STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	C/A No. 2017-CP-40-04833
	)	
	)	
LeBrian Cleckley, on behalf of himself And all others similarly situated,	)	
	)	
Plaintiff,	)	
	)	**STATE OF SOUTH CAROLINA'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AND RETURN TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**
- v.	)	
	)	
South Carolina Electric & Gas Company)	)	
	)	
And the State of South Carolina,	)	
	)	
Defendant.	)	
_____	)	

Based upon the Attorney General's extensive Opinion of September 26, 2017, as well as memoranda of law previously submitted to this Court, Defendant State of South Carolina moves pursuant to Rule 12(c), SCRCP, for partial judgment on the pleadings and submits this Return to Plaintiff's Motion on the ground that the Base Load Review Act ("BLRA") is unconstitutional as applied to SCE&G ratepayers.

The question of the constitutionality of the BLRA as applied to SCE&G ratepayers is purely a question of law and is a basis for granting partial judgment on the pleadings. Only recently, in Doe v. State, 421 S.C. 490, 808 S.E.2d 807 (2017), the Court held in its original jurisdiction that certain statutes defining the words "household member" in the Violence Reform Act and the Protection from Domestic Abuse Act was unconstitutional as applied to the Petitioner and others similarly situated. The Court's decision constituted purely a question of law which could be decided in the original jurisdiction. Likewise, here, this Court may review the BLRA on its face and determine its constitutionality as applied to SCE&G ratepayers. We urge the Court to declare the BLRA unconstitutional for the reasons that follow.

INTRODUCTION

As the Attorney General's Office advised in its extensive September 26, 2017 Opinion, the Base Load Review Act ("BLRA") is unconstitutional based upon a variety of grounds. Among other constitutional concerns, the Opinion advised that ratepayers possess a property right in the electrical rates they pay, must be given notice and an opportunity to be heard, and that several provisions of the BLRA "may well violate due process."

And, as we have argued in our previous memoranda and letters to this Court – which along with the Opinion, we incorporate herein – the BLRA has, virtually from the start of the process of construction of the V.C. Summer project, deprived SCE&G customers of their property without due process of law. As we argued to the Public Service Commission, ratepayers did not receive adequate notice nor an opportunity to be heard prior to revised rate increases. We discuss fully below that the United States Supreme Court, in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), held that notice by publication violates due process when those to whom publication is directed, together with their mailing addresses, are readily known. Thus, there is no legal reason publication should have been used to notify SCE&G ratepayers here. Such is unconstitutional under Mullane. Moreover, and argued in that same Brief, as the project went forward, customers were given no opportunity to challenge SCE&G's prudence or lack thereof to construct the project. See Brief to S.C. PSC of Attorney General In Opposition To SCE&G's Motion To Dismiss, pp. 62-71 (submitted to this Court, January 4, 2018); see also Letter to Judge Hayes, January 5, 2018.

Art. I, § 22 of the South Carolina Constitution provides in pertinent part 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." Pursuant to Art. I, §

22, "[a]dministrative agencies are required to meet minimum standards of due process." Stono River Environmental Protection Assn. v. S.C. DHEC, 305 S.C. 90, 406 S.E.2d 340, 342 (1991).

Strikingly, as the Supreme Court stated in Porter v. S.C. Pub. Serv. Comm., 338 S.C. 164, 168-69, 525 S.E.2d 866, 868 (2000), "[r]ate increases are of primary concern to the public and are the essential reason for requiring notice." (emphasis added). Thus, Porter established that ratepayers possess "private rights" or property rights which may not be taken without due process.

Here, as in Porter, ratepayers were clearly given no constitutionally adequate notice or opportunity to be heard, in violation of Art. I, § 22. Prior to the imposition of any of the nine "revised rate" increases for additional capital costs imposed pursuant to § 58-33-280, ratepayers were virtually deprived of any due process by the BLRA. In contrast to the general rate case procedure, in which each customer is usually notified of a rate increase by mail, the BLRA's § 58-33-280, on its face, provides for no notice to customers prior to the revised rate increase. While some form of notice – notice by publication – was provided, see SCE&G Memorandum In Support of Its Motion to Stay or Dismiss, (January 2, 2018) at 22, such notice was constitutionally inadequate as violative of due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950) ["It would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the court."].

Moreover, the ratepayer was given little, if any, opportunity to be heard with respect to the revised rate increase. Pursuant to § 58-33-280, the SCE&G customer who happened to hear about the proposed rate increase, by reading a legal notice in the newspaper, could then submit only "written comments" prior to the revised rate's becoming effective. Only after the increase had been approved, was the ratepayer notified by bill insert, and only then, could he or she challenge the revised rates by bringing an entirely new action. See § 58-33-285. This "horse is

out of the barn" procedure is in stark contrast to the normal rate case and is a gross violation of due process. See Goldberg v. Kelly, 397 U.S. 254, 269 (1970) [written submissions do not satisfy due process]. The BLRA thus allows ratepayers' property to be taken with no constitutionally meaningful notice or opportunity to be heard in violation of Art. I, § 22 of the South Carolina Constitution, as well as the Due Process Clauses of the federal and state Constitutions (Amendment XIV; Art. I, § 3). See Porter, supra; Barasch v. Pa. Util. Comm., 546 A.2d 1296, 1306 (Pa. 1988) ["We disagree with West Penn's contention . . . that the due process rights of its customers would be protected adequately by a procedure involving publication of the Commission's decision in the Pennsylvania Bulletin followed by a thirty-day period in which interested persons might submit written comments on the decision."]. Here, the Act does not allow ratepayers to have a meaningful opportunity to be heard on revised rates.

But these Due Process violations are only a portion of the picture of the BLRA's constitutional flaws. The customer is deprived of any remedy to challenge SCE&G's prudency in the construction of the project. As Justice Hearn aptly observed for the Court in S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm., 388 S.C. 488, 495-96, 697 S.E.2d 587, 592 (2015), the BLRA has "no mechanism in place to challenge the prudence of S.C.E.&G's financial decisions." Nothing could be a truer statement. Not only is the project deemed "used and useful" by the BLRA before the first shovel of dirt is ever dug, see § 58-33-275(A), but § 58-33-275(A) and (B) forbid ratepayers from challenging or reopening "in any subsequent proceeding" the question of prudency of the project's capital costs going forward. Our Supreme Court noted that the purpose of this removal of a remedy to challenge prudency was to alter past practice and to remove "[t]he possibility of prudency challenges while construction was underway. . . ." S.C. Energy Users Comm. v. SCE&G, 410 S.C. 348, 359, 764 S.E.2d 918-19 (2014).

Such a prohibition violates both procedural and substantive due process. No matter what the changes in circumstances or economic conditions might be, no matter how imprudent the project may have become, the BLRA serves as a barrier to a prudency challenge of the project by ratepayers along the way. This violates due process in its most basic form by taking ratepayers' property, but offering no remedy to challenge that taking. See State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2014) [statutory ban for life on any subsequent challenge to offender's status is arbitrary and violates substantive due process].

As the United States Supreme Court has held in a closely analogous situation, a state law which does not afford procedural protections, such as adequate notice, terminates "every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund" and thus violates Due Process. Mullane v. Central Hanover Bank, 339 U.S. at 311. A statute such as was present in Mullane (and here) which was procedurally flawed, by allowing only notice by publication, deprived the beneficiaries of property, "cut[ting] off their rights to have the trustee answer for requirement of their interests." Id. at 313. Accordingly, severance of a remedy was "impermissible unless constitutionally adequate notice and hearing procedures were established before the settlement process went into effect." Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982) (reaffirming Mullane). Such a prohibition is arbitrary.

In this instance, the BLRA does precisely the same thing as the statutes or conduct deemed unconstitutional in Porter, Dykes, Mullane, and Zimmerman Brush. It authorizes the taking of ratepayers' property, in the form of higher utility rates, but allows no opportunity to challenge such taking of property through appropriate due process procedures. See S.C. Const. Art. I § 22. Moreover, the BLRA's affirmative deprivation of a remedy to challenge SCE&G's imprudence is, as the Court in the 2014 Energy Users case recognized, a major departure from

past practice in South Carolina. We believe it is a procedure which is totally arbitrary and is thus a violation of substantive and procedural due process. When combined with the BLRA's inadequate notice and opportunity to be heard with respect to revised rates, the statute's prohibition upon further challenge to SCE&G's prudency serves as a body blow to the utility's customers. SCE&G has been authorized by the BLRA to continue charging revised rates (18%) with no accountability, resulting in no nuclear plant.

Moreover, in other ways, the BLRA is nothing more than what might be termed the "Stockholders' Protection Act." The Act authorizes ratepayers to subsidize utility investors and to shift the burden from the stockholder to the consumer. SCE&G stated in its brief in Friends of the Earth v. Pub. Serv. Comm., 387 S.C. 260, 692 S.E.2d 910 (2010), that such "statutory finality provides certainty for investors." To paraphrase our Supreme Court, government cannot "join hands with a [private company] and undertake a project primarily of benefit to the [company] with no assurance of more than negligible advantage to the general public." Karesh v. City of Council of City of Charleston, 271 S.C. 339, 343, 247 S.E.2d 342, 344 (1978). This is precisely what the BLRA does. SCE&G acknowledges that it was the "implicit bargain" in the passage of the BLRA to "ensure that . . . investors were repaid." SCE&G Brief to Public Service Commission, (October 31, 2017) at 23. Still today, investors continue being "repaid" through the revised rates, which have been unconstitutionally imposed. Such a stark, unadulterated private purpose cannot, consistent with the State Constitution, be deemed regulation of utilities "to the extent required by the public interest." This "subsidy" to investors and mandated transfer of property from the ratepayer to the utility thus violates Art. IX, § 1 [requirement of regulation of utilities as required by the public interest] and Art. I, § 13 ["Takings Clause"] of the State Constitution.

Further, the BLRA unlawfully delegates legislative power to the private utility. There is no doubt that the ratemaking authority is a legislative power exercised through the General Assembly by the Public Service Commission. See Art. IX, § 1 of the South Carolina Constitution and Section 1 of Act No. 440 of 1980. See also In re Carolina Water Service, Inc., 2007 WL 4944726 (Nov. 19, 2007) ["all regulation of public utilities must be conducted in a manner consistent with the public interest. The State Supreme Court has recognized [Art. IX, § 1] as the underlying basis of the Public Service Commission's authority to regulate public utilities."]. Here, however, the BLRA has essentially delegated this authority to SCE&G, particularly as contained in the abandonment provision set forth in § 58-33-280(K). Pursuant to this abandonment provision of the BLRA, it is up to SCE&G, not the PSC, or General Assembly, to end the project, subject only to a showing that the abandonment is prudent. Thus, we are left with a situation that no matter what, no matter how imprudent, SCE&G is in control of the situation after the base load review order, and neither ratepayers nor the State have much to say about it.

In short, the BLRA is the poster child for legislation which fully supports SCE&G and fully ignores SCE&G customers. The Act is thus in contravention of the constitutional requirement that the interests of utilities and ratepayers must be balanced as set forth in Fed. Power Comm. v. Hope Nat. Gas Co., 320 U.S. 591, 602-03 (1944) and Southern Bell Tel. Co. v. PSC, 270 S.C. 590, 596, 244 S.E.2d 278, 282 (1978).

ARGUMENT

I

THE BLRA DOES NOT PROVIDE FOR ADEQUATE NOTICE IN VIOLATION OF THE DUE PROCESS CLAUSE AND CONTRARY TO THE APA

As our Supreme Court stated in Kuschner v. City of Camden Planning Comm., 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008),

> [p]rocedural due process imposes constraints on government decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments of the United States Constitution. Matthews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review. S.C. Const. Art. I, § 22; Stono River Envtl. Protection Assn. v. S.C. Dept. of Health and Envitl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991).

And, as the Court stated in Brown v. S.C. Bd. Ed., 301 S.C 326, 328-29, 391 S.E.2d 866, 867 (1990), "[t]he fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of property or liberty interest by the State." (citing Bd. of Regents v. Roth, 408 U.S. 564 (1972)); Art. I, § 22 of South Carolina). Where the issue turns on questions of fact, due process requires the opportunity to confront and cross-examine adverse witnesses. Id.

Article I, § 22 of the South Carolina Constitution in pertinent part requires 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. . . ." Our Supreme Court has made clear that this constitutional provision governs proceedings of the Public Service Commission as to rate increases. Porter v. S.C. PSC, 338 S.C. 164, 525 S.E.2d 866 (2000). In Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997), the Court described the purpose of the Constitution's framers with respect to Art. I, § 22 as follows:

> [i]n recognition of the increasing number of governmental powers delegated to administrative agencies, South Carolina Constitution article I, § 22 was added to the 1895 Constitution in 1970 "as a safeguard for the protection of liberty and property of citizens. Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895, p. 21 (1969). . . .
>
> We have interpreted this provision as specifically guaranteeing persons the right to notice and an opportunity to be heard by an administrative agency, even when a contested case under the APA is not involved. Stono River EPA v. Department of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991). . . . [Art. I, § 22] mandates notice and an opportunity to be heard at some point before the agency makes the final decision.

Art, I, § 22 was applied in the Porter case, discussed above, which concluded that ratepayers were given inadequate notice and opportunity to be heard prior to a rate increase in violation of due process. In Porter, ratepayers were notified through newspaper publication of "rate adjustments" and of a public hearing in which they might participate. Nevertheless, the Court concluded that the notice given was inadequate to satisfy the relevant statute, as well as the requirements of Art. I, § 22.

SCE&G incorrectly has previously argued that Porter stands only for the fact that the statutory notice requirements in that instance were not followed. To the contrary, the Court in Porter clearly separated the statutory notice from the requirements of due process required by Art. I, § 22, concluding that "the rate increases were ordered without adequate notice in violation of due process." 338 S.C. at 170, 525 S.E.2d at 869. According to the Court, "[r]ate increases are of primary concern to the public and the essential reason for requiring notice." 338 S.C. at 168-69, 525 S.E.2d at 868 (emphasis added). In the Supreme Court's view, ". . . the public was completely deprived of an opportunity to be heard." 338 S.C. at 170, 525 S.E.2d at 869. Thus, there was substantial prejudice to the ratepayers. Porter clearly enunciates the rule, contrary to SCE&G's contention, that ratepayers possess due process rights with respect to rate increases and that there is considerable prejudice to the ratepayer to paying higher rates. Further, Porter recognized that an inadequate notice may well lead to a complete deprivation of the opportunity

to be heard. Accordingly, prior to any rate increase, adequate notice and an opportunity to be heard pursuant to Art. I, § 22 of the South Carolina Constitution is mandated.

Both state and federal appellate courts have consistently pointed to the constitutional flaws in notice by newspaper publication which was the only notice given ratepayers before revised rates were ordered under the BLRA. In the context of notice requirements under Article I, § 22 (and the federal Due Process Clause), the South Carolina Court of Appeals has stated that, although notice by newspaper publication may be adequate "'where it is not reasonably possible or practicable to give more adequate warning,'" publication "'is constitutionally insufficient where actual notice by mail is feasible. '" Caldwell v. Wiquist, 402 S.C. 565, 575-76, 741 S.E.2d 583, 589 (Ct. App. 2013), quoting United States v. Borromeo, 945 F.2d 750, 752 (4th Cir. 1991)). According to the Wiquist Court,

> "[i]f the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process." Montgomery v. Scott, 802 F.Supp. 930, 935 (W.D.N.Y. 1992).

Also instructive is Miss. Power Co., Inc. v. Miss. Pub. Serv. Comm., 168 So.3d 905 (Miss. 2015). There, the Mississippi Supreme Court addressed that State's Base Load Review Act in the context of due process for ratepayers. It was argued that "the assessments (increased rates) ordered by the Commission's actions violate his and others' due process rights." 168 So.3d at 913. The Mississippi Supreme Court en banc held that "[t]here is no question that the taking of private funds is a transfer of the property and results in the deprivation of that property." Id. at 914. Under Mississippi law, notice was required to be given customers of a "major" rate increase both by newspaper publication and by insert in the customer's bill. However, many in Mississippi received no such notice. The dissent reasoned that "notice of the rate proceedings was provided by publication," thus fully meeting due process requirements. Id.

at 928 (Dickinson, J., dissenting). But the majority disagreed, using language remarkably similar to the situation here:

> Blanton raises his objections, not only for himself, but also for the unnoticed ratepayers. 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. Ratepayers first received notice of MPC's intent to increase rates after entry of the April 24, 2012, Order, when an increase in rates was a fait accompli. "[A]s a practical matter," ratepayers should have been provided notice in the initial proceedings in order to protect their "substantial interest … [in the] outcome of the proceeding," and if a ratepayer, after receiving such notice, desired to protect his/her interests, the ratepayer could do so by intervening in the proceedings. See Public Utilities Rules of Practice and Procedure 6.121. Yet ratepayers were not afforded procedural due process via notice.

Id. at 914-915 (emphasis added). Thus, the Mississippi Supreme Court held that ratepayers were deprived of procedural due process for want of notice. See also Pa. State Univ. v. Pub. Util. Comm., 988 A.2d 771, 782 (Pa. 2010) ["... Allegheny Power provided PSU with adequate notice through its customer bill inserts."]. In this instance also, notice was given to SCE&G customers for the revised rate increases by newspaper publication prior to their being ordered, totally insufficient according to the Mississippi Power case.

The revised rates authorization for the BLRA is set forth in §§ 58-33-280, -285 and -287. As noted, Section 58-33-280 does not contain a provision for any notice whatsoever to customers of a revised rates increase. However, as indicated, notice by publication was provided here. With respect to the opportunity for the customer to be heard or challenge the revised rates, the process is equally flawed. Section 58-33-280 provides that "[w]ritten comments to the Commission and the Office of Regulatory Staff concerning the revised rates and the information supporting them shall be allowed within one month of the revised rates filing." Once the revised rates are ordered by the PSC and the utility is "granted a rate increase in the revised rates order,"

then "the utility shall provide notice to its customers with its next billing." § 58-33-280(H). According to § 58-33-280(H), the "utility may implement revised rates for bills rendered on or after the date selected by the utility, which may not be sooner after revised rates are approved."

In other words, the customer received notice of the fact that revised rates were being proposed only by newspaper publication, and then could submit only "written comments" thereupon. However, each customer was notified "with the next billing" once "the utility [was] granted a rate increase in the next revised rates order. . . ." Such a disparity in treatment of ratepayers with respect to the notice they received is not only appalling; it is unconstitutional.

Also pertinent to the revised rates equation is § 58-33-285 which provides for the customer's opportunity for "review" of the revised rates order. Pursuant to § 58-33-285(A), an "aggrieved party" may, within 30 days of the issuance of a revised rates order, petition the PSC "for review of the order. . . ." However, Subsection (E) of § 58-33-285, provides that such filing "must be considered a new proceeding subject to the provisions of Section 58-33-240."

Section 58-33-240, which § 58-33-285 references, is indeed pertinent. Subsection (A) states in pertinent part as follows:

> [e]xcept as otherwise specified in this article, all procedural requirements that apply to general rate proceedings by law or regulation shall apply to proceedings and combined proceedings, to revised rate proceedings, and for the judicial review of orders issued under this article. (emphasis added).

Subsection (C) further provides with respect to the review of the revised rates order once issued that:

> [i]n proceedings to review revised rates orders, no further notice to the public, customers, and others is required additional to that provided upon the filing of the proceeding or combined proceeding. In proceedings to review revised rates orders, the utility's revised rates filing shall serve as the application and the utility, must be considered the applicant.

Section 58-33-240(A), pursuant to its literal reading, mandates that "all procedural requirements applicable to general rate proceedings" are applicable to revised rate proceedings.

Subsection (C), which is clearly applicable to the "review" of the revised rate order, simply says no further notice to customers is necessary. Thus, it appears that § 58-33-240(A) requires the typical notice given in a general rate proceeding must also be given for revised rates. Such is usually a thirty day notice to each customer both by publication and by direct notice to the customer. See § 1-23-320 (Administrative Procedures Act). See also 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."].

Regardless of the BLRA, however, the APA does not authorize notice by publication in this circumstance. As we have discussed in a previous Memorandum, in 2008, after the BLRA had been enacted in 2007, the General Assembly re-enacted the Administrative Procedures Act including the definition of a "contested case' in § 1-23-505. A "contested case" for purposes of the APA means ". . . a proceeding including, but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a party are required by law or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency of the Administrative Law Court after an opportunity to be heard." (emphasis added). There is no doubt that "ratemaking" is a "contested case" and would include the revised rates proceedings. See Op. S.C. Att'y Gen., 1980 WL 121176 (April 17, 1980) [rate proceedings constitute a "contested case."]. Section 1-23-320 of the APA mandates a specific form of actual, individualized notice in contested cases. See 1-23-320(b).

In S.C. Dept. of LLR v. Girgis, 332 S.C. 162, 503 S.E.2d 490 (Ct. App. 1999), the Court of Appeals reaffirmed that in a contested case, § 1-23-320(b) requires individualized notice. Although "[d]ue process does not mandate any particular form of procedure[,] . . . [c]ertain minimum elements must be present." Citing Huellmantel v. Greenville Hosp. System, 303 S.C.

549, 402 S.E.2d 489 (Ct. App. 1991), the Court in Girgis concluded that due process must include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. 332 S.C. at 166, 503 S.E.2d at 492. In Girgis, the Court held that the complaint against him was insufficient to give him adequate notice. Notice there consisted of letters to Girgis outlining in detailing his alleged violations. The Court referenced § 1-23-320(b) of the APA (specifying notice requirements), concluding that "these requirements have been met." 332 S.C. at 167, 503 S.E.2d at 492. Moreover, the 1980 Attorney General's Opinion, referenced above, concluded that the Consumer Advocate, as a party must receive individualized notice under the APA. Thus, the notice by publication in this case was defective, not only for purposes of due process, but the APA as well.

Nevertheless, notice by publication was used for revised rates. Even if the PSC's interpretation of the BLRA is correct, notice by publication not only violates the APA, but is constitutionally inadequate, as we demonstrate below.

The decisions, discussed above, regarding the constitutional requirement of adequate notice, such as Porter, supra, Miss. Power Co., supra and Pa. State Univ., supra support the principle that notice to utility ratepayers must provide those ratepayers "'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" Miss. Power, 168 So.3d at 913, quoting Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978). The BLRA, and its application to SCE&G ratepayers fails completely with respect to this constitutional requirement.

In an analogous situation, the United States Supreme Court in Mullane, supra, relied upon by Miss. Power, vividly illustrates the constitutional flaws in notice by publication. There, the question was the constitutionality of the statutory notice "to beneficiaries on judicial settlement of accounts by the trustee of a common trust fund established under the New York Banking

Law." 339 U.S. at 307. Central Hanover Bank and Trust had established a common trust fund and petitioned the court for settlement as common trustee. There were many beneficiaries of the trust and "it is clear that some of them were not residents of the State of New York." Id. at 309. According to the Court, "[t]he only notice given beneficiaries of this specific application was by publication in a local newspaper in strict compliance with the minimum requirements to N.Y. banking law. . . ."

The Supreme Court noted that "[i]n two ways this proceeding does or may deprive beneficiaries of property." First, according to the Court was the deficient notice by publication. The Court noted that it must balance the interest of the State in bringing the issue of the trust as to its beneficiaries to final settlement with "the individual interest sought to be protected by the Fourteenth Amendment." Id. at 313-14. As is the case with the BLRA, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Id. at 314.

In the Court's view, notice "must be of such nature as reasonably to convey the required information." Id. Process "which is a mere gesture is not due process." Id. at 315. Notice by publication did not afford due process and the Mullane Court made it clear why not:

> [i]t would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. [Here the PSC]. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident on advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation, the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

Id. The Court further distinguished the validity of notice on publication where beneficiaries' "whose interests or addresses are unknown to the trustee" from "present beneficiaries of known place of residence. . . ."

> [e]xceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the merits to apprise them of its pendency.

Id. at 318 (emphasis added).

According to the Mullane Court, such flawed procedure, as was present in that case and is certainly present here, had the following effect:

> [i]n two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

Id. at 313. Thus, under Mullane, and other cases referenced above, notice to ratepayers by newspaper publication is constitutionally inadequate.

II

THE BLRA PROVIDES NO ADEQUATE OPPORTUNITY TO BE HEARD IN VIOLATION OF THE DUE PROCESS CLAUSE AND CONTRARY TO THE APA

Not only is the notice to customers provided by the BLRA with respect to revised rates completely flawed, but the lack of opportunity for ratepayers to be heard is even worse. In our January 5 supplemental letter to this Court, we referenced one of the PSC Orders, which had previously been submitted in our briefing to the PSC; such Order prohibited any intervention by a customer prior to the revised rates order. See PSC Order No. 2013-514 (July 10, 2013) (quoted in January 5 letter to Judge Hayes). As we noted in that letter, "[a]s the Order from the PSC

cited in our Supplemental filing (to the PSC) demonstrates, customers could not intervene except in a 'new' proceeding, in essence through a 'collateral attack' upon the order revising rates. Essentially, no one did this because the revised rate increase was a fait accompli at that point." While the BLRA may seek to streamline the process through "advanced costs," such has completely sacrificed the interests of SCE&G ratepayers.

The "written comments" provision of § 58-33-280 is particularly flawed. Pursuant to § -280(C), written comments may be submitted "concerning the revised rates and the information supporting them." But due process demands an opportunity to be heard on revised rates and the basis for such increases in a way far beyond the submission of written comments thereupon. Porter and Art. I, 22 require an evidentiary hearing with evidence submitted, cross-examination allowed, and the ability to refute the utility's presentation concerning revised rates.

The BLRA's text in Subsection (C) of Section -380 recognizes that revised rates will likely be challenged. Subsection (C) uses the language written comments "concerning the revised rates and the information supporting them." However, the BLRA's limitation of such a challenge before the imposition of a rate increase to written comments only is requiring the ratepayer to fight the increase with one hand tied behind the back. As the United States Supreme Court held in Goldberg v. Kelly, supra, "written submissions do not afford the flexibility of oral presentations; they do not afford the recipient [here, the ratepayer] to mold his argument to the issues the decision maker appears to regard as important. . . . [W]ritten submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 269. When one combines the BLRA's limitation to written comments before rate increases are ordered with a notice of the proposed revised rate increases by newspaper publication, the ratepayer's due process offered by the BLRA is but a mere token gesture.

Such a lack of procedure was present in Barasch v. Pa. Util. Comm., 546 A.2d 1296 (Pa. 1988). There also, notice by publication was combined with the submission of "written comments" by ratepayers. In the Court's view, "such a procedure would needlessly postpone the customers' opportunity to challenge the proposed action until after the Commission had formulated a decision as to the matter and had a stake in preserving that decision." Thus, the Court held:

> [i]n our view, due process requires that, before the PUC may issue a declaration approving the legality of the terms and conditions of a contract for a utility's purchase of power from a QF that includes payments for capacity, the utility's customers must be provided with notice of the proceeding and an opportunity to challenge the proposed action.

Likewise, it does no good in this instance to allow the submission of a few written comments (by those who happened to hear about the proposed revised rate increase), only providing notice and an opportunity to be heard after the fact. That is hardly due process to SCE&G ratepayers.

In Brown v. S.C. State Bd. of Ed., 301 S.C. 326, 328-29, 391 S.E.2d 866, 867-68 (1990), the Supreme Court addressed a situation similar to the constitutional flaws contained in § 58-33-280. Brown involved the invalidation of a teaching certificate and a determination of the process that was due. At issue, was the validity of a regulation alleged as violative of procedural due process pursuant to the 14th Amendment and Art. I, § 22. The Court noted that "[t]he State must afford notice and the opportunity for a hearing appropriate to the nature of the case." According to the Supreme Court,

> [w]e hold Reg. 43-59 unconstitutional because it does not provide for notice and an opportunity to be heard when the State deprives a teacher of his or her teaching certificate. The fact that appellant was granted a hearing as a matter of favor in this case does not save the regulation from constitutional under the Due Process Clause. Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S.Ct. 625, 59 L.Ed. 1027 (1915). Further, the hearing appellant was granted did not comport with procedural due process since the Board did not disclose any evidence substantiating cancellation of the NTE scores in order to allow appellant the opportunity to contest the allegations against her.

As can be seen in Brown, the fact that the Board of Education granted a hearing gratuitously did not cure the regulation's lack of provision for notice and a hearing. Similarly, § 58-33-280, providing for no notice or meaningful opportunity to be heard within the statute's four corners is fatal to its unconstitutionality. By employing a "written comments" approach before the revised rate increase and a "new" proceeding requiring the ratepayer affirmatively to intervene after the increase has been approved, disregards existing procedure and violates due process. Porter clearly mandates that prior to a rate increase, notice and an opportunity to be heard must be given to ratepayers. As the United States Supreme Court has observed, ". . . stockholders are not the only persons whose rights or interest are to be considered. The rights of the public are not to be ignored." Smyth v. Ames, 169 U.S. 466, 545 (1898). Yet, here, § 58-33-280 allows ratepayers to submit only "written comments" even though there is no provision for notice to them in the statute. Notice given to customers through bill inserts after the rate increase has gone into effect and allowing intervention by ratepayers in a new proceeding after the increase has gone into effect is grossly insufficient. Such a procedure places an impossible burden upon all ratepayers.

Again, ratemaking proceedings constitute a "contested case" under the APA. Our Supreme Court has emphasized that Art. I, § 22 requires not only adequate notice, but a meaningful opportunity to be heard. As was said by the Supreme Court in Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 484-85, 636 S.E.2d 598, 615, overruled on other grounds in Joseph v. Labor Licensing & Regulation, 417 S.C. 436, 790 S.E.2d 776 (2016),

> [t]he requirements of procedural due process, usually deemed to apply in a contested case or hearing which affects an individual property or liberty interest, generally include adequate notice, the opportunity to be heard in a meaningful time and in a meaningful way, the right to introduce evidence, the right to confront and cross-examine witnesses whose testimony is used to establish facts, and the right to meaningful judicial review.

The "right" to submit "written comments" by customers while revised rates are being considered, and the "right" to then intervene in a "new" proceeding after the rate increase has been ordered,

is hardly the "opportunity to be heard in a meaningful time and in a meaningful way" in conformity with due process as required by Art. I, § 22. As was stated by the Court in Popowsky v. Pa. Util. Comm., 805 A.2d 637, 643 (Pa. 2002), ". . . the allowance by the commission to submit comments [regarding rates] without the opportunity to present evidence or cross-examine witnesses did not constitute a meaningful opportunity to be heard. . . ." In other words, the entire revised rates procedure denies SCE&G ratepayers adequate due process under Art. I, § 22.

Moreover, as emphasized and discussed extensively in the September 26th Opinion, § 58-33-275(A) and (B) contain prohibitions which violate both procedural and substantive due process. Subsection (A) states:

> [a] base load review order [the initial order] shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are properly included in rates so long as the plant is being constructed within the parameters of:
> (1) the approved construction schedule including contingencies; and
> (2) the approved capital costs estimates, including specified contingencies.

Subsection (B) further provides that

> 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 provision and Section 58-33-280 and other applicable provisions of this article.

Furthermore, as Justice Hearn recognized in S.C. Energy Users, supra, there is "no mechanism in place [in the BLRA] to challenge the prudence of SCE&G's financial decisions."

Our Supreme Court has struck down a statute which forecloses all subsequent challenges to an initial determination made as violative of due process. State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2014). As Dykes makes clear, a "complete absence of any opportunity for judicial review," such as is present in the BLRA's § 58-33-275(A) and (B), may be deemed arbitrary and not rationally related to the Legislature's stated purpose of protecting ratepayers from a utility's imprudent decisions. See Section 1A of Act No. 16 of 2007 (Base Load Review Act). Given

Porter's requirement of protection of the due process rights of ratepayers, Sections 58-33-275(A) and (B) arbitrarily deprive ratepayers of their due process right to challenge SCE&G's financial decisions. As was stated in the September 26, 2017 Opinion:

> [b]y 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 prudency 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 prudency 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 prudency 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 prudency]. Moreover, the statute creates an irrebuttable and, we believe, irrational conclusion with respect to prudency 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.

We reiterate this analysis here. To preclude ratepayers from questioning the prudency of a project is to saddle them with continuing to pay for building nuclear plants no matter how much of a "white elephant" they might have become.

All in all, the BLRA's pledged purpose to protect ratepayers is simply not accurate in terms of the stark reality of the statute. Not only do the provisions relating to revised rates offer no due process protections to customers to challenge revised rate increases, but § 58-33-275(A) and (B)'s foreclosure of any right to challenge prudency leaves ratepayers with no recourse to

protest the runaway waste and cost overruns which occurred as a matter of public record during the Project's existence. In summary, the BLRA gives ratepayers no real or meaningful opportunity to contest rising rates or the project's prudency. In the words of Porter, "the public [has been] . . . completely deprived of an opportunity to be heard." Porter, supra.

III

ART. IX § 1 AND "TAKINGS CLAUSE" OF STATE AND FEDERAL CONSTITUTIONS

Art. IX, § 1 of the South Carolina Constitution requires the General Assembly to regulate utilities "to the extent required by the public interest." As the Opinion and our earlier briefing indicates, the West Committee, selected to revise the South Carolina Constitution, drafted Art. IX, § 1 as a "mandate to the General Assembly" that utilities be regulated "in the public interest." See West Committee Final Report at 106-107.

The regulation of utilities "to the extent required by the public interest" is certainly a broad term and there is no doubt that a determination by the General Assembly will be given great deference. However, such deference is not unlimited, as demonstrated by the West Committee Report, referenced above. Consistent with other such broad provisions in the Constitution, the Legislature's compliance with the "public interest" standard remains subject to judicial review. See Feldman & Co. v. City Council of Chas., 23 S.C. 57 (1885) [leaving the determination of public purpose completely to the Legislature "would amount to no restriction at all."].

Our Supreme Court has made clear over many years as to the governing standard for regulation of utilities in the "public interest." As the Court stated in Mims v. Edgefield Co. Water and Sewer Auth., 278 S.C. 554, 556, 229 S.E.2d 484, 486 (1983),

> [h]owever, the reasonableness of rates should be determined by an evaluation of the utility's holdings and obligations and the return which the utility realizes from the rates. So. Bell Tel. & Tel. v. Public Service Commission,

> 270 S.C. 590, 244 S.E.2d 278 (1978). The focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be a confiscatory to the utility or so high as to be unduly burdensome to the utility's customers. Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1922); Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819 (1898).

Moreover, in S.C. Cable Television Assn. v. Pub. Serv. Comm. of S.C., 313 S.C. 48, 51, 437 S.E.2d 38, 39-40 (1993), the Court stated:

> [i]t is the PSC's statutory duty to set rates which are just and reasonable. S.C. Code Ann. § 58-9-210 (1976). 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. Southern Bell v. Pub. Ser. Comm'n., 270 S.C. 590, 244 S.E.2d 278 (1978); see also S.C. Code Ann. § 58-9-570 (1976). In South Carolina, rate making is based on historical data, with adjustments permitted for any known and measurable out-of-period changes such as the future effective date of a court ruling or the promulgation of not effective regulations. Hamm v. Southern Bell, 302 S.C. 132, 394 S.E.2d 311 (1990) (emphasis in original); Southern Bell v. Pub. Ser. Comm'n., supra.

In the S.C. Cable case, the Court held that the PSC lacked authority to vary from "this traditional rate-making scheme. . . ." 313 S.C. at 51, 437 S.E.2d at 40. In the Court's mind, the particular rate-making scheme utilized by the PSC "allows the utility to earn a rate of return above that which is fair and reasonable."

Southern Bell, supra stated quite clearly that the foundation for South Carolina's regulation of utilities is the United States Supreme Court decisions in Bluefield, supra and Hope Natural Gas, supra. The Court stressed in a quote from Bluefield that "[a] public utility is entitled to such rates as will permit it to earn a return on the value of the property 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 595-96, 244 U.S. at 692-93. Moreover, the Southern Bell

Court quoted Hope Natural Gas; regardless of what ratemaking formula is used, "the fixing of 'just and reasonable' rates, involves the balancing of the investor and the consumer interests." 270 S.C. at 596, 244 S.E.2d at 281, quoting Hope, 320 U.S. at 602-03.

In short, according to South Carolina law, Bluefield and Hope represent the quintessential definition of regulation of utilities in the "public interest." In the context of utility regulation, the importance of maintaining the proper balance between customer and investor remains paramount. For example, the Virginia Supreme Court has stated that "an important aspect of public interest is assurance 'that an affiliated company of a regulated utility does not receive unjust benefits to the detriment of the utility's customers.'" Roanoke Gas Co. v. Commonwealth of Va., 234 S.E.2d 302, 305 (1977), quoting Brasfield, "Regulation of Electric utilities by the State Corporation Commission," 14 Wm. & Mary L.Rev. 589, 599 (1972-1973).

As Braswell has written, protection of the consumer is vital in any utility regulation. The need for "balancing" of consumer and investor interests is a major part of the "public interest" and emphasizes the importance of both ends of the spectrum. Therefore,

> . . . the rationale for regulation is consumer protection. Regulation is needed to ensure that rates and charges do not exceed reasonable levels, to ensure that service is adequate and reliable, and to ensure that a natural monopoly without substantial competition is unable to take unfair advantage of its monopolistic power.
>
> There is a popular misconception in the minds of many that regulation exists to guarantee utilities a profit. . . . Quite the opposite is the case: regulation exists to prevent the utilities from earning an unreasonable profit or otherwise taking advantage of consumers. The reason for this misconception is apparent. Although there now exists no question as to the power of the state to regulate utility rates, that power is limited by the utilities' constitutionally protected right not to be deprived of property without due process of law.

Braswell, at 592.

Cases such as Southern Bell, Mims and Cable Assn. all emphasize the importance of protecting consumers, as well as the public at large, in any utility regulation. Indeed, our Supreme Court has stated:

> . . . the State may engage in the public business of the generation, distribution and sale of electric power regardless of the effect upon private utilities because the welfare of the State and its people is paramount. When the right and interest of the public as a whole and its private citizens or its corporations conflict, the rights and interests of the latter must yield to the rights and interests of the public; and competition may be restrained by the courts only when it is unlawful competition which this is not, even if it results in practical confiscation of the business and property of private corporations and individuals.

South Carolina Electric & Gas Co., et al. v. South Carolina Public Service Authority, 215 S.C. 193, 205, 54 S.E.2d 777, 782 (1949).

Where constitutional analysis is dependent upon application of a "balancing" test, it is not particularly unusual for a court to determine, following application of such a test, to conclude that a statute is unconstitutional. See e.g. Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988) [applying the balancing test for Commerce Clause, Supreme Court concluded that statute was unconstitutional]. Here, the same analysis applies. Under Hope and the South Carolina cases, referenced above, the "balancing" of interests between consumers and investors – which is required to determine the constitutionality of the BLRA – the Act is so weighted toward the interests of private investors, it should be renamed the "Stockholders' Protection Act."

As Mims, supra, makes clear, there must be a proper balance struck between the interests of the utility and its customers. However, here, the Act's very purpose is to ensure that stockholders recover their investment, first and foremost. The Title of the Act states that the legislation's purpose is to enhance "the certainty of investments in the infrastructure of electric utilities. . . ." SCE&G admits that the "implicit bargain" in the Act's passage was to "ensure that . . . investors were repaid." SCE&G Brief to Public Service Commission, supra.

Every aspect of the Act virtually serves to provide aid and comfort to utility stockholders. We have discussed at length the revised rates provisions (§§ 58-33-280 and -285) which virtually

excluded customers from the process – thereby violating their due process rights. As noted above, Justice Hearn, writing for the Supreme Court in S.C. Energy Users, supra, was troubled by the fact that the BLRA has "no mechanism in place to challenge the prudence of SCE&G's financial decisions."

In another BLRA case, South Carolina Energy Users Comm. v. SCE&G, supra, the Supreme Court interpreted the Act. Such interpretation demonstrated the one-sidedness of the legislation. There, the appellants (ratepayers) argued that SCE&G's failure to adhere to the projected costs and schedules constituted, a "material and adverse deviation from the approved schedules, estimates, and projections set forth in Section 58-33-270(B)(1) and 58-33-270(B)(2). . . ." See § 58-33-275(E). Appellants argued that such a deviation allows the PSC to "disallow the additional capital costs that result from the deviation" if the utility "could have acted to avoid the deviation or minimize its effect."

However, the Supreme Court disagreed. The Court affirmed the Commission, concluding that the proceeding was an "update' proceeding under § 58-33-270, rather than a "material and adverse deviation" under § 58-33-275. Thus, SCE&G was allowed "to update the capital costs and construction schedules contained in the original base load review order." 410 S.C. at 357-58, 764 S.E.2d at 917-18.

In addition, the 2014 Energy Users case addressed the "abandonment" provision of the BLRA, contained in § 58-33-280(K). Such provision states:

> [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 utility shall bear the burden by 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 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 abandoned plant as part of an order adjusting rates under this article.

The Appellants argued that the PSC "should have conducted a prudency evaluation of the entire construction project 'going forward' at the time of the modification request." 410 S.C. at 358, 764 S.E.2d at 918. Again, the Supreme Court rejected the argument. According to the 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." Id. The Court referenced §§ 58-33-275(A) and (B) which preclude further challenges to prudency after the initial Base Load Review Order has been issued. Quoting from the PSC Order, the Court stated:

> [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 difficulties 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, over 20 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 918-919. Thus, in the Supreme Court's view, "it would be nonsensical to include such a [prudency] requirement at this stage," characterizing the updated proceedings as "likely to be a routine part of administering BLRA projects going forward (including future projects proposed by other electric utilities). . . ." 410 S.C. at 360, 764 S.E.2d at 919.

As Judge Starr wrote in Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1190 (D.C. Cir. 1987), "[r]equiring an investment to be prudent when made is one safeguard imposed

by regulatory authorities upon the regulated business for benefit of ratepayers." He addressed the fact that both prudency determinations, together with the "used and useful" rule,

> [a]re 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.

Here, the BLRA is ratepayers' worst nightmare. Customers are precluded by § 58-33-275(A) and (B) of the Act from challenging the prudency determination made in the initial base load review order. No matter how great costs escalate and how far the schedule falls behind, SCE&G ratepayers are powerless to stop it.

The obligation of a utility to act prudently is a continuing one. As was said by the United States Supreme Court in In re Permian Basin Rate Cases, 390 U.S. 747, 779 (1968), a rate commission is "obliged at each step of its regulatory process to assess the requirements of the broad public interests entrusted to its protection." Yet, the BLRA radically alters this protection of the public interest by both foreclosing review of the initial prudency determination as well as in cutting off ratepayers from virtually any procedural protections prior to their rates being raised. Such provisions are not the regulation of a utility to the extent required by Art. IX, § 1 of the State Constitution or the "Takings" Clauses of the federal and state constitutions.

The "abandonment" provision of the BLRA (§ 58-33-280(K)) is even worse, if such is possible. The essence of this provision is that it delegates to the utility the decision to end the project altogether as long as the decision to abandon is prudent. Ratepayers must continue to handsomely compensate the utility for up to 60 years, with a significant rate of return on the utility's investment. It is the tail wagging the dog. Such is an unlawful delegation to a private entity. This rate of return continues through abandonment. Yet ratepayers get nothing whatsoever back. Not the first kilowatt of electricity is generated by an abandoned nuclear plant.

It is giving the utility "something for nothing" in the worst sense of the word. In short, the BLRA was drafted to ensure that investors are fully protected and ratepayers are fully left out of the process.

Such is a "taking" of ratepayers' property and the transferring of that property to the utility's stockholders. Judge Starr's description of "no discernible benefit" to ratepayers is being all to gentle. To paraphrase the immortal Jerry Reed, SCE&G gets the "gold mine" and SCE&G's ratepayers get the "shaft."

Courts have invalidated statutes which go overboard in protecting a utility's shareholders. For example, in Stewart v. Utah Pub. Serv. Comm., 885 P.2d 759 (Utah 1994), the Utah Supreme Court struck down a statute which authorized a public utility to have veto power over an incentive rate regulation plan adopted for the utility by the Public Service Commission. There, the Court explained:

> [i]n promulgating its incentive regulation plan, the Commission exercised a legislative power delegated to it by the Legislature, and in nullifying that order, USWC [a regulated public utility], a private party, exercised a legislative power.
>
> . . . .
>
> In the instant case, the role of the commission is to protect the interests of both the ratepayers and the shareholders and to accommodate both those interests to the overall public interest. The veto power granted by the statute to a utility is a power that can be used to advance only the shareholder's interests, without regard to either the ratepayers' interests or the overall public interest. . . .

885 P.2d at 776 (emphasis added).

Likewise, here, the General Assembly has delegated to the utility, through the "abandonment" provisions [§ 58-33-280(K)] the authority to halt the project and to place upon the ratepayers' the complete burden of continuing to pay for a project which produces nothing. While it is true that the PSC must determine if the abandonment is prudent, the utility is in sole

possession of deciding when to "cash in" and be paid, regardless of the costs which are imposed upon the ratepayers and the public. As the Court said in Stewart, paraphrasing the Court there, the abandonment provision can be read "to advance only the shareholders' interests without regard to either the ratepayers' interest or the overall public interest. . . ." 885 P.2d at 776.

The Attorney General, in the September 26, 2017 Opinion, succinctly summarized the heavy burden placed upon ratepayers by the BLRA in violation of Art. IX, § 1 as follows:

> [i]t 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. Op. S.C. Att'y Gen., 2017 WL 4464415 (September 26, 2017) at 57. As applied to SCE&G ratepayers, the BLRA violates Art. IX, § 1.

As the Opinion stated, quoting Dayton Power and Light v. Pub. Util. Comm. of Ohio, 447 N.E.2d 733, 742-43 (Ohio 1983), it is "inequitable to prematurely shift the risk of plant failure from the utility's investors to the ratepayers by 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." That is precisely what SCE&G did here.

Finally, as was concluded in the Opinion:

> [r]ather 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. . . [R]atepayers are foreclosed or impeded by several provisions of the Act from challenging the prudency of the utility. . . [A]s 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. [citation omitted]. See also State v. Dykes [citation omitted]. . . These various procedural bars in the BLRA [violate due process].

CONCLUSION

The State continues to believe that the BLRA is unconstitutional as applied to SCE&G ratepayers. Therefore, this Court should grant the State's Motion for Partial Judgment on the Pleadings.

/s J. EMORY SMITH, JR.
S.C. Bar No. 5262
Deputy Solicitor General

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

OFFICE OF THE ATTORNEY GENERAL
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email: esmith@scag.gov

April 20, 2018 ATTORNEYS FOR THE STATE

Rule 11, SCRCP, affirmation:

Undersigned counsel confirms that consultation with counsel for the Defendant SCE&G as to this motion would serve no useful purpose. The State believes that Plaintiff's counsel consent to the instant motion.

April 20, 2018 /s J. EMORY SMITH, JR.