STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	FIFTH JUDICIAL CIRCUIT
LeBrian Cleckley, on behalf of himself and all others similarly situated,	)	Case No.: 2017-CP-40-04833
Plaintiff,	)	**PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
vs.	)	
South Carolina Electric & Gas Company, and the State of South Carolina,	)	
Defendant.	)	

Plaintiff LeBrian Cleckley, on behalf of himself and all those similarly situated, and by and through his undersigned counsel of record, hereby moves the Court for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Specifically, Plaintiff requests this Court find the Base Load Review Act (BLRA), S.C. Code sections 58-33-210 through 58-33-298, unconstitutional as violative of: (1) due process, both procedural and substantive; (2) the non-delegation doctrine; and (3) the South Carolina Constitution's provision requiring that legislation governing utilities serve the public interest. For these reasons, Plaintiff requests this Court grant summary judgment in his favor finding the Base Load Review Act unconstitutional, both on its face and as applied, and a judgment in the amount received from customers attributable to nuclear construction that have been collected from July 31, 2017 through the present.[1]

INTRODUCTION

On July 31, 2017, an announcement made public what SCE&G had known for years. The V.C. Summer Project, a flawed concept from inception and known to be so before construction

[1] Plaintiff incorporates by way of reference, his prior memorandum on the unconstitutionality of the BLRA, filed January 10, 2018.

began, was unsalvageable due to cost overruns, construction delays, and mismanagement that customers had no means to challenge, much less stop. Changes in South Carolina law proposed and promoted by SCE&G transformed its customers into powerless financiers of the project and allowed SCE&G, its executives and shareholders, and third parties to reap substantial financial benefit while providing nothing to the customers in return. The changes stripped the South Carolina Public Service Commission ("PSC") of discretionary authority and precluded any meaningful participation in the regulatory process by customers. The result was that ever-increasing financing charges were passed along to customers for a project that was unnecessary before construction began, never properly planned, and mismanaged from the start, with no constitutional safeguards in place to prevent it.

BACKGROUND

I. History of Nuclear Power in the United States from 1945-2000.

Following World War II and the recognition of the potential use of nuclear energy, the federal government encouraged the development and expansion of nuclear energy through legislation designed to foster private industry's investment in and construction of power plants—legislation that often-limited liability. *See* Exhibit 1, Affidavit of Nathan Richardson; Atomic Energy Act of 1946, Pub. L. No. 79-585, 60 Stat. 755 (1946). Through these regulations, the construction of nuclear plants burgeoned across the country throughout the 1960s to meet projected energy needs. This construction, however, slowed by the mid-1970s as it became evident that nuclear power could not grow as quickly as originally estimated given economic constraints. By the 1990s, many projects were largely winded down, downsized, or abandoned.

To reverse the decline in nuclear expansion, Congress passed the Energy Policy Act, 42 U.S.C. § 13201, in 2005. In part, this legislation was intended to encourage nuclear energy

production. The Act offered significant tax incentives, federal loan guarantees, and risk insurance assistance for utilities to consider revisiting construction of nuclear generating stations. Additional constraints were placed on these tax incentives by the IRS. For example, eligibility for tax credits required that a qualifying utility have applied for its combined license (COL) from the United States Nuclear Regulatory Commission (NRC) by December 31, 2008. Furthermore, qualifying utilities were required to commence construction by January 1, 2014.

Despite the appeal of federal incentives, utilities did not readily forget the economic risks and pitfalls encountered in the 1980s, produced by the traditional methods of cost allocations. Thus, utilities began lobbying for the adoption of advanced cost recovery legislation as a means of shifting the risk of loss to customers.

II. Transition from Traditional Utility Regulation to Advanced Cost Recovery

Spurred in part by the renewed interest in nuclear energy, utilities in many states began pushing for legislative change to shift the burden of paying for new nuclear facilities from the utilities to their customers in the form of "advanced cost recovery." The rationale behind this proposed change was that construction required for nuclear energy was too expensive and too lengthy for the costs to be carried by the utility until the project became "used and useful." The problem with advanced cost recovery is that it removes the normal market forces that dictate whether a nuclear project is feasible by eliminating the utility's risk. This problem was exacerbated in South Carolina by the enactment of legislation that not only removed the market forces, but also the ability to provide oversight via the state's Public Service Commission (PSC). This legislation thereby turned advanced costs into a profit center for the utility. To appreciate the changes and risk, it is first necessary to examine the traditional role of the PSC and general ratemaking.

Typically, electric services have been provided through a single source that enjoys an exclusive service area. To mitigate the effects of this natural utility monopoly on customers, utility service has been subject to public regulation by state PUCs such as the PSC (as well as by other regulatory bodies, including the Federal Energy Regulatory Commission). Essentially, the role of PUCs is to stand in for market forces to protect customers from monopolistic exploitation while ensuring utilities receive a sufficient rate of return to operate and attract capital. Exhibit 1, Richardson affidavit. *See* January Memorandum at 7.

Traditionally, utilities do not earn a rate of return on capital investment until the asset being built is "used and useful" to ratepayers; in the context of a power plant, that means generating and supplying power. *See* Exhibit 2, Chart: Changes to Traditional Ratemaking Under the BLRA; *see also*, January Memorandum at 7-9. Consistent with this rule, if an asset is cancelled during construction and never becomes useful, costs are never included in the utility's rate base and the utility never profits (earns a return) from its investment. In recent years, some jurisdictions softened the used-and-useful rule, applying a "prudent investment" standard, under which utilities could earn a rate of return on an investment deemed prudent by the state PUC even if the plant never entered service. South Carolina, however, has historically followed a strict used-and-useful rule.

Nevertheless, under either rule a utility was ineligible to earn a return on investment until project completion. Until then, construction was traditionally funded by utility investors or by borrowed money. These costs of capital (e.g., interest on loans during the period before the plant entered service) and a return, known as allowance for funds used during construction ("the AFUDC"), would be rolled into the utility's rate base once the plant entered service for a period set by statute. This allowed a utility to earn a rate of return on AFUDC just as it would on the

construction costs themselves. *See* Exhibit 2, Chart on Changes Under the BLRA; *see also*, January Memorandum at 7-9.

When plants, particularly large-scale nuclear plants, are cancelled after construction has started, significant abandonment costs remain. These include contract penalties, cleanup and dismantling costs, regulatory compliance costs, and, of course, AFUDC. Some PUCs have traditionally allowed utilities to recover construction costs and AFUDC on abandoned projects through rates by amortizing these costs over some time period (often ten years or more).

In contrast, advanced cost recovery shifts significant (and arguably absolute) financial risk from utilities to ratepayers. If a project is abandoned, ratepayers will have already compensated investors by giving a return on investment in addition to eventually covering the utility's capital expenditures through amortization. Utilities advocated this shift in costs by arguing that, in the long-run, customers may pay less construction costs than with finance costs rolled into the project via AFUDC. They further contended nuclear investment was necessary as the least-cost alternative for base load generation and because cost shifting would reduce overall project costs.[2] Exhibit 1, Richardson affidavit. Additionally, utilities justified the shift in costs with a promise of future rate savings from the inexpensive energy supplied by a nuclear reactor. Of course, the reality underlying these assertions is that "any benefit to ratepayers depends on the project being completed and entering service. Ratepayers bear the risk of project failure under advanced cost recovery." Exhibit 1, Richardson affidavit.

[2] Critics of this form of policy argued that this financial mechanism annihilates the consumer protection at the heart of utility regulation. Specifically, they contended that advanced cost recovery alters the most fundamental principles of rate-setting by shifting the risk of construction so dramatically that the result of cost recovery virtually eliminated stockholder risk in the investment and removed the ability of utility regulators to amend or supplement decisions once the decision to construct a plant was rendered.

Despite this possibility, utilities managed to persuade twenty-nine states to enact legislation that varied from resolutions which merely promoted nuclear energy, to legislation in South Carolina, Florida, and Georgia that expressly required customers to bear the risk and advance all construction financing.[3] As Plaintiff will show, the South Carolina Legislature went impermissibly farther than any other, beyond the delicate balance of due process, creating a statutory scheme that lead directly to the abandonment debacle that is the subject of this action.

III. V.C. Summer Units 2 & 3

In 2007, South Carolina's legislature enacted the BLRA to allow for the advancement of construction costs associated with new nuclear power plants. The statute was instrumental in SCE&G and Santee Cooper's decision to begin construction of two nuclear units at V.C. Summer. Pursuant to the BLRA, on May 30, 2008, SCE&G filed a combined application seeking a certificate of environmental compatibility and public convenience and necessity to build two nuclear units at V.C. Summer and for a base load review order to allow for construction costs to be advanced. Exhibit 4, Order No. 2009-104; *see also* Complaint ¶¶ 14-22. In ruling on the combined application, the PSC approved the building of the two units and entered a "final and binding determination" under the statute that the plant was used and useful for utility purposes, as long as construction was within the parameters of the approved plan. *Id.* Additionally, the PSC set the construction schedule and forecasted capital costs for the two units. *Id.* at 37-45. Also included within the Order was a finding that the BLRA authorized SCE&G to select its own return on equity. *Id.* at 43.

[3] *See* Exhibit 3, Chart Comparing South Carolina, Florida, and Georgia's Advanced Cost Recovery Statutes

On three separate occasions over the course of the next eight years, the PSC approved requests by SCE&G to revise its construction schedule and increase capital costs. *See* Construction Orders. Moreover, on nine separate occasions the PSC approved the increase in the amount customers would have to pay in advance to finance construction costs. By June 30, 2017, customers had contributed $3.8 billion toward nuclear construction. *Id.* at 28. However, on July 31, 2017, SCE&G announced it was terminating construction. Since the announcement, SCE&G has continued to collect this monthly premium from its customers, despite the fact that construction has ceased, and the amount is not attributable to any provision of service.

On September 26, 2017, Solicitor General Robert D. Cook, on behalf of the Attorney General's Office of South Carolina, issued an opinion as to the constitutionality of the BLRA. 2017 WL 4464415 (S.C.A.G. Sept. 26, 2017). The Attorney General's Office found, after a thorough analysis, that the BLRA "fails to strike the constitutionally required balance between the investors and [customers]," denies customers procedural due process, and awards abandonment 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." *Id.* at *1. The next day, Plaintiff filed his first amended complaint incorporating the Attorney General's arguments on constitutionality. Plaintiff now moves for partial summary judgment on these grounds.

STANDARD OF REVIEW

Rule 56(c), SCRCP provides that a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In reviewing a summary judgment motion, the

facts and circumstances must be viewed in the light most favorable to the non-moving party. *Holmes v. East Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014).

ARGUMENTS

I. The Base Load Review Act Violates Due Process Because It Provides Customers with Inadequate Notice, Denies Customers an Opportunity to be Heard, and Provides No Mechanism to Protect Customers from Paying Imprudent Costs Attributable to Nuclear Construction.

Under the BLRA, a utility may file an application for construction of a new nuclear power plant along with an application for a base load review order. S.C. Code Ann. § 58-33-160(1); S.C. Code Ann. § 58-33-225(A)-(D); S.C. Code Ann. § 58-33-250. In its application, the utility sets forth estimates and projected schedules for anticipated construction, as well as presumed capital costs, a projection of revenue, and a return on equity along with specifications of the plant and potential risks. S.C. Code Ann. § 58-33-250. Following an initial review to determine if the plans to build a new nuclear plant appear prudent, the PSC issues a base load review order with three key components. S.C. Code Ann. § 58-33-275.

First, the order also establishes the initial approved cost estimate and construction schedule. S.C. Code Ann. § 58-33-270. Second, the order establishes the plant is "used and useful" and the utility costs are prudent, which allows inclusion of the financing costs of new nuclear construction in the utility's rate. S.C. Code Ann. § 58-33-275. Radically, the statute states the PSC's decision constitutes:

> . . . *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.

S.C. Code Ann. § 58-33-275(A)(1)-(2) (emphasis added). To be clear, neither the used and useful finding nor the prudency of the costs may be challenged if the utility complies with the schedule and estimates. As such, the BLRA allows the utility to modify the schedules and estimates at its discretion. S.C. Code Ann. § 58-33-270(E). In effect, the BLRA grants the utility the power to ensure that its plant will always be used and useful and the costs prudent.

Beyond a finding of prudence, the base load review order also establishes a return on equity. S.C. Code Ann. § 58-33-270. Section 58-33-220(16) of the South Carolina Code defines a return on equity as "the return on common equity established in the base load review order for a plant." S.C. Code Ann. § 58-33-260(16). The statute then modifies the definition stating:

> But if the order in the utility's most recent general rate proceeding was issued no more than five years before the date of filing of the application or combined application, or if such an order is issued after the application, combined application or base load review order related to the plant is filed, then *at the utility's option*, the rate of return on common equity established in that order shall be the rate of return used for computing future rate revisions under this article.

Id. (emphasis added). The statute thus allows the utility to select its preferred option. Once established, only the utility may choose to modify what it earns, and this number need not reflect actual market conditions.

In addition to the prohibition on challenging prudency, the statute prohibits a base load review order from being challenged in any subsequent proceeding. S.C. Code Ann. § 58-33-275(B) (stating a base load review order "may not be challenged or reopened in any subsequent proceeding"). Thus, once established, no party, including no paying consumer, may challenge the rate of return or the schedules or estimates. *Id.* However, as noted above, the utility, at its election, may petition to modify the schedules or estimates. S.C. Code Ann. § 58-33-270(E).

Procedurally, the BLRA permits the utility to apply annually for increases in construction costs through "revised rates." S.C. Code Ann. § 58-33-280. The annual requests are essentially

automatic under sections 58-33-275(C) and 58-33-280. Section 58-33-275(C) states in pertinent part:

> So long as the plant is constructed or being constructed in accordance with the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2), as adjusted by the inflation indices set forth in Section 58-33-270(B)(5), *the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings*.

S.C. Code Ann. § 58-33-275(C) (emphasis added). Section 58-33-280(B) echoes this sentiment, stating:

> a utility *must be allowed* to recover through revised rates its weighted average cost of capital applied to all or, at the utility's option, part of the outstanding balance of construction work in progress, calculated as of a date specified in the filing. Any construction work in progress not included in any specific filing for revised rates shall continue to earn AFUDC and may be included in rates through future filings.

S.C. Code Ann. § 58-33-280(B). Practically, the BLRA mandates that the utility must always be allowed to recover irrespective of the validity or viability of the utility's decisions.[4] Simply put, under the BLRA, a utility's spending is unchecked.

As the above illustrates, remarkably absent from the BLRA is the customers' meaningful opportunity to be heard. Unlike in general rate proceedings, which allow the public to intervene and participate in a hearing, when a utility seeks revised rates, the BLRA does not contemplate a hearing prior to the adoption of revised rates. S.C. Code Ann. § 58-33-240(C). Instead, the BLRA only requires a utility to notify customers of its application for revised rates through publication, in which it informs customers they may submit written comment to the Office of Regulatory Staff (ORS). S.C. Code Ann. § 58-33-280(C); *see* Exhibit 5, 2013 Letter from Commission Instructing SCE&G to Notify Customers & Notice; Exhibit 6, Notice Published in Newspapers. When the

[4] Notably, the entire revised ratemaking process—a paper review with no hearing—is required to be completed within four months of the filing of the utility's application.

revised rates are approved, all customers receive notice that they are subject to additional cost increases in their next bill.

Only after the revised rates are in effect is a customer permitted any degree of intervention and that intervention is extremely limited in its scope.[5] S.C. Code Ann. § 58-33-285. Instead of affording the consumer the opportunity to address the wisdom of any increase, any challenge is essentially confined to administrative deficiencies. Section 58-33-287(B) notes that a review of a revised rates order is "limited to issues related to whether the revised rates filed by the utility comply with the terms of the Commission order issued pursuant to Section 58-33-270 and with the specific requirements of Section 58-33-280." S.C Code Ann. § 58-33-287(B). Thus, a customer is not allowed to take issue with the substance of the rates such as the spending and advancement of costs. Rather, a customer can only assert the PSC failed to follow the approved schedules and estimates in setting the revised rates.

A. The BLRA Violates the Customers' Rights to Procedural Due Process Facially and As Applied to Plaintiff.

The BLRA's allowance of advanced cost recovery for new nuclear construction essentially provides the utility a blank check signed by customers. This guaranteed approval for future construction costs and profits is achieved by abolishing customers' opportunity to have sufficient notice and be heard and effectively eliminating the PSC's administrative function as a market force on the utility. A plain reading of the statute demonstrates that the BLRA fails to provide Plaintiff, and similarly situated consumers, sufficient notice and a meaningful opportunity to be heard prior

[5] Conspicuously, a customer is required to intervene within thirty days of the issuance of the order granting a revised rate. S.C. Code Ann. § 58-33-285. Because the customer's receipt of notice is subject to the utility's billing cycle, there is no guarantee the customer will have a full thirty days to bring a petition. *See* S.C. Code Ann. § 58-33-280(H).

to customers' payment of increased construction costs. Further, as applied, Plaintiff can establish the deprivation of due process on more than nine occasions.

Procedural due process imposes constraints on governmental decisions that deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the United States Constitution and the South Carolina Constitution. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3; *see Board of Regents v. Roth*, 408 U.S. 564 (1972) (explaining in order to prevail on a claim that a party has been deprived of property by the government, a plaintiff must prove (1) a property interest, (2) the procedure established by the state for governing the deprivation of the property interest did not allow the party a meaningful opportunity to be heard, and (3) the lack of adequate process was prejudicial to the party). Due process under both provisions requires notice, an opportunity to be heard in a meaningful way, and judicial review. U.S. Const. amends. V and XIV, § 1; S.C. Const. art. 1, § 22; *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (distinguishing the need for trial-type hearings for adjudicatory decisions compared to discretionary decisions before an administrative agency).

In addition to the protection mirrored in the United States Constitution, the South Carolina Constitution art. I, § 22 contains an express protection of the right of notice and an opportunity to be heard. S.C. Const. art. I, § 22 ("No 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 . . . ."). Accordingly, South Carolina's Constitution affords a higher level of protection of procedural due process. *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (recognizing "section 22 is an additional guarantee of important due process rights, enacted in 1970 as legislators and judges noticed the increasing

prevalence and influence of administrative agencies in daily life"). This heightened protection places a greater emphasis on adequate notice and an opportunity to be heard prior to the PSC ordering an increase in construction costs to be paid by customers.

A failure to provide notice or a meaningful opportunity, however, does not , in and of itself, rise to a due process violation. *Olson v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 504 (Ct. App. 2008). To prevail, there must also be a showing of substantial prejudice. *Id.*

Customers have a property interest in their advancement of construction costs and must be afforded due process before the utility can justify collection of these costs. *Porter v. S.C. Pub. Serv. Comm'n*, 338 S.C. 164, 170, 525 S.E.2d 866, 869 (2000); *see also* Exhibit 7, Affidavit of Josh Eagle. In *Porter*, the Supreme Court of South Carolina found customers have a due process protected property interest in the traditional rates they pay. *Id.* The BLRA expands the property interest of customers by placing them in a unique position as equity investors in the plant. They are responsible for "both reimbursing capital costs and paying the utility a rate of return on its costs." Exhibit 7, Eagle Affidavit. Therefore, customers, as "project underwriters" who are "paying construction costs before the plant enters into service, deserve a higher level of due process than [customers] paying ordinary, plant-in-service rates." *Id.*

On its face, the BLRA violates due process. The BLRA fails to provide customers with sufficient notice that a utility is seeking revised rates. Generally, for non-BLRA revised rates, customers receive notice through publication in a newspaper, as required by regulation, and through direct contact, either by a mail-insert or on their utility bill itself, at the direction of the PSC. *See generally* S.C. Code Ann. § 1-23-320; S.C. Code Ann. Regs. 103-193(2) ("Whenever any new or changed rate, fare, charge, rule, or classification is filed, *the commission may, in its*

discretion, require the filing party or parties to give notice of such filing by publishing once, a notice in the form prescribed by the commission, in newspapers of general coverage in the affected territory."); S.C. Code Ann. Regs. 103-817(C)(3)(a) ("The Chief Clerk, pursuant to other rules of the Commission, *may require* that the Notice of Filing be mailed to customers and other persons and a certificate of mailing be filed on or before the return date.") (emphasis added).

The BLRA, however, requires only publication, thereby removing the PSC's discretionary function to determine the import of revised rates on customers. S.C. Code. Ann. § 58-33-240(C). While notice by publication conforms with the Administrative Procedures Act and Regulation 103-193(2), it is insufficient for the purpose of satisfying due process given the nature of the property interest implicated and South Carolina's heightened procedural due process. *See Kurschner*, 376 S.C. at 172, 656 S.E.2d at 350 (holding the sufficiency of due process depends on the nature of the interest); *Garris v. Governing Bd. of S.C. Reinsurance Facility*, 333 S.C. 432, 444, 511 S.E.2d 48, 54 (1998) (recognizing Art. I, § 22 is "an additional guarantee of important due process rights").

Aggravating its procedural constitutional deficiencies, notice under the BLRA is ultimately feckless. Customers are prohibited from intervening or having a hearing prior to the revised rates order. *See Bundy v. Shirley*, 412 S.C. 292, 303, 772 S.E.2d 163, 169 (2015) (stating a meaningful opportunity to be heard requires a hearing with the right to introduce evidence and confront and cross-examine witnesses). Tellingly, in every other case contemplated for utilities, customers are permitted to intervene and participate in a hearing before the PSC prior to a determination that the customer owes more. It is nonsensical that revised rates under the BLRA are not afforded the same due process as general revised rates when the economic impact on customers is the same. *See* Exhibit 8, Dkt. No. 2007-220-E, Notice for SCE&G Revised Rates (allowing intervention and hearings for an application for general revised rates outside the BLRA). As it stands, the BLRA

fails to provide a forum for customers to raise any meaningful complaint about the prudency of the utility's decisions. Moreover, the statute prohibits any substantive challenge to prudency and whether the construction remains used and useful. S.C. Code Ann. § 58-33-275

SCE&G attempts to shroud the BLRA's deficiencies, directing the Court to the provisions providing for written comment to ORS and intervention after imposition of revised rates. *See* S.C. Code Ann. § 58-33-280(C); S.C. Code Ann. § 58-33-285. This reliance is misplaced. First, providing written comment to ORS fails to satisfy the requisite standard of a hearing with evidence and witnesses. *See Bundy*, 412 S.C. at 303, 772 S.E.2d at 169; *Barasch v. Pa. Pub. Util. Comm'n.*, 546 A.2d 1296, 1306 (Pa. 1988) (stating that participation by written comment alone is insufficient to satisfy due process). This inadequacy is especially bothersome given the property interest at stake, along with the nature of the decision being rendered. *See Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350 (noting adjudicative decisions require a hearing). Second, intervention following the issuance of revised rates is limited to challenging compliance with the schedules and estimates provided in the base load order. S.C. Code Ann. 58-33-287(B), thereby, leaving the scope of intervention to "essentially ministerial errors." Exhibit 7, Eagle Affidavit. By barring substantive complaints and review, customers are denied procedural due process.[6]

Even if the Court does not believe the BLRA is facially unconstitutional, it is unconstitutional as applied. Since the issuance of the base load review order in 2009, SCE&G has

[6] While the BLRA was enacted to expedite nuclear construction and simplify the process, it does so at the cost of due process by depriving the public of notice and an opportunity to be heard. Advancing nuclear development does not, nor can it, require a forfeiture of this most basic constitutional right of due process. As referenced *supra*, Georgia and Florida enacted similar statutes without sacrificing customers' constitutional protection. Neither Florida nor Georgia law appears to restrict public participation in rate hearings for nuclear projects. Fl. St. §366.041; Ga. Code Ann. § 46-2-25(a). The BLRA acutely bars meaningful public participation.

applied and been approved for revised rates on nine occasions. Each time marks a violation of due process. Customers have repeatedly attempted to intervene prior to the issuance of revised rates and have sought hearings and discovery. *See* Exhibit 9, Dkt. No. 2013-150-E, Order No. 2013-622 (explaining "no hearings are provided" for revised rates and the BLRA "does not contemplate any type of hearing or discovery" during revised rate making); Exhibit 10, Dkt. No. 2013-150-E, Order No. 2013-481 (explaining intervention is not allowed following notice of the filing of SCE&G's application for revised rates); Exhibit 11, Dkt. No. 213-150-E, Order No. 2013-514 (same); Exhibit 12, Dkt. No. 2013-150-E; Order No. 2013-515 (same).

Additionally, customers who have timely petitioned for intervention after issuance of a revised rates order have been denied because they asserted substantive complaints about the increase. *See* Exhibit 13, Docket No. 2013-150-E, Order No. 2013-775 (denying a customer's petition to intervene because her complaint was not within the limited scope). In rendering these decisions, the PSC has explained that it is "constrained by the terms of the [BLRA]," and in the absence of direction to allow these acts, the customers may not have hearings. *Id.*

By way of example, in 2013 Ms. Doris Fletcher petitioned to intervene and for a night hearing following notice of the SCE&G application for revised rates. *See* Exhibit 14, Fletcher-June 12, 2013 Letter; *see also* Exhibit 10. Ms. Fletcher was informed that the BLRA prohibited intervention and did not allow for a night hearing. Exhibit 10. The PSC instructed Ms. Fletcher that the BLRA entitled her to intervene following the issuance of the revised rates. *Id.* Ms. Fletcher timely filed and the PSC denied her petition. Exhibit 15, Fletcher-October 19, 2013 Letter; Exhibit 13. The PSC found she failed to comply with the statutory requirements of section 58-33-270 because her petition was founded on general complaints about the increase "with a request at the end for review of the order and opportunity to speak." Exhibit 13.

In sum, the BLRA fails to provide fundamental requirements of due process on its face or, alternatively, as applied. Because of this deprivation, Plaintiff and others similarly situated were substantially prejudiced. *See Porter*, 338 S.C. at 164, 525 S.E.2d at 866 (noting the denial of an opportunity to be heard is substantially prejudicial). Absent the BLRA, the utility would have been subject to a general rates proceeding for every request for revised rates, the public would have had the right to intervene, and the utility would have been required to justify its request. The customers were denied this opportunity. As a result, this Court should find the BLRA unconstitutional under both the United States Constitution and the South Carolina Constitution as violative of procedural due process.[7]

[7] Without waiving any argument, Plaintiff also contends the BLRA violates procedural due process because it prohibits customers from challenging the prudency of the construction costs issued through the revised rates. *See* S.C. Code Ann. § 58-33-275. Specifically, and as fully addressed below, the statutory scheme prohibits customers from challenging the prudency of increased spending following the initial base load review order by allowing the utility to modify its schedules and estimates to remain compliant with section 58-33-275. *Id.*; S.C. Code Ann. § 58-33-270(E). Therefore, prudency may never be challenged. Plaintiff and all other customers are prejudiced by these prohibitions because the rates fail to take into account economic and market conditions, and they insulate the utility from risk and responsibility in making business decisions. Thus, a utility is incentivized to proceed with construction at the expense of customers. Moreover, "in the absence of a transparent and informed discussion of the reasons for additional costs, costs which by definition were never deemed prudent by the initial [PSC] order, it is very likely than an erroneous deprivation would occur." Exhibit 7, Eagle Affidavit. In the absence of a right to be heard and challenge the prudency of costs, it is "impossible for anyone to discover that the utility had made imprudent decisions in spending funds underwritten by [customers]." *Id.* Because of the statutory limitations, Plaintiff and all other customers were deprived the opportunity to intervene and challenge the utility's spending of their money.

B. The Base Load Review Act Violates the Customers' Rights to Substantive Due Process Because the Statute as Written, and in Application, Prohibits Its Stated Purpose of Protecting the Customers from Imprudent Cost

In addition to violating procedural due process, the BLRA violates customers' rights to substantive due process, facially and as applied, by arbitrarily depriving customers of their property without justification. Specifically, the BLRA mandates that the PSC arbitrarily and capriciously grant SCE&G revised rates for construction costs paid by its customers. The BLRA's statutory scheme is arbitrary and capricious because it requires that revised rates be approved by the PSC with no regard for the prudency of construction cost increases or consideration of the deprivation of customers' money. In doing so, the BLRA drastically alters the rate-making process and the ability of the PCS to balance the interests of the customers versus the utility.

The Due Process Clause guarantees more than just fair process; it "cover[s] a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them.'" *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 840, (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, (1986)); *see* U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3. "The substantive component of the due process clause protects against arbitrary government action that infringes a specific liberty interest." *Hawkins v. Freeman*, 195 F.3d 732, 749 (4th Cir. 1999) (en banc). "Substantive due process in particular protects against the arbitrary infringement of 'fundamental rights' that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" *State v. Dykes*, 403 S.C. 499, 512, 744 S.E.2d 505, 512 (2013) (quoting *Doe v. Moore*, 410 F.3d 1337, 1342–43 (11th Cir. 2005)). If the interest infringed upon is a fundamental right, the statute must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993).

As discussed *supra*, Plaintiff has a cognizable property interest in and fundamental right to his payment of the construction costs for V.C. Summer Units 2 and 3. *Porter*, 338. S.C. at 164,

525 S.E.2d at 866; *see also Young v. Wiggins*, 240 S.C. 426, 435, 126 S.E.2d 360, 365 (1962) ("The great and fundamental principle of all constitutional governments . . . secures to every individual the right to acquire, possess, and defend property."); *Keane/Sherratt Partnership v. Hodge*, 292 S.C. 459, 465 n.3, 357 S.E.2d 193, 196 n.3 (Ct. App. 1987) ("Property rights have long been regarded as fundamental in Western civilization.").[8]

Not only has Plaintiff acknowledged the fundamental right and protection customers have in the advanced costs for construction, so did the Legislature. The Legislature placed the protection of this property at the forefront of the BLRA's purpose, stating the purpose is both (1) to provide advance cost recovery and (2) to protect customers "from responsibility for imprudent financial obligations costs." S.C. Code Ann. § 58-33-210; *S.C. Energy Users Comm'n v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 495–96, 697 S.E.2d 587, 592 (2010) (recognizing the dual purposes of the BLRA). Thus, the Legislature codified its understanding and appreciation of the balance between a utility and its customers. *See generally*, *Smyth v. Ames*, 169 U.S. 466, 544 (1898) (recognizing a constitutional balance between the rights of the utility and its customers); *see also In re Application No. 30466*, 194 Neb. 55, 62, 230 N.W.2d 190, 196 (1975) ("As a matter of elemental justice, consumers of utility services are entitled to the same protection against confiscation of property or arbitrary action on the party of the utility as are the utilities.").

Despite placing this protection on a pedestal, the BLRA stands in complete contradiction to this second stated goal. Instead, in furtherance of achieving the first objective, the BLRA renders protecting customers from imprudent costs impossible. The BLRA is not narrowly tailored, or even rationally related, to achieve its declared purpose of protecting customers because

[8] Out of an abundance of caution, and for the purposes of issue preservation, Plaintiff asserts this substantive due process challenge under both a strict scrutiny and rational basis analysis.

it divests the PSC of its ability to assess the soundness of requests for increased construction costs and prohibits customers from challenging the prudency of construction costs.

In furtherance of nuclear construction, the BLRA establishes a statutory scheme insulating a utility's nuclear plant from all construction risks, particularly increased costs and return on profit.[9] The BLRA shifts this risk and responsibility by prohibiting the PSC and customers from reviewing and challenging the prudency of costs. In fact, the Supreme Court of South Carolina has previously recognized the drastic limitations of the BLRA, stating the statute leaves no "mechanism in place for [customers] to challenge the prudence of SCE&G's financial decisions." *Energy Users Comm'n v. SCE&G*, 388 S.C. 486, 496, 697 S.E.2d 587, 592 (2010).

The BLRA *requires* the PSC to annually approve revised rates, if requested by the utility, provided the utility is complying with the schedules and estimates. S.C. Code Ann. §58-33-280(C) ("[T]he utility *must be allowed* to recover its capital costs related to the plant through revised rate filings or general rate proceedings.") (emphasis added); *see also* S.C. Code Ann. § 58-33-275(A). In reviewing the utility's application for revised rates, the PSC may not consider whether the construction remains used and useful or whether the construction costs remain prudent. Rather, the PSC may only confirm compliance with the schedules and estimates. S.C. Code Ann. § 58-33-280(C). Significantly, the utility may file a petition to modify the schedules and estimates at its discretion, ensuring the utility may always set its own timeline and budget. S.C. Code Ann. § 58-33-270(E). Given this statutory safeguard, the utility is able to maintain and enforce the binding order that costs are prudent as it annually applies for revised rates.

[9] As discussed, the BLRA is "one of if not the most nuclear-friendly regulatory environments in the United States, in large part by shifting risk from utilities to their customers." Exhibit 1, Richardson Affidavit.

The utility is further insulated in its revised rates application because customers are precluded from challenging the prudence of including the increased construction costs in the rates or any other substantive aspect of a final base load order. *See Energy Users Comm.*, 388 S.C. at 496, 697 S.E.2d at 592. As discussed, customers cannot intervene or receive a hearing prior to the revised rates going into effect, and post-rate intervention does not allow prudency challenges. S.C. Code Ann. § 58-33-280. In sum, the process established by the BLRA does nothing more than rubber stamp the utility's desire for increased costs. The deprivation of property is neither narrowly tailor or rationally related to the government's primary interest. Moreover, the BLRA fails to even consider protecting prudency of costs and the protection of customers, in direct contradiction to its stated purpose.[10]

Plaintiff and all other customers are harmed by these statutory provisions because the revised rates fail to take into account economic and market conditions, and they completely insulate the utility from risk and responsibility in making business decisions. This blind rejection of market conditions mirrors other limitations in the BLRA, such as the prohibition on challenging construction schedules, estimates, and rates of return on equity. S.C. Code Ann. § 58-33-275(B).

[10] The arbitrary nature of the BLRA is further demonstrated by Florida and Georgia's statutes. While the BLRA requires only one determination of prudency, Florida's Nuclear Cost Recovery Act requires the Florida Public Service Commission (FPSC) to determine the feasibility of the nuclear plant and the reasonableness of the projected costs during four phases of construction. Additionally, the utility is subject to an annual review through a capacity recovery clause, which requires the utility to show the "reasonableness of the costs and the prudence of the actual construction costs at each phase. Similarly, Georgia's Nuclear Energy Financing Act requires the evaluation of construction every twelve months based on the actual cost of debt and the authorized equity determined by the Georgia Public Service Commission. Further, as previously stated, Florida and Georgia customers are not prohibited from intervening and raising concerns with reasonableness and prudency. The BLRA incomparably confines the PSC's review of a nuclear project, allows project costs and duration to be unconstrained, and prohibits the public from challenging the advancement of their forced investments. "While the Florida and Georgia laws are similar to the BLRA in that all three contain the core mechanism of advanced cost recovery, only the BLRA has such ancillary utility-favorable provisions." Exhibit 1, Richardson Affidavit.

Neither the PSC nor the customers are permitted to challenge these portions of the base load review order in the event of changes in market conditions or imprudent decision making and spending by the utility. The utility is allowed to operate without regard for market changes. In the absence of market pressure to control costs, coupled with the abdication of the PSC as the utility's regulator, a utility is accountable to only one group: shareholders. Thus, a utility is incentivized to proceed with construction at the expense of customers if it remains economically beneficial.

Moreover, without transparent and informed discussion of a utility's need for additional costs, customers can easily be charged for imprudent costs in direct contradiction to the BLRA's stated purpose. *See* S.C. Code Ann. § 58–33–210; *S.C. Energy Users Comm.*, 388 S.C. at 495–96, 697 S.E.2d at 592 (recognizing the dual purposes of the BLRA). "At the very least, the absence of a right to challenge the prudence of additional construction costs would make it impossible for anyone to discover that the utility had made imprudent decisions in spending funds underwritten by ratepayers." Exhibit 7, Eagle Affidavit.

The BLRA ensures one outcome: consumers bearing the burdens of costly and financially risky, if not wholly unnecessary, nuclear plants with the PSC powerless to effectively oversee the projects and customers prohibited from challenging prudency of the cost increases they may endure. This will always be the outcome. The BLRA mandates the advancement of construction costs, i.e. deprivation of property, without providing the necessary constitutional safeguards for customers to protect their fundamental right to their property. While the Legislature is empowered to regulate utility rates and may employ this power to advance nuclear expansion, the pursuit of policy interests must always comport with the guarantees of due process. The BLRA's deprivation is neither compelling nor legitimate given the deficiencies discussed herein. For these reasons, the BLRA is unconstitutional.

II. The BLRA Violates the Non-Delegation Doctrine in Violation of the Constitution as Applied.

By allowing SCE&G to establish its own return on equity, the BLRA improperly delegates legislative power to a private party and is therefore unconstitutional. Article III, section 1 of the South Carolina Constitution vests legislative power in the General Assembly. The Supreme Court of South Carolina has interpreted this section as forbidding the delegation of legislative authority to private persons or corporations. *Toussaint v. State Bd. of Med. Exam'rs*, 285 S.C. 266, 269, 329 S.E.2d 433, 435 (1985).

In *Eastern Federal Corporation v. Wasson*, the Supreme Court found a statute allowing a tax of twenty percent to be applied to movies rated by the Motion Picture Association of America (MPAA) was unconstitutional because it was an improper delegation of power. 281 S.C. 450, 451, 316 S.E.2d 373, 374 (1984). The Court explained that the MPAA was a private organization, and the statute imposed no guidelines for rating the films, but rather left the determination solely to the discretion of the MPPA. *Id.*

As discussed, section 58-33-220(16) of the South Carolina Code defines a return on equity as "the return on common equity established in the base load review order for a plant." S.C. Code Ann. § 58-33-260(16). The statute then modifies the definition stating:

> But if the order in the utility's most recent general rate proceeding was issued no more than five years before the date of filing of the application or combined application, or if such an order is issued after the application, combined application or base load review order related to the plant is filed, then *at the utility's option*, the rate of return on common equity established in that order shall be the rate of return used for computing future rate revisions under this article.

Id. (emphasis added). This statute allows the utility, at its sole election, to choose its own profit.

Significantly, the statute provides no limiting language or time restriction for a utility to employ a prior rate for its return on equity in new construction. There is no procedural mechanism for the PSC to independently order modification of the return on equity. In fact, the BLRA makes

no mention of any change to the return on equity. Thus, the initial return on equity set at the outset of construction remains the return indefinitely, regardless of market conditions. Consequently, the rate of return may only be modified at the election of the utility.

The statute requires acceptance of the utility's proposed rate of return without substantive consideration, as evidenced by the PSC's holding. *Id.* Significantly, the 2007 rate was selected prior to pertinent information being submitted to the PSC in the base load review application in May 2008. Since 2009, SCE&G has twice voluntarily agreed to reduce its return in settlement agreements with ORS—in 2015 to 10.5% and in 2016 to 10.25%, and each time SCE&G used its return as a bargaining tool to achieve other goals in its annual revised rate applications. *See* Exhibit 16, 2015 Settlement Agreement; Exhibit 17, 2016 Settlement Agreements. Absent SCE&G's willingness to reduce its return, the return would still be 11%, because the PSC is not authorized to change it. Thus, SCE&G— and only SCE&G—has the power to determine its profit.

In sum, the BLRA unlawfully allows SCE&G, a private company, to determine its return on equity—a determination inarguably legislative in nature and fundamental to the traditional role of the PSC. This utility-favorable provision increases the degree to which project risks are yet again shifted from the utility to customers and only invites protraction of construction to the financial benefit of the utility.

III. The Base Load Review Act Violates Article IX, Section 1 of the South Carolina Constitution

The BLRA promotes private interest of the utility to the exclusion and detriment of public interest of customers in violation of Article IX, section 1 of the South Carolina Constitution. Pursuant to Article IX, section 1, utility law and regulation must cater to public interest. *Duke Power Co. v. S.C. Pub. Serv. Comm'n*, 284 S.C. 81, 92, 326 S.E.2d 395, 401 (1985) (noting "the General Assembly has the power and duty to itself 'provide for appropriate regulation' of public

utilities 'as and to the extent required by the public interest'"); *see also In Re Carolina Water Serv.*, 2007 WL 4944726 (Nov. 19, 2007).

As discussed *supra*, the BLRA divests the PSC of its ability to assess the soundness of rate increases for construction costs, removes historical consumer protection safe guards, and prohibits customers from having a meaningful opportunity to challenge the revised rates. In stark contrast to public interest, the BLRA unilaterally promotes the utility's interest without regard to the public. *See generally S. Bell v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978) (noting it is the result of balancing the interest of the utility and its customers that matters in establishing a rate). Specifically, the utility benefits from the statutory scheme that places all of its construction costs and plans beyond reproach by prohibiting review and challenges. There can be no question this violates the very core of Article IX, section 1.

CONCLUSION

For these reasons, Plaintiff requests this Court grant summary judgment in his favor finding the BLRA unconstitutional, both on its face and as applied, and a judgment in the amount received from customers attributable to nuclear construction that have been collected from July 31, 2017 through the present.[11]

(*signature page to follow*)

[11] This amount is calculable but changes as additional amounts are received on a daily basis.

s/J. Preston Strom, Jr.

STROM LAW FIRM, LLC
J. Preston Strom, Jr.
petestrom@stromlaw.com
Mario A. Pacella
mpacella@stromlaw.com
Bakari T. Sellers
besellers@stromlaw.com
Jessica L. Fickling
jfickling@stromlaw.com
2110 Beltline Blvd.
Columbia, South Carolina 29204
Tel: 803.252.4800
Fax: 803.252.4801

MCGOWAN, HOOD & FELDER, LLC
Whitney B. Harrison
1517 Hampton Street
Columbia, South Carolina 29201
Tel:803) 779-0100
-and-
James L. Ward, Jr.
Ranee Saunders
321 Wingo Way, Suite 103
Mt. Pleasant, South Carolina 29464
Tel: (843)388-7202

RICHARDSON, PATRICK, WESTBROOK & BRICKMAN, L.L.C.
Terry Richardson
Daniel S. Haltiwanger
dhaltiwanger@rpwb.com
Matthew A. Nickles
mnickles@rpwb.com
P. O. Box 1368
1730 Jackson Street
Barnwell, SC 29812
Telephone No.: (803) 541-7850
Fax No.: (803) 541-9625

LEWIS BABCOCK, LLP
Keith M. Babcock
kmb@lewisbabcock.com
Ariail E. King
aek@lewisbabcock.com
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211-1208
Tel: 803-771-8000

Galvin Law Group
Gregory Michael Galvin, Esq.
P.O. Box 887
Bluffton, SC 29910
843-227-2231
888-362-0714 fax
ggalvin@galvinlawgroup.com

Speights and Solomons
Dan Speights
A.G. Solomons III
100 Oak Street
Hampton, S.C. 29924
(803) 943-4444

ATTORNEYS FOR PLAINTIFFS

April 13, 2018
Columbia, South Carolina