ALAN WILSON
ATTORNEY GENERAL

January 18, 2022

The Honorable Bill Sandifer, Chairman
House Labor, Commerce and Industry Committee
P.O. Box 11867
Columbia, SC 29201

Dear Chairman Sandifer:

You seek an opinion regarding a proposed "joint hearing" between the Public Service Commission of South Carolina ("PSC") and the North Carolina Utilities Commission ("NCUC"). Your concern is the scope of S.C. Code Ann. § 58-27-170 as it may apply to a proposal having been made by Duke Energy. Section 58-27-170 allows the PSC to "hold joint hearings and issue joint or concurrent orders in conjunction or concurrence" with the commission of any state or of the United States, and permits the Office of Regulatory Staff to make a "joint investigation with" the commission of any state or of the United States. Duke seeks to have the PSC employ § 58-27-170 in order to adopt a carbon reduction plan based upon a recently enacted North Carolina statute. We advise that from a legal standpoint, this proposal is fraught with problems.

By way of background, the PSC has received a joint petition filed by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC ("Duke Energy" on November 9, 2021. You attach this Petition for our reference. Notably, there has been no request for a "joint hearing" to South Carolina by either the State of North Carolina or by the NCUC, but only by Duke Energy through the filing of the aforementioned Petition before the PSC. Such a request is unprecedented. You further state the following in your letter:

> [t]he Petition [by Duke Energy] . . . requests the Commission to hold a joint proceeding with [NCUC] . . . to develop Duke Energy's Carbon Plan as required by N.C. Gen. Stat. §§ 62-2, 62-30, Part I of Session Law 2021-165 ("HB 951"). The Petition seeks to develop a joint record through joint proceedings to develop Duke Energy's Carbon Plan. The Petition also requests that the Commission subsequently issue an order by January 31, 2023 requiring Duke Energy's Carbon Plan to be incorporated into future IRPs ("Integrated Resource Plan") to be filed in South Carolina. The Petition further requests authorization of Duke Energy's plans and associated costs to implement the plan, which if allowed would ultimately result in these costs being shared between North and South Carolina.

> I believe we need further clarification on the scope of the Commission's jurisdiction and authority over this matter which will impose North [Carolina's] legislatively mandated greenhouse costs onto Duke Energy's South Carolina customers. Specifically, I am requesting an opinion on two issues: 1) the Commission's jurisdiction to hold the requested "joint proceeding" with the NCUC and the Commission's authority to grant the requested relief, and 2) the extent of the Commission's authority to order that South Carolina ratepayers cover the costs of Duke Energy's compliance with North Carolina's legislatively mandated greenhouse gas tax on South Carolina ratepayers under HB 951.

(emphasis added).

Your letter notes your considerable concern regarding Duke's proposed "joint proceeding." Summarizing your misgivings, you state the following:

> I also question whether the Commission has the authority to order the remedy requested by the Petition—that South Carolina customers share the cost burden of Duke Energy's North Carolina legislatively mandated compliance with a carbon plan under North Carolina law (HB 951) and adopted by the NCUC. . . . In essence, the Petition requests the Commission to impose the costs of a greenhouse gas tax on Duke Energy South Carolina ratepayers through a North Carolina legislative mandate. To allow such a remedy would be an error of law, clearly erroneous, or arbitrary and capricious as directly inapposite to the Commission decision recently upheld in Duke Energy Carolinas, LLC v. South Carolina Office of Regulatory Staff, Op. No. 28066 (S.C. Sup. Ct. filed Oct. 27, 2021). There, the South Carolina Supreme Court affirmed the Commission's decision not to require South Carolina customers to pay Duke Energy's costs of complying with North Carolina's Coal Ash Management Act of 2014 ("CAMA"). . . . The Commission found that CAMA did not confer benefits to South Carolina ratepayers, and the statute was not intended to do so. Only North Carolina ratepayers benefit, and were intended to benefit, from the North Carolina legislatively mandated CAMA requirements. The Supreme Court therefore affirmed the Commission's decision to disallow the costs of compliance with CAMA in Duke Energy's South Carolina rates. . . .
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> I further question if the requested remedy of shared cost of compliance with a North Carolina Statute is constitutional. See generally Duke Energy Carolinas, Op. No. 28066 at n.18. Under Article [X], Section [5] of the South Carolina Constitution, "[n]o tax subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." . . . The South Carolina General Assembly has not enacted statutes requiring actions by Duke Energy that result in increased costs to South Carolina customers. For these reasons, I question whether it is constitutional to require South Carolina customers to pay a greenhouse gas tax to comply with laws passed by the North Carolina General Assembly.

We fully agree. In our view, it is highly questionable that the Commission possesses the requisite authority and jurisdiction to convene such a "joint hearing" pursuant to § 58-27-170 for

the purposes outlined in your letter. First of all, we are aware of no instance where this statute has been employed for such a "joint hearing" since its enactment in 1932. Regardless, however, we do not think that the Commission may order South Carolina ratepayers to "cover the costs of Duke Energy's compliance with HB 951," a North Carolina statute, through utilization of § 58-27-170. The recent South Carolina Supreme Court decision in Duke Energy Carolinas, which will be discussed below, illustrates vividly that the South Carolina General Assembly has not authorized the PSC to develop a carbon plan on the basis of a North Carolina statute, pursuant to a proceeding presided over by the NCUC, and using only North Carolina law as its basis. We think that this proposal stretches South Carolina law and federal constitutional law past the breaking point. Indeed, rather than seeking a constitutionally authorized compact between the two states, such a "joint proceeding" raises significant constitutional concerns as well. Thus, to our mind, if the PSC engaged in this plan, it would run the risk of usurping the legislative powers of the General Assembly, and could well violate the state and federal Constitutions. We do not believe that current law nor the Constitution so permits.

Law/Analysis

We first examine the general authority of the Public Service Commission. Like any administrative agency, the PSC "is created by statute and its authority is limited to that granted by the legislature." Nucor Steel v. South Carolina Pub. Serv. Comm., 310 S.C. 539, 543, 426 S.E.2d 319, 321-22 (1992). Moreover, "it is well established that the Public Service Commission is a body of limited jurisdiction and has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers granted." Black River Elec. Co-op., Inc. v. Public Serv. Comm., 238 S.C. 282, 292, 120 S.E.2d 6, 11 (1961) (citing Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E. 564 (1948) and Piedmont & Northern Railroad Co. v. Scott, et al., 202 S.C. 207, 24 S.E.2d 353 (1943)). In Black River, supra, the South Carolina Supreme Court concluded that the PSC lacked jurisdiction to hear, and the electric cooperative had no standing to make, a request to the Commission for a cease and desist order.

Further, our Supreme Court has consistently emphasized that:

> [o]rders issued under the powers and authority vested in the PSC have the force and effect of law. Chemical Leaman Tank Lines, Inc. v. South Carolina Public Service Commission, 258 S.C. 518, 189 S.E.2d 296 (1972). The PSC's findings of fact are presumptively correct and its orders are presumptively valid. Id. This Court will not substitute its judgment for that of the PSC upon a question for which there is room for a difference of opinion. Id. We will not set an order of the PSC aside unless it is found by a convincing showing to be unsupported by evidence or to embody arbitrary or capricious action as a matter of law. Greyhound Lines v. South Carolina Public Service Commission, 274 S.C. 161, 262 S.E.2d 18 (1980).

S.C. Cable Television Ass'n. v. Southern Bell Tel. and Tel. Co., 308 S.C. 216, 219, 417 S.E.2d 586, 588 (1992).

Yet, while South Carolina courts afford considerable weight to the Commission's rulings when it is acting within the scope of its jurisdiction or authority, such is just the opposite if the Commission exercises a power which has not been delegated to it by the General Assembly. A good example of such lack of jurisdiction is found in City of Cola. v. Pub. Serv. Comm. of S.C., 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984). There, our Supreme Court stated the following:

> [t]he respondent, however, maintains that the PSC retained the power to assign the Westville area to the Cooperative. We disagree. No statute gives the PSC such broad power. The Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are conferred upon it expressly or by reasonably necessary implication by the General Assembly. Glendale Water Corp. v. City of Florence, 274 S.C. 472, 265 S.E.2d 41 (1980).

In short, if the PSC lacks the jurisdiction or authority to exercise a particular power not bestowed by the General Assembly, our Supreme Court has not hesitated to so conclude.

We turn now to a discussion of § 58-27-170, upon which Duke's Petition is based. This statute reads as follows:

> [t]he commission may hold joint hearings and issue joint or concurrent orders in conjunction or concurrence with any official board or commission of any state or of the United States. The Office of Regulatory Staff may make joint investigations with any official board or commission of any state or of the United States.

Section 58-27-170 was originally enacted in 1932 as part of Act No. 871, the State's first comprehensive effort to regulate electric power. Our Supreme Court has described the purpose of Act No. 871 thusly:

> [i]n 1932 comprehensive legislation was enacted regulating electric utilities. 37 St. at L. 1497. It is frequently referred to as the Electric Utilities Act. . . . Under the terms of this legislation, the Public Service Commission is empowered to fix rates charged by electric utilities, prevent discrimination, regulate extension and development of transmission lines and otherwise supervise the operation of such utilities.
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> The legislation was designed to require electric utilities to furnish the public, without discrimination, with adequate and efficient service at reasonable rates, and to protect such utilities from ruinous competition which was deemed an economic waste. Competition was eliminated and regulation substituted.

Black River Elec. Co-op, Inc. v. Public Service Comm., 238 S.C. supra, at 288-89, 120 S.E.2d supra, at 9.

Act No. 871 was entitled "An Act Regulating Persons, Corporations and Municipalities Engaged in the Generation, Transmission, Delivery of Furnishing of electricity for Light, Heat or Power, Prescribing the Duties of the Railroad Commission in Relations Thereto, and Prescribing Penalties for Violations of the Provisions Thereof." This Act resulted from the recommendations of the South Carolina Power Rate Investigating Committee, authorized by the 1931 General Assembly. The Act sought to level the playing field regarding power regulation in South Carolina and placed such regulation and administration of electrical power in the State under the Railroad Commission, which was ultimately succeeded by the PSC. One of the key purposes of the Act was to prevent utilities from discriminating between patrons and customers either in services or rates. See, The State Newspaper, April 9, 1932.

What became today's § 58-27-170 was found in subpart (1) of § 4 of the Act. This provision enumerated the powers of the Railroad Commission with respect to the regulation of electrical power and the utilities producing it. The original purpose of the "joint hearing" provision is not precisely clear, but we may reasonably speculate as to the General Assembly's objective. One scholar has summarized the reasons for various states' creation of such "joint hearings" provisions:

> [s]tates have presented similar proposals [for joint boards] since the 1920's, when the United States Supreme Court decided that the states lacked the authority to regulate the sale or transmission of power in interstate commerce. [see Public Util. Comm'n. of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927)]. . . . Apart from the regulatory problems that decision created (which were largely solved by the 1935 amendments to the Federal Power Act . . .), the planning aspects remain. Both in 1967 . . . and 1980, . . . federal authorities noted the need for additional regional coordination. Likewise, the states have requested federal-state coordination for nearly every major issue that was raised in the turbulent 1970's and 1980's. . . . Despite the seeming congruence between federal and state views on the need for federal regulation, little sustained effort toward that goal has occurred. . . .
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> A partial explanation for the lack of regional regulation stems from jurisdictional limitations on state and federal authority. The states alone may not regulate the sale and transmission of electricity on a regional basis. . . . Although Congress provided for several cooperative devices, such as joint boards, conferences, and hearings, . . . to deal with the divisions of federal and state authority in the Federal Power Act, through its rules and practice the Commission has refused to use the cooperative procedures. The reasons for denying their use range from supposed jurisdictional limitations to assertions of administrative discretion. . . .
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> But even if Congress broadened the Commission's authority, some significant institutional biases would remain because the Commission refuses to use its existing authority to create regional boards. . . . Although Congress provided for several cooperative devices, such as joint boards, conferences, and hearings, . . . to deal with the divisions of federal and state authority in the Federal Power Act, through its rules

> and practice the Commission (FERC) has refused to use the cooperative procedures. The reasons for denying their use range from supposed jurisdictional limitations to assertions of administrative discretion....

Darr, "A Critical Analysis of Joint Board Policy at the Federal Energy Regulatory Commission," 30 San Diego L. Rev. 485, 486-87(1993).

According to Professor Darr's analysis,

> [j]oint proceedings thus present a means of coordinating federal and state action since they place the parties in direct authoritative relationships with one another. Under a delegation of authority [by FERC], the state board would act as an agent of the Commission. . . . Alternatively, joint hearings would provide a forum for coordinated receipt of evidence and the opportunity for coordinated decision making. . . .

Id. at 492. Thus, such "joint proceedings" provisions have generally proven ineffective. Compare State ex rel. Clarkston v. Dept. of Public Utilities, 208 P.2d 882, 884 (Wash. 1949) [employing a similar statute to § 58-27-270 with telephone rates and the Court's noting that "a situation could arise where such action on the part of a regulatory body might be deemed to be so arbitrary or capricious or that there was such a denial of procedural due process as to make the action of such body invalid...."].

We have been unable to locate an instance in which § 58-27-170 has been invoked over the years since its enactment in 1932. Certainly, no South Carolina decision or Attorney General's opinion regarding the statute has been found. As we understand it, there have been occasions where South Carolina and North Carolina rate regulators have shared information with each other for the purpose of joint cooperation. However, no evidence of the employment of the "joint proceedings" statute has surfaced. As one study has documented,

> [c]oordination of effort with the two states was not a problem. Key reasons for this success were the strong common purpose of modeling the same utilities, the desire of the two states to act cooperatively, the mutual dependence implied by the need for data from both states, professional respect among individuals on the staffs, and the lack of conflicting model requirements. The nearly full-time dedication of the staffs and the relative absence of competing activities were instrumental in the successful completion of this joint undertaking. . . .

See Regional Regulation of Public Utilities: Issues and Prospects, at 73 (December 1980).

Based upon this background, it is our opinion that § 58-27-170 is inapplicable to this situation. First, the proposal for a "joint hearing" is not really "joint" at all. It is a proposal made to the South Carolina Public Service Commission by Duke Energy. No request from North Carolina or NCUC has been made, as far as we are aware. The intent underlying § 58-27-170 is to create a true "joint" hearing between the South Carolina Public Service Commission and

NCUC. The Petition you have forwarded would require the PSC to act unilaterally, rather than in unison with a fellow state. No such action in unison has occurred.

Secondly, we have no information that FERC is involved in this proposal. There is a strong indication that, pursuant to the Federal Power Act, FERC must participate directly or delegate authority to the states in order to avoid a "Commerce Clause" issue under the Attleboro case or other decisions. While it is true that Duke's "joint hearing" proposal is not one to directly regulate rates, as you point out in your letter, the Petition for a Joint Hearing seeks to "require that the Carbon Plan be used in the preparation of the Companies' next comprehensive IRP's" and to "confirm that the companies' plans and associated costs for the transition to be undertaken under the Carbon Plan will be fully shared and embraced between the states." Petition ¶ 20 (emphasis added). Undoubtedly, there is a strong possibility that, should the PSC authorize this "joint proceeding," the result would be to pass on a substantial portion of the costs imposed by the Carbon Plan to Duke's South Carolina customers, thereby resulting in a rate increase. In our view, this runs the risk that, without FERC's participation under the Federal Power Act, the states would be acting ultra vires and possibly in violation of the Commerce Clause.

Moreover, we also think that the "joint hearing" proposal is flawed because Duke seeks to utilize only North Carolina law in the proceeding. There can be no doubt that any proceeding in which the PSC is involved is governed by South Carolina law. As we have already emphasized in City of Cola. v. Publ. Serv. Comm. of S.C., supra, the PSC "has only such powers as are conferred upon it expressly or by reasonably necessary implication by the General Assembly." And as noted in Glendale Water Corp. of Florence, Inc. v. City of Florence, 274 S.C. 472, 474, 265 S.E.2d 41, 42 (1980), the Commission derives its powers from the South Carolina Legislature. As you recognize in your letter,

> [t]he Commission's authority to hold proceedings reviewing rates and proposed IRPs, as well as the requirements— including public posting—that Duke Energy must follow in proposing an IRP are explicitly governed under South Carolina law, including S.C. Code Ann. § 58-37-40. South Carolina has explicit statutory and regulatory procedures in place to address matters of this nature. Cost recovery issues affecting South Carolina customers are purely a matter of South Carolina law, and must be subject to a properly convened South Carolina proceeding before our Commission acting with its full authority.

The decision of the Supreme Court of South Carolina in Duke Energy Carolinas, LLC, v. South Carolina Office of Regulatory Staff, ___ S.C. ___, 864 S.E.2d 873 (2021) is highly instructive here. Not only did the Court necessarily imply that only South Carolina law could be used by the PSC, but that the PSC may not apply North Carolina law to govern South Carolina customers. In Duke Energy, Duke – the owner of a coal-fired power plant in South Carolina – sought recovery for their expenses related to their plants in North and South Carolina. Recovery of those costs were sought on a proportional share basis from their customers in the two states. The PSC, in two "lengthy and thoughtful orders, allowed in part and disallowed in part the

requested expenses." On appeal, Duke contended that the PSC "erred in disallowing (1) environmental compliance costs associated with North Carolina law"; (2) litigation costs and (3) and carrying costs. 864 S.E.2d at 875-76.

The North Carolina law involved in Duke Energy resulted from a major spill of coal ash on the Dan River. The Act, enacted by the North Carolina General Assembly, constituted the Coal Ash Management Act (CAMA), therein requiring major cleanup efforts by Duke. Duke argued that Duke's South Carolina customers should share in the imposition of CAMA costs because "in an integrated system that encompasses multiple jurisdictions, system costs are presumed to benefit the entire system, and, thus, in general customers from each jurisdiction must pay their allocable share of the system costs." 864 S.E.2d at 885.

The Supreme Court affirmed the PSC's rejection of this analysis. According to the Supreme Court,

> [h]ere, there is no evidence of any direct benefit to South Carolinians that stems from coal ash remediation costs required by North Carolina's CAMA scheme. Duke presented evidence that South Carolina ratepayers had historically enjoyed lower utility rates due to the power-generation and cost-sharing arrangement between the two states. Following the production of that low-cost power, South Carolinians paid for their pro rata share of any then-applicable environmental regulations related to disposing of the coal ash generated. CAMA, however, is a post hoc environmental remediation scheme intended by the North Carolina General Assembly to ensure the cleanliness, safety, and beauty of North Carolina's environment and the health of North Carolina's citizens. Duke's reliance on the power-generation and cost-sharing arrangement conflates the benefits of joint electricity production with the benefits of cleaning up a previously-legal, unlined coal ash pond or landfill. The environmental cleanup costs are wholly unrelated to the current production of power for which South Carolina ratepayers must pay. Had CAMA never been passed, South Carolina's ratepayers would have enjoyed the same benefits and low-cost electricity that they received after CAMA's passage.
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> The PSC made the factual determination that the CAMA costs sought here neither directly benefitted Duke's South Carolina customers, nor were they intended to do so. There is evidence in support of this factual determination. See N. Va. Elec. Coop., Inc., 945 F.3d at 1207-08 (upholding the Commission's finding that North Carolinians did not benefit from undergrounding because the utility failed to introduce evidence to that effect, and because, in passing the undergrounding statute, the Virginia legislature intended to act for the benefit of its own citizens). We thus conclude the PSC did not commit an error of law in disallowing CAMA costs. See Utils. Servs. of S.C., Inc., 392 S.C. at 105, 708 S.E.2d at 760 (explaining that, in evaluating the evidence, the PSC is permitted to find "that some portion of an expense actually incurred by a utility should not be passed on to consumers.").
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> Failing in its assertion of legal error, Duke next asserts the PSC's decisions regarding CAMA expenses were arbitrary and capricious. However, Duke repeatedly

> characterized this issue-whether the PSC should require South Carolina ratepayers to pay for expenses caused by another state's laws-as a policy decision, contending so at least eight times in its briefs. It is true the General Assembly designated the PSC as the expert in policy determinations with regards to utility ratemaking, and the Court does not lightly overturn those policy-based decisions. See Patton, 280 S.C. at 291, 312 S.E.2d at 259 ("The [PSC] is recognized as the 'expert' designated by the legislature to make policy determinations regarding utility rates; thus, the role of a court reviewing such decisions is very limited."). However, the issue before us is more properly characterized as a factual determination on the benefit, or lack of benefit, to South Carolina customers from CAMA related remediation costs. It appears Duke believes that by recasting the findings of the PSC as a mere policy decision, it makes it an easy leap to assert a legal error. The PSC made a factual determination that Duke's South Carolina customers did not benefit from the North Carolina-specific CAMA law. Because there is evidence to support this finding, we may not rely on contrary evidence and (assuming we were inclined to do so) substitute our view of the facts for the PSC. As we have already found, Duke has shown no such legal error.

864 S.E.2d at 885-86.

The Court's reasoning in Duke Energy is highly persuasive with respect to the questions you present here. In Duke Energy, the Court relied heavily upon the fact that application of a North Carolina statute provided no "direct benefit to South Carolinians. . . ." In other words, according to the Court, "[t]he PSC made the factual determination that the CAMA costs 'sought here neither directly benefitted Duke's South Carolina' customers, nor were they intended to do so.'" 864 S.E.2d at 415. The North Carolina carbon reduction law (HB 951), much like the CAMA statute, enacted by the North Carolina General Assembly, is a "policy" determination, and its application would require "South Carolina ratepayers to pay for expenses caused by another state's laws. . . ." Id. As in Duke Energy, this provides no benefit to South Carolina customers.

While the Court in Duke Energy did not squarely address the constitutionality of applying the North Carolina statute extraterritorially to South Carolina customers, the Supreme Court did note that it had been argued by ORS, and that the PSC had agreed, that Duke's proposal would violate Art. X, § 5 of the South Carolina Constitution, prohibiting "[n]o tax subsidy or charge shall be established, fixed, laid or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully assembled." 864 S.E.2d at 884, n. 18. In this context, the Supreme Court recited that "[t]he PSC also noted CAMA did not confer any benefits to South Carolina ratepayers, nor did the ratepayers have any opportunity to influence the North Carolina General Assembly's actions since those legislators did not represent South Carolina ratepayers." Id. The same holds true in this instance.

This argument is essentially one of "taxation without representation," based upon the extraterritorial application of a North Carolina statute to South Carolina customers with a resulting rate increase. It is the same argument in essence, that the colonists made with great

force against King George III and Parliament at the time of the American Revolution. We agree with you that, pursuant to Art. X, § 5, if the Duke proposal is implemented and does result in rate increases, such could put the Commission at risk of violating the South Carolina Constitution, as well as the federal Constitution, through the extraterritorial application of the law of another state.

It is well settled that extraterritorial laws are invalid. Our own Supreme Court has, in other contexts, recognized the invalidity of a state's application of its laws extraterritorially. The Court has stated the following:

> [t]he several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as it is allowed by comity, and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions . . . (Emphasis added). Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, 568.
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> It is frequently declared that statutes can have no extraterritorial effect. By this statement it is mean that legislative enactments can only operate, proprio vigore, upon persons and things within the territorial jurisdiction of the lawmaking power, and that no law has any effect, or its own force, beyond the territorial limit of the sovereignty, from which its authority is derived. Thus, the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid . . . 50 Am. Jur., Statutes, Section 485.
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> Under this rule, 'rather universally recognized,' . . . it is quite clear that the South Carolina statute could not affect the rights or liabilities of the parties from the North Carolina collision. No lien arose in North Carolina under the South Carolina statute, and none was created when the Pennsylvania automobile was transported into this state after the collision.

Ex Parte First Pennsylvania Banking and Trust Co. et al. v. Russell, 247 S.C. 506, 508, 48 S.E.2d 373, 374 (1966). See also Carolina Trucks & Equip. v. Volvo Trucks of North America, Inc., 492 F.3d 484, 489 (4th Cir. 2007) ["The principle that state laws may not generally operate extraterritorially is one of constitutional magnitude."]; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 571, 521 (1935) [one state may not "project its legislation" into another.]. The rule of no extraterritoriality "reflects core principles of constitutional structure" and derives in part from the structure of federalism, which is built upon 'the autonomy of the individual states within their respective spheres.'" Carolina Trucks, 492 F.3d at 490 (quoting Healy v. Beer Inst., 491 U.S. 324, 336 (1989)).

Finally, the proposal raises constitutional concerns under the federal Commerce Clause. As the Fourth Circuit explained in Carolina Trucks, the Commerce Clause guards against

extraterritorial application of one state's laws against another by precluding ". . . the application of a state statute to commerce that takes place wholly outside of the state's borders, whether or not the commerce has effects within the state. . . ." 492 F.3d at 490 (quoting Healy, 491 U.S. at 335). As the Supreme Court held in Federal Energy Regulatory Comm. v. Elec. Power Supply Assn., 577 U.S. 260, 266, ". . . the Commerce Clause bars the states from regulating certain interstate electricity transactions, including wholesale sales (i.e., sales for retail) across state lines. That ruling (Attleboro, supra, 273 U.S. at 90) created what became known as the "Attleboro gap" – a regulatory void which the Court pointedly noted, only Congress could fill."

Continuing, the Court, in Elec. Power Supply, stated:

> Congress responded to that invitation by passing the FPA in 1935. The Act charged FERC's predecessor agency with undertaking "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." New York v. FERC, 535 U.S. 1, 6, 122 S.Ct. 1012, 152 L.Ed.2d 47 (2002) (quoting Gulf States Util. Co. v. FPC, 411 U.S. 747, 758, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973)). Under the statute, the Commission has authority to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1).
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> In particular, the FPA obligates FERC to oversee all prices for those interstate transactions and all rules and practices affecting such prices. The statute provides that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with" interstate transmissions or wholesale sales – as well as "all rules and regulations affecting or pertaining to such rates or charges" – must be "just and reasonable." § 824d(a). And if "any rate [or] charge," or "any rule, regulation, practice, or contract affecting such rate [or] charge[,]" falls short of that standard, the Commission must rectify the problem: It then shall determine what is "just and reasonable" and impose "the same by order." § 824e(a).
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> Alongside those grants of power, however, the Act also limits FERC's regulatory reach, and thereby maintains a zone of exclusive state jurisdiction. As pertinent here, § 824(b)(1) – the same provision that gives FERC authority over wholesale sales – states that "this subchapter," including its delegation to FERC, "shall not apply to any other sale of electric energy." Accordingly, the Commission may not regulate either within-state wholesale sales or, more pertinent here, retail sales of electricity (i.e., sales directly to users). See New York, 535 U.S., at 17, 23, 122 S.Ct. 1012. State utility commissions continue to oversee those transactions.

577 U.S. at 767-68. In Electric Power Supply Association, the Court upheld a FERC rule addressing wholesale demand response, stating that:

> [t]he Rule governs a practice directly affecting wholesale electricity rates. And although (inevitably) influencing the retail market too, the Rule does not intrude on the State's power to regulate retail sales.

577 U.S. at 784 (emphasis added).

In short, the Carbon Plan proposal, outlined in your letter, in which Duke requests a "joint proceeding" pursuant to § 58-27-170, poses significant risks. Herein, we are only responding to your opinion request, not acting as an adversary to Duke, but fulfilling our legal responsibility to you as a member of the General Assembly. Nevertheless, as the South Carolina Supreme Court recognized in the Duke Energy case, supra discussed above, there was simply no benefit for "the PSC to require South Carolina ratepayers to pay for expenses caused by another state's laws. . . ." So too here. And, as the Court opined in Ex Parte First Pennsylvania Banking and Trust Co., supra, "the laws of one state have no operation outside its territory" except through comity. Thus, a court could well conclude that such a proposal constitutes "taxation without representation" in violation of Art. X, § 5 of the South Carolina Constitution. Moreover, the extraterritorial affect of the North Carolina statue in regulating Duke's South Carolina customers could be deemed to violate the principle of extraterritoriality, as well as the Commerce Clause.

Conclusion

In responding to your questions, whether the Commission possesses jurisdiction to hold the requested "joint proceeding,"; and whether the PSC has authority to order South Carolina ratepayers to cover the costs of Duke's compliance with the North Carolina statute in question (HB 951) – we seriously doubt that the answers thereto are anything but "no." This proposal is unprecedented. While we cannot resolve the legal issues presented here, we can point them out and that is what we do in this advisory opinion. The bottom line is that no statute, enacted by the South Carolina General Assembly, expressly delegates to the Commission the power to develop a carbon plan, based upon the requirements of a North Carolina statute and utilizing only North Carolina law.

While § 58-27-170 was not involved in the Duke Energy decision, discussed above, that case remains highly instructive here. As in that case, we fail to see the benefit to South Carolina customers in applying a North Carolina statute to the development of a carbon plan and imposing that plan upon South Carolina ratepayers. Rather than a benefit, such a plan, using North Carolina law, may well result in a rate increase upon Duke's South Carolina customers. In our view, employment of a "joint proceeding" does not alter that situation. The application of North Carolina law to South Carolina ratepayers is, again, unprecedented.

Further, such a proposal runs the risk of a constitutional infringement based upon Art. X, § 5 of the State Constitution. See Bradley v. Cherokee School Dist. No. One, 322 S.C. 181, 184, 470 S.E.2d 570, 571 (1996), overruled on other grounds, Home Builders Ass'n of S.C. v. School Dist. No. 2 of Dorchester Co., 405 S.C. 458, 748 S.E.2d 230 (2013) ["Where the taxing power is delegated to a body composed of persons not assented to by the people nor subject to the supervisors control of a body chosen by the people, the constitutional restriction against taxation without representation is violated."]. This is the same argument made by the colonists against

King George III and Parliament at the time of the American Revolution. Here, a "joint proceeding" which imposed rate increases, pursuant to a carbon plan, would threaten to violate Art. X, § 5.

In addition, application of North Carolina law to the "joint proceeding" could well infringe upon the constitutional principle against extraterritoriality. See North Dakota v. Heydinger, 15 F. Supp.3d 891, 910 (D. Minn. 2014), aff'd., 825 F.3d 912 (8th Cir. 2016) [Minnesota statute regulating carbon emissions, as applied to North Dakota, "violates the extraterritoriality doctrine and is per se invalid. . . ."]. No mention has been made of a constitutionally authorized compact between the two states. While the PSC undoubtedly possesses broad discretion, and it is the Commission's call to make, such a "joint proceeding" is fraught with risks. We do not believe the PSC possesses the statutory authority and jurisdiction to so act. Again, we stress that the role of the Attorney General here is to respond to the request for an advisory opinion from a member of the General Assembly, not to act as an adversary before the PSC.

Sincerely,

Robert D. Cook
Solicitor General