become used and useful). The BLRA is South Carolina's answer to the question of how to encourage the construction of new nuclear power plants.

Under the BLRA, utilities may include in their rates the prudently incurred costs of new nuclear power plants, even if the utility eventually abandons construction. *See* S.C. Code Ann. § 58-33-280(K). The BLRA also provides that the PSC's initial prudency determination is "final," preventing reevaluation of a project's prudence in any subsequent proceeding. *Id.* § 58-33-275(A)-(B). During construction, however, the PSC may increase rates to account for higher-than-expected costs, so long as those

[8] "Capital costs (construction and financing) account for 71.4% of overall nuclear generation costs[.]" Robert C. Volpe, *The Role of Advanced Cost Recovery in Nuclear Energy Policy*, 15 Sustainable Dev. L. & Pol'y 28, 29 (Winter 2015).

costs did not result from the utility's imprudence and the new rates are "just and reasonable." *Id.* § 58-33-270(E).

In the wake of SCE&G's decision to abandon the V.C. Summer Project, significant attention has been paid to the BLRA, both as to the wisdom of the General Assembly's enactment of it in 2007, and as to its constitutionality. The latter category includes the Attorney General's Advisory Opinion from September 2017, which stated that the BLRA's prudency review process and its abandonment provisions raise "constitutional concerns." Att'y Gen. Adv. Op. at 12-13.

The Takings Clause

The United States Constitution's primary restriction on government regulation of utility rates is the Fifth Amendment's Takings Clause, which provides that "private property [shall not] be taken for public use, without just compensation." The Fourteenth Amendment makes this restriction applicable to the States. *See Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897). The South Carolina Constitution likewise provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made for the property." S.C. Const. Art. I, § 13.

Under the Federal Takings Clause, "[a] public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692-93 (1923). In other words, the United States Constitution requires "just and reasonable" utility rates that strike a balance between the interests of investors and the interests of ratepayers. *Permian Basin Area Rate Cases*, 390 U.S. 747, 770 (1968); *see also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Rates set too low or too high are equally unconstitutional. "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). "In addition to prohibiting rates so low as to be confiscatory," the Supreme Court's cases also "make[] clear that exploitative rates are illegal as well." *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1177-1180 (D.C. Cir. 1987) (en banc). When it comes to utility regulation, South Carolina's legal requirements appear to overlap with the Fifth Amendment. Rates cannot be set "so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility's customers." *Mims v. Edgefield Cty. Water & Sewer Auth.*, 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983).

"In reviewing a rate order courts must determine whether or not the end result of that order constitutes a reasonable balancing . . . of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." *Jersey Central*, 810 F.2d at 1177-78. So long as the "total effect" of a rate is reasonable, the method employed to set the rate largely does not matter. *Duquesne*, 488 U.S. at 310. Challengers face a "heavy burden" to establish that a rate is constitutionally unreasonable. *Hope Natural Gas*, 320 U.S. at 602. Any rate falling with the "broad zone of reasonableness . . . cannot properly be attacked as confiscatory." *Permian Basin*, 390 U.S. at 770.

Importantly, the United States Supreme Court has made clear that the "used and useful" test is ***not*** the only measure of what is "just and reasonable." The "used and useful" test was first articulated in *Smyth v. Ames*, 169 U.S. 466, 546 (1898), where the United States Supreme Court held that "the basis of all calculations as to the reasonableness of rates . . . must be the fair value of the property being used by it for the convenience of the public." Subsequently, however, that Court held "that the 'fair value' rule is not the only constitutionally acceptable method of fixing utility rates." *Duquesne*, 488 U.S. at 310 (citing *Hope Natural Gas*, 320 U.S. at 602).

After *Hope Natural Gas*, the "used and useful" test "ceased to have any constitutional significance[.] . . . It is now simply one of several permissible tools of ratemaking, one that need not be, and is not, employed in every instance." *Jersey Central*, 810 F.2d at 1175. Consequently, "the inclusion of property not currently used and useful in the rate base" does not "automatically constitute[] exploitation of consumers[.]" *Id.* at 1180. "[I]ncluding prudent investments in the rate base is not in and of itself exploitative[.] . . . Indeed, when the regulated company is permitted to earn a return not on the market value of the property used by the public, . . . but rather on the original cost of the investment, placing prudent investments in the rate base would seem a more sensible policy than a strict application of 'used and useful,' for under this approach it is the investment, and not the property used, which is viewed as having been taken by the public." *Id.* at 1181. The United States Constitution thus permits the BLRA's reasonable choice of a "prudent investment" rule over a "used and useful" standard.

Furthermore, although South Carolina courts have traditionally applied the "used and useful" test in ratemaking outside the context of the BLRA, state judicial opinions do not appear to treat that standard as a constitutional requirement. To be sure, the South Carolina Supreme Court cited *Smyth* approvingly in *Mims*, but only for the general proposition that a utility's rates must be reasonable, neither too high nor too low. *See* 278 S.C. at 556, 299 S.E.2d at 486. *Mims* ***does not once*** mention the "used and useful" standard.

In view of the fact that the Constitution mandates only the end result—a rate that reasonably balances the interests of investors and the interests of customers—and

not the method used to reach that result, I conclude that the choice of ratemaking principles is the prerogative of the General Assembly as the state's legislative body. It was well within the General Assembly's purview to decide, as it did in enacting the BLRA, that encouraging investment in new power plants would benefit the public over the long term, and therefore it was well within its authority "to include prudent but cancelled investments" in utility rates. *Jersey Central*, 810 F.2d at 1177; *see also State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 166 (Mo. 1985) ("Electric utilities will be reluctant to embark on new construction projects, or with long-range plans, if the prospect of forfeiture looms. Investors will hesitate to stake their money in [a] venture with a controlled return and substantial risk of loss."). The BLRA thus appears to achieve a constitutionally reasonable balance between investor and consumer interests. This is also the view of a "substantial majority" of courts and utility regulators that have addressed this question. *People's Org. for Wash. Energy Res. v. Wash. Utilities & Transp. Comm'n*, 711 P.2d 319, 332 (Wash. 1985); *see also Att'y Gen. v. Dep't of Pub. Utils.*, 455 N.E.2d 414, 422 (Mass. 1983).

Substantive Due Process and Equal Protection

Two other potential challenges to the BLRA are based on the view that the BLRA unfairly favors investors at the expense of customers. One theory posits that the imbalance is a substantive due process violation, while another posits that the imbalance is a denial of equal protection *See* Att'y Gen. Adv. Op. at 36.

In my view, both challenges are without merit. Legislatures have "considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties." *Eastern Enters. v. Apfel*, 524 U.S. 498, 528 (1998) (plurality). Laws "adjusting the burdens and benefits of economic life" carry a strong "presumption of constitutionality," and only offend substantive due process if they are "arbitrary and irrational." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see also Permian Basin*, 390 U.S. at 769-70 (explaining that price regulation is unconstitutional "if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt"). Likewise, to satisfy equal protection, the PSC's ratemaking need only have a rational basis; the PSC's rates do not receive heightened judicial scrutiny. *See Friends of the Earth*, 387 S.C. at 365-66, 692 S.E.2d at 913. The BLRA is rationally related to the State's legitimate interest in encouraging investment in new power plants.

Procedural Due Process

Another potential challenge to the BLRA would be an assertion that the BLRA violates utility customers' procedural due process rights because (1) § 58-33-275 allegedly denies customers subsequent hearings on prudency by establishing "an irrefutable presumption" of prudence and preventing relitigation of the issue after the PSC's initial determination, and (2) § 58-33-270(E) allegedly "shifts the burden from the utility being required to prove prudency to one of a challenger required to

demonstrate imprudence." Att'y Gen. Adv. Op. at 31. Neither of these arguments has merit.

While utility customers undoubtedly have a procedural due process right to notice and an opportunity to be heard at rate-adjustment hearings, *see Porter v. PSC*, 338 S.C. 164, 170, 525 S.E.2d 866, 869 (2000), the BLRA does not deny that right—and thus creates no "irrefutable presumption" of prudence—because the Act only deems the PSC's prudency determination final ***after*** notice and a hearing. Indeed, the BLRO approving the V.C. Summer nuclear plant came after "weeks of hearings" featuring testimony from "over 20 witnesses" creating "a transcript that is more than a thousand pages long." *Energy Users II*, 410 S.C. at 359, 764 S.E.2d at 918. The PSC carefully "addressed each and every concern" raised during the hearings and issued its decision "in a very thorough and reasoned order" upheld by the South Carolina Supreme Court. *Friends of the Earth*, 387 S.C. at 372, 692 S.E.2d at 916. This comprehensive process satisfies due process, in part, because it gave everyone a full opportunity to testify and offer evidence.

In light of the thoroughness of the initial proceedings that resulted in the PSC's prudency determination, due process does not entitle customers to relitigate that question. Due process "does not require an endless number of opportunities for one to assert or reassert his or her rights." 16B Am. Jur. 2d *Constitutional Law* § 1023. "At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). Once a party "has had its day in court," further review "is not a requirement of due process." *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 42-43 (1954). The BLRA thus hardly denies customers a hearing—indeed, numerous members of the public appeared at the prudency hearings or submitted written comments—nor does it create an irrebuttable presumption of prudence. It simply does not allow the PSC's prudence determination to be reopened once made.

Moreover, statutes creating irrebuttable presumptions do not automatically violate due process so long as "the legislation in question bears a rational relation to a legitimate legislative objective," and the presumption is "based upon 'an objective criterion' which bears 'a sufficiently close nexus with underlying policy objectives.'" *Lazerson v. Hilton Head Hosp., Inc.*, 312 S.C. 211, 213, 439 S.E.2d 836, 838 (1994) (quoting *Weinberger v. Salfi*, 422 U.S. 749, 771 (1975)). A presumption of prudence after the PSC's initial determination meets that test because it is reasonably based upon the findings and reliability of the initial process. The presumption is also rationally related to the BLRA's goal of encouraging investment in new power plants. ''Before adoption of the BLRA, a utility's decision to build a base load generating plant was subject to relitigation if parties brought prudency challenges after the utility had committed to major construction work on the plant. The possibility of prudency challenges while construction was underway increased the risks of these projects as

well as the costs and difficulty of financing them. In response, the General Assembly sought to mitigate such uncertainty by providing for a comprehensive, fully litigated and binding prudency review before major construction of a base load generating facility begins." *Energy Users II*, 410 S.C. at 359, 764 S.E.2d at 918.

The second possible procedural due process challenge – that the BLRA shifts the burden to the challenger to demonstrate imprudence – is also without merit. This argument rests on a misreading of the statutory text because the BLRA provides for no such shift. Aside from that, "it is normally within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 201-02 (1977) (internal citations and quotations omitted). No such deeply rooted principle of justice says that utilities must shoulder the burden of proving the prudence of new costs before regulators may approve a rate increase.

In conclusion, by enacting the BLRA in 2007, the General Assembly joined a host of other states in seeking to encourage the construction of new nuclear power plants by mitigating the enormous carrying costs of construction. Further, the General Assembly recognized, and provided for, the risk that such projects might not come to fruition. The BLRA as a whole, and each of its individual provisions, stand on solid constitutional ground. Accordingly, I am of the opinion that any constitutional challenge to the BLRA would fail.

QUESTION #2: Would a repeal of the BLRA, in which SCE&G is required to refund past revenues collected for the V.C. Summer Project and/or prohibited from future recovery of its $5 billion investment in the Project, survive constitutional challenge?

ANSWER: No.

Prior to the opening of the 2018 Legislative Session, various bills were pre-filed in the House and Senate that would repeal the BLRA, in whole or in part. One of the bills (H. 4375) would prohibit future collections under the 2008 BLRO, while another (H. 4380) would require the PSC to "order a refund to ratepayers of all amounts collected" pursuant to the 2008 BLRO. It is my opinion that these two provisions, if enacted, would not survive a legal challenge for at least two reasons.

First, a statutorily mandated rate that excludes project-related costs, if its effect would be to jeopardize SCE&G's financial integrity, could be deemed confiscatory and in violation of the Takings Clause. Given that project-related costs amount to 18% of SCE&G's rates, a court could very well find that the loss of this revenue would jeopardize SCE&G's financial integrity.

Second, under the Due Process Clause, SCE&G has a right to avoid "arbitrary and irrational" laws. This is a high standard, and it means that in most cases, even those involving statutes that are explicitly retroactive in application, the Constitution is not violated even if settled economic expectations are destroyed. But this is not "most" cases. The BLRA explicitly anticipates and provides for the possibility of a project being abandoned prior to completion, and in doing so gave SCE&G the assurances it needed to undertake the project. For the General Assembly to retroactively deprive SCE&G of the BLRA's protections at the very moment they are needed could very well be viewed by a court as grossly unfair and arbitrary.

Substantive Due Process

"Congress may, consistent with the Due Process Clause, alter rights and responsibilities retroactively so long as it has a rational basis for doing so." *Mondragon v. Holder,* 706 F.3d 535, 541 (4th Cir. 2013). However, there are limits to this principle.

The foundational case for due process and retroactivity is *Usery v. Turner Elkhorn*, 428 U.S. 1 (1976). In that case, the United States Supreme Court upheld new federal laws that required coal mine operators to pay benefits to disabled former employees, even though the employees had stopped mining before the law existed. Thus, the operators presumably did not envision such liability when they employed the miners. Regardless, the Court held that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Usery,* 428 U.S. at 16. The Court upheld the laws on the basis that it was rational to reallocate the burdens of paying for miners' disabilities to the coal companies and consumers who had profited from their labor.

Eastern Enterprises, however, establishes that a retroactive law may violate due process rights. *See generally Eastern Enters.*, 524 U.S. 498. In that case, a 1992 law required a company—which had left the coal industry in 1965, long before any labor agreements began to call for lifetime health benefits for miners—to pay at least $50 million into a miners' benefits fund. Five members of the United States Supreme Court concluded that the law was unconstitutional, but did not agree as to why this was so. Four justices believed the law effected a taking of the company's property. Justice Kennedy, apparently alone, believed that the law violated due process.

Several factors lead me to believe that a court faithfully applying the foregoing principles would invalidate H. 4375 and H. 4380 as violating SCE&G's substantive due process rights. *First*, the clear purpose of the BLRA was to encourage SCE&G to expand its nuclear power-generating capacity. SCE&G embarked on the Project with the General Assembly's assurance that it would be able to recoup its costs over time, ***even*** if the Project was abandoned before completion. In *Duquesne*, the United States Supreme Court specifically addressed the possibility of a legislative "bait and switch":

> [A] State's decision to arbitrarily switch back and forth between methodologies in a way which require[s] investors to bear the risk of bad investments at some times while denying them the benefit of good investments at other times ***would raise serious constitutional questions***.

Duquesne, 488 U.S. at 315 (emphasis added). This warning reflects the broader principle that due process prohibits a state from "reconfigur[ing] its scheme, unfairly, in *midcourse*" by holding out a remedy and then yanking it away just when it is needed. *Reich v. Collins*, 513 U.S. 106, 111 (1994) (emphasis in original).

In *Reich*, a veteran sought a refund of taxes paid on federal retirement benefits, after taxation of such benefits was held unconstitutional by the United States Supreme Court. The refund claim was based on a Georgia law that entitled taxpayers to refunds of all taxes "erroneously or illegally assessed and collected." *Id.* at 109 (internal quotations omitted). Ultimately, the Georgia Supreme Court ruled that the veteran was not entitled to a refund (a postdeprivation remedy) because Georgia provided "ample" ***pre***deprivation remedies. *Id.* at 110 (emphasis added). The United States Supreme Court reversed, holding that Georgia had improperly "held out what plainly appeared to be a 'clear and certain' postdeprivation remedy, its refund statute, and then declared, only after Reich and others had paid the disputed taxes, that no such remedy exists." *Id.* at 111.

H. 4375, if enacted, would result in the same constitutional violation condemned by the *Reich* Court. SCE&G embarked on the Project under the auspices of the BLRA, which explicitly assured SCE&G that it would be able to recoup its prudently incurred costs even if construction were abandoned. *See* S.C. Code Ann. § 58-33-225(G); *see also* S.C. Code Ann. § 58-33-280(K) ("Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent.") Now that the Project has been abandoned and SCE&G seeks to recoup its prudently incurred costs, the General Assembly is considering declaring "that no such remedy exists." Thus, I believe a court would be constrained to hold that due process forbids retroactive application of H. 4375.

Second, the United States Supreme Court's decision in *United States v. Carlton*, 512 U.S. 26 (1994), and a South Carolina Supreme Court decision construing *Carlton*, demonstrate that the Due Process Clause imposes limits on retroactive application of economic legislation. In *Carlton*, the executor of an estate took advantage of a recently enacted tax deduction for the proceeds of sales of stock to employee stock-ownership plans (ESOPs) by using estate funds to purchase stock and reselling it to an ESOP. After the transaction was complete and the executor had filed a tax return that reflected

the deduction, Congress retroactively amended the law to permit the deduction only for sales of stock owned by the decedent immediately prior to death.

The United States Supreme Court held there was no due process violation, pointing to three factors in support of its conclusion. First, Congress's purpose in adopting the amendment was to correct a flaw in the original legislation, which was never intended to permit transactions like the executor's. *See id.* at 32. Second and third, "Congress acted promptly" to correct the error "and established only a modest period of retroactivity." *Id.* In a concurring opinion, Justice O'Connor wrote that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions." *Id.* at 38.

The South Carolina Supreme Court quoted Justice O'Connor's concurrence when it ruled, in *Rivers v. State*, 327 S.C. 271, 490 S.E.2d 261 (S.C. 1997), that a retroactivity period of "at least two years and possibly as long as three years" violated both the federal and state constitutions. *Id.* at 279, 490 S.E.2d at 265. In *Rivers*, a 1988 law retroactively decreased capital gains taxes for capital gains realized from January 1987 through January 1988. An amendment, passed in 1989, shortened the eligibility period and provided that refunds would be made in two equal installments for the 1990 and 1991 tax years. In 1991, after the first installment of the refund had been paid, the General Assembly amended the act again, this time to reduce by half the amount of each taxpayer's refund.

The South Carolina Supreme Court held that the 1991 amendment did not violate the Takings Clause because the taxpayers did not have a vested property right in the second half of their refunds. *See id.* at 275-76, 490 S.E.2d at 263. Nevertheless, after a lengthy discussion of *Carlton*, the Court held that the 1991 amendment violated taxpayers' rights under the federal and state constitutions. The Court reasoned that taxpayers "had an ***expectation*** of the full tax refund" that arose no later than the adoption of the 1989 amendment. *Id.* at 278 n.3, 490 S.E.2d at 265 n.3 (emphasis added). Consequently, the 1991 amendment had the effect of eliminating taxpayers' expectations at least two years after the fact (or three years, if the expectation arose when the act was initially adopted in 1988). The Court held that such an extended retroactivity period was not supported by the state's legitimate interest in achieving its revenue goals. Consequently, the Court ruled that the 1991 amendment violated taxpayers' substantive due process rights.

In my opinion, *Carlton* and *Rivers* make clear that retroactive repeal of the BLRA would violate SCE&G's due process rights. In this case, unlike in *Carlton*, the General Assembly would not be acting to correct an unintended omission from the text of the BLRA. To the contrary, the BLRA plainly provides that once a utility carries its burden of proving that the decision to abandon construction was prudent, it is entitled to recover prudently incurred costs through revised rates under the BLRA. *See* S.C.

Code Ann. §§ 58-33-225(G), -280(K). Indeed, the ability to recover costs of abandoned nuclear construction projects is a critical aspect of laws like the BLRA, because it encourages investment by mitigating the potential financial impact of a failed project. Additionally, the period of retroactivity here is more than ten years, ***five times*** the length of the period the South Carolina Supreme Court in *Rivers* found to be a clear violation of the federal and state constitutions.

Substantive due process challenges to retroactive legislation face high hurdles and are rarely successful. Nevertheless, I believe that the enactment of H. 4375, H. 4380, or any other legislation that retroactively reduces or eliminates SCE&G's ability to recover its prudently incurred costs for the Project would give rise to a substantial claim for violation of SCE&G's substantive due process rights.

The Takings Clause

As discussed in my analysis of Question 1, a utility rate is confiscatory—and constitutionally prohibited—if it is "not sufficient to yield a reasonable rate of return on the value of the property used . . . to render the service." *Bluefield Waterworks*, 262 U.S. at 690; *see also Duquesne*, 488 U.S. at 307 ("[T]he Constitution protects utilities from being limited to a charge for their property serving the public interest which is so 'unjust' as to be confiscatory.").

In *Duquesne*, the United States Supreme Court applied this rule in the context of an abandoned nuclear construction project. Pennsylvania utilities began a venture in 1967 to build nuclear power plants. *Id.* at 302. In 1980, they cancelled those plans, having spent roughly $40 million (roughly $125 million in 2017 dollars). Both the decisions to begin and to cancel were found to be prudent. *See id.* at 303. In 1980 and 1981, the utilities were permitted to amortize their expenditures and recover fractions of them in rates. In 1982, however, Pennsylvania passed a law prohibiting recovery of costs until a plant is "used and useful in service to the public." *Id.* at 304. Applying this statute, the Pennsylvania Supreme Court declined to permit further cost recovery.

Before the United States Supreme Court, the Pennsylvania utilities argued that this violated the Takings Clause. The Court disagreed, reaffirming the rule that a taking occurs only when rates are set so low as to be "confiscatory." *Id.* at 307-08. Put differently, "'[i]f the total effect of the rate order . . . [is reasonable], judicial inquiry . . . is at an end.'" *Id.* at 310 (quoting *Hope Natural Gas*, 320 U.S. at 602). The Court had little difficulty concluding that the post-1982 rates were not confiscatory, given that the loss amounted to roughly 0.5% of the utilities' annual revenues. *Id.* at 312 ("No argument has been made that these slightly reduced rates jeopardize the financial integrity of the companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital.").

Duquesne leaves open the real possibility that a significant rate reduction, under similar circumstances, would result in a rate so low as to be confiscatory. Several other

courts have mentioned or applied the same "confiscatory" standard in addressing takings issues based on abandoned nuclear projects. For example, in *Dayton Power & Light Co. v. Pub. Utils. Comm'n of Ohio,* 447 N.E.2d 733, 741 (Ohio 1983), the Ohio Supreme Court upheld a statute that effectively barred recovery of costs for an abandoned nuclear project. Dayton Power & Light argued that denying recovery would violate the takings clause. The court ruled, however, that to prevail on its takings claim, the utility "must prove not only the unreasonableness of the . . . exclusion but also the confiscatory effect this exclusion had on the rates established by the commission, viewing the rate order 'in its entirety.'" *Id.* at 745 (quoting *Hope Natural Gas*, 320 U.S. at 602). The court found that Dayton Power & Light had not made this showing.

Like all public utilities, SCE&G is constitutionally entitled to a rate that is "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Hope Natural Gas*, 320 U.S. at 603. My understanding is that Project-related costs represent 18% of SCE&G's rates. At the very least, SCE&G would have a claim that a rate that does not include these amounts is confiscatory.

QUESTION #3: Could the General Assembly constitutionally amend the BLRA in a prospective manner, *i.e.*, not affecting the previously approved V.C. Summer Project and associated rates, but doing away with the BLRA's funding mechanism going forward?

ANSWER: Yes.

As discussed previously, Article IX, Section 1 of the South Carolina Constitution provides that "[t]he General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, ***and privately owned utilities serving the public as and to the extent required by the public interest.***" With respect to Article IX, the West Committee explained that it had "fully discussed the need for regulation of corporations and utilities in the Constitution," and that it "believe[d] that the regulation of common carriers, public utilities and corporations ***is a matter for statute not the Constitution.***" Final Report of the Comm. to Make a Study of the S.C. Const. of 1895 at 106-07 (1969) (emphasis added). Thus, just as it did in 2007 when it passed the BLRA, the General Assembly has great constitutional latitude to change – once again – the manner in which utility rates will be made in South Carolina. It can certainly repeal the BLRA and establish a different rate-making structure that the PSC will apply going forward if it determines doing so is "required by the public interest."

QUESTION #4: If the BLRA is retroactively amended or repealed, who would have standing to bring a legal challenge, and against whom would a claim be brought? Would such a suit be filed in state or federal court? Approximately how long would the litigation last? How would the litigation affect SCANA and SCE&G's customers?

ANSWER: A legal challenge would be brought by SCE&G against the PSC, and could be brought either in a declaratory judgment action filed in the original jurisdiction

of the South Carolina Supreme Court, or in the context of ratemaking proceedings before the PSC. In either case, SCANA, as well as SCE&G's customers, would suffer the expense and uncertainty of such litigation.

Parties and Nature of Action

Any challenge to a retroactive amendment or repeal of the BLRA would be brought by SCE&G, the entity most directly impacted by such legislation, against the PSC, the agency responsible for implementing the legislation. SCE&G would have two possible avenues by which to bring a constitutional challenge to legislation retroactively amending or repealing the BLRA. First, SCE&G could file an action in the original jurisdiction of the South Carolina Supreme Court, seeking to enjoin implementation of the legislation. Second, SCE&G could wait until the PSC issued a rate order under the new legislation, and then appeal that order to the South Carolina Supreme Court. In either event, the losing party could seek *certiorari* review from the United States Supreme Court.

In my opinion, it would not be possible for SCE&G to pursue relief in federal court. Ordinarily, federal courts have subject matter jurisdiction over cases involving federal questions, such as whether a state legislative act violates the U.S. Constitution. *See* 28 U.S.C. § 1331. Congress, however, has restricted federal jurisdiction over challenges to public utility rates through the Johnson Act, which prohibits federal district courts from enjoining, suspending, or restraining "the operation of, or compliance with, any order affecting rates chargeable by a public utility" when all of the following conditions exist:

> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
>
> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,
>
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342. Here, SCE&G's claim would be that the retroactive amendment or repeal of the BLRA violated the Due Process or Takings Clauses of the United States Constitution. In similar circumstances, federal courts have ruled that the Johnson Act requires such claims to be brought in state court. *See, e.g.*, *Hill v. Kansas Gas Serv. Co.*, 323 F.3d 858, 167 (10th Cir. 2003); *Pub. Serv. Co. of N.H. v. Patch*, 167 F.3d 15, 25 (1st Cir. 1998).

Impact of Action

As discussed in the previous sections of this letter, I believe that there are strong constitutional challenges to a retroactive repeal or amendment of the BLRA and that a court adhering to precedent would rule in favor of SCE&G. But regardless of whether SCE&G wins or loses, any final decision will be preceded by hard-fought, expensive litigation.[9] The cost of SCE&G's pursuit of the litigation—including attorneys' fees, discovery, expert witnesses, trial expenses, and the like—could, ultimately, be reflected in SCE&G's rates, and thus would be borne by SCE&G's customers.

In conclusion, my view is that the answers to your questions rest on long-settled principles of constitutional law and that a court faithfully applying those rules would reach the same conclusions. The abandonment of the V.C. Summer Project is, unquestionably, a hard blow to SCE&G's ratepayers. But the Constitution forbids the General Assembly from enacting legislation that would require SCE&G either to refund or cease collecting the revised rates authorized pursuant to the General Assembly's enactment of the BLRA.

Very truly yours,

William W. Wilkins

William W. Wilkins

[9] In the case of an action filed in its original jurisdiction, the South Carolina Supreme Court would have the authority to refer issues of fact to a master or referee. *See* S.C. Code Ann. § 14-3-340 (2017).