NO. 18-1899

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SOUTH CAROLINA ELECTRIC & GAS COMPANY,

Plaintiff - Appellant

v.

SWAIN E. WHITFIELD, etc., et al.,

Defendants – Appellees

and

JAMES H. LUCAS, etc. et al.,

Intervenors/Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT COLUMBIA

BRIEF AMICUS CURIAE OF SOUTH CAROLINA ATTORNEY GENERAL ALAN WILSON IN SUPPORT OF DEFENDANTS-APPELLEES AND INTERVENORS/DEFENDANTS APPELLEES IN OPPOSITION TO PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTION PENDING APPEAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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South Carolina Attorney General Alan Wilson
(name of party/amicus)

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If yes, identify all such owners:

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Signature: s/James Emory Smith, Jr. Date: 8/15/2018

Counsel for: Attorney General Alan Wilson

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****

I certify that on 8/15/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

SCE&G seeks an injunction pending appeal. Yet, the District Court rejected that same extraordinary remedy. This Court should deny such relief as well. See Fed. R. App. P. 8.

In a comprehensive order, the District Court denied SCE&G's preliminary injunction, which had sought to block the temporary rate decrease mandated by the challenged legislation ("the Act"), and alleged to be unconstitutional. The Act addressed SCE&G's abandonment of the nuclear plants on July 31, 2017 by reducing "revised rates." Revised rates allow SCE&G to collect capital costs as construction proceeds. Thus, the Act temporarily reduced rates by almost 15%, pending a final determination by the Public Service Commission ("PSC") by December 21, 2018.

The District Court concluded that SCE&G's constitutional claims were unlikely to succeed on their merits and denied the preliminary injunction. Subsequently, the temporary rate reduction became effective. The District Court then denied the request for an injunction pending appeal, again concluding that SCE&G's constitutional claims were unlikely to succeed. SCE&G also focuses its arguments here on its likelihood of success on the merits. Having lost a stay before the District Court on the likelihood of prevailing on the Act's constitutionality, SCE&G seeks the

same extraordinary relief at the appellate level.

The District Court Correctly Applied the Rule 62(c) Standard for an Injunction Pending Appeal

Here, applicant is "seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute." *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J. in chambers); *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 318 (1940). As with any stay, "following a denial of a similar motion by a trial judge, the burden of persuasion ... is substantially greater than it was before the trial judge." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970). The District Court did not abuse its discretion and SCE&G is not entitled to a stay. See *Hilton v. Braunskill*, 481 U.S. 770, 776-77 (1987) [four factors required]. See also *Glick v. Koenig*, 766 F.2d 65 (7th Cir. 1985) [district court did not abuse discretion in denying stay].

"[W]ithout such a substantial indication of probable success, there would be no need for the Court's intrusion into the ordinary processes of administrative and judicial review." *Virginia Petroleum Jobbers, Assn. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Nken v. Holder*, 556 U.S. 418, 434-35 (2009) ["first two factors" must be met first]. Accordingly, the District Court correctly found that, without a "strong showing" of likelihood

any appeal will succeed, a stay should be denied. See also *Miltenberger v. Chesapeake and Ohio Railway Co.*, 450 F.2d 971, 974 (4th Cir. 1971) ["no substantial prospect for ... eventual success in the appellate court."]; *Tucson Women's Center v. Arizona Med. Bd.*, 2010 WL 234956 (D. Ariz. 2010). Thus, the District Court correctly denied the stay.

The Injunction Pending Appeal Should be Denied

The District Court, ruled against SCE&G twice on the "likelihood" question, both in denying the preliminary injunction, as well as the injunction pending appeal. Thus, SCE&G cannot come close to the substantially higher standard here. *Long, supra.* Accordingly, the stay should be denied.

Extinguishment of Any Property Interest of SCE&G

The foundation of the District Court's analysis regarding "likelihood of success" is twofold: extinguishment of any property interest of continuing revised rates upon abandonment; and lack of "ripeness" in determining any "taking" of SCE&G's property. As to the first issue, the District Court properly construed § 58-33-275(A) and (C) of the Base Load Review Act as only conveying any property interest SCE&G had in revised rates "so long as" the plants were "constructed or being constructed...." See Op. S.C. Att'y Gen., 2017 WL 4464415 (September 26, 2017) [BLRA is "constitutionally

suspect"]. Thus, any property interest ceased upon SCE&G's abandonment. Accordingly, there could be no substantive or procedural due process violation or "taking" of "property."

"Conditional" property interests are addressed in *Texaco v. Short*, 454 U.S. 516, 526 (1982) and *U.S. v. Locke*, 471 U.S. 84 (1985). As *Texaco* recognized, "just as a state may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain that interest." In *Texaco*, the Court upheld against a "taking" challenge to a statute requiring that a mineral lease unused for twenty years automatically lapsed, absent a statement of claim. *Id.* at 530. The Court stated that "[i]n ruling that private property may be deemed to be abandoned and to lapse upon the failure of the owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of its own neglect." *Id.* Thus, ". . . after abandonment, the former owner retains no interest for which he may claim compensation." *Id.* (emphasis added).

And, in *U.S. v. Locke, supra*, the Supreme Court reaffirmed *Texaco*, emphasizing that "even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints in the way in

which those rights are used, or to condition their continued retention on the performance of certain affirmative duties." Quoting *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976), the *Locke* Court added that "'legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.'" *Locke*, 471 U.S. at 104.

These cases control. Any property interest of SCE&G is statutorily conditioned upon the requirement that the plants are "constructed or being constructed." Once abandonment occurred, such property interest was extinguished. Abandonment means "SCE&G is no longer performing the conditions necessary to retain any alleged property interest under S.C. Code Ann. § 58-33-275(A), likely extinguishing an entitlement SCE&G could claim under S.C. Code Ann. 58-33-275(A)." Order Denying Preliminary Injunction at 25, ¶ 88 [ECF 101].

This Court reached a similar conclusion in *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir. 1994) regarding the abandonment of a property interest. There, "... Randall voluntarily left the Army and thereby abandoned any property interest she had as practicing physician at Womack." Thus, SCE&G forfeited any property interest by abandoning construction. See *Coney v. Broad River Power Co.*, 171 S.C. 377, 172 S.E. 437, 441 (1933) [a utility has a "property right" only in an "assembled and established

plant...."]; *Dodge v. Bd. of Ed.*, 302 U.S. 74 (1937) ["[P]ayments [which] are gratuities ... create[ ] no vested rights."].

Lack of "Ripeness"

Also, the District Court properly concluded any "takings" challenge was not yet "ripe" based upon *Williamson Co. Reg. Planning Comm. v. Hamilton Bank*, 473 U.S. 172 (1994). The District Court held that *Williamson* established that "'a regulatory taking claim is not ripe until (1) the state agency imposing the allegedly confiscatory regulation has taken final action against the plaintiff's property and (2) the plaintiff has pursued all available remedies under state law....'" Order Denying Preliminary Injunction at 15, ¶ 59.

The District Court correctly concluded that SCE&G failed to meet either *Williamson* requirement. Certainly, the PSC has not yet "taken final action against SCE&G's alleged property interest by implementing a rate that is confiscatory"; nor is there "any evidence in the record that SCE&G pursued to completion an inverse condemnation action in state court." Order Denying Preliminary Injunction at 17 at ¶¶'s 61, 62; see also *Market St. Railway Co. v. R.R. Comm.*, 324 U.S. 548, 565-69 (1945) [experimental rate is not a "taking" because "it is not forbidden by the Constitution that there be a pragmatic test of matter even the most expert could not know in

advance."]; *Palazzalo v. Rhode Island*, 533 U.S. 606, 620-21 (2001) ["(u)nder our ripeness rules a taking claim based on a law or regulation which is alleged to go too far in burdening property depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion .... As a general rule, until the ordinary processes have been followed the extent of the restriction on the property is not known and a regulatory taking has not been established"]; *Henry v. Jefferson Co. Planning Comm.*, 34 Fed. Appx. 92, 96 (4th Cir. 2002) ["Henry has not established that his property has been taken without just compensation. Henry's taking claim is not ripe and must be dismissed without prejudice."].

In *San Remo Hotel v. City and Co. of S.F.*, 545 U.S. 323, 346-347 (2005), it was stated that it was "settled well before *Williamson"* that a "takings" claim is "not ripe" until a final decision has been reached by the "government entity charged with implementing the regulation." Thus,

> ... there is scant precedent for the litigation in federal district court of claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause. To the contrary, most of the cases in our takings jurisprudence ... came to us on writs of certiorari from state courts of last resort....

Id.

This Court followed *San Remo* in *Holliday Amusement Co. of Chas. v.*

S.C., 493 F.3d 404, 409 (4th Cir. 2007). There, the Court noted that "... *San Remo* underscored the principle of federalism at the core of *Williamson's* prudentially ripeness requirements." *Holliday* explained that this requirement "reduces the risk that legitimate exercises of state police power in furtherance of important goals – such as public health, public welfare and environmental protection – will be impeded by vexatious and repetitive litigation." 493 F.3d at 409. The Court thus concluded that there was no reason "to second-guess ... that claims for just compensation for regulatory takings by state agencies generally belong in state court." *Id.*; see also *United Merchants and Manufacturers v. SCE&G*, 206 F.2d 685, 687 (4th Cir. 1953) [PSC's jurisdiction over public utility rates is "plenary" with "right of appeal to the South Carolina courts"; "... there are many reasons justifying the refusal of a federal court to interfere, through the instant civil action, with the functioning of the machinery set up by South Carolina for the control of rates to be charged by a public utility."]. Accordingly, the District Court's application of *Williamson* was correct.

Retroactivity

Also, the District Court properly rejected any argument the Act imposed "retroactive re-definition of prudency in violation of its Due Process rights. See Order Denying Injunction Pending Appeal at 5, n. 5

[ECF 103]. The Court noted that the BLRA does not define "prudency" "so the Act cannot 'redefin[ ]' 'prudency.'" *Id.* The District Court explained that it is unclear as to the prudency standard which the PSC will apply. Further, the Court held that the Act "does not 'attach[ ] new legal consequences to events completed before its enactment.'" *Id.* (citing *Landraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)). Thus, the issue of prudency remains "pending before the PSC."

Accordingly, the District Court correctly held that SCE&G had not clearly shown a likelihood of prevailing. See *Gordon v. Pete's Auto Serv. Of Denbigh, Inc.* 637 F.3d 454, 459 (4th Cir. 2011) (quoting *Landgraf*). Moreover, even if the definition is retroactive, does not mean it is unconstitutional. The due process inquiry is "whether in enacting the retroactive law, the legislature acted in an arbitrary and irrational way." *Eastern Enterprise v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J. concurring) (citing *Usery, supra* and *U.S. Carlton*, 512 U.S. 26, 31 (1994)). To define a term in a statute previously undefined is a rational means to further the State's interest in sound utility regulation. See *Kuhali v. Reno*, 266 F.3d 93, 111 (2nd Cir. 2001). See also *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) [retroactive rate decrease valid].

No Bill of Attainder

Finally, the District Court was correct that SCE&G has not met the "likelihood of success" requirement as to a bill of attainder. As noted in *Consol. Ed. Co. v. Pataki*, 292 F.3d 338, 348 (2nd Cir. 2002), "... cases finding a bill of attainder targeting any party are extraordinarily rare." And, as this Court stated in *Ameur v. Gates*, 759 F.3d 317, 329 (4th Cir. 2014), "'only the clearest proof could suffice to establish the unconstitutionality of a statute [on the ground that it is a bill of attainder].'" (quoting *Comm. Pty. of the U.S. v. Subversive Activities Control Bd.*, 307 U.S. 1, 82-83 (1961)). A bill of attainder is described as legislation which "'singles out an individual or narrow class of persons for punishment without a judicial proceeding.'" *Ameur*, 759 F.3d at 329. Such is not the case here.

As stated in *Ameur*, there are three tests applicable for a bill of attainder: a "historical" test; a "functional" test (legitimate purposes served by the bill); and a "motivational" test (actual legislative motives). SCE&G meets none. Certainly, the Act is not a traditional form of "punishment." See *Selective Serv. Syst. v. Minn. Pub. Int. Research Grp.*, 468 U.S. 841, 853 (1984) [There is "'nothing approaching the infamous punishment' of imprisonment or other disabilities historically associated with punishment."] Second, there is a clear non-punitive purpose associated with the Act:

recognition that abandonment likely extinguishes any property right, thereby justifying a temporary rate reduction pending a final rate to be determined by the PSC. The Legislature was well within its constitutional authority under Art. IX, § 1 of the State Constitution to regulate utilities in the "public interest" by temporarily reducing rates upon abandonment by the utility. The Act clearly "further[s] non-punitive legislative purposes." See *Nixon v. Adm. Of Genl. Services*, 433 U.S. 425, 475-476 (1977). It leaves, for example, the question of "prudency" to the PSC.

Thirdly, the Act "passes muster under the motivational test." *Ameur*, 759 F.3d at 330. As the District Court properly concluded, SCE&G could not rely upon a "smattering of legislators" to determine that a legislative purpose was punitive. Order Denying Preliminary Injunction, at 22. While there is no doubt SCE&G is "named" in the legislation, it is because SCE&G is, solely, operating under the BLRA or, as *Nixon* characterized the situation, it is a "class of one." 433 U.S. at 472. The prohibition against a bill of attainder was not intended to invalidate every act "that legislatively burdens some persons or groups but not all other plausible individuals." *Nixon*, 433 U.S. at 471. The Act notes that SCE&G possesses legal rights and remedies. Order Denying Preliminary Injunction, at 31.

SCE&G Does Not Meet The Other Necessary Factors for a Stay

Likewise, SCE&G fails to meet the other stay factors either. Its alleged irreparable harm is based upon financial considerations. See SCE&G's Emergency Motion at 20. As this Court stated in *Long, supra*, "'mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.'" *Long*, 432 F.2d at 980. Moreover, in *FPC v. Hope Nat. Gas*, 320 U.S. 591, 605 (1994), the Court stated that a rate is not condemned because of a "meager return." Further, SCE&G admits it is still paying dividends. Motion at 24.

With respect to harm to other parties, it is obvious that continuing revised rates for an abandoned plant is certainly as much financial harm on one side as the other, particularly since SCE&G has already collected 2.2 billion in revised rates. The utility's interest is "only one of the variables in the constitutional calculus of reasonableness." *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987). Finally, the Legislature expressly determined it to be in the "public interest" to reduce rates temporarily. For all of these reasons, the stay should be denied.

Respectfully submitted,

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August 15, 2018

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 18-1899 **Caption:** South Carolina Electric & Gas v. Swain Whitfield

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