



ALAN WILSON
ATTORNEY GENERAL

September 26, 2017

The Honorable G. Murrell Smith, Jr., Member
South Carolina House of Representatives
420-B Blatt Building
Columbia, SC 29211

The Honorable Leon E. Stavrinakis, Member
South Carolina House of Representatives
420-C Blatt Building
Columbia, SC 29211

The Honorable J. Gary Simrill, Member
South Carolina House of Representatives
518-C Blatt Building
Columbia, SC 29211

The Honorable James E. Smith, Jr., Member
South Carolina House of Representatives
Post Office Box 50333
Columbia, SC 29250-0333

Dear Representatives M. Smith, Stavrinakis, Simrill and J. Smith:

You seek an opinion as to the constitutionality of the Base Load Review Act of 2007. Specifically, you state:

The undersigned have been reviewing the Base Load Review Act of 2007 in light of the recent problems that have occurred with V.C. Summer Nuclear Plant. In reviewing this Act, we have concerns about the overall constitutionality of the same.

Please provide us with an Attorney General Opinion as to whether this Act is in accordance with the Constitution of the State of South Carolina.

We have discussed your concerns by telephone and I have advised you of my preliminary thoughts. Your question relates to the recent controversy surrounding the abandonment of the V.C. Summers Nuclear power project undertaken by SCE&G and Santee Cooper. This opinion was prepared with the able assistance of Assistant Attorney General Matt Houck. It is our opinion that, as applied, portions of the Base Load Review Act are constitutionally suspect. The Act fails to strike the constitutionally required balance between investors and ratepayers. It also denies ratepayers procedural due process. The Act further rewards abandonment of nuclear projects such that ratepayers must pay the utility's costs plus a substantial rate of return for investors without receiving any service from the plants. Such a provision, once abandonment is declared, transfers private property (ratepayers' money) to another private entity (the utility) for a private use (payment to utility's investors).

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 2
September 26, 2017

Law/Analysis

Background Leading Up To Passage Of The Base Load Review Act of 2007

Enactment of the Base Load Review Act 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. One authority has described this movement as follows:

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 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. The purpose of Mississippi’s “Baseload Act,” for instance, is to allow the commission to use alternative cost recovery mechanisms to “facilitate Mississippi electric utilities’ ability to finance and construct baseload generation.”...

While regulations differ from state-to-state and resource-to-resource (*e.g.*, some are limited to specific technologies, such as renewables, nuclear, and integrated gasification combined cycle (IGCC)), the regulations generally include some or all of the following elements: 1) pre-approval to construct the plant; 2) pre-approval of cost estimates; 3) ability to recover pre-construction costs; 4) ability to recover financing charges; 5) ongoing reporting requirements and prudence reviews; 6) no ability to revisit previous prudence determinations absent extenuating circumstances; 7) ability to recover costs before the plant goes into service; and 8) ability to recover costs if the plant is cancelled.

In Florida, for instance, a utility must seek commission approval to construct a nuclear or IGCC plant and must also provide a nonbinding estimate of the costs to construct the plant. Once the commission issues a final order finding that the plant is needed, the utility is entitled to recover the estimated costs unless the commission finds imprudence based on a preponderance of the evidence. The utility also can recover its prudently incurred costs before the plant enters service, and may recover all prudently incurred costs if the plant isn't completed. Any costs that the commission finds were prudently incurred during interim reviews can't be challenged subsequently unless there was fraud, perjury, or intentional withholding of key information.

In exchange for these benefits, Florida utilities must provide significant information regarding their projects. For instance, the utility must provide all documents relied on by management to approve expenditures that it seeks to recover, a description of the technology selected, including the factors leading to its selection,

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 3
September 26, 2017

and annual cost-variance explanations. Furthermore, the utility must submit to ongoing auditing and monitoring.

Kansas has similar reporting requirements for utilities that seek pre-approval and also presumes imprudence if costs exceed the approved estimate by 200 percent, at which point the utility must prove by a preponderance of the evidence that such costs were prudently incurred. If the utility completes construction within the estimate presented, however, the commission won't consider the prudence of the incurred costs absent fraud or other intentional imprudence. . . .

In South Carolina, the commission may grant a "base load review order" for any baseload plant. The order is a final and binding determination that a plant is "used and useful." After receiving a baseload review order, the utility must be allowed to recover its capital costs so long as the plant is constructed—or is being constructed—in conformance with the approved schedules, estimates, and projections. A utility also may submit revised rate requests before the plant enters service to collect part or all of its incurred costs and to earn financing costs on that portion of its costs for which it didn't seek recovery. The utility also must submit quarterly reports detailing the progress of the project, with the ability to recover its costs if it prudently abandons the project.

Overall, pre-approved statutes and regulations seek to properly balance ratepayer and utility obligations and risks. By making an early determination of need and reasonableness, a commission finds that a particular project benefits ratepayers at a defined cost, thereby providing a level of certainty to the utility that it will recover its costs and assisting in obtaining financing. Utilities aren't, however, given *carte blanche* to develop the project at any cost and are motivated through regular reporting requirements and ongoing prudence reviews to ensure that the project remains in ratepayers' best interests. Moreover, by allowing cost recovery if a project is prudently abandoned, regulators give utilities an incentive to cancel a project rather than continuing to pursue a project that has become uneconomic.

Galloway and Cousineau, "Cost Recovery For Pre-Approved Projects," *Fortnightly*, 151 No. 6 Publ. Util. Fort. 54, 55-56 (June 1, 2013) (emphasis added). As this article noted, South Carolina joined the effort for increased nuclear power. The Base Load Review Act came about as a result of the need in this State to develop usable sources of clean energy and to lessen reliance upon fossil fuels.

One commentator has succinctly outlined the process for rate determination under ordinary circumstances and how that process differs for construction of nuclear facilities as follows:

[p]rocedures used for determining rates vary among commissions . . . Generally, a commission will select a recent 'test' year and examine the revenue, costs and rate base of the test period. . . Only reasonably and ordinary costs are considered in ratemaking; imprudent or unnecessary costs and costs associated with illegal

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 4

September 26, 2017

activities are not considered . . . Extraordinary revenues and costs incurred in the test year are normalized. . . .

For purposes of allocating nuclear plant cancellation costs, the crucial variable in the rate determination equation is rate base. . . . The crucial questions in allocating nuclear plant cancellation costs for an investor-owned utility are whether the principal payments will be recovered through amortization and whether the unamortized balance of these costs should be included in [the] rate base. . . .

Two tests have traditionally been used by commissions for determining whether or not a utility's investment in a new plant should be included in [the] rate base; the prudent investment test and the used and useful test. . . . Under the prudent investment test, if the utility makes an investment that is imprudent in light of information that was reasonably available to management at the time the investment was made, all costs associated with that investment are disallowed in determining rates. It is rare for a commission to disallow all or a substantial part of a utility's investment as imprudent. . . .

A second test for determining whether utility investment in plant construction can be included in the rate base is the used and useful test. . . . Under this test, only the costs of plants that are actually used and useful to the utility in providing service are included in the rate base. The used and useful test excludes from the rate base plants that are not yet providing service, and also requires the removal of underpreciated capital costs from [the] rate base where plants are no longer used due to obsolescence. . . . While these two tests are most often used by commissions for determining rate base treatment of [an] operating plant; they are also used to calculate the rate base treatment of [an] abandoned plant. . . .

The costs associated with nuclear plant cancellation fall into four categories: (1) the direct cash payments the utility has made up to the time of abandonment for land, site improvements, labor, materials, engineering and environmental studies, and licenses and permits; (2) the costs incurred by the utility to raise the capital necessary to construct the plant, often called allowance for funds during construction (AFUDC); . . . any contract cancellation penalties; and (4) costs incurred in discontinuing construction, minus salvage value. . . .

Rogers and Gray, "State Commission Treatment of Nuclear Plant Cancellation Costs," 13 Hofstra L.Rev. 443, 448-50 (1985) (emphasis added).

Outside of the BLRA, South Carolina has steadfastly adhered to the "used and useful" test. For example, in Parker v. S.C. Pub. Service Comm., 280 S.C. 310, 313, 313 S.E.2d 290, 292 (1984), the Court explained that "[t]he rate base is the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return. " [quoting Southern Bell v. Pub. Serv. Comm., 270 S.C. 590, 600, 245 S.E.2d 278, 283 (1978)]. The Court further noted that a public utility's rate base "represents the total investment in, or the fair value of the used and useful property which it necessarily devotes to rendering the regulated service. ' Utility rate increases are gauged to generate revenues sufficient to realize a reasonable

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 5

September 26, 2017

return on the rate base.” *Id.* at n. 1 (emphasis added). In *Parker*, the Court held that “the record contains no justification for the Commission’s inclusion of the service account in SCE&G’s rate base in light of *Southern Bell* and the Commission’s own pronouncement.” Improper inclusion of property in the rate base in *Parker*, caused the Court to “remand this issue to the Court of Common Pleas for return to the commission, who will make the proper rate adjustment.” See also *Parker v. S.C. PSC*, 281 S.C. 215, 314 S.E.2d 597, 598 (1984) [operating reserves derived from funds supplied by ratepayers and not from investors were improperly included in the rate base]; *Hamm v. S.C. P.S.C.*, 309 S.C. 282, 422 S.E.2d 110 (1992).

In *Hamm v. S.C. Pub. Serv. Comm.*, the Court upheld the PSC’s decision to include in utility’s rate base 400 megawatts of investment in nuclear power. However, in that instance, the Commission had earlier “excluded this portion of the investment as ‘phase-in’ of the new plant.” Later the new plant was included in the rate base (less depreciation) “and the amortization of the previously deferred carrying cost over a ten year period.” According to the Court, “[t]his action was accompanied by a proposed new depreciation rate which decreased SCE&G’s depreciation expense.” No increase in consumer rates occurred. It is important to note that the new plant, which was operational, was not found by the PSC to be not “used and useful,” but instead it had been excluded from the rate base earlier as a “phase-in.” See also *Hamm v. S.C. Pub. Serv. Comm.*, 294 S.C. 320, 324, 364 S.E.2d 455, 457 (1988) [phase-in was to “prevent ‘rate shock’ to a utility customer when a new plant is brought on line. . . Under the ‘phase-in’ plan, presently before this Court, there is no dispute that all of the SCE&G’s generating facilities are in fact . . . in service. . .”] (emphasis added). Thus, the “used and useful” principle has always served as the foundation of utility law in South Carolina. See *August Kohn and Co., Inc. v. PSC*, 281 S.C. 28, 30, 313 S.E.2d 630, 631 (1984) [“Normally, the unit for rate-making purposes would be the entire interconnected operating property used and useful for the convenience of the public in the territory served. . . .”]. See also *Ky. Util. Co. v. FERC*, 760 F.2d 1321, 1324, n. 4 (D.C. Cir. 1985) [“the ‘used and useful’ principle, enunciated [by *Smyth*], has stood as a bedrock principle of utility rate regulation.”].

The Base Load Review Act (BLRA)

The Base Load Review Act (Act No. 16 of 2007) was enacted in 2007 with little opposition in the General Assembly. The Act “encourages new nuclear development.” Volpe, “The Role of Advanced Cost Recovery In Nuclear Energy Policy,” 15 *Sustainable Dev. L. & Policy*, 28, 34 (Winter 2015). Its purpose, as set forth in Section 1(A) as follows:

. . . to provide for the recovery of the prudently incurred costs associated with new base load plants, as defined in Section 58-33-220 of Article 4, when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 6
September 26, 2017

The Act plainly states in its Title that its object is that of “revising procedures for approving costs associated with the add in of base load generating plants.” (emphasis added). Thus, the General Assembly made it clear that the Act constituted a “revision” of its “procedures” in “approving costs” of generating plants constructed.

One authority has summarized The BLRA thusly:

[The Act] allows the South Carolina Public Service Commission (SCPSC) to grant a project development order for a new nuclear power plant. Under the Act, the SCPSC may allow a utility’s pre-construction and development costs for a new nuclear power plant to be included in rates when the plant goes into service. If the project is prudently abandoned, the costs can still be included in rates during the next review. Under the Act, the SCPSC may grant a base load review order for any “base load” plant. A base load review order is a final and binding determination that a plant is “used and useful” and that its capital costs are prudent and can be included in rates, so long as the plant is constructed in accordance with the parameters in the order. A utility may also submit a revised rate request with the base load review order or one year after such order is granted, and every year thereafter. . . .

South Carolina Electric and Gas Company (SCE&G) applied for a Base Load Review Order for the construction and operation of a nuclear facility, as well as for a Certificate of Environmental Compatibility and Public Convenience and Necessity (Combined Application). In October, 2008, the SCPSC approved the commencement of initial construction activities. In March, 2009, the SCPSC approved the Combined Application, allowing SCE&G to annually adjust rates during the construction of the units to recover costs associated with the project; provided that SCE&G complete the new units for approximately 4.5 billion in 2007 dollars or obtain the SCPSC’s approval of a change in such costs, if needed. . . . In May, 2009, SCE&G filed a rate request for an overall 1.1% increase to its electric rates for costs associated with the construction of two 1,117 MW units at the VC Summer Nuclear Station.

“Report of the Nuclear Regulations Committee,” 30 Energy Law Journal, 715, 726 (2009) (Energy Bar Association). (emphasis added). This summary notes that if the project “is prudently abandoned, the costs can still be included in the rates during the next review,” even though no facility has yet been completed and no service to customers is being provided by the plants. This is a marked departure from longstanding precedent in South Carolina particularly the “used and useful” operating principle. As Appellant in Friends of the Earth v. PSC, 387 S.C. 260, 692 S.E.2d 910 (2010) argued on appeal, under traditional rules “current customers are not expected to pay either retroactively for utility expenditures which do not presently serve them, or for investment which may serve only future customers.” Appellants Brief at 9.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 7
September 26, 2017

Our Supreme Court has construed the BLRA on several occasions. In Friends of the Earth v. Pub. Serv. Comm., the Court upheld the PSC’s decision to issue The BLRA Order and allow the project to go forward “as well as to revise [SCE&G’s] . . . rates to reflect the cost of capital applied to the project.” 387 S.C. at 363, 692 S.E.2d at 911-12. The argument against approval was essentially that “SCE&G is too small of a utility to be the guinea pig for these types of nuclear facilities” and that the “costs for this risky facility would ultimately be passed on to SCE&G customers.” This proved prophetic. The Court also agreed that this is a “valid and noteworthy point, the Commission had addressed each and every concern Appellant presented. . . .” 387 S.C. at 371-72, 692 S.E.2d at 916. Thus, the BLRA order was approved by our highest court.

Moreover, in In South Carolina Energy Users Comm. v. South Carolina Electric and Gas, et al., 410 S.C. 348, 764 S.E.2d 913 (2014), the Court addressed the BLRA in many particulars in the context of a proposed rate increase by SCE&G following the initial base load review order. The Court noted that “[o]n May 15, 2012, SCE&G petitioned the Commission for a base load review order approving updates to the capital cost and construction schedules for the project. SCE&G sought approximately 283 million in capital costs to be recouped from its customers in rates pursuant to The BLRA.” 410 S.C. at 351, 764 S.E.2d at 914. In affirming SCE&G’s proposed rate increase, which the Public Service Commission had approved, the Court reviewed the overarching purpose of The BLRA, as expressed in the legislative findings – the advanced cost recovery allowed by the Act:

[t]he purpose of the BLRA “is to provide for the recovery of the prudently incurred costs associated with new base load plants . . . when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligation or costs.” S.C. Energy Users Comm., 388 S.C. at 494-95, 697 S.E.2d at 592 (citing S.C. Code Ann. § 58-33-210 (Supp. 2009) (Editor’s Note)). Therefore, the objectives of the BLRA are:

- (1) to allow SCE&G to recover its “prudently incurred cost” associated with the nuclear facility and (2) to protect customers “from responsibility for imprudent financial obligations or costs.”

...

410 S.C. 354, 764 S.E.2d at 916. In addition, the Court in Energy Users Committee noted that in the initial BLRA Order, the SC PSC must consider a number of factors which are specified in the BLRA and contained in § 58-33-270(A)(1). The Court explained that, in order for there to be a rate recovery on capital costs, “the utility’s decision to proceed with construction of the plant . . . [must be deemed] prudent and reasonable considering the information available to the utility at

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 8
September 26, 2017

the time.” 410 S.C. at 355, 764 S.E.2d at 916 (quoting § 58-33-270(A)(1) and referencing § 58-33-270(B)(1)-(6).

In Energy Users Committee, the Supreme Court also referenced § 58-33-270(E), which provides for rate modifications (increases), should circumstances of the initial order change. Such provision allowing rate modification provides in pertinent part:

. . . The Commission shall grant the relief requested if, after 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;
- (2) as to the changes in the class allocation factors or rate designs, that the evidence of record indicates that the proposed class allocation factors or rate designs are just and reasonable.

410 S.C. at 354-55, 764 S.E.2d at 916-917 (quoting § 58-33-270(E)). The Court rejected the argument that § 58-33-275, rather than § 58-33-270, governed in the instance of approval of additional capital costs. Section 58-33-275 specifies that, if proven by a preponderance of evidence that there had been “a material and adverse deviation from the approved schedules, estimates and projections,” the Commission could disallow additional capital costs if SCE&G had acted imprudently by not avoiding the deviation or minimizing its effect. Rejecting this contention, the Supreme Court cited its earlier decision in S.C. Energy Users Comm. v. SCE&G, 388 S.C. 486, 697 S.E.2d 587 (2010), and thus concluded:

[T]he enactment of Section 58-33-270(E) of the South Carolina Code . . . reveals that the General Assembly anticipated that construction costs could increase during the life of the project. Under Section 58-33-270(E), SCE&G may petition the Commission for an order modifying rate designs.

Id. at 496, 697 S.E.2d at 592-93. This is exactly the course that SCE&G followed here.

Thus, we find the BLRA contemplates changes to an initial base load review order and provides the mechanism to accomplish such changes is § 58-33-270, not section 58-33-275, as Appellants argue. . . . Thus, the Commission correctly rejected Appellants’ attempt to convert the modification proceeding into a deviation proceeding, and because SCE&G sought to update the existing base load review order, § 58-33-270 plainly applied. . . .

Therefore, we find the Commission did not err in applying § 58-33-270 to SCE&G’s application for an additional base load review to update the capital costs and construction schedules contained in the original base load review order.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 9

September 26, 2017

410 S.C. at 357-58, 764 S.E.2d at 917-18. Interestingly, the Court did not address when, if ever, the “material and adverse deviation” provision would apply. The Court found that the BLRA not only anticipated additional rate increases, based upon costs not foreseen when the initial BLRA order was obtained, but that the PSC was mandated to approve such increases so long as it found they were not the result of imprudence and were just and reasonable.

Importantly also, the Court rejected Appellants’ argument that “the Commission should have conducted a prudency evaluation of the entire construction project ‘going forward’ at the time of the modification request.” The Court quoted § 58-33-280(K) as referenced by Appellants in their argument, which reads as follows:

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 providing by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A) recovery of capital costs and the utility’s cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs. The Commission shall order the amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting rates under the article.

According to the Supreme Court, “[t]he mere fact that the BLRA provides for a course of action in the event of the abandonment of a construction project has no relevance under these circumstances. In fact the express language of the BLRA contradicts Appellants’ contention.” 410 S.C. at 358-59, 764 S.E.2d at 918.

In support of this conclusion, the Court cited instead § 58-33-275(A) of the BLRA, which provides:

[a] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:

(1) the approved schedule including contingencies;

and

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 10
September 26, 2017

(2) the approved capital costs estimates including specified contingencies.

Further, the Court noted that § 58-33-275(B) provides that “[d]eterminations under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding, including proceedings under [s]ection 58-27-810 and other applicable provisions and [s]ection 58-33-280 and other applicable provisions of this article. ” Accordingly, the Court’s disposition of this issue was as follows:

Practically speaking, it would be nonsensical to include such a requirement at this stage. As the Commission aptly noted,

[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 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 . The BLRA order related to [the initial base load review order], is the result of such a process. It involved weeks of hearings, and twenty witnesses, a transcript that is more than a thousand pages long and rulings that have been the subject of two appeals to the South Carolina Supreme Court.

410 S.C. at 359, 764 S.E.2d at 918-19. Thus, the Court acknowledged that the BLRA constituted a departure from previous law allowing prudency to be re-challenged. Accordingly, the Supreme Court affirmed the rate increase approved by the Commission, finding that the BLRA foreclosed any further challenge to the prudency of the project after the initial base load order:

[t]he Commission found that the BLRA did not require it to reassess the prudency of the entire construction project at the base load review stage and we adopt its logic:

Update proceedings are likely to be a routine part of administering BLRA projects going forward (including future projects proposed by other electric utilities), such that under the Sierra Club’s argument, the prudence of the decision to build the plant will be open to repeated relitigation during the construction period if a utility seeks to preserve the benefits of the BLRA for its project. Reopening the initial prudency determination each time a utility is required to make an update filing would create an outcome that the BLRA was intended to prevent and would defeat the principal legislative purpose in adopting the statute. . . .

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 11

September 26, 2017

Therefore, we find Appellants' argument that the Commission should have conducted a prudency evaluation of the entire construction project at his modification stage unavailing.

410 S.C. at 359-60, 764 S.E.2d at 918-19.

It is important to note that the Supreme Court did not question the constitutionality of the BLRA's foreclosing further review of the initial prudency determination or other provisions of the Act such as § 58-33-270(E). See Porter v. S.C. PSC, 338 S.C. 164, 525 S.E.2d 886 (2000) [Art. I, § 22 of the South Carolina Constitution requires ratepayers notice and an opportunity to be heard]. This is probably because the issue of constitutionality was not directly raised. Instead, the Court concluded that the BLRA mandates that once the initial base load review order is granted, ratepayers may not further challenge the prudency of the decision to go forward even though the initial costs and schedule are no longer applicable.

It is our understanding that, since the SC PSC approved the initial base load review order, there have been nine rate "increases" to pay for increased costs of the project as it has proceeded. We understand that these nine rate increases have totaled as much as 1.4 billion dollars.

Critics of the BLRA, of course, now abound. These criticisms have been supported by a newly released audit performed by the Bechtel Corporation. Senator Campsen, who opposed the Act from the outset, has summarized his criticisms of the Act as follows:

So how did the BLRA enable it all? Before the BLRA utilities recouped plant construction costs only after the plants were online. Customers paid for plants they actually used. The BLRA authorized utilities to charge fees for construction costs during construction. Customers paid for plants they don't actually use, or need. The needs arise from people migrating here in the future.

If all goes well the BLRA's charge-as-you-go policy means utilities pay less interest, earn greater returns, and have less debt on their balance sheet. It's a good deal for utilities.

But its not a good deal for utility customers. Ever-increasing BLRA fees inflate monthly power bills. And these fees don't build generating capacity for the customers paying them. Current customers already fund generating capacity they use through regular monthly power bills. The BLRA fees are used to build new generating capacity for future customers.

So current customers pay twice. Once through their regular rates for generating capacity serving them. And a second time through BLRA fees for new capacity to serve future customers. The first payment is reasonable. The second is unconscionable.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 12
September 26, 2017

“Why I Voted Against the Base Load Review Act,” www.moutrienews.com/opinion/why-i-voted-against-the-base-load-review-act/article_of294b48-8412-11e7-9427-43e51d76e4d4.html (August 18, 2007). In our view, this is a succinctly stated and legally correct view of the issues arising from the BLRA.

Moreover, long before this matter became controversial, the following summary of the BLRA was provided by one newspaper in 2013:

Advanced cost recovery is a financing method SCE&G helped perfect and turn into a South Carolina law known as the “Base Load Review Act.” This law allows SCE&G or any investor-owned utility in the state to avoid the financial risk and huge costs of building a nuclear power plant.

It does so by making ratepayers foot the bill of construction financing through increased rates yearly as the plant is being built, years before customers get any benefit from the electricity plants are to produce. Its kind of like starting loan payments to buy a new car that won’t leave the assembly line for a few years.

Without advanced cost recovery, SCE&G and its stockholders would have to pay for construction financing for the nuclear plant, one of the most expensive current construction projects in the county.

“Was Nuclear The Right Decision for SCE&G?” Post and Courier, July 7, 2013. Again, this analysis is legally correct. The Act, in sum, shifts the burden of costs from the utility and its investors to consumers.

The recently released Bechtel Report is highly critical of the project. Issued in February 20, 2016, the Report’s Executive Summary finds the following:

- While the Consortium’s engineering, procurement and construction (EPC) plans and schedules are integrated, the plans and schedules are not reflective of actual project circumstances
- The Consortium lacks the project management integration needed for a successful project outcome
- There is a lack of a shared vision, goals and accountability between the Owners and the Consortium
- The Contract does not appear to be serving the Owners or the Consortium particularly well
- The detailed engineering design is not yet completed which will subsequently affect the performance of procurement and construction

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 13
September 26, 2017

- The issued design is often not constructible resulting in a significant number of changes and causing delays
- The oversight approach taken by the Owners does not allow for real-time appropriate cost and schedule mitigation
- The relationship between the Consortium partners (Westinghouse Electric Company (WEC) and Chicago Bridge & Iron (CB&I)) is strained, caused to a large extent by commercial issues

In addition, the Appellant, in its Brief in Energy Users Committee, decried the provisions of the BLRA, noting that the BLRA “provides the utility with the financial benefits of advanced cost recovery.” Thus, if the PSC is convinced (and it was) “that the plant is constructed on schedule and within the approved capital budget, the Act assures the utility that it will recover its capital costs in customer rates since such investment is deemed [pursuant to the Act] prudent, used and useful within the meaning of those traditional public utility regulatory terms.” Appellant’s Brief at 13. The Appellant in Energy Users contended that foreclosing ratepayers from being able to raise the prudence of the project improperly skews the allocation of risks and benefits under the BLRA in favor of the utility and against ratepayers. Id. at 27. Appellant pointed to the provision of the BLRA allowing abandonment by the utility, making the argument that the utility could abandon the project if it demonstrated prudence. According to the Brief, it makes no sense to allow a prudence determination upon abandonment, yet not allow ratepayers to be able to challenge the prudence of the project itself at any stage following the initial order. The argument is summarized as follows: “Allowing consideration of the prudence of project abandonment and cost recovery solely at the will of the utility,” while “. . . depriving utility customers of the opportunity to even raise the issue of project cancellation, where current conditions make prudent, would distort the Baseload Review Act into an imbalance measure flowing benefits unilaterally to the utility while imposing undue risks on ratepayers.” Id. at 28.

Presumption of Constitutionality

At the outset, it is important to emphasize that the power of the General Assembly is plenary, except as limited by the Constitution. City of Rock Hill v. Harris, 391 S.C. 149, 705 S.E.2d 53 (2011). Thus, there exists a strong presumption of the constitutionality of any statute enacted by the General Assembly. As we have previously recognized,

. . . legislation passed by the General Assembly is presumed constitutional. Horry County School Dist. v. Horry County, 346 S.C. 621, 631, 552 S.E.2d 737, 742 (2001) (“All statutes are presumed constitutional and will, if possible, be construed so as to render them valid.”). “A legislative enactment will be declared unconstitutional only

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 14

September 26, 2017

when its invalidity appears to clearly as to leave no room for reasonable doubt that it violates a provision of the Constitution.” Joytime Distrib. & Amusement Co. Inc. v. State, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). Moreover, “[W]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.” Op. S.C. Att’y Gen., August 1997. Op. S.C. Att’y Gen., 2007 WL 428626 (November 27, 2007). In addition, we have consistently advised that a statute “must continue to be enforced unless set aside by a court or repealed by the General Assembly.” Op. S.C. Att’y Gen., 2003 WL 20143494 (April 1, 2003).

Op. S.C. Att’y Gen., 2016 WL 6496888 (October 25, 2016). This presumption certainly governs the BLRA. As noted, this Office’s opinion is not a judicial ruling of a court. Any constitutional concerns, discussed herein, would need to be addressed by a court or by the General Assembly in its review of the BLRA.

Our own review of the BLRA has, however, identified certain particularly troublesome constitutional concerns. Such provisions include § 58-33-275(A) and (B). These state:

- (A) A base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:
 - (1) The approved construction schedule including contingencies; and
 - (2) The approved capital costs estimates including specified contingencies.
- (B) Determinations under section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding, including proceedings under Section 58-27-810 and other applicable provisions and Section 58-33-280 and other applicable provisions of this article.

These provisions came into play in Energy Users Committee, just discussed. As noted, our Supreme Court concluded that the Act foreclosed any further review of or challenge to the prudence of the decision to construct the facility once the initial base load review order had been issued. Yet, the Mississippi Supreme Court has held that due process entitles ratepayers to notice and an opportunity to be heard in matters related to “rate base, rates, rate of return and prudence hearings.” Miss. Power Co. v. Miss. Pub. Service Comm., 168 So.3d at 916 (emphasis added). We agree with the Mississippi Supreme Court.

We also find Section 58-33-280(K) to be particularly problematical from a constitutional standpoint. Such provision states:

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 15
September 26, 2017

[w]here 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. Without limiting the effect of Section 58-33-275(A) recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs. The Commission 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.

The abandonment provision raises a serious question of an unconstitutional "taking" as well as a violation of substantive due process. We will discuss these below.

Constitutional Background

It is first important to set forth, by way of background, the leading cases concerning the constitutional parameters of rate regulation. As our Supreme Court wrote in Mims v. Edgefield Co. Water and Sewer Auth., 278 S.C. 554, 556, 299 S.E.2d 484, 486 (1983), utility regulation must focus upon achieving the proper balance between protecting the interest of the utility's shareholders and the interest of the customers. The Mims Court thus noted:

[t]he focus is upon the financial conditions of the utility, particularly whether the return realized from the rate is so low as to be confiscatory to the utility or so high as to be burdensome to the utility's customers. Bluefield Water Works & Improvements, Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed.2d 819 (1898).

See also S.C. Cable TV Assn. v. PSC, 313 S.C. 48, 437 S.E.2d 38 (1993). This requirement of a balance between the utility's and ratepayers interests have long been in place in both the federal and state courts.

In Smyth, the Court established the governing test under the Takings Clause of the Fifth Amendment of the Federal Constitution with respect to utilities regulation. The Court noted that a public utility, under the laws of the State, cannot "fix its rates with a view solely to its own interests, and ignore the rights of the public." Thus, according to Smyth,

. . . the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining its highway [railroad] under legislative sanctions must be the fair value of the property being used by it for the convenience of the public. What

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 16
September 26, 2017

the Company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use . . . than the services rendered by it are reasonably worth.

169 U.S. at 546-47 (emphasis added). Smyth also stated:

. . . the rights of the public would be ignored if rates . . . are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

Id. at 544. Pursuant to Smyth, in other words, a public utility is entitled in the rates it charges only to a “fair return on the value of that which it employs for the public service.” (emphasis added). This test thus employs what is today known as a “used and useful” standard, i.e. that the facility is in operation and is serving customers.

The Texas Supreme Court has explained the “used and useful” concept in Citizens For Fair Utility Rates v. Pub. Util. Comm. of Texas, 924 S.W.2d 933, 935 (Tex. 1995). There the Court stated:

[a] utility’s cost for constructing a facility for use in providing service is ordinarily not an operating expense; obviously, until the facility is completed, there is nothing to operate. Rather, the cost of conducting a new facility, like the purchase price of an existing facility, is an investment of capital in an asset to be used in the future. As such, it must be included in a utility’s rate base, but not until the facility has become “used and useful” in rendering service to the public. “Used and useful” refers to “such property as has been acquired . . . in good faith and held for use in the reasonably near future in order to enable [a utility] to supply and furnish adequate and uninterrupted . . . service.” Lone Star Gas Co. v. State, 139 Tex. 279, 153 S.W.2d 681, 698 (1941).

Smyth more than once emphasized the importance of protecting the interests of a utility’s ratepayers, as well as the property interests of its shareholders. The Court stated:

[a] corporation [operating a public utility], although it owns the property it employs for accomplishing public objects, must be held to have accepted its right, privileges and franchises subject to the condition that the government creating it, or the government within whose limits it conducts its business may, by legislation, protect people against unreasonable charges for the services rendered by it. . . . [The utility cannot suppose] . . . that it acquired, or that it was intended to grant to it, the power [to use its property] . . . simply to its benefit, without regard to the rights of the

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 17
September 26, 2017

public. . . But it is equally true that the corporation performing such public services, and the people financially invested in its business and affairs, have rights that may not be invaded by legislative enactment in disregard of the fundamental guaranties for the protection of property.

169 U.S. at 545-46. Smyth went on to add that “[t]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in every case, where its power has not been restrained by contract, to proceed upon the ground that the public may not rightfully be required to submit to unreasonable exactions for the use of [the utility] . . . established and maintained under legislative authority.” Id. at 545. As noted above, our Supreme Court, in Mims, not only cited Smyth with approval, but by doing so, indicated that Smyth continues to be the governing standard in this State with respect to whether utility rates are “so high to be burdensome on the utility’s customers.”

Subsequently, in Fed. Power Comm. et al. v. Hope Natural Gas Co., 320 U.S. 591 (1944), the Supreme Court somewhat altered the Smyth v. Ames rule in a case involving the Natural Gas Act. The Court in Hope concluded that the Constitution does not require a particular methodology to be used in the ratemaking process. Instead, it is the “end result” of the process which is important in determining the validity of rates. It is said that Hope Natural Gas “established the framework for modern rate regulation.” Goldsmith, “Utility Rates and Takings,” 10 Energy L.J. 241, 242 (1989). In Hope, the Court explained:

[t]he rate-making process under the Act, i.e. the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests. . . . The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or the company standpoint.

320 U.S. at 603. The Supreme Court also added in Hope that “[i]f the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not that important.” Id. at 602. Thus, the Hope Court held that the “constitutional standards” for rate determination are the standards enunciated in the Natural Gas Act – the “fixing of ‘just and reasonable’ [r]ates” through “balancing of the investor and the consumer interests.” Id. See also S.C. Cable Television Assn. v. PSC, 313 S.C. at 31, 437 S.E.2d at 39 [“PSC’s statutory duty is to set rates which are just and reasonable. . . The just and reasonable rate is set by balancing the interests of the ratepayers and the right of the utility to earn a fair return.”]; Mims, supra.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 18
September 26, 2017

Also of importance, is the United States Supreme Court's decision in Denver Union Stockyard Co. v. U.S., 304 U.S. 470 (1938). There, the Court dealt with the issue of the need for the utility's property to be "used and useful" as part of the rate base for any determination of the rates charged. In Denver Union Stockyard Co., the Court opined:

[a]s of right safeguarded by the due process clause of the Fifth Amendment, . . . appellant is entitled to rates, not per se excessive and exorbitant, sufficient to yield a reasonable rate of return upon the value of the property used, at the time it is being used, to render the services [citing cases] . . . But it is not entitled to have included any property not used and useful for that purpose. Cf. St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38, 56 S.Ct. 720, 727, 80 L.Ed. 1033.

304 U.S. at 475 (emphasis added).

In Columbus Gas & Fuel Co. v. Pub. Util. Comm., 292 U.S. 398, 406-07 (1934), the Court elaborated upon the concept of the "used and useful" principle in rate proceedings, as follows:

[t]here will be no need in the computation of the rate base to include the market or the book value of fields not presently in use, unless the time for using them is so near that they may be said, at least by analogy to have the quality of working capital. The arrival of that time cannot be known in advance by application of a formula, but within the margin of a fair discretion must be determined for every producer by the triers of fact in light of all the circumstances. The burden is on the gas company to supply whatever testimony may be necessary to enable a court or a board to make the requisite division. Leases bought with income, the proceeds of the sale of gas, and thus paid for in the last analysis through the contributions of consumers, ought not in fairness to be capitalized until present or imminent need for use as sources of supply shall have brought them into the base upon which profits may be earned. To capitalize them sooner is to build the rate structure of the business upon assets held in idleness to abide the uses of the future.

(emphasis added). Moreover, in In re Permian Basin Rate Cases, 390 U.S. 747, 791 (1968), a post-Hope, decision, the Supreme Court emphasized the importance of the consumer's interest in the balancing necessary to determine a "fair and reasonable" rate. According to the Court in Permian Basin,

[t]he Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market. It is instead obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection. . . . Accordingly, the "end result" . . . of the Commission's order [as required by Hope] must be measured as much by the

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 19
September 26, 2017

success with which they protect those interests as by the effectiveness with which they ‘maintain credit and attract capital.’

(emphasis added). In other words, Permian Basin makes it clear that it is up to the Public Service Commission, and ultimately the General Assembly, to provide “‘a complete, permanent and effective bond of protection from excessive rates and charges.’” Permian Basin, 390 U.S. at 796 (quoting Atlantic Refining Co. v. Public Service Commission, 360 U.S. 378, 388 (1959)). It is equally necessary to establish a rate base grounded in “‘fairness,” not only to investors but also ratepayers. A rate base formulated upon property sooner than when the facility becomes “‘used and useful” is “‘to build the rate structure of the business upon assets held in idleness to abide the uses of the future.” Columbus Gas and Fuel, *supra*.

While there is disagreement on this point to be sure, and authorities in certain instances reach a different result, courts elsewhere have commented as to whether there is a constitutional requirement after Hope Natural Gas that the rate base include only property which is “‘used and useful.” For example, recently, the Mississippi Supreme Court noted that there are strong criticisms of any methodology which includes property which is not used and useful in the determination of the rate base:

[r]equiring ratepayers to pay a utility a return on CWIP costs [costs of work in progress] is inequitable, because this would force current ratepayers to pay a return on property constructed for future ratepayers with the result that, when the future ratepayers begin to receive the new, upgraded service, the utility would derive a double return on the cost of construction.

Miss. Power Co., Inc. v. Miss. Pub. Serv. Comm., 168 So.3d at 918-19 (emphasis added).

Further, some decisions have read Hope Natural Gas itself as continuing the constitutional requirement that property be “‘used and useful” for inclusion in a rate base so that the proper “‘balance” between investors and customers can be achieved. In Kan. Gas and Elec. Co. v. Kan. Corp. Comm., 720 P.2d 1063, 1071 (Kan. 1986), for example, the Kansas Supreme Court noted that “. . . Hope requires only that the regulatory authority balance competing consumer and investor interests to determine just and reasonable rates providing return on used and useful property.” (emphasis added). Likewise, in Pa. Elec. Co. v. Pa. Pub. Util. Comm., 502 A.2d 130, 134-35 (Pa. 1985), the Pennsylvania Supreme Court made clear that under Hope, investor interests do not “‘supersede those of consumers in any case where what would otherwise be a ‘just and reasonable’ rate would endanger the financial integrity of the utility. To conclude otherwise would be to elevate the investor interests to a constitutionally guaranteed dimension, a result which was not indicated by Hope and its progeny.” According to the Pennsylvania Supreme Court, “[t]he ‘used and useful’ concept came into existence long before the Hope decision was rendered, and it is not generally regarded as having been overridden by that

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 20
September 26, 2017

decision.” The Court went on to say that “[t]he ‘used and useful’ principle is soundly based, for it serves to protect consumers from exploitation and it comports with the view that, in fairness, consumers should not be required to buoy up failing utility companies by being required to, in effect, provide public subsidies for utility properties that are not useful in the public service.” Thus, the Court found:

In summary, therefore, we hold that the Hope decision is to be interpreted as recognizing a constitutional requirement of “just and reasonable” utility rates, providing a return on used and useful property, with rates to be determined through a balancing of consumer and investor interests.

(emphasis added).

As noted, our own Supreme Court, in Mims v. Edgefield Co. Water and Sewer Authority, supra, appears to agree. The Court stated that any utility rate must achieve the proper balance so that the rate is not “so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility’s customers.” The Court cited Smyth v. Ames, supra in support for the latter proposition. The Smyth Court had stated that “[W]hat the company is entitled to ask is a fair return upon that which it employs for the public convenience.” (emphasis added). Thus, like the other cases referenced above, it appears our Supreme Court would require the constitutional “balancing” required by Hope on property to depend upon property which the company “employs for the public convenience” or that which is “used and useful.” See also So. Bell and Tel. Co. v. PSC, supra, (which quoted the “used and useful” rule in South Carolina, while at the same time quoting from Hope).

We would be less than candid if we did not point out that other courts have recognized that Hope does not require a particular methodology and that the “prudent investment” rule is also valid in setting utility rates. “[U]nder the prudent investment rule, a utility is compensated for all prudent investments at their costs when made, irrespective of whether they are deemed necessary or beneficial in hindsight.” Gulf States Utilities Co. v. La. Pub. Serv. Comm., 578 So.2d 71, 85 (La. 1991) citing Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). These cases allow a utility to recover its investment in a nuclear power plant reasonably abandoned or canceled. See e.g. Attorney General v. Dept. of Pub. Utilities, 455 N.E.2d 414 (Mass. 1983). On the other hand, other cases adhere strictly to the “used and useful” rule, holding that an unfinished, canceled nuclear power plant is not “used or useful” property and thus cannot be included in the rate base. Citizen Action Coalition, Inc. v. Northern Ind. Pub. Service Co., 485 N.E.2d 610 (Ind. 1985). We believe South Carolina is one of those states. The various decisions, either way, are collected in the Annotation, 83 A.L.R. 4th 183.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 21
September 26, 2017

As noted, South Carolina has always approached the issue conservatively prior to the enactment of the BLRA steadfastly adhering to the “used and useful” principle. As Justices Littlejohn and Lewis found in Johnson v. Piedmont Municipal Power Agency, 277 S.C. 345, 383, 287 S.E.2d 476, 486 (1982), “. . . the authority to assess moneys for electric power not received is the equivalent of a tax. . . .” (Littlejohn and Lewis, J.J., dissenting). Moreover, as recently as this year, the Court has reaffirmed the viability of the “used and useful” rule. In Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff, ___ S.C. ___, ___ S.E.2d ___, n. 4 (2017), a “rate base” was defined as “‘the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return’ and ‘represents the total investment in, or the fair value of, the used and useful property which it necessarily devotes to rendering the regulated services.’” (quoting S. Bell. Tel. and Tel. Co. v. Pub. Serv. Comm. of S.C., 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1983)) (emphasis added). This statement by the Court in 2017 is virtually the same as that enunciated by the South Carolina Supreme Court long ago in 1934 in DePass v. Broad River Power Co., 173 S.C. 387, 176 S.E. 325, 333 (1934) in summarizing as follows:

[i]t is true that a public service utility company, in the exercise of the franchises granted it, has certain rights and privileges not enjoyed by private enterprises. But it must be remembered that, as such utility, it is required to properly serve the public, and this duty or obligation it can neither neglect or avoid. Nor can it choose its own customers, but must serve all who comply with its reasonable rules and regulations. And, . . . as indicated in all the decisions, it will not be permitted, should it be so minded, to exploit the public it serves, or to coerce its patrons, by any method or plan devised by it into paying past due bills about which there is a bona fide dispute. However, it is admittedly entitled, the same as a conservative private business which is subject to similar risks and uncertainties, to a fair return on the value of its property used and useful in the service of its customers; and, as is its duty, the rate-making body named by the Legislature for that purpose fixes such rates, upon a full consideration of all the relevant facts and elements entering into its determination of the matter, as will insure such a return, but no more.

(emphasis added).

Constitutionality Of Section 58-33-275(A) and (B)

We turn now to an examination of specific provisions of the BLRA, particularly § 58-33-275(A) and (B). Such provision states that

(A) base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as the plant is constructed or is being constructed within the parameters of:

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 22

September 26, 2017

- (1) the approved construction schedule including contingencies
 - (2) the approved capital costs estimates including specified contingencies.
- (B) Determinations under Section 58-33-275(A) may not be challenged or reopened in any subsequent proceeding including proceedings under Section 58-27-810 and other applicable provisions and Section 58-33-280 and other applicable provisions of this article.

A “base load review order” is

An order issued by the Commission (PSC) pursuant to Section 58-33-270 establishing that if a plant is constructed in accordance with an approved construction schedule, approved capital costs estimates, and approved projections of in-service expenses, as defined herein, the plant is considered to be used and useful for utility purposes such that its capital costs and prudent utility costs and are properly included in rates.

(emphasis added). Section 58-33-270(A) states that after the hearing, the commission “shall issue a base load review order approving rate recovery for plant capital costs if it determines:

- (1) that the utility’s decision to proceed with construction of the plant is prudent and reasonable considering the information available for the utility at the time;
 - (2) for plants located in this State, that the utility has satisfied the requirements of Section 58-33-160 of the Utility Facility Siting and Environmental Protection Act, either in a past proceeding or in the current proceeding if the current proceeding is a combined proceeding;
- (B)The base load review order shall establish . . . [that the enumerated criteria are met] . . .

In analyzing the constitutionality of these provisions, we note that our Supreme Court has emphasized that “[r]ate-making is not an exact science, but a legislative function involving many questions of judgment and discretion.” Parker v. S.C. Pub. Service Comm., 280 S.C. 310, 312, 313 S.E.2d 290, 291 (1984) (quoting Colo. VTE Elec. Assn., Inc. v. The Public Utilities Comm., 602 P.2d 861, 864 (1979)). As the Supreme Court emphasized in Duquesne Light Co. v. Barasch, 488 U.S. at 313, “[W]e have never doubted that state legislatures are competent bodies to set utility rates.” In essence, we believe that it is precisely what the BLRA did – the General Assembly gave “specific instructions to their utility commission[],” in this instance, the PSC, as to the requirements of ratemaking with respect to the construction of a nuclear power plant. Duquesne Light, *id.* Thus, we must look to these provisions of the BLRA, particularly as to how they depart markedly from traditional ratemaking in South Carolina, in light of our constitutional concerns. To say these provisions depart dramatically from traditional rate-making law is an understatement, to say the least.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 23
September 26, 2017

We believe the BLRA implicates a “property” interest of ratepayers in terms of the rates they pay. As the Mississippi Supreme Court noted in Miss. Power Co., *supra*, ratepayer monies constitute “property” for substantive and procedural due process purposes. 168 So.3d at 913-14. There, the Court noted that “[b]y approving increased rates based on ‘mirror CWIP’ recovery, the Commission has deprived the ratepayers of their property, money . . . There is no question that the taking of private funds is a transfer of the property and results in the deprivation of that property.”

Moreover, in Miss. Power Co., the Mississippi Supreme Court concluded that ratepayers had been denied procedural due process in not being given proper notice in order to challenge rate increases with respect to a nuclear power plant:

Ab initio, the Commission deprived ratepayers of procedural due process by failing to require notice to the ratepayers. . . No notice of the original filing was provided to the ratepayers in the overwhelming majority of the Southeastern Mississippi counties constituting MPC’s service area. . . MPC sought and obtained approval for CWIP (cost of work in progress) recovery that would result in rate increases. When MPC pursued rate increases as part of its certificate filing, all of its customers were entitled to notice. . . .

No argument has been advanced that all ratepayers participated in every stage of these proceedings, because it simply is not true. Notice was not properly given. The construction and operation of this multibillion-dollar electric generation facility was going to increase rates. Any suggestion to the contrary is facetious and wholly untenable. . . Yet, ratepayers were not afforded procedural due process via notice.

Id. at 914.

Moreover, in Bard v. Cox Cable of Omaha, Inc., 416 N.W.2d 4, 8 (Neb. 1987), the Nebraska Supreme Court stated:

[b]ecause the setting of rates for a regulated industry is a legislative act, the courts of this State lack the power to set rates. . . . The courts do, however, have the power to review legislatively set rates to determine whether they are so arbitrary and unreasonable as to be confiscatory and thus unconstitutionally take property without due process of law. [citations omitted].

Thus, in the absence of overriding federal law, the district court possesses subject matter jurisdiction to determine whether Cox Cable’s rates are so arbitrary and unreasonable to be confiscatory.

And, in Porter v. South Carolina Public Service Comm., 338 S.C. 164, 170, 525 S.E.2d 866, 869 (2000), the Court concluded that ratepayers were deprived of due process for failure to

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 24
September 26, 2017

receive adequate notice of a rate increase. According to the Court, “[t]aken as a whole, this notice [given] is not informative and in fact somewhat misleading. . . . We find the notice given was inadequate to satisfy the requirements of § 58-9-530.” Thus, the Court found that “the rate increases were ordered without adequate notice in violation of due process.” 338 S.C. at 69-70, 525 S.E.2d at 869. The Court cited Art. I, § 22 of the State Constitution, which provides that “[n]o person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” In short, the Court concluded that Art. I, § 22 applies to protect ratepayers.

Furthermore, money is considered “property” for purposes of constitutional “takings” provisions. Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 164-65 (1980). Likewise, BHA Investments, Inc. v. City of Boise, 108 P.3d 315, 319 (Idaho 2004), it was stated:

[m]oney is clearly property that may not be taken for public use without the payment of just compensation. Thus, the district court erred in holding that money is not property under the Takings Clause.

See also Eastern Enterprises v. Apfel, 524 U.S. 498 (1988) (plurality opinion); Miss. Power, supra. Further, clearly under Hope, exorbitant or unfair rates may constitute a “taking” for purposes of the Fifth Amendment if the rates are exorbitant or unjust to ratepayers.

In this instance, § 58-33-275(A) mandates that the base load review order [authorizing construction of the VC Summer facilities] constitutes a “final and binding” determination not only that the project is “used and useful,” but that its capital costs are “prudent utility costs and expenses and are properly included in rates. . . .” Our Supreme Court has reviewed the constitutionality of a similar unreviewable determination made by the General Assembly and concluded that it violates due process. In State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2014), the Court determined that a statute subjecting one to a lifetime of electronic monitoring without the ability to challenge at any point after the initial determination is unconstitutional. After finding that the offender possessed a “liberty” interest under the Due Process Clause, and that freedom from electronic monitoring was not a “fundamental” right, the Court held that, even so, the offender’s preclusion from challenge following initial challenge was “arbitrary.” The Court, citing In re Treatment and Care of Luckabaugh, 351 S.C. 122, 139-40, 568 S.E.2d 338, 346 (2002), stated:

[a]lthough we find the initial imposition of satellite monitoring under Section 23-3-540(C) constitutional, we believe the final sentence of Section 23-3-540(H) is unconstitutional, for it precludes judicial review for persons convicted of CSC-First or lewd act on a minor. . . . The complete absence of any opportunity for judicial review to assess a risk of re-offending, which is beyond the norm of Jessica’s law is arbitrary and cannot be deemed rationally related to the legislature’s stated purpose

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 25
September 26, 2017

of protecting the public from those with a high risk of re-offending. See Luckabaugh, 352 S.C. at 139-40, 568 S.E.2d at 346 (find due process ensure that a statute which deprives a person of a liberty [or property] interest has “at minimum, a rational basis, and may not be arbitrary”).

403 S.C. at 508, 744 S.E.2d at 510 (citing numerous cases) (emphasis added). Thus, if the Court deemed a complete removal from judicial review a deprivation of a “liberty” interest as arbitrary and violative of due process with respect to one who has been convicted, we conclude that it would also certainly deem such removal from judicial review for ratepayers to challenge the Legislature’s determination as to “used and useful” and prudence to be violative of due process.

We believe a court is likely to conclude that it simply makes no sense for the Legislature to deem a project “used and useful” virtually from the outset of the project. This means that once the base land review order is issued “the plant is considered to be used and useful for utility purposes such that its capital costs are prudent utility costs and are properly included in the rates.” § 58-33-220(4) [definition of “base load review order”]. Thus, the General Assembly has conclusively determined that issuance of the base load review order entitles the utility to recover capital costs throughout construction of the plant so long as within the “parameters” of the “approved construction schedule” and the “approved capital cost estimates.” See § 58-33-275(A) (emphasis added).

Indeed, the Texas courts have concluded that even if a utility plant is “up and running,” it remains not “used and useful” so long as it is not providing power to its current customers. In El Paso Elec. Co. v. Pub. Util. Comm. of Texas, 997 S.W.2d 846, 856 (Tex. Ct. App. 1995), the Court stated:

[t]hus, PURA (“Public Utility Regulatory Act,”) is concerned primarily with balancing the interests of utilities and their consumers in the area over which the utilities enjoy a monopolistic advantage. As part of this balance, a utility is entitled to have the prudently incurred costs of “used and useful” property included in its rate base when providing service to customers in its service area.

917 S.W.2d at 856. The Texas Court of Appeals further explained:

[r]ate-setting requires balancing investor and consumer interests; the result of this balance does not necessarily insure that the utility will produce net revenues. Hope Natural Gas, 320 U.S. at 603, 64 S.Ct. at 288. Constitutional protections merely reinforce the idea that agencies may not arbitrarily disallow expenditures; they do not entitle utilities to immediate return on investments that are imprudent or are not used and useful in providing service to customers.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 26
September 26, 2017

Id. at 862. The utility argued that its plant was “actually being used” and such sufficed to meet the “used and useful” test and therefore includable in the rate base. Yet, such a view, concluded the Court, failed to serve ratepayers’ interests and protect them from unreasonable rates. Certainly, according to the Court, the utility was not entitled to a per se conclusion of usefulness “in providing service to its local ratepayers” because such a conclusion would undermine the “strictly regulated monopoly balance” of the ratemaking structure. Id. at 856. Moreover, factually speaking, the plant was not “actually used and useful” based upon the record. Here, the BLRA is far more extreme. The Act has as a matter of law deemed the plant to be “used and useful” virtually from the start, enabling capital costs to be recovered by the utility. Such a conclusion is inconsistent with the “balance” between investor and ratepayer which Hope requires. Moreover, by designating the utility’s property to be “used and useful” before it actually is, the BLRA runs the risk of “taking” ratepayers’ property throughout the entire process under Art. I, § 13 of the State Constitution. Rates are increased on property that is not yet “used and useful,” and thus not yet clothed with a “public” interest. See discussion below.

Moreover, in effect, § 58-33-370(A) and (B) create an irrebuttable presumption as to “used and useful” and prudence. The United States Supreme Court has held that a statute creating an irrebuttable presumption of non-residence provides no opportunity for out of state students to demonstrate that they have become permanent residents. Vlandis v. Kline, 412 U.S. 441 (1973). Our own Supreme Court has held that at the very least, such an irrebuttable presumption must bear “a rational relation to a legitimate objective.” It must be “based upon an ‘objective criterion’ which bears ‘a sufficiently close nexus with underlying policy objectives.’” Lazeron v. Hilton Head Hosp., Inc., 312 S.C. 211, 213, 439 S.E.2d 836, 838 (1994). To illustrate that these irrebuttable presumptions of prudence and “used and useful” are arbitrary based solely upon approval of the base load review order, we quote one court which noted that “[a] vested right to build is not a vested right to have customers pay.” Appeal of Pub. Serv. Co. of N.H., 454 A.2d 435, 443 (N.H. 1982).

Further, it is well recognized that “the legislature cannot make certain facts conclusive proof of another ultimate fact when there is no logical connection of probability in experience to connect them.” City of New Port Richey v. Fidelity and Deposit Co. of Md., 105 F.2d 348, 351 (5th Cir. 1939). As was concluded in Fitzhugh v. City of Jackson, 97 So. 190, 193 (Miss. 1923) (citing Quintini v. City of Bay St. Louis, 1 So. 625)), the Legislature cannot

... by a mere declaration, convert the harmless, proper, and ordinary use of property into a nuisance. Where the use of the land furnishes the test for the determination of the constitutionality of the law, the Legislature may not conclusively determine the effect to be harmful. This would be the assumption of judicial functions by the legislative department.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 27
September 26, 2017

Similarly, here, the Legislature has conclusively declared the plants to be “used and useful” based upon the initial base load review order. Such a declaration has “no logical connection or probability in experience to connect them. City of New Port, supra.

Moreover, with respect to the BLRA’s foreclosure of further challenge to the prudence of the decision to construct the facilities, as another court has stated, “[t]hroughout the rate proceedings, the utility has the burden of proving that its investments meet these [prudence] requirements.” Bus. And Professional People for Public Interest v. Ill. Commerce Comm., 585 N.E.2d 1032, 1039 (Ill. 1991). In Business and Professional People, the Court stressed the irrationality of using a prior order or orders to govern prudence throughout. The intervenors contended “that the Commission’s orders do not establish the prudence of continued construction of the Braidwood unit after 1980 and that the Commission failed to determine the prudence of continued construction after that date.” Id. at 1041. The Supreme Court of Illinois agreed and remanded back to the Commission:

The Remand Order also ignores the specific findings of the 1986 orders (ICC Docket Nos. 82-0855, 86-0249) and makes only a passing reference to them. Instead, the Commission uses its prior orders to substantiate its conclusion that “Issuance of the certificate and the final orders of the Commission ordering completion established a prima facie case.” We believe the Commission’s reliance on orders which predate the order to show cause is insufficient to establish that the Braidwood plants were prudent. Because the Remand Order fails to set forth the conclusions of the 1986 orders, the evidence Edison presented, if any, to comply with the Commission’s rule to show cause, or an analysis of the facts and findings sufficient to permit an informed judicial review, we remand for a proper determination of the prudence of the continued construction of the Braidwood units. Ill.Rev.Stat1987, ch. 111 2/3, par. 10-201(e)(iii).

(emphasis added).

By contrast, our Supreme Court, in South Carolina Energy Users v. SCE&G, supra, concluded that the BLRA foreclosed reassessment of or a challenge to “the prudence of the entire construction project at that base load order review stage. . . .” 410 S.C. at 360, 764 S.E.2d at 919, describing it as “nonsensical” to do so. The Court found that the Act did not allow “[r]eopening the initial prudence determination” each time a rate increase for higher costs is requested. Such a foreclosure by the BLRA has the result of a ratepayer never again being able to challenge the prudence of plant construction after the initial base load review order regardless of changes in circumstances. Based upon the Porter case, cited above, such provision of the BLRA would deprive ratepayers of the “opportunity to be heard” pursuant to Art. I, § 22 of the South Carolina Constitution. See also Miss. Power Co., supra [ratepayer has a due process right to challenge prudence]. Moreover, the statute creates an irrebuttable and, we believe, irrational

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 28
September 26, 2017

conclusion with respect to prudence and “used and useful.” This, in our view, violates substantive, as well as procedural due process.

In short, the initial authorization by the PSC to build the VC Summer plants cannot, consistent with due process, bind the PSC to conclude that the project continues to be prudently constructed or that it is “used and useful.” By way of analogy, the initial decision to build a house does not bind the homeowner to continue the project, regardless of the costs, or that the project has been completed merely by laying the foundation. Such a decision, in light of changing circumstances, would always be subject to review by the homeowner. No reasonable person would wish to be denied the opportunity to review the viability of his home construction at every step of the way. To deny review in the BLRA likewise could well be deemed by a court to be arbitrary and thus violative of due process.

Moreover, the “used and useful” determination by the legislature does not comport with the reality, or when a plant becomes “used and useful.” Not only is such a conclusion arbitrary, but usurps judicial powers to determine when a plant is “used and useful.” Fitzhugh, supra.

Abandonment Provision and “Taking” as Well as Substantive Due Process

The provision of the BLRA, which we believe is particularly constitutionally suspect, is the provision allowing the utility to recover its capital investments, AFUDC, and rate of return upon abandonment of the nuclear project. Section 58-33-280(K) provides:

[w]here a plant is abandoned after a base load review order approving the recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recovered under this article provided that the utility shall bear the burden of providing by a preponderance of the evidence that the decision to abandon construct of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility’s cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time the utility could have acted to avoid or minimize the costs. The Commission shall order an amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting the rates under this article.

In short, the General Assembly has required the ratepayers to compensate the utility and its stockholders even if it has abandoned or cancelled the project and the project is providing no service to its ratepayers.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 29
September 26, 2017

As already discussed, the Hope Natural Gas case requires that rates must be “just and reasonable” as a result of a “balancing of the investor and consumer interests. Our own Supreme Court’s decision in Mims agrees, as does the decision of our Supreme Court in S.C. Cable Television Assn., supra. Judge Starr eloquently elaborated upon the Hope formula in his concurring opinion in Jersey Power and Light Co. v. FERC, 810 F.2d 1168, 1190-91 (D.C. Cir. 1987). He astutely recognized that, while prudence and “used and useful” principles may not now be constitutionally required in and of themselves under Hope, they, nevertheless, furnish important protections for consumers ensuring the proper constitutional balance between investors and ratepayers under Hope. In the words of Judge Starr,

[U]nder one line of analysis, inclusion of prudent investments in the rate base is not in and of itself exploitative. See Washington Gas Light Co. v. Baker, 188 F.2d 11 (D.C.Cir.1950), cert. denied. 340 U.S. 952, 71 S.Ct. 571, 95 L.Ed. 686 (1951). I am not so sure that such an easy rule can automatically be properly employed consistent with the demands of the Fifth Amendment. Prudence is, of course, relevant to the process of striking a reasonable balance in rate-setting for public utilities. Requiring an investment to be prudent when made is one safeguard imposed by regulatory authorities upon the regulated business for benefit of ratepayers. As I see it, the “used and useful” rule is but another such safeguard. The prudence rule looks to the time of investment, whereas the “used and useful” rule looks toward a later time. The two principles are designed to assure that the ratepayers, whose property might otherwise of course be “taken” by regulatory authorities, will not necessarily be saddled with the results of management’s defalcations or mistakes, or as a matter of simple justice, be required to pay for that which provides the ratepayers with no discernible benefit.

The two principles thus provide assurances that ill-guided management or management that simply proves in hindsight to have been wrong will not automatically be bailed out from conditions which government did not force upon it. That is, government forced upon the utility an obligation to provide service, but that obligation, as we have seen, is the quid pro quo for a protected area of service (and eminent domain authority). What is fundamental is that government did not force upon the utility a specific course of action for achieving the mandated goal.

Indeed, it would be curious if the Constitution protected utility investors entirely from business dangers experienced daily in the free market, the danger that managers will prove to have been overly sanguine about business prospects or the danger that a particular capital investment will not prove successful. In the face of anticipated demand, an airline may acquire additional aircraft, only to face unhappy consequences when passenger traffic does not meet expectations, perhaps due to economic factors entirely beyond management's control. Utilities are not exempt from comparable forces. As the cases have repeatedly held, the Fifth Amendment does not provide utility investors with a haven from the operation of market forces. See, e.g., FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590, 62 S.Ct. 736, 745, 86 L.Ed. 1037 (1942) (“[Regulation does not insure that the business shall produce net

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 30
September 26, 2017

revenues.”). Yet, the prudent investment rule, in full vigor, would accomplish virtually that state of insulation, all in the guise of preventing government from effecting a taking without just compensation.

For me, the prudent investment rule is, taken alone, too weighted for constitutional analysis in favor of the utility. It lacks balance. But so too, the “used and useful” rule, taken alone, is skewed heavily in favor of ratepayers. It also lacks balance. In the modern setting, neither regime, mechanically applied with full rigor, will likely achieve justice among the competing interests of investor and ratepayers so as to avoid confiscation of the utility’s property or a taking of the property of ratepayers through unjustifiably exorbitant rates. Each approach, however, provides important insights about the ultimate object of the regulatory process, which is to achieve a just result in rate regulation. And that is the mission commanded by the Fifth Amendment. Unlike garden-variety takings, the requirements of the Takings Clause are satisfied in the rate regulatory setting when justice is done, that is to say the striking of a reasonable balance between competing interests.

Thus it is that a taking occurs not when an investment is made (even one under legal obligation), but when the balance between investor and ratepayer interests—the very function of utility regulation—is struck unjustly. Although the agency has broad latitude in striking the balance, the Constitution nonetheless requires that the end result reflect a reasonable balancing of the interests of investors and ratepayers. As we have seen, both investors and ratepayers were the intended beneficiaries of the Forked River investment; both should presumptively have to share in the loss. Filling in the gaps, the making of the specific judgments that constitutes the difficult part of this enterprise, belongs in the first instance to the politically accountable branches, specifically to the experts in the agency, not to generalist judges.

It is here that Hope’s “end result” test comes into play. The judiciary is not to micromanage the rate regulation process, just as we are to be restrained in reviewing the other work of administrative agencies. We are not to impose procedures that we think are wise or methodologies that we think strike a better balance than that struck by the regulators. Our limited but vital role is to ensure that the end result of a rate order reasonably balances investor and ratepayer interests.

(emphasis added). Thus, while Judge Starr acknowledges that the twin principles of prudence and “used and useful” may not in every imagined instance be rigidly applied, they are usually essential in protecting the necessary constitutional balance between investor and ratepayer which Hope Natural Gas requires. Here, however, the BLRA has essentially stripped both of these principles from the process. Prudence to construct the project may not be contested after the initial base load review order and the project is deemed “used and useful” virtually throughout the process. We believe this skews the interests strongly in favor of the investor in contravention of Hope.

One general treatise has emphasized that ratepayers may not be left out of the equation, further noting that:

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 31

September 26, 2017

[a] rate which produces a fair return for the investors is not necessarily fair to the consumers. . . . In fixing rates for the product or service of a public utility, the interests of both the utility and the public must be regarded. . . . Thus, a public utility regulatory commission cannot fulfill its statutory duty to balance competing interests of public utilities. Stockholders and ratepayers in establishing just and reasonable utility rates without taking into account the impact of the proposed rates on the ratepayers. The proper final result is reached by balancing of the investor and consumer interests. . . .

73 B.C.J.S. Public Utilities, § 76 (emphasis added).

The “balance” which the General Assembly fashioned in the BLRA, particularly with respect to the abandonment provision, is truly one sided. It is highly imbalanced in favor of the investor and against the consumer. There is the unchallengable conclusion in the Act of prudence to build, as well as that the plants are deemed “used and useful” throughout by operation of law. See § 58-33-270(A). Moreover, there are the provisions of allowing “modifications” in § 58-33-270(E) [as opposed to application of the “material and adverse deviation” provision of § 58-33-275(E)]. Further, § 58-33-270(E) shifts the burden from the utility being required to prove prudence to one of a challenger required to demonstrate imprudence. See also § 58-33-275(C) [allowing revised rate filings for capital costs virtually automatically]. We believe the combination of these provisions pushes the Act well over the line in favor of investors and thus in violation of Hope Natural Gas. The ratepayers are required to pay for plants which will never be built, much less serve customers, but have been abandoned.

Most importantly, the utility may recover costs and is guaranteed a substantial return on investment upon abandonment. It only has to demonstrate that the abandonment is prudent. The Indiana Supreme Court has commented upon such a situation as follows:

. . . if an automobile company embarked on a new capital project to build a factory that would produce a new sports car and then, before it even produced a sports car, cancelled it, the automobile company would ordinarily be unable to recover the cost from its consumers in a competitive market. This is the case we have here. NIPSCO embarked on a capital project to build a nuclear generating plant and, before it ever produced electricity NIPSCO cancelled it. . . . Consequently, . . . [Indiana law] protects consumers from having to pay for service not received, something which they would not be subjected to in a competitive industry. Since Bailley N-1 never became ‘used and useful’ property as [Indiana law] . . . contemplates, the PSCI’s characterization of the cancelled Bailley N-1 project as an extraordinary cost of service loss was incorrect and the order allowing amortization was contrary to law. In dealing with and receiving this claim, we have been unable to conceive of a situation of our own in which the consumers could be required to replenish lost

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 32
September 26, 2017

capital which had never become “used and useful” property or in other words, be required to act in aid and support of the utility as an insurer of the investor’s risk, unless consumers received an interest in return which provided an opportunity to earn a return on the capital supplied.

Citizens Action Coalition of Indiana v. Northern Indiana Pub. Serv. Comm., 485 N.E.2d 610, 615 (1995) (emphasis added). See also Johnson v. Piedmont Municipal Power Agency, supra [“. . . the authority to assess moneys for electric power not received is the equivalent of a tax. . . .”]

In Citizens Action Coalition, supra, the Indiana Court distinguished for purposes of amortization between a plant abandoned because of obsolescence and a plant project simply cancelled during construction:

[a]llowance of amortization of cancelled plants would encourage uneconomical or unproductive ventures; whereas allowance for amortization of abandoned or returned plants encourages utilities to remove plants and property from the rate base. This treatment also benefits consumers because obsolete and inefficient property is removed from the rate base.

485 N.E.2d at 616.

In addition, the Pennsylvania courts have concluded that with respect to a shutdown of a nuclear power plant (Three Mile Island), under Hope’s test, it is a proper “balancing” of investor and consumer interests to exclude ‘capital costs and operating expenses from the companies’ rate bases.” Pennsylvania Elec. Co. v. Pa. Pub. Util. Comm., 467 A.2d 1367, 1372 (Pa. 1983). There, the utility argued that Hope required inclusion of such costs, rather than exclusion. However, the Pennsylvania Court disagreed:

[W]e find that the Commission did not abuse its discretion in finding that TM-1 was not used or useful and thus in excluding its capital and operating costs from the rate bases. The actions of the Commission do reflect a balancing of investor and consumer interests as prescribed by the Supreme Court in Pennsylvania Gas & Water Co. [424 A.2d 1213 (1980)].

(emphasis added).

Moreover, the Illinois Supreme Court found that allowance for construction costs prior to completion of a project eviscerates the “balance” between investors and consumers. That Court stated:

[e]xpensing the construction costs as incurred would mismatch the costs and benefits of a plant because current ratepayers would be charged for a plant which produces no

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 33
September 26, 2017

current benefit. For this reason, construction costs are capitalized and amortized over the useful life of the plant.

Bus. Profess. People for Pub. Int. v. Ill. Commerce Comm., 585 N.E.2d at 1059 (emphasis added).

Further, in Office of Consumers Counsel v. Pub. Util. Comm., 423 N.E.2d 820 (Ohio 1981), the Ohio Supreme Court rejected the argument of the Public Utilities Commission and utility that “the commission may authorize the amortization of the investment in the terminated nuclear facilities.” That Court opined:

[t]he commission order engrafts upon the statutory ratemaking scheme an exception that would allow utility companies to recover their investment in unfinished projects ineligible for rate base treatment if the original decision to build the facilities and the subsequent decision to cancel the projects are prudent under the circumstances. In so doing the commission has exceeded its statutory mandate. We hold that the commission unreasonably and unlawfully exceeded its statutory authority when it approved amortization of CEI’s investment in the four nuclear power plants.

423 N.E.2d at 828 (emphasis added).

And, in Dayton Power and Light Co. v. Pub. Util. Comm. of Ohio, 447 N.E.2d 733, 734 (1983), the Court held that the commission’s disallowance of the utility’s request to treat its expenditures associated with a canceled generating plant as amortized costs did not constitute a “taking” of the utilities property in violation of the Fifth Amendment. The Court noted that “Appellant further contends that the commission, in denying the Killen amortization . . . disregarded the constitutional requirement announced in FPC v. Hope Natural Gas Co. . . . that ‘[t]he ratemaking process involves a balancing the investor and consumer interest.’” According to the Dayton Court,

Appellant asserts that it “and all Ohio utilities are disadvantaged in the capital markets where they must attract capital in order to plan for the future and to provide adequate facilities . . . because the utilities must inform their investors that they may not be permitted to earn a rate of return on this investment if the facilities which are prudently planned and necessary today are cancelled in the future.”

447 N.E.2d at 742. The Ohio Court, however, explained why amortization of costs for an unfinished plant was improper. Citing its earlier decision in Consumers’ Counsel v. Pub. Util. Comm., the Dayton Court said this:

[in Consumers’ Counsel] . . . this Court held that the Davis-Besse Unit 1 Generating Station, which was not “used and useful in rendering the public utility service” . . .

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 34
September 26, 2017

could not be included in the utility's rate base. Toledo Edison made a constitutional argument similar to that presented herein to which we responded at page 456, 391 N.E.2d 311:

“Toledo Edison argues that to deny inclusion of the unit in its rate base would be tantamount to the confiscation of its property in violation of its constitutional right to due process of law. In Columbus Gas & Fuel Co. v. Pub. Util. Comm., *supra*, 292 U.S. 398, 54 S.Ct. 763, 78 L.Ed. 1327), the Supreme Court addressed the issue of whether gas fields not yet in service should be included in the rate base. Justice Cardozo, speaking for the court, stated at page 406 (54 S.Ct. at page 767):

“[t]here will be no need in the computations of the rate base to include the . . . value of fields not presently in use, unless the time for using this is so near that they be said, at least by analogy to have the quality of working capital . . . Postponement of . . . profit until the state of imminent or present use is not an act of confiscation, but a legitimate exercise of legislative judgment. . . .

It would be inequitable to prematurely shift the risk of plant failure from the utility's investors to the ratepayers by the inclusion in the rate base of highly complex and innovative technology which has not been proven to be reasonably free from significant design or construction defects. The initial risk of failure is appropriately borne by the investors who have undertaken the project and who will ultimately profit from its success.”

447 N.E.2d at 742-43.

Moreover, in Pacific Power and Light Co. v. Pub. Serv. Comm. of Wyoming, 677 P.2d 799, 805 (Wyo9ming 1984) the Wyoming Supreme Court made it clear that the rate base could not include the property of a cancelled nuclear plant. That Court explained:

[i]f the project had been successful and had gone on line for production of electricity for public convenience, the cost or value would have been properly considered in establishing a rate base. Since they were not successful and were only partially constructed, they could never become property of a “used and useful” nature.

(emphasis added).

Thus, even though Hope does not expressly state that a “used and useful” formula is constitutionally required, courts have concluded that the constitutional balance between investors and ratepayers is dramatically altered by departure from the “used and useful” principle in the case of a cancelled or abandoned nuclear plant. Words such as “mismatch” and “inequitable” are

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 35

September 26, 2017

used by these courts to characterize the situation where traditional “used and useful” principles are sought to be discarded. The BLRA imposes the “fiction” that the plant is in use from the issuance of the base load review order. Here, the BLRA conclusively engrafts a requirement that the plant ordered to be constructed is “used and useful,” not at the end of the process after the plant is serving customers, but at the very beginning of construction. This departure violates Hope’s “balance” test and likely results in an unconstitutional taking of ratepayers’ property.

We also note also that courts have also adopted compromise positions by balancing the exclusion of cancelled plant expenditures from the rate base with also allowing the utility costs to be amortized over time. In NEPCO Mun. Rate Comm. v. FERC, 668 F.2d 1327 (1981), the D.C. Circuit upheld FERC’s fashioning of just such a balance. NEP cancelled a project which included two nuclear plants. FERC found NEP’s expenditures to have been prudent and thus recoverable over a five year amortization period. However, FERC denied NEP’s request to include unamortized expenditures in the rate base “because those expenditures did not result in an operation of facilities ‘used an useful’ in providing electrical service.” 668 F.2d at 1332-33. The D.C. Circuit concluded that FERC’s resolution struck the proper balance:

[t]he question in this section is whether FERC’s refusal to include project expenditures in the rate base, while allowing their recovery in costs over time, is a valid approach to allocating the risks of project cancellation. NEP contends that FERC’s approach denies the opportunity to earn a return on prudent investments in the cancelled projects and thus deprives NEP of property without just compensation in violation of the Fifth Amendment.

NEP says capital prudently invested in a generating facility is taken for public use and must be included in the rate base. That view, had its genesis in a dissenting opinion of Mr. Justice Brandeis in Pacific Gas & Electric Co. v. San Francisco, 265 U.S. 403, 44 S.Ct. 537, 66 L.Ed. 1075 (1924). This Court has recognized, however, that “Justice Brandeis’ formula for ascertaining rate base – the amount of capital prudently invested – was not to become the prevailing rule.” [citations omitted]. . . .

The general rule recognized by this Court is that expenditure for an item may be included in a public utility’s rate base only when the item is “used and useful” in providing service; that is, current rate payers should bear only legitimate costs of providing service to them.

668 F.2d at 1333.

Moreover, in Union Elec. v. FERC, 668 F.2d 389 (8th Cir. 1981), the Eighth Circuit upheld FERC’s decision that ratepayers would pay the expenditures prior to cancellation, but investors would not receive a return on their investment in the plant. According to the Court, the FERC decision was “clearly a reasonable one.” According to the Court,

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 36
September 26, 2017

[t]he FERC made the decision as a rational compromise of ratepayer and investor interests. The FERC reasoned that its decision would not penalize UE for making a decision that appeared reasonable at the time and thereby discourage construction of needed facilities. Putting all the risk of cancellation on the investors would increase the cost of money for projects because a greater risk would demand a higher return.

Although contrary arguments could be made, the FERC decision is clearly a reasonable one.

668 F.2d at 397.

Our own Supreme Court decision in State ex rel. Pub. Serv. Comm. v. Atlantic Coast Line R. Co., 222 S.C. 266, 72 S.E.2d 438 (1952) is also instructive as to the proper balancing between ratepayers and investors. There, the railroad companies sought to abandon a forty year old, partially burned and unprofitable station and to cancel trackage. The Public Service Commission, however, ordered the railroads to restore the station and continue operating at that location. The Order directed the Companies to “rebuild their passenger station building in the City of Charleston, South Carolina on the site of the station building which burned on January 10, 1947, and thereafter to inaugurate passenger train service thereto and therefrom.” 222 S.C. at 271, 72 S.E.2d at 439. The companies challenged the Order as “arbitrary and unreasonable amounting to a denial of due process or equal protection under applicable constitutional provisions. . . .” 222 S.C. at 277, 72 S.E.2d at 442. The Supreme Court affirmed the Commission’s Order, stating as follows:

[t]he respondents have franchises which include the duty of furnishing adequate passenger service and facilities, and they may not continue to enjoy their franchises and escape from the burdens of their use. State ex rel. Daniel v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537; Harmon v. Columbia & G. Railroad Co., 285 S.C. 401, 5 S.E. 835. The mere fact that the station operation and the incidental train dispositions may not be profitable by themselves does not constitute a confiscation of the property of the respondents, even if involving loss, for the evidence fails to show that they are not necessary to afford suitable passenger service in the City of Charleston. The Commission’s Order finds full support in the evidence, and was not arbitrary and unreasonable.

226 S.C. at 282, 72 S.E.2d at 444. The ratepayers (passengers) were not, in other words, required to subsidize the railroads through the loss of passenger service, but instead the companies were required to bear their own losses.

Also instructive is the United States Court is the United States Supreme Court decision in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998). In Apfel, a plurality decision, plurality included that the Coal Act constituted an unconstitutional taking. Justice Kennedy concurred, finding that the Coal Act of 1992, which imposed liability upon Eastern owners for the health

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 37
September 26, 2017

care premium of over 1,000 retired miners, violated substantive due process. Justice O'Connor reasoned that the "taking" depended upon three factors: "the economic impact of the regulation, its interference with reasonable investment back expectations and the character of the governmental action." 534 U.S. at 522-23 (quoting Kaiser Aetna v. U.S., 444 U.S. 167, 175 (1979)). According to Justice O'Connor,

. . . [o]ur decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of the liability is substantially disproportionate to the parties' experience.

524 U.S. at 528-29. Analyzing the factors which had been laid out, the plurality concluded that the Coal Act violated the Takings Clause because the "solution [Congress] crafted ". . . improperly places a severe, disproportionate, and extremely retroactive burden on Eastern." Id. at 538.

Commentators have analogized the Court's decision in Apfel to situations such as here, in which consumers are required to pay higher rates to subsidize the costs and return to shareholders based upon the decision to build a nuclear power plant which is subsequently abandoned prior to completion. As one commentator has written,

[t]he economic regulation of the Coal Act is analogous to the rate regulation of Public Utility Commissions (PUCs) because both situations involve a third party mandating that someone (i.e., ratepayers in rate regulation or coal or coal businesses in Eastern Enterprises) pay a fixed amount to another party (i.e. a utility or coal mine workers). Although the two situations may appear to be inversely related (in the rate regulation context, individuals are paying a company; in the Eastern situation, a company was paying individuals), the analogy holds true. First, both cases involve a prescribed transfer of property from one person to another. In addition, companies are treated as individuals under the Fourteenth Amendment. . . .

Watkins, "Nuclear Power Rate Regulation After Eastern Enterprises," 28 B.C. Env'tl. Aff. L.Rev. 191, 217-18 (2000) (emphasis added). The commentator also observed that ratepayers would have a substantial substantive due process argument under Justice Kennedy's analysis:

Justice Kennedy reached the same conclusion . . . as O'Connor but used a substantive due process analysis . . . A due process analysis offers support to the ratepayers' argument that a regulation requiring payment for previous service (which has already been paid for) is retroactive and patently unfair under a due process analysis.

Id. at 222-23.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 38
September 26, 2017

State Constitution Issues

We also examine our State Constitution and decisions thereunder regarding a “taking” of property. Article I, § 13(A) of the State Constitution provides in pertinent part:

(A) Except as otherwise provided in this Constitution, 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.

In Byrd v. City of Hartsville, 365 S.C. 650, 656, 620 S.E.2d 76, 79 (2005), our Supreme Court addressed a “takings” issue regarding the National Historic Landmark. There, the Court stated the following:

[b]oth the United States Constitution and the South Carolina Constitution provide that if the government takes private property for public use, then it must compensate the owner for the value. . . . While the government typically takes property through an eminent domain proceeding . . . , a taking may occur without such a proceeding. That is called “inverse condemnation.” See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, . . . [482 U.S. 304, 316 (1987)]. . . . An inverse condemnation may result from the governments’ physical appropriation of private property, or it may result from government-imposed limitations on the use of private property.

Our Supreme Court has taken a “restricted view of the power of eminent domain because it is in derogation of the right to acquire, possess and defend property.” Ga. Dept. of Transp. v. Jasper County, 335 S.C. 631, 633, 556 S.E.2d 853, 856 (2003). Compare Kelo v. City of New London, 545 U.S. 469 (2005) [applying the Fifth Amendment “Takings Clause” of the United States Constitution to equate “public use” with “public benefit” and holding that economic development is a “public use.”].

The Court has further explained that “[i]t is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public.” Georgia Dept. of Transp., supra, citing Karesh v. City Council of City of Chas., 271 S.C. 339, 247 S.E.2d 342 (1978). Instead, the Court has interpreted the term “public use,” employed in the Constitution, as follows:

[t]he public use implies possession, occupation and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 39
September 26, 2017

Edens v. City of Columbia, 228 S.C. 563, 573, 91 S.E.2d 280, 283 (1956). Thus, “[t]he involuntary taking of an individual’s property by the government is not justified unless the property is taken for public use, independent of the will of the private lessor of the condemned property.” Ga. Dept. of Transp., 355 S.C., supra at 638, 586 S.E.2d, supra at 857, referencing Karesh, 271 S.C. supra at 344, 247 S.E.2d, supra at 345 (emphasis added).

In Edens, our Supreme Court declared unconstitutional the attempt to condemn property by the City of Columbia. In that instance, the property was deemed a “blighted” area, principally “occupied by slum dwellings.” The City, through its Redevelopment Board, proposed “to take the property, by condemnation if necessary, clear it of the present structures and sell it at the then fair value, a portion of it to the University of South Carolina for the expansion of it, and the remainder which is the most of it, to private persons and corporation for sites for light industry...” 227 S.C. at 567, 91 S.E.2d at 280-281. In concluding that the foregoing condemnation proposal was unconstitutional, the Court elaborated upon the definition of “public use” as contained in the State Constitution:

“It is not easy to give a definition of ‘public use’ which will be adequate to cover every case that may properly fall within the term, and this case does not call for an attempt to define the term. Some cases take the very broad view that ‘public use’ is synonymous with ‘public benefit.’ A more restricted view, however, would seem to better comport with the due protection of private property against spoliation under the guise of eminent domain. Judge Cooley, in his Constitutional Limitations, 654, says: ‘The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it. In Lewis on Eminent Domain, § 165, it is said that ‘public use’ means the same as ‘use by the public.’ These definitions involve the idea that the public must have a definite and fixed use of the property to be condemned, independent of the will of the person or corporation taking title under condemnation, and that such use by the public is protected by law. [citations omitted]. . . . The case of Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681, 63 L.R.A. 820, 99 Am. St. Rep. 964 holds that a public use must be either a use by the public or by some quasi public agency, and not simply a use which may incidentally or directly promote the public interest or general prosperity.’”

Thus, our Supreme Court has concluded that the “more restricted view” of “public use” is applicable to Art. I, § 13.

As the United States Supreme Court has stated, even under the federal Constitution, pursuant to the “Takings Clause,” “one person’s property may not be taken for the benefit of another private person, without a justifying public purpose even though compensation be paid.”

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 40
September 26, 2017

Hawaii Housing Auth. V. Midkiff, 467 U.S. 229, 241 (1984). This is even more the case as to Article I, § 13 of the State Constitution. See Goode v. Sowell, 62 S.C. 516, 40 S.E. 970 (1902); Fort v. Goodwin, 36 S.C. 445, 155 S.E. 723 (1892); Bowman v. Middleton, 1 S.C.L. (1 Bay) 252 (1792); S.C. Mun. Ins. and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 628 S.E.2d 276 (Ct. App. 2006). In Fort, our Supreme Court cited with approval the Bowman decision which held that an act which “take[s] away the freehold of one man and vest[s] it in another . . . without compensation . . . [is] ipso facto void.” These decisions conclude that the taking from one person and giving to another for a private use is unconstitutional.

Thus, when Edens was decided, there was already ample precedent in South Carolina that the City could not, consistent with South Carolina’s “Takings” provision, take the property from one group of landowners and sell to another group for a predominantly private use. The Edens Court noted that the Legislature’s determination in the statute that such a transaction constituted a “public use” was not conclusive. According to the Court, “what is a public use is ultimately a judicial question.” 228 S.C. at 576, 99 S.E.2d at 285. As the Court in Edens stated, in concluding that the use in question was a private use, rather than a public use,

[i]t would be difficult to think of a village, town or city in the United States which a group of artists, architects, and builders would not improve vastly if they could tear down the whole community and rebuild the whole of it. . . The claim of Government power for such purposes runs squarely into the right of the individual to own property and to use it as he pleases.

228 S.C. at 574, 91 S.E.2d at 284.

Here, § 58-33-280(K) allows a utility to abandon the nuclear plant under construction and yet to recover “capital costs and AFUDC related to the plant.” The Commission, at that point has a mandatory duty to order “the amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting rates under this article.” Id. By shifting these costs to the ratepayer upon abandonment, the Act certainly appears to constitute a “taking” for a private use, transferring property from one private person (ratepayer) to another (utility and shareholders) with little or no “public use” involved. As Justice Harlan stated in Smyth v. Ames, “[t]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.” 169 U.S. at 545.

Retroactive Relief for Ratepayers

You have also asked about the powers of the General Assembly to mitigate the effects of the BLRA and to provide relief for ratepayers. It was stated in Barasch v. Pa. Public Utility Comm., 532 A.2d 325, 336 (1987), the following:

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 41

September 26, 2017

In Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151, 54 S.Ct. 658, 78 L.Ed. 1182 (1934), the Supreme Court described the “operating expenses” of a public utility as “the cost of producing the service.” Id. at 167, 54 S.Ct. at 665 (emphasis added). The Court, observing that “[c]harges to operating expenses may be as important as valuations of property,” pointed out that an improper inflation of operating expenses would produce the same result as an increase of the allowed rate of return on the rate base. Id. at 164, 54 S.Ct. at 663. The Court, in Lindheimer, went on to hold that the ratemaking authority could properly exclude from a utility’s claimed operating expense the amount of excessive depreciation charges. The depreciation charges there involved were deemed excessive [because they went far beyond any realistic measure of the degree to which the utility’s plant was being consumed by use in the public service. In the case of Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 54 S.Ct. 647, 78 L.Ed. 1267 (1934), the Supreme Court held that a state, in fixing rates for a utility, may exclude from reported operating expenses unreasonable amounts which the utility paid to an affiliated company for supplies. See also Columbus Gas & Fuel Co. v. Public Utilities Commission, supra. It is thus clear that the federal constitution does not confer upon a public utility the right to claim, for ratemaking purposes, whatever it sees fit to include in the category of “operating expenses.” In that regard, the significance of the Lindheimer and Dayton Power & Light Co. cases may be stated thus: principles of “just compensation” under the federal constitution do not endow a public utility with the right to burden ratepayers with what the utility calls an “operating expense” unless such item, in addition to being reasonable in amount, represents a cost of providing present utility service.

See also Smyth v. Ames, supra [So long as there is no deprivation of property, the government “may, by legislation, protect people against unreasonable charges for the services rendered” by the utility]. Here, as no services have been “rendered” by these plants, legislation mitigating the effects of the BLRA is a possible tool to address this issue. Such would, of course, be up to the General Assembly.

As noted above, it has long been concluded that utility ratemaking is a legislative function. As our Supreme Court stated in Berry v. Lindsay, 256 S.C. 282, 290, 182 S.E.2d 78, 82 (1971) noted,

“[i]t has been held that rate making is not a judicial function . . . but is a legislative one, whether exercised by the legislature directly or by an administrative body under delegated authority, although subject to review by the courts as to legality and reasonable of its exercise. . . . It operates prospectively, and necessarily implies a range of legislative discretion, and ordinarily the legislative determination within the scope of such discretion is conclusive.” 73 C.J.S. Public Utilities § 16, Page 1012.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 42
September 26, 2017

It has generally been stated with respect to the regulation of utilities and utility rates, that

[h]istorically, states have regulated utilities and utility rates under the police power. The United States Supreme Court has said that “The regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.” [Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm., 461 U.S. 375, 377 (1983)]. States have the authority to regulated public utility rates as long as the rates do not result in a “deprivation of property without due process of law or the taking of private property for public use without just compensation. [St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1936)]. Within those confines a state has broad discretion.

City of Corpus Christi v. Pub. Util. Comm. of Texas, 44 S.W.3d 231, 241 (Tex. 2001). The “fixing or revision of rates is not a judicial function and under our separation of powers the courts do not and cannot regulate rates of public utilities, but the determination of whether rates fixed by the utility are unreasonably high is a judicial function.” State v. Southwestern Bell Tel. Co., 526 S.W.2d 526, 529 (Tex. 1975).

As the Court recognized in Texas Assn. of Long Distance Tel. Cos. v. Pub. Utility Comm. of Texas, 798 S.W.2d 875, 882 (Tex. 1990), “unless vested rights are impaired, a statute (or rate) is not constitutionally infirm even though it operates retrospectively.” The Court went on to say:

[t]his Court has held that “no person can have a vested right in any rate other than the last legal or official rate. . . .”

. . . Although one can have a vested right in an existing legal or official rate, that rate will not necessarily retain its protected status. A legal rate is said to be presumed valid, but such presumption can be overcome. Thus, when a regulatory agency’s jurisdiction attaches to a rate (e.g., when an existing rate’s validity is formally called into question), the presumption of validity vanishes, and no one can continue to claim to have a vested right in the rate.

. . . The constitutional prohibition against retroactive ratemaking therefore does not apply when a regulatory agency established an effective date that is later than its jurisdiction attached.

Id. Cases have also concluded that “the rule against retroactive rate-making is not constitutionally mandated.” Steward v. Utah Pub. Serv. Comm., 885 P.2d 759, 777 (Utah 1994).

As commentators have noted, there are three recognized forms of recovery for the investors of a company which has undertaken to construct a nuclear plant, but then cancelled that plant. As has been recognized, “[t]he allocation of abandonment costs used by state commissions and state courts can be classified into three categories: full recovery, no recovery

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 43
September 26, 2017

and partial recovery.” Barker, “Who Pays? An Analysis of the Allocation of Cancelled Nuclear Power Plants After Duquesne Lighting Co. v. Barasch,” 50 Ohio St. L. J. 999, 1002 (1989). Full recovery places “the entire burden of abandonment on the ratepayers.” Id. at 1002. This allows “amortization of the costs of canceled projects and the unamortized portion of the losses to be placed in the rate base.” Id. On the other hand, Barker notes that no recovery “forces investors to bear the entire cost, while the rates charged to the utility’s customers do not change.” Id. at 1003. The chief advantage of this method is that “because the plant will provide no benefit to ratepayers, [the customers] . . . should not pay for managerial errors.” This disallowance does not reward “imprudent decisionmaking on the part of the utility.” A middle ground – partial recovery – permits “utilities to recover the construction costs through amortization over a period of years, but to deny inclusion of the unamortized portion of the cancelled plant in the rate base.” We have referenced cases above which employ this method. The particular method employed is, of course, a matter for the General Assembly to decide, but it appears the BLRA as it presently exists chose the method of full recovery.

We turn now to the Supreme Court’s seminal decision in Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989). The administrative and lower court proceedings in Pennsylvania are described as follows:

[b]ecause of this increased demand for electricity, in 1967 Duquesne Light Company, . . . Pennsylvania Power Company . . . and three other electric utility companies from Ohio formed the Central Area Power Company (CAPCO) . . . The purpose of CAPCO was to construct jointly seven nuclear power plants. By 1980, intervening events . . . decreased the demand for electricity generated by nuclear power stations... This resulted in the cancellation of four of the nuclear plants before completion, with Duquesne’s investment in the cancelled plants totaling 34,697, 389 and Penn Power’s investment totaling 9,569,665. . . .

Duquesne filed a request with the Public Utility Commission of Pennsylvania (PUC) to amortize this investment over a ten-year period. . . In a report to the PUC, an administrative law judge found Duquesne acted prudently in joining CAPCO and acted prudently in canceling the four nuclear power stations. . . The PUC approved a rate increase which included a \$3.5 million in revenue from the first installment of the ten-year amortization of Duquesne’s loss in CAPCO’s projects.

During this proceeding a Pennsylvania statute was passed which restricted inclusion in the rate base of any facility not currently used and useful in service to the public. Pennsylvania’s Commonwealth Court consolidated Duquesne’s and Penn Power’s action and construed the Pennsylvania statute to not exclude amortization.... However, the Supreme Court of Pennsylvania disallowed any amortization of the costs of the canceled project by interpreting the statute to exclude all costs of facilities not used and useful. . . The Court held it was not an unconstitutional taking because the “just compensation” safeguard “is a reasonable return on the fair value of its property at the time it is being used for public service.” Because the investments

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 44
September 26, 2017

in the canceled projects were not serving the public at that time, no constitutional right to recovery attached.

Barker, supra at 1008.

The United States Supreme Court affirmed the Pennsylvania Supreme Court's decision. In its analysis, the Court noted that the Smyth v. Ames rule had previously provided that "the Constitution required rates to be set according to the actual present value of the assets employed in the public service." 488 U.S. at 308. Chief Justice Rehnquist explained that the fair value rule gives utilities strong incentive to manage their affairs well and to provide efficient service to the public. . . ." Id. at 309. However, the Court noted that the "landmark" decision in FPC v. Hope Natural Gas Co. had "abandoned the rule of Smyth v. Ames" and had held the "fair value" rule "was not the only constitutionally acceptable method of fixing utility rates." In Hope, the Court had found that "historical cost [or prudent investment rule] was a valid basis on which to calculate utility compensation." 488 U.S. at 310.

The Duquesne Court also explained that under Smyth v. Ames, the "fair return" on "used and useful" plants, "the utilities suffer because the investments have no fair value and so justify no return." Id. at 308-09. Thus, Hope changed the landscape of utility regulation. The Court reaffirmed these "teachings of Hope Natural Gas . . ." which looked at the "total effect of the rate order" and whether it is unreasonable:

[t]his language [of Hope], of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: Whether a particular rate is "unjust" or "unreasonable" will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins these questions have constitutional overtones.

Id. at 310. Pennsylvania's modification of the rate structure by virtue of the amended statute was based upon "when prudent investments will never be used and useful." In the circumstance of a plant which had not become "used and useful," Pennsylvania "allowed amortization of the capital lost but does not allow the utility to earn a return on the investment." Id. at 310, n. 7.

The Court held that the Pennsylvania law, as amended, met the requirements of Hope Natural Gas as not confiscatory, even though it was retroactively applied by the Pennsylvania Legislature. Duquesne emphasized that "[i]t cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates." Id. at 313. Moreover, the rate set by the amended law was "just" and "reasonable" under Hope even though

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 45
September 26, 2017

Pennsylvania retroactively excluded CAPCO costs by eliminating any project not used and useful. According to the Court,

Pennsylvania determines rates under a slightly modified form of the historical cost/prudent investment system. . . . Neither Duquesne nor Penn Power alleges that the total effect of the rate order arrived at within this system is unjust or unreasonable. In fact, the overall effect is well within the bounds of Hope, even with total exclusion of CAPCO costs. Duquesne was authorized to earn a 16.14% return on common equity and an 11.64% overall return on a rate base of nearly \$1.8 billion. See Pennsylvania PUC v. Duquesne Light Co., 57 Pa. P.U.C. at 51, 51 P.U.R. 4th at 243. Its \$35 million investment in the canceled plants comprises roughly 1.9% of its total base. The denial of plant amortization will reduce its annual allowance of 0.4%. Similarly, Penn Power was allowed a charge of 15.72% return on common equity and a 12.02% overall return. Its investment in the CAPCO plants comprises only 2.4% of its \$401.8 million rate base. See Pennsylvania PUC v. Pennsylvania Power Co., 58 Pa. P.U.C. at 331-332, 60 P.U.R. 4th at 618. The denial of amortized recovery of its \$9.6 million investment in CAPCO will reduce its annual revenue allowance by only 0.5%.

Given these numbers, it appears that the PUC would have acted within the constitutional range of reasonableness if it had allowed amortization of the CAPCO costs but set a lower rate of return on equity with the result that Duquesne and Penn Power received the same revenue they will under the instant orders on remand. The overall impact of the rate orders, then is not constitutionally objectionable. 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. Nor has it been demonstrated that these 3 rates are inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme. . . .

488 U.S. at 310-12.

According to Barker's analysis of the Duquesne decision,

. . . the Court also recognized the need for flexibility. . . . The Court did not adopt the use of "historical cost" [prudent investments] as a rigid constitutional rule, but allowed flexibility for state legislatures to choose appropriate rate structures. The Court stated that state legislatures must balance the needs of investors and consumers and create a system which best meets both their needs. . . .

A major policy behind the Hope test is the need for flexibility in setting a ratemaking structure. . . . A legislature is free to choose its own ratemaking scheme in order to reach what it feels is an equitable balance between investors' and consumers' interests. A state legislature may or may not allow amortization according to the balance it feels is required, given the political and economic climate of the particular

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 46
September 26, 2017

state. The Court's refusal to adopt one single constitutional standard ("historical cost") directly furthers the flexibility policy. Therefore, the choice made by the state legislature is to be given great deference.

Barker, at 1009-10.

Conclusion

1. In our opinion, a number of provisions of the BLRA are constitutionally suspect. In sum, the Act mandates the transfer of property from consumers to the utility and its investors for a private purpose, a likely violation of the "Takings Clause." The Act shifts the burden of costs from the utility and its investors to ratepayers without the plants ever being completed. Several other provisions likely contravene due process. The Act, through its lenient provisions in favor of the utility, encourages the utility to spend unwisely.

Thus, the Act is an unprecedented departure from longstanding South Carolina law governing utility regulation. Its purpose, as expressed in the title of the Act, is to "revis[e] procedures for approving costs associated with the addition of base load generation plants." In revising such procedures, the BLRA breaks sharply with the bedrock principle in South Carolina that a utility may recover its capital costs only on property which is in use and serving its customers. Here, the BLRA allows the recoupment of the "prudently incurred" costs of the nuclear plants by the utility. These costs, submitted to the PSC as the construction proceeds, rather than after the plant has been built and providing service, are to be borne by the ratepayers through periodic rate increases.

2. Of course, we must presume the BLRA to be constitutionally valid. Only a court may declare any portion of the Base Load Review Act unconstitutional. This Office, in its Opinion, may only comment upon potential constitutional issues which we see as possibly arising in a judicial proceeding. In this instance, we have identified a number of the BLRA's provisions which are constitutionally problematical.

Our conclusions herein, particularly dealing with the abandonment provision, speak to the constitutionality of the Act, as applied, not to facial unconstitutionality. See U.S. v. Salerno, 481 U.S. 739, 743 (1987) [a facial challenge to an Act requires that "no set of circumstances exist under which the Act would be valid."]. We certainly recognize that if the project had been completed, these issues likely would not have arisen. Members of the General Assembly were assured when they enacted the BLRA that the project would be completed on time and that the BLRA was the

solution to South Carolina's future energy problems. They were assured that the ratepayers would save in costs. Thus, it must be presumed that the General Assembly enacted the law in good faith, believing that. See Riley v. Chas. Union Station Co., 471 S.C. 457, 55 S.E. 485, 492 (1905) [". . . the General Assembly is presumed to have acted in good faith, and it is not the province of the courts to inquire into its motives and purposes."]. Nevertheless, we must give our best judgment as to the constitutionality of the Act as we now find it.

3. Under the federal and state Constitutions, it has long been held that a utility rate must be "just and reasonable"; thus, there must be the proper "balance" between the interests of investors and ratepayers. Our Supreme Court, recognized in the Mims case that, in setting utility rates, "[t]he focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility's customers." Long ago, Justice Harlan, in the Smyth case noted that "[t]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends." Likewise, the Hope Natural Gas case mandates that the fixing of "just and reasonable" rates requires "balancing the investor and the consumer interests." As Judge Bork stated in the Jersey Central Power case, "the holding of Hope Natural Gas makes clear that exploitative rates [upon the consumer] are illegal. . . ." "Under Hope Natural Gas, rates are just and reasonable only if consumer interests are protected and if the financial health of the [company] in our economic system remains strong." Fed. Power Comm. v. Memphis, Light, Gas and Water Div., 411 U.S. 458, 474 (1973).
4. Given the constitutional standard that rates must reflect a proper balance between the interests of investors and consumers, in our opinion, the BLRA is throughout weighted far too heavily in favor of the utility's interest and against the interest of ratepayers. We acknowledge that the purpose of the Act was to encourage investment in new nuclear facilities. That is a proper public purpose. However, in its zeal to accomplish that purpose, the Legislature went too far. See Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922) ["if regulation goes too far, it will be recognized as a taking."]. Rather than balancing the interests of investors and ratepayers, the Act is substantially skewed against customers of the utility. The Act makes ratepayers virtually the insurers of the interests of the utility's investors. The BLRA departs from longstanding law by shifting the burden from the utility to establish prudence. In the proceeding to modify the "schedules, estimates, findings, class allocation factors, rate designs, or conditions" of the initial base load review order pursuant to § 58-33-270(E), the PSC is required to grant such "modifications" unless the utility is shown to be imprudent and the modifications are determined to be unjust or unreasonable.

Thus, such modifications were granted in virtually every instance in which SCE&G has sought them..

Further, ratepayers are foreclosed or impeded by several provisions of the Act from challenging the prudence of the utility. Most strikingly, the ratepayer cannot further contest the prudence of the initiation of the project following the initial base load review order. As SCE&G wrote in its Brief in Friends of the Earth, “[t]his statutory finality provides certainty for investors.” Brief at 6. However, as the United States Supreme Court stated in Permian Basin, a rate procedure “is obliged at each step of the regulatory process to assess the requirements of the broad public interests entrusted to its protections. . . .” 390 U.S. at 791 (emphasis added). And, as our Supreme Court held in Porter v. S.C. PSC, ratepayers are entitled to due process, consisting of notice and an opportunity to be heard under Art. I, § 22 of the State Constitution. 338 S.C. at 170, 552 S.E.2d at 869. See also State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2013) [statute precluding for life any challenging to electronic monitoring violates due process]. These various procedural bars in the BLRA may well violate due process.

Moreover, upon “abandonment” of the project, the utility may still recoup, through rate increases, its capital costs, construction costs, and a substantial return on investment for utility investors. § 58-33-280(K). Yet, consumers receive nothing in return but an unfinished plant. Accordingly, this abandonment provision is particularly onerous to ratepayers because it requires them to pay in full for a plant not nearly finished and providing no service to customers. Such a provision eviscerates the longstanding rule in South Carolina that a plant must be “used and useful” to recover capital costs. Based upon existing case law, the abandonment provision skews the balance between investors and ratepayers heavily in favor of the utility. Moreover, the abandonment provision may well authorize a “taking” of property for private use in violation of the Fifth Amendment of the Federal Constitution (as incorporated by the 14th Amendment) and Art. I, § 13 of the State Constitution. The abandonment provision mandates the transfer of property from ratepayers to the utility for a private use with no customer service in return.

5. Numerous cases illustrate this constitutional “takings” principle. Judge Ken Starr’s opinion in Jersey Power and Light is particularly instructive with respect to the federal “Takings Clause.” He opined that “a taking occurs . . . when the balance between investor and ratepayer interests – the very function of utility regulation – is struck unjustly.” 810 F.2d at 1191. Judge Starr noted that a rate must not only “avoid confiscation of the utility’s property,” it must not constitute “a taking of the property of ratepayers through unjustifiably exorbitant rates.” Id. He recognized that, even

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 49
September 26, 2017

though Hope Natural Gas does not require a particular methodology, and the principle of “used and useful” cannot always be employed, the “used and useful” principle remains an important safeguard for consumers in striking a reasonable balance between ratepayers and investors under Hope. He reasoned that the “prudence” and “used and useful” principles “assure that the ratepayers, whose property might otherwise of course be ‘taken’ by regulatory authorities, will not necessarily be saddled with the results of managements’ defalcations or mistakes, or as a matter of simple justice, be required to pay for that which provides the ratepayers with no discernible benefit.” 810 F.2d at 1190 (emphasis added). Thus, in his mind, the “used and useful” concept is essential to avoid a “taking” of ratepayers’ property through the payment of rates.

Indeed, in Jersey Power and Light, the Court of Appeals for the D.C. Circuit remanded to FERC for a determination as to whether inclusion in the rate base (of a cancelled nuclear plant) of the unamortized portion of the plant would, pursuant to Hope, “exploit consumers in this case” or [whether] “exclusion” would constitute confiscation of the utility’s property.” And, importantly, long after Hope was decided, our own Supreme Court has continued to deem the utility’s rate base to be properly founded upon “used and useful” property (citing the definition used in Smyth v. Ames in the Mims case).

Accordingly, when both the “prudence” and “used and useful” principles are conclusively pre-determined by the General Assembly, without a basis in fact or an opportunity for meaningful challenge, as the BLRA does, the balance between investors and ratepayers becomes heavily and unfairly skewed against consumers. The Act resorts to a “fiction” that incomplete or abandoned nuclear plants are, nevertheless, “used and useful” upon issuance of the initial base load review order even though, of course, they are not. Ground may not even have been broken, but the plant is deemed “used and useful” by the BLRA. Cases indicate that such a conclusive determination, not based upon actual fact, is unconstitutional. In the meantime, customers pay heavily for plants never completed and service never provided.

Justices Littlejohn and Lewis in the Piedmont Power case, likened the imposition of rates – with the prospect of nothing in return -- an imposed, unconstitutional “tax” for the benefit of a private utility. He reasoned that because ratepayers are paying, but getting nothing in return, such a situation violates the State Constitution. While he did not employ a “takings” analysis, the result is the same. A serious “takings” issue, therefore, arises under Hope Natural Gas.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.

Page 50

September 26, 2017

This conclusion is buttressed by the Supreme Court's decision in Eastern Enterprises v. Apfel, 524 U.S. 498, 538 (1998), concluding that the Coal Act violates the "Takings Clause" by imposing retroactive liability upon an employer because such liability "places a severe, disproportionate, and extremely retroactive burden on Eastern.". See also 524 U.S. at 549 (Kennedy, J. concurring in judgment) ["The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process."]; Pa. Elec. Co., supra [". . . The Hope decision is to be interpreted as recognizing a constitutional requirement of 'just and reasonable' rates, providing a return on used and useful property with rates to be determined through a balancing of consumer interests."]; Kan. Gas and Electric Co. v. Kan. Corp. Comm., supra [Hope requires a balancing of interests based upon "used and useful" property]; Dayton Power & Light Co. v. Public Utilities Comm. of Ohio, supra ["It would be inequitable to prematurely shift the risk of plant failure from the utility's investors to the ratepayers by the inclusion in the rate base of highly complex and innovative technology which has not been proven to be reasonably free from significant design or construction defects. ""]; NEPCO Mun. Rate Comm. v. FERC, supra ["used and useful" rule means that "current ratepayers should bear only legitimate costs of providing service to them. "]; Mims, supra [citing Smyth v. Ames, supra to the effect that ratepayers are to be protected from "exorbitant rates."].

6. The fundamental tenet of utility regulation is based upon fair and equitable rates in exchange for services provided. As one court has stated, "[t]he Commission can no more permit the utility to have confiscatory rates for the service it performs than it can compel a utility to provide service without just and equitable compensation." Myers v. Blair Tel. Co., 230 N.W.2d 190, 196 (Neb. 1975) (emphasis added).

It is also important to note that the "Takings Clause" protects all property without distinction as to types. Horne v. Dept. of Agriculture, 135 S.Ct. 2419 (2015). Further, the "Takings Clause" forbids a taking for a private use, even if just compensation is paid. Montgomery v. Carter County, Tenn., 226 F.3d 758, 766 (2000). Moreover, under the "Takings Clause," "one person's property may not be taken for the benefit of another private person, without a justifying public purpose even though compensation be paid." Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984); see also Kelo v. City of New London, 545 U.S. 469, 477 (2005) ["it has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation. "]. Here, pursuant to the BLRA, the utility charges customers for an unfinished plant and investors are fully compensated by receiving a substantial return on their investment. One court has likened this type of situation to a car manufacturer cancelling a new sports car factory before completion, yet being able still to charge

sports car purchasers for the unfinished plant even though there is no plant to make the cars and no cars to ride in. Citizens Action Coalition, supra.

Accordingly, the BLRA, which shifts the burden to ratepayers to subsidize a utility's investors upon abandonment, lacks the "public use" necessary to survive a "Takings" challenge. Instead, it is a private use of another's property – the consumers' – which, is forbidden by the "Takings Clause" of the federal Constitution. See e.g. Mo. Pacific R.R. Co. v. Nebraska, 164 U.S. 403, 416-17 (1896) [statute requiring railroad to transfer right of way to farmers for erection of grain elevator is a transfer from one private person to another for a private purpose, in violation of the Takings Clause]. See also Smalley v. Duke Energy, 154 So.3d 439 (Fla. 2014) [Court concludes statute allowing utility to recover costs for cancelled plant is not facially unconstitutional, but court suggests that where circumstances preclude utility from completing plant due to circumstances beyond its control, the public purpose is defeated and only a private purpose is involved]. As Citizen Action Coalition, supra states, "[a]llowance of amortization of cancelled plants [“that never became used and useful”] would encourage uneconomical or unproductive ventures. . . .” 485 N.E.2d at 616. Further, as Justices Littlejohn and Lewis stated in Piedmont Mun. Power, supra, this is an example of the law ‘charging the customers for power never received,’ -- a private purpose. The federal Takings Clause prohibits such transfers.

7. Case law, recognizes that ratepayers property interests are at serious risk of a “taking” when capital investments in property which is not “used and useful” are included in the rate base, such as is the case with an abandoned or cancelled nuclear plant. These decisions have thus upheld legislation which excludes such plants from the rate base, concluding that inclusion is unfair to consumers and such exclusion does not constitute a “taking” of the utility’s property. As the Texas Court stated in El Paso Elec. Co. v. Pub. Util. Comm. of Texas, 917 S.W.2d 846, 882 (Tex. 1995), “[c]onstitutional protections [for utilities] . . . do not entitle [these] utilities to immediate return on investments that are imprudent or not used and useful in providing service to customers.” And, as the Pennsylvania Supreme Court explained in Barasch v. Pa. Public Utility, 532 A.2d 325, 336, aff’d, Duquesne Light Co. v. Barasch, supra, “. . . just as a utility has no constitutional right to have included in its rate base assets which are not ‘used and useful’ in the public service, so too may it be restricted as to what items it can properly claim as operating expenses.” Moreover, Duquesne, itself is said to have “revived Smyth’s substantive ratemaking methodology. Duquesne recognized that regulatory determinations of utility rates might benefit from a ‘return to some form of the fair value rule.’” Chen, “The Death of the Regulatory Compact,” 67 Ohio St. C.J. 1265, 1287 (2006) (quoting Duquesne, 488 U.S. at 316, n. 10). As Justice Harlan wrote in Smyth long ago, “. . . the rights of

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 52
September 26, 2017

the public would be ignored if rates . . . are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses pay the interest on its obligations, and declare a dividend to stockholders.” 169 U.S. at 544.

8. Further, the requirements of our State Constitution, with respect to its “Takings Clause” (Art. I, § 13), are even more stringent with respect to the necessity for a “taking” only for a “public use” than is required by the Federal Constitution. As our Supreme Court has emphasized in Ga. Dept. of Transp. v. Jasper Co., 355 S.C. 631, 638, 586 S.E.2d 853, 856 (2000), under our State Constitution, “[t]he involuntary taking of an individual’s property by the government is not justified unless the property is taken for public use – a fixed, definite, and enforceable right of use, independent of the will of a private lessor of the condemned property.” “Public use” implies possession, occupation, and enjoyment of the land by the public at large or by public agencies. . . .” Cases such as Edens v. City of Columbia, *supra* and Karesh v. City Council of Chas., *supra* and Georgia Dept. of Transp. v. Jasper Co., *supra*, demonstrate clearly that government cannot take property, and then allow it to be devoted to a private use (such as payment to the investors of a utility).

Again, the “used and useful” principle serves as a protection for ratepayers. As our Supreme Court stated in So. Bell Tel. and Tel. Co. v. PSC, “[a] public utility is entitled to such rates [constituting just compensation to it] 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.” 270 S.C. at 558-59, 244 S.E.2d at 281 (quoting Bluefield Water Works & Improvement Co. v. PSC of WVa., 262 U.S. 679, 692-93 (1923)) (emphasis added). The Court also cited Hope for the proposition that there must be “the balancing of the investor and the consumer interests.” *Id.* When, as here, a statute takes money from ratepayers and then gives it to investors of a private company for a plant which is now abandoned and nowhere near being “used and useful,” and is producing no service to customers, we believe such is a taking for a private use.

The Court of Appeals’ decision in S.C. Mun. Ins. and Risk Fund v. City of Myrtle Beach, 368 S.C. 240, 628 S.E.2d 276 (Ct. App. 2006) is particularly instructive. There, the underlying case involved an ordinance, which required the landlord to act as insurer to the City for payment of the tenant’s water bill. The master-in-equity declared the ordinance unconstitutional as a “taking” of property without “just

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 53
September 26, 2017

compensation.” As the Court of Appeals noted, the master in “ordering the city to make refunds to the class members . . . concluded that requiring one person to pay another’s water bill to obtain service amounted to a ‘taking of property which violates the United States and the South Carolina Constitutions.’” 368 S.C. at 245, 368 S.E.2d at 278. The SC MIRF relied upon an exclusion in the policy expressly providing that liability coverage would not apply to instances of eminent domain. The Court of Appeals concluded that because the “claim at issue in this appeal fell within the policy exclusion [of a taking without just compensation] SCMIRF should not be required to indemnify the city for its loss.” Thus, the Court of Appeals, by applying the policy exclusion, validated the “takings” determination.

Moreover, in Goodale v. Sowell, *supra*, our Supreme Court rendered a decision which is very analogous here. The Court held unconstitutional a series of laws which required county commissioners to “superintend” the construction and maintenance of a “stock law fence” and to require all the residents of the designated area to build it. However, the fence was not built on schedule, nor in accord with the statutory specifications. The Court concluded that the Acts requiring the construction of the fence, as well as its maintenance, constituted a “taking” for a private use under the State Constitution and were thus unconstitutional. Not only were the landowners upon whose property the fence was to be built deprived of their property in violation of the Constitution, but so too were the residents themselves “by requiring them to build said fence.” 40 S.E. at 973.

The Goodale case cited with approval the earlier decision in Fort v. Goodwin, 36 S.C. 445, 15 S.E. 723 (1892), in which the Court struck down a similar statute which required the Lexington County commissioners to assess a tax for such a fence structure. In that case, the fence was never completed.

The Supreme Court in Fort noted that “[t]he constitutional principles involved in this case are important to every citizen. . . .” According to the Court, under our Constitution private property can only be taken by government “when the property is taken for public use and when the property condemned is necessary to enable the public use to be carried into effect.” The Court emphasized that the fence benefited “those whose business it is to raise stock,” at the expense of the freeholders who are “forced to keep up the pasture fence” and thus “whose rights are injuriously affected.” Fort cited with approval Bowman v. Middleton, *supra*, which stated that an Act “which take[s] the freehold of one man, and vest[s] it in another [for a private use is] ipso facto void.”

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 54
September 26, 2017

Accordingly, both cases, Goodale and Fort, vividly illustrate the serious constitutional problems created by an Act requiring the PSC to assess higher rates upon ratepayers to build a nuclear power plant, and then to continue assessing higher rates, even where the plant is abandoned and provides no service to customers. These cases dictate that the BLRA, as applied, likely amounts to a “taking” for a private use in violation of the State Constitution. See also Clinton v. Spencer, 229 N.W. 609, 615 [application of drainage law constitutes a taking for a private purpose requiring landowners to pay assessments for the improvements of farm land]; Smalley v. Duke Energy, 154 So.3d 439, 441 (Fla. 2014) [Court suggests that where “utility is precluded from completing a power plant due to factors beyond its control, the public purpose for the legislation which is to encourage investment in new nuclear power plants is defeated.”]. As the United States Supreme Court stated in Smyth v. Ames, *supra*, “[t]he public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.” 169 U.S. at 545. And, as Justice Littlejohn wrote in Piedmont Mun. Power, *supra*, “to collect money from its electric customers, whether or not the project ever generates any electricity, thereby charging the customers for power never received,” violates the State Constitution. 277 S.C. at 363, 287 S.E.2d at 485 (emphasis added).

9. With respect to the constitutionality of any retroactive action the General Assembly might take, this question is controlled by the United States Supreme Court’s decision in Duquesne Light. Duquesne strongly reaffirmed Hope Natural Gas. There, the Pennsylvania statute retroactively “prohibited recovery of the costs in question either by inclusion in the rate base or by amortization.” According to the Supreme Court, the utility contested the fact that the Pennsylvania Legislature had through the enactment of the statutes “. . . suddenly and selectively [applied] the used and useful requirement, normally associated with the fair value approach [of Smyth v. Ames].” Nevertheless, the Supreme Court concluded that the statute was not confiscatory as to the utility, nor did it violate the Takings Clause of the Fifth Amendment made applicable to the states by the Fourteenth Amendment. The Court applied the constitutional test of Hope, and concluded that the statute constituted a “reasonable rate as determined by the Pennsylvania legislature.” Duquesne Light looked to the fact that “[n]o argument has been made that these slightly reduced rates [as a result of the statute] jeopardize the financial integrity of the companies either by leaving them insufficient operating capital or by impeding the ability to raise future capital.” *Id.* at 212. Only if the State decides to “arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefits of good investments at others,” would “serious constitutional questions” be raised. 488 U.S. at 315.

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 55
September 26, 2017

Thus, under the Hope test, the Pennsylvania “corrective” statute which banned inclusion in the rate base of property not “used and useful,” was deemed constitutional. Of course, it is a matter for the General Assembly as to whether any modification or repeal of the BLRA is undertaken. As one commentator has recognized, “. . . allowing full recovery of a utility’s investment in a canceled plant does not respond at all to the need to counteract the incentive to overinvest in capital assets, because it permits the utility to earn a rate of return on imprudent investments equal to the return allowed on wise investments.” Pierce, “The Regulatory Treatment of Mistakes In Retrospect,” 132 U.Pa. L.Rev 497, 542 (1984). As the Court in Duquesne noted, there is nothing wrong with the Legislature itself serving as the rate regulator because utility ratemaking is a legislative function. Id. at 313-14.

Some “middle ground” alternatives have been suggested by commentators, such as “where the ratepayers pay for the cost, but the investors do not receive a return on that portion of their investment. This approach allows the investors and ratepayers to share in the burden of covering the cost.” Watkins, “Nuclear Power Rate Regulation After Eastern Enterprises,” 28 B.C. Env’tl. Aff. L. Rev. 191, 201 (2000). We have discussed other compromise solutions herein. Should the Legislature choose to take action, however, it must use the Hope balancing test, as well as Duquesne, as its constitutional guide. Any legislation must balance consumer and investor interests and must be careful not to effect a taking on either side of the equation.

10. Particularly important in our analysis is a provision of our State Constitution which deals specifically with the General Assembly’s regulation of utilities. Art. IX, § 1 of the Constitution states that “the General Assembly shall provide for all appropriate regulation of . . . publicly owned utilities and privately owned utilities serving the public as and to the extent required by the public interests.” (emphasis added). This provision was approved by the voters in the 1970 general election. A “blue ribbon” panel, the “West Committee,” chosen to make a study of the South Carolina Constitution of 1895, formulated the language of this provision. The provision was modelled upon the Kentucky constitution, but it is important to note that the Committee itself insisted on adding the language “to the extent required by the public interest.” There is no question that this language was intended by the Committee to be a limitation upon the power of the General Assembly. See West Committee Minutes, II, 287 [“It (is not) bad constitutional policy to say that the Constitution is concerned that utilities [are] properly regulated for the public interest.”]. (emphasis added). Our Supreme Court typically affords considerable weight to the West Committee in interpreting the State Constitution. See e.g. Duncan v. York Co., 267 S.C. 327, 339, 228 S.E.2d 92, 97 (1976).

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 56
September 26, 2017

While the term “public interest” is not defined by Art. IX, § 1, it has a well-established meaning, particularly in the area of utility regulation. The usual meaning of the term “public interest” is “something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected.” Ure v. Bendick, 1993 WL 8538548 (R.I. 1993) (quoting Black’s Law Dictionary).

Moreover, as to utility regulation, the United States Supreme Court in the Permian Basin case, has noted that the “public interest” includes preventing situations which “cast upon other consumers an excessive burden or [are] . . . unduly discriminatory” 390 U.S. at 820-21. Likewise, in the DePass case, our own Supreme Court observed that a utility is “required to properly serve the public,” may not “exploit the public it serves,” and is entitled to “a fair return in the value of the property used and useful in the service of its customers.” 173 S.C. 387, 176 S.E. 325, 333. Thus, our Court equated public service, or public interest with “used and useful.”

Further, in Munn v. Illinois, 94 U.S. 113 (1876), the United States Supreme Court explained that utility “property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.” (emphasis added). This is, of course, the “used and useful” principle. As one commentator has noted, “[t]he historic distinction between what is and what is not employed or devoted to a public use, in other words, what is clothed with a public interest, [is the difference] between what is and what is not used and useful to the public service.” Hoecker, “Used and Useful’s Autopsy of Rate Making Policy,” 8 Energy L.J. 303, 305 (1987). See Covington & Lexington Turnpike Rd. v. Sandford, 164 U.S. 578, 598 (1986) [“The utmost that any corporation . . . [as a utility] can rightfully demand at the hands of the legislature when exerting its general powers is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and the public.”]. These authorities strongly support the idea that in utility regulation, the “public interest” equates with and is equivalent to the principle of “used and useful” in order to protect consumers and the community at large. Indeed, utility property becomes “clothed with a public interest” when it comes “used and useful.” Thus, Art. IX, § 1 most probably incorporates the “used and useful” principle into our State Constitution.

Inasmuch as Art. IX § 1 authorizes the General Assembly to regulate utilities to the extent such regulation is in the “public interest,” we believe that the BLRA, by designating utility investment in property to be “used and useful” at the point of the initial base load review order, rather than when the plant is serving consumers, likely contravenes Art. IX, § 1. Cases have long defined the “public interest” in rate

The Honorable G. Murrell Smith, Jr.
The Honorable Leon E. Stavrinakis
The Honorable J. Gary Simrill
The Honorable James E. Smith, Jr.
Page 57
September 26, 2017

regulation as regulation only of a utility's property which is "used and useful." As Justice Stukes stated in Darby v. Southern Ry. Co., 194 S.C. 421, 10 S.E.2d 465, 475 (1940), "[t]he power and propriety of the regulation in the public interest of railroads and other public utilities is grounded upon the public nature of the service and the public use to which property is dedicated." (Stukes J. dissenting, citing 51 C.J. 9) (emphasis added). While the Legislature possesses broad power to determine the "public interest," such power is not unlimited and must confirm to the Constitution. Feldman & Co. v. City Council of Charleston, 23 S.C. 57 (1885) [designation by Legislature of "public purpose" not binding on the courts in applying the Constitution].

Accordingly, Art. IX, § 1 ensures that the "public interest" must be protected in any regulation of utilities by the General Assembly. As one authority has written, "[p]ublic utility regulation does not exist for the benefit of the utility companies; Its purpose is to protect consumers from monopoly power." Pond, "The Law Governing the Fixing of Utility Rates," 41 Admin. L.Rev. 1, 23-24 (1989). Not only is the BLRA skewed strongly against ratepayers overall, in conflict with Art. IX, § 1's purpose, but the Act's abandonment provision, which discards the bedrock principle of "used and useful" disregards the "public interest" as defined by Permian Basin, DePass and the other authorities, referenced above. It cannot be in the "public interest" to charge ratepayers for capital costs of an unfinished and abandoned plant. It cannot be in the "public interest" to charge customers in order to pay stockholders an exorbitant rate of return. It is not in the "public interest" to increase the power bills of consumers who receive nothing in return, essentially charging them twice. Thus, we believe that Art. IX, § 1 renders the abandonment provision, as well as the other BLRA provisions discussed herein, to be constitutionally suspect.

While we readily recognize that there is contrary authority in other jurisdictions, see 83 A.L.R. 4th 183, we believe longstanding South Carolina law requires the conclusions herein. In sum, this State's uniquely rigorous protection of private property rights, including the rights of ratepayers not to have their money taken for a private use, renders portions of the BLRA to be constitutionally suspect. S.C. M.I.R.F. v. City of Myrtle Beach, supra.

Sincerely,



Robert D. Cook
Solicitor General