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Mar 12 2019

March 12, 2019

VIA ELECTRONIC FILING

Ms. M. Lynn Jarvis, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Joint Application of Dominion Energy, Inc. and SCANA Corporation to
Engage in a Business Combination Transaction
Docket No. E-22, Sub 551
Docket No. G-5, Sub 585

Dear Ms. Jarvis:

Pursuant to Regulatory Condition 16.5 as approved by the North Carolina Utilities Commission's ("Commission") *Order Approving Merger Subject to Regulatory Conditions and Code of Conduct* issued in the above-captioned proceedings on November 19, 2018, enclosed for filing in these dockets on behalf of Virginia Electric and Power Company, d/b/a Dominion Energy North Carolina, and Public Service Company of North Carolina, Inc., is a copy of the *Final Order Approving SCANA Energy Marketing, Inc.'s Request for Change in Ownership and Control at the Holding Company Level to Dominion Energy, Inc.* issued on March 22, 2018, by the Georgia Public Service Commission, and the *Ruling on Petitions for Rehearing or Reconsideration* issued on February 12, 2019, by the Public Service Commission of South Carolina ("SCPSC"). The SCPSC's *Order Addressing South Carolina Electric & Gas Nuclear Dockets* issued on December 21, 2018, was previously filed in these dockets on January 9, 2019.

Please do not hesitate to contact me should you have any questions. Thank you for your assistance with this matter.

Very truly yours,

/s/Andrea R. Kells

ARK:mth

Enclosures

COMMISSIONERS:

LAUREN "BUBBA" McDONALD, CHAIRMAN
TIM G. ECHOLS
CHUCK EATON
H. DOUG EVERETT
TRICIA PRIDEMORE



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MAR 22 2018

**EXECUTIVE SECRETARY
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DOCKET# DOCKET NO. 9536
DOCUMENT# 171675

IN RE: JOINT APPLICATION AND PETITION OF SCANA ENERGY MARKETING INC. AND DOMINION ENERGY, INC. FOR REVIEW AND APPROVAL OF AMENDMENT TO INTERIM CERTIFICATE NO. GM- 0010

**FINAL ORDER APPROVING
SCANA ENERGY MARKETING INC.'S
REQUEST FOR CHANGE IN OWNERSHIP AND CONTROL AT THE HOLDING
COMPANY LEVEL TO DOMINION ENERGY, INC.**

I. Background

This matter came before the Georgia Public Service Commission ("GPSC" or "Commission") on the joint petition by SCANA Energy Marketing, Inc. ("SCANA Energy" or SEM) and Dominion Energy, Inc. ("Dominion Energy") (together, the "Petitioners") filed with the Georgia Public Service Commission ("Commission") to amend its Interim Certificate No. GM-0010 to reflect a change in ownership and control at the holding company level.

SCANA Energy is a natural gas marketing company, certificated by the Commission on October 6, 1998 with Interim Certificate No. GM-0010, to provide natural gas to retail customers within the State of Georgia. SCANA Energy Marketing, Inc. is a wholly- owned subsidiary of SCANA Corporation ("SCANA"). According to the petition, SCANA Corporation will become a wholly owned subsidiary of Dominion Energy. According to the petition, Dominion Energy is a Virginia corporation is one of the largest producers and transporters of electricity and natural gas in the United States and it currently serves over six million customers in regulated and retail market. As per the petition, Sedona Corp. ("Sedona") is a South Carolina Corporation and a wholly- owned

subsidiary of Dominion Energy created solely to accomplish the Merger. On January 2, 2018, Dominion Energy, Sedona and SCANA entered into an agreement and Plan of Merger. Sedona and SCANA will merge, with SCANA being the surviving entity. As a result of the Merger, SCANA, as the surviving corporation, will become a wholly-owned subsidiary of Dominion Energy. Following the Merger, Dominion Energy and SCANA plan to operate SCANA Energy in substantially the same manner as it operated in Georgia and will service its customers in Georgia on the same basis as it has in the past.

The Commission has Jurisdiction over the amendment of the Certificate of Authority pursuant to the Natural Gas Competition and Deregulation Act, particularly O.C.G.A. Section 46-4-153, and the Commission's Rules, Chapter 515-7-3 for a natural gas Certificate of Authority to market and provide natural gas commodity sales service to retail customers who receive firm service. Pursuant to Commission Rule 515-7-3-.04(10), a Marketer must apply to the Commission to receive authorization prior to any change in ownership, name change (including doing-business-as (d/b/a) name change), adding or dropping a delivery pool group from service, owning meters, or any other substantial change that would affect their certification.

On January 19, 2018 Petitioners filed with the Commission a petition for approval of change in control at the holding company level.

II. Staff's Analysis

The Staff reviewed all filed materials related to SCANA's change in ownership request. Additionally, the Staff has reviewed the Dominion and SCANA's 10K and 10Q filed with the Commission. Staff also filed two data request and reviewed their responses. According to Staff's analysis Dominion has a strong financial standing. The Staff has concluded that the change in ownership will have no negative impact to SEM's financial or technical capability, its customers, or to the natural gas market in Georgia.

III. Finding of Facts and Conclusions of Law

The Commission finds and concludes that the Petitioners request for a change in ownership will have no negative impact to SEM's financial or technical capability, its customers, or to the natural gas market in Georgia. The Commission also finds that it is appropriate to approve Petitioners request to amend its Interim Certificate No. GM-0010 to reflect a change in ownership from SCANA Corporation, parent of SCANA Energy Marketing INC., to be a wholly owned subsidiary of Dominion Energy.

* * * * *

IV. Ordering Paragraphs

WHEREFORE, IT IS ORDERED, that all findings of fact and conclusions of law contained within the preceding sections of this Order are hereby adopted as the findings of facts and conclusions of this Commission.

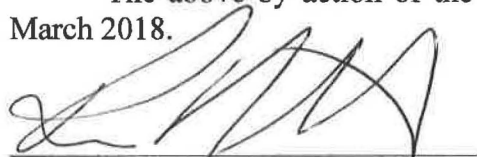
ORDERED FURTHER, that the Commission approves the joint application and petition of SCANA Energy Marketing INC. and Dominion Energy, INC. for approval of amendment to Interim certificate GM- 0010 to reflect a change in ownership from SCANA Corporation, parent of SCANA Energy Marketing INC., to be a wholly owned subsidiary of Dominion Energy.

ORDERED FURTHER, that the change in ownership will have no negative impact to SCANA Energy Marketing INC.'s financial or technical capability, its customers, or to the natural gas market in Georgia.

ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument, or any other motion, shall not stay the effectiveness of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as the Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 20th day of March 2018.



Reece McAlister
Executive Secretary



Lauren "Bubba" McDonald
Chairman

3-22-18

Date

3/22/18

Date

Ann. Regs. 103-825. On December 21, 2018, the Commission issued Order No. 2018-804 finding that the decision by South Carolina Electric & Gas Company (“SCE&G” or the “Company”) to abandon its nuclear development project (the “Project”) on July 31, 2017, was prudent, approving the proposed merger of SCANA Corporation (“SCANA”) with Dominion Energy, Inc., (“Dominion Energy”) and adopting the voluntary plan proposed by Dominion Energy and SCE&G in support of the merger as the most appropriate resolution to the rate and rate regulatory matters associated with the Project. That plan is the Customer Benefits Plan–B Levelized (“Plan–B Levelized”).

On December 24, 2018, FOE and the Sierra Club filed a timely Petition for Rehearing or Reconsideration of Order No. 2018-804. ORS did the same on December 28, 2018; and AARP, SCCCL/SACE and Mr. Knapp did so on December 31, 2018. On December 31, 2018, Lynn S. Teague filed a letter joining in these requests. On January 9, 2019, protestant Jerry Harvell filed a Request for Reconsideration of all matters.

Having carefully considered the matters raised in these Petitions, the Commission finds that they fail to identify any basis for granting rehearing or reconsideration of Order No. 2018-804. Instead, the Commission, with the exceptions stated below, affirms the findings and conclusions set forth in that Order and finds that they are amply supported by the law and the evidence and, further, are in the best interest of SCE&G’s customers.

STANDARD OF REVIEW

Under S.C. Code Ann. Reg. 103-825(4):

A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:

- (a) The factual and legal issues forming the basis for the petition;

- (b) The alleged error or errors in the Commission order;
- (c) The statutory provision or other authority upon which the petition is based.

The purpose of a petition for rehearing and reconsideration is to allow the Commission to identify and correct specific alleged errors and omissions in its prior rulings. Conclusory statements and general and non-specific allegations of error do not satisfy the requirements of the rule. *See In re S.C. Pipeline Co.*, Docket No. 2003-6-G, Order No. 2003-641, at 6 (“[A] conclusory statement based upon speculation and conjecture is no evidence at all and is legally insufficient to support a [petition for reconsideration]”). While the requirement of specificity in post-trial motions is interpreted with flexibility, at minimum the decision-making body must be “able to both comprehend the motion and deal with it fairly.” *See Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). Additionally, a party cannot raise issues in a motion to reconsider that were not raised during the proceeding. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm’n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995).

ALLEGED ERRORS CONTAINED IN THE ORDER

A. The Request for an Imprudency Finding

ORS’s primary argument in its petition for rehearing, echoed by several of the other Petitioners, is that the Commission failed to make a determination regarding prudence, or that SCE&G’s investment in the Project after March 12, 2015, was imprudent, a determination that the Petitioners assert the Commission was required to make under the

law. *See* ORS Pet. at 6; FOE/Sierra Pet. ¶¶ 2-6; AARP Pet. ¶¶ 2, 4(a)-(c); Knapp Pet. ¶ 2. However, the relief granted by Order No. 2018-804 found that capital costs incurred up to March 12, 2015, were recoverable, which is an implicit determination of prudence, and by this Order we hereby expressly find such capital costs incurred up to March 12, 2015 to be prudently incurred.

Regarding the prudence of SCE&G’s investment in the Project after March 12, 2015, ORS asserts that it is essential for this Commission to acknowledge that the regulatory compact between the utility and the regulators was broken by SCE&G’s deliberate withholding of material information and lack of transparency. We completely agree. Our discussion of the relevance of a prudency finding in our initial Order should not be construed as holding SCE&G unaccountable for their imprudent actions. Indeed, our original order recognized the loss of trust and harm that resulted from SCE&G’s actions subsequent to March 12, 2015.¹ To clarify, SCE&G’s actions were imprudent under any definition of the term and this Commission will not tolerate deliberate withholding of material information, lack of transparency, or opacity from any entity under our jurisdiction.

In Order No. 2018-804, the Commission determined that Plan–B Levelized, which did not request reimbursement of investment after March 12, 2015, was the plan that most

¹ On page 17 of Order No. 2018-804, the Commission addressed “the withholding of information from ORS and this Commission related to the SCE&G internal estimate at completion (EAC) calculations and the Bechtel Report.” The Commission further stated: “We have heard conflicting testimony on the reasons for the withholding of that information, but even SCE&G recognizes the resulting loss of trust from its lack of transparency, and it is beyond dispute that SCE&G failed to disclose any iteration of the Bechtel Report to ORS or the Commission. SCE&G and Dominion have agreed to use the ORS date of March 12, 2015, as the end date for reimbursement of capital investment, which is further recognition of the harm that comes from a lack of transparency.”

clearly benefited customers over the short and long term and chose it as the basis for the rates SCE&G was ordered to charge going forward. The Commission chose this plan because, among other things, it provided a residential bill reduction of approximately 15% compared to prior, permanent rates and did so while protecting SCE&G's creditworthiness and future ability to serve customers safely and reliably.

Under Plan–B Levelized, SCE&G voluntarily offered to write-off for regulatory purposes \$1.962 billion in Project-related assets with financial support from Dominion Energy. Tr. at 1140; 4217-3–4217-4. Dominion Energy agreed to provide financial support to recapitalize SCE&G in the face of these write-offs and to provide cash to replace revenue that would not be collected from customers, thereby allowing SCE&G to sustain the offered bill relief related to the Project over 20 years. *Id.* at 1109; 4217-4.

The combination of immediate write-offs and long-term funding from Dominion Energy was sufficient to achieve bill rates comparable to those temporarily imposed by the General Assembly through Act 258 without endangering SCE&G's long-term financial stability and ability to serve customers. The plan brings SCE&G's bills into alignment with regional averages and puts them substantially below national averages.²

The primary alternative to Plan–B Levelized was the Optimal Benefits Plan proposed by ORS. The Optimal Benefits Plan was premised on a finding that all investment in the Project after March 12, 2015, was imprudent. Tr. at 267, 288-5, 916-5, 1799. As the Commission found in Order No. 2018-804, the Optimal Benefits Plan was

² The Commission also notes that, in reliance on Order No. 2018-804, Dominion Energy closed its merger with SCANA Corporation on January 1, 2019.

not legally or factually justified and its adoption would not be in customers’ best interest or the public interest. Order No. 2018-804 at 62-65, 79. Furthermore, the adoption of the Optimal Benefits Plan could have placed the Dominion Energy merger in fatal jeopardy and could have left SCE&G in so weakened a state financially that it would not be able to meet customers’ expectations for reliable and efficient service. Tr. at 1752-12–1752-25, 2296-4, 2988–89.

In its Petition for Rehearing or Reconsideration, ORS does not challenge the adoption of Plan–B Levelized. Instead, ORS challenges the Commission’s decision not to enter a finding affirming ORS’s assertion that SCE&G engaged in a “deliberate and ongoing effort . . . to conceal, omit, misrepresent and fail [] to disclose” certain analyses related to the Project. ORS Pet. at 9. ORS alleges that this concealment began with a petition under S.C. Code Ann. § 58-33-270(E) that SCE&G filed with the Commission on March 12, 2015. *See id.* at 8.

No Statutory Requirement: Petitioners argue that a finding of imprudence is statutorily required, citing the language of S.C. Code Ann. § 58-33-280(K) that capital costs “may be disallowed only to the extent” that they are found to be imprudent. However, the petitioners misread the statute. Before the Commission may disallow a cost, the utility must first seek recovery of that cost. *See* S.C. Code Ann. § 58-33-280(K) (permitting disallowance only when a utility seeks “recovery of capital costs”). Through Plan–B Levelized, SCE&G is not requesting to recover capital costs incurred after March 12, 2015. As a result, there is no claim for recovery of these costs, and no prudence issue concerning them is raised under S.C. Code Ann. § 58-33-280(K). However, our ruling in Order No.

2018-804 should not have been perceived as even an implicit finding of prudence on our part for capital costs incurred after March 12, 2015. Nothing could be further from the truth.

We have recognized that SCE&G and Dominion have agreed to use the ORS date of March 12, 2015 as the end date for reimbursement of capital investment, and the Joint Applicants have therefore removed the prudence terms of S.C. Code Ann. Section 58-33-280 (K) from consideration in the disallowance of capital costs after that date. However, in not claiming capital costs after that date, SCE&G has also recognized the impacts that result from its lack of transparency.

Clearly, SCE&G failed to disclose any iteration of the Bechtel Report (Tr. 271-288; 883; 892; 1519-1520) or the EAS Study to ORS or the Commission. (*See* Tr. 1459, where SCE&G CEO Addison stated with reference to the EAS numbers, that “I wish the Company had disclosed those . . .”) Even given that the Company does not seek capital costs after March 12, 2015, and the consequent mootness of a finding of imprudence under the Base Load Review Act, it is clear that the Company acted imprudently under any definition of the term by not disclosing material, and even potentially decisive, information to ORS and the Commission. Due to the lack of transparency and forthrightness with regard to reports and studies available to the Company, this Commission was effectively denied the opportunity to fully consider the prudence of continuing to expend resources on the project with all information available at the time. Under any definition of the term “prudence,” the Company was imprudent in its actions in this case with regard to costs incurred after March 12, 2015.

Dr. Petrunik (Tr. at 3648-14) and Mr. Byrne (Tr. at 4076) both testify, in part, that the Bechtel Report did not uncover any issues with the V.C. Summer Project that the owners were unaware of, and that did not appear in various construction reports available to ORS. The Company apparently believes that this allegation, along with a declaration of various problems with the Bechtel Report, is enough to excuse the Company from revealing the existence of the Report to ORS and this Commission. This belief is erroneous. The Commission had the right to perform its own evaluation of the Bechtel Report, and weigh all the evidence. That assessment, which was not disclosed until late 2017, included projected commercial operation dates that were 18 to 36 months after the dates filed by SCE&G in the Petition. Tr. at 892-2. Company witness Wenick, a construction attorney who originally hired Bechtel to perform the assessment, testified that he never intended that the subsequent Report not be discoverable by the Commission or the Office of Regulatory Staff. Tr. at 2522.

A similar conclusion is apparent with regard to the Company's failure to reveal the existence of its 2014 EAS analysis. The difference in cost estimates between the Company's EAS team and the Consortium was significant and material. Indeed, the EAS analysis showed that completing the V. C. Summer Project might have cost approximately \$500 million more than the contractors estimated if promised productivity improvements were not achieved. *See* SCE&G's and Dominion Energy's Response to Petitions for Rehearing or Reconsideration in the Form of a Proposed Order at 15. Although the Company argues that the fixed price contract made the EAC study immaterial, it is important to note that the fixed price contract was not known at the time of the 2015

Commission proceeding. Thus, the materiality of the EAC study for that proceeding is clear and the study should have been made available to ORS and the Commission. Again, the failure to disclose is troubling.

Nevertheless, as discussed above, the fact that the Company does not claim capital costs after March 12, 2015, moots the application of the statutory terms “prudent” or “imprudent” in the context of the Base Load Review Act to this case. The Commission found in Order No. 2018-804 that the finding requested by ORS was not necessary to the relief granted in that order. As Order No. 2018-804 states, “the Joint Applicants have agreed to voluntarily forego recovery of all Project costs incurred after March 12, 2015.” Order No. 2018-804 at 14. And again: “Plan–B Levelized as proposed by Dominion [Energy] recognizes that no capital investment will be recovered after March 12, 2015. Such an agreement makes claims of imprudent expenditures after that date moot.” *Id.* at 18. Although, as stated above, we believe that the Company acted imprudently in withholding the information on the Bechtel and EAS Reports, both of which should have been revealed to ORS and this Commission, we reaffirm this holding from Order No. 2018-804 that a statutory finding of imprudence is moot. However, the Commission’s above finding of imprudence is important to understanding the negative impacts of a lack of transparency which is required to give full context to the Company’s decisions and resulting ramifications to the state and the ratepayers.

The law on mootness in South Carolina is well-documented. “A case [or an issue] becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy.” *Mathis v. S.C. State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d

713, 715 (1973). “If there is no actual controversy, this Court will not decide moot or academic questions.” *Sloan v. Friends of Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006).

In the present case, the Joint Applicants presented testimony alleging a lack of harm resulting from their failure to reveal the information. However, this Commission unequivocally recognizes SCE&G’s imprudence in withholding information. This Commission had the right to make its own independent evaluation as to the relevance of the withheld information to the matters before it. We believe this finding emphasizes the need for all regulated utilities to be transparent in their dealings with ORS and this Commission. We also agree with ORS that it is essential to restore public trust for this Commission to acknowledge that the regulatory compact between the utility and the regulators was broken by SCE&G. This Commission has been charged with protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or cost. We have ordered the payment of resources from the Company – for the benefit of ratepayers – that maximizes that relief within the limits of the authority of the Commission.

Several Petitioners have raised the specter of the utility somehow later pursuing recovery for capital costs incurred after March 12, 2015. This recovery would not be possible under the law on abandonment. The current proceeding is the only proceeding in which recovery of costs in abandonment may be pursued. *See* S.C. Code Ann. § 58-33-280(K). Joint Applicants are not seeking recovery of capital costs incurred after March 12, 2015, and by this order are hereby expressly foreclosed from pursuing recovery of such

costs in any future proceedings. To be clear, no capital costs incurred after March 12, 2015, may be recovered as prudent. Indeed, at the conclusion of this case, the legislature’s Act 258 will abolish the BLRA including the provision that allows any recovery in abandonment.

B. The Used and Useful Standard and the BLRA

In their Petitions, FOE/Sierra and AARP assert that the Commission erred in approving the Joint Application pursuant to the Base Load Review Act, S.C. Code Ann. §§ 58-33-210 *et seq.* (“BLRA”), because the BLRA, on its face and as applied in Order No. 2018-804, “takes money from ratepayers and gives it to investors of a private company for a private use for a utility plant which is now abandoned and not ‘used and useful’ in producing utility service to ratepayers.” FOE/Sierra Pet. ¶ 1; *see also* AARP Pet. ¶ 1. On this basis, FOE/Sierra and AARP assert that Order No. 2018-804 is contrary to the public interest and violates Article I, section 13(A) of the South Carolina Constitution. *Id.*

In public utility ratemaking, however, a utility that is owned by private investors is subject to a statutory duty to provide service to the public on demand. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *De Pass v. Broad River Power Co.*, 173 S.C. 387, ___, 176 S.E. 325, 333 (1934). Moreover, the utility must offer its service at rates set by the government. *See, e.g., Verizon Commc’ns, Inc. v. F.C.C.*, 535 U.S. 467, 527 (2002). Because the utility is compelled to use its property for the public good, without any control over the price it charges, the government cannot set a rate that is so low as to be confiscatory. *See, e.g., Duquesne*, 488 U.S. at 307; *In re Railroad Commission Cases*,

116 U.S. 307, 331 (1886). This principle is a requirement of the Takings Clause of the United States Constitution.

In contrast, courts have consistently held that, while utility customers can and do have a statutorily protected interest in the ratemaking process, they do not have constitutionally protected property interests in rates or ratemaking and thus cannot challenge rates on constitutional grounds related to confiscation or an unconstitutional taking of property. *See Holt v. Yonce*, 370 F. Supp. 374 (D.S.C. 1973) (three-judge panel) (per curiam), *aff'd* 415 U.S. 969 (1974). Accordingly, “ratefixing power operates exclusively within a range of reasonableness, bounded on the one hand by the utility’s *constitutional* right to a fair and reasonable return and on the other hand by its customers’ *statutory* right to rates that are not unreasonable or exorbitant.” *Gulf States Util. Co. v. Pub Util. Comm’n*, 784 S.W.2d 519, 520 n.2 (Tex. App. 1990), *aff’d* 809 S.W.2d 201 (Tex. 1991) (emphasis added). On this basis, the South Carolina Supreme Court has held that the constitutionality of rates should be assessed based on their financial impact on the utility and that burdensomeness to customers should be considered to the extent that rates exceed the constitutional requirement of just compensation:

[T]he 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. The focus is upon the financial condition of the utility, particularly whether the return realized from the rates is so low as to be confiscatory to the utility or so high as to be unduly burdensome to the utility’s customers.

Mims v. Edgefield Cty. Water & Sewer Auth., 278 S.C. 554, 555-56, 299 S.E.2d 484, 485-86 (1983).

Through the BLRA, the General Assembly struck a balance between investors and the State of South Carolina with the intent to make it possible for investors to underwrite costly investments in nuclear power, which were seen at the time as providing important benefits for South Carolina and its citizens. One of the risks that the BLRA expressly sought to address was the potential for construction to be abandoned after the project was undertaken for reasons that were not envisioned at the time. *See* S.C. Code Ann. § 58-33-280(K). In this regard, the General Assembly chose not to make the “used and useful” test operative for recovering the costs of plants that were constructed under the BLRA and later abandoned.

FOE/Sierra and AARP mistakenly assert that the “used and useful” standard is a constitutionally mandated rate making principle. It is not. The “used and useful” standard, which was enunciated in *Smyth v. Ames*, 169 U.S. 466 (1898), was overturned in *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602–03 (1944). *Duquesne*, 488 U.S. at 308; *accord*, *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1175 (D.C. Cir. 1987) (en banc).

As one court has noted, with the doctrinal shift from *Smyth* to *Hope*, “the constitutional basis for ‘used and useful’ was swept away.” *Wash. Gas Light Co. v. Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950). Or, as another court noted, after *Hope*, “‘used and useful’ ceased to have any constitutional significance.” *Jersey Cent. Power & Light*, 810 F.2d at 1175. Though South Carolina authorities have referenced the “used and useful” principle in quoting general ratemaking principles from older cases, there is no constitutional mandate that such a principle be applied in all cases, and the holdings in the cases that

quote this language so demonstrate. *See Hamm v. Pub. Serv. Comm’n*, 309 S.C. 282, 285 n.1, 291, 422 S.E.2d 110, 112 n.1, 115 (1992).

Specifically, this Commission has consistently allowed utilities to include construction costs in their base rates since at least 1974, a clear departure from “used and useful” as a constitutional mandate. The South Carolina Supreme Court has also approved this practice of including construction work in progress costs in the base rates for utilities. *Hamm*, 309 S.C. at 291, 422 S.E.2d at 115. In fact, the Supreme Court expressly approved of base rates that included base property not being used to provide electricity to customers in *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm’n*, 270 S.C. 590, 244 S.E. 2d 278 (1978), when it held that the Commission should have made a factual determination regarding the exclusion from rate base of property held for future use instead of “arbitrarily excluding all such property from the rate base.” *Id.* at 600-01, 244 S.E.2d at 283-84; *see also Parker v. S.C. Pub. Serv. Comm’n*, 280 S.C. 310, 313, 313 S.E.2d 290, 292 (1984) (“[R]ate base should reflect the actual investment by investors in the Company’s property and value upon which stockholders will receive a return on their investment.”).

The BLRA included provisions that expressly allow an electric utility to recover its investment in an abandoned plant after a prudent decision to abandon has been made. S.C. Code Ann. § 58-33-280(K). None of the Petitioners have challenged the determination in Order No. 2018-804 that the decision to abandon this Project was prudent. Accordingly, abandonment of the Project at issue here does not put the Project outside of the scope of the BLRA. As indicated above, S.C. Code Ann. § 58-33-280(K) fails to support this premise.

Similarly, FOE/Sierra’s and AARP’s assertions that Order No. 2018-804 is contrary to the public interest and violates Article I, section 13(A) of the South Carolina Constitution are without legal or evidentiary support and do not demonstrate any error or omission by the Commission. Instead, the Commission properly relied upon the provisions of the BLRA by allowing SCE&G to recover its capital costs and Allowed Funds related to the Project as approved in Order No. 2018-804.

To the extent that various parties have argued that the BLRA or some provisions thereof are unconstitutional, the Commission declines to rule on these arguments. In *Travelscape, LLC. V. S.C. Dept. of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011), the South Carolina Supreme Court reiterated the longstanding rule that administrative tribunals cannot rule on a facial challenge to the constitutionality of a regulation or a statute, but clarified that those tribunals may rule on whether a law as applied violates constitutional rights. 391 S.C. at 109, 705 S.E.2d at 38-39. Upon examination of the facts and allegations of the instant case, we find that the constitutional challenges to the BLRA which have been asserted here are facial challenges, not as applied challenges, and are therefore exclusively justiciable by the courts.

C. Refunds of Revised Rates

ORS, AARP, FOE/Sierra, and Mr. Knapp assert that it was error for the Commission not to require SCE&G to refund past revised rates collections. ORS Pet. at 13-17; AARP Pet. ¶ 3; FOE/Sierra Pet. ¶ 6; Knapp Pet. ¶ 6. ORS seeks refunds of rates collected after March 12, 2015, or associated with amounts of Project investment in excess of \$2.772 billion. The other Petitioners seek refunds going back further—in some cases,

back to the beginning of the Project. Though ORS's petition identifies dates which revised rates were collected, their filing fails to specify a total dollar amount for reconsideration or whether refunds associated with Plan-B Levelized address the relief they seek..

As stated in Order No. 2018-804, at pages 48 and 49, Plan-B Levelized provides for write-offs, refunds and restitution totaling approximately \$3 billion. Refunds are further addressed and included in the Commission's Order in the Capital Cost Rider, discussed on pages 59 and 60. Under the Capital Cost Rider, regulatory liabilities will be established for refunds of the Toshiba Settlement as well as amounts previously collected under the BLRA in the amounts of \$1.032 billion and \$1.007 billion, respectively. The total amount of \$2.039 billion in refunds and restitution under the Plan-B Levelized is designed to compensate ratepayers for the time value of the delayed refund on the Toshiba Proceeds, as well as provide refunds and restitution for any rate overpayments previously collected under the BLRA.

By requesting refunds of past revised rates collections, the Petitioners are asking, in effect, for SCE&G and Dominion Energy to add additional bill mitigation funds beyond what has already been offered and accepted as reasonable. The combination of immediate write-offs and long-term funding from Dominion Energy was sufficient to achieve bill levels comparable to those temporarily imposed by the General Assembly through Act 258, which has passed constitutional muster. The United States District Court held, in *South Carolina Electric & Gas Co. v. Randall*, 333 F. Supp. 552, 564 (D.S.C. 2018), that the rates imposed in Act 258 and Resolution 285 had not been shown to be confiscatory.

Furthermore, for his part, Speaker of the House of Representatives Jay Lucas argued that setting the rates significantly lower than the previously imposed temporary rates could create uncertainty for ratepayers due to constitutional challenges or bankruptcy concerns. Such uncertainty would be to the detriment of the ratepaying public. Speaker Lucas urged the Commission to adopt a rate within the ‘zone of reasonableness’ established by the experimental rate adopted in Act 258.³ We agree, and find that deviating from those rates, as advocated by the Petitioners seeking reconsideration, would add hundreds of millions of dollars in additional bill mitigation funds and may well raise the constitutional difficulties of which Speaker Lucas warned, which could in turn delay the implementation of the rate decreases approved in this case.

As such, the rates approved by the Commission in Order No. 2018-804 represent a balancing of all interests in this case, recognizing the arguments on specific monetary issues, and the potential legal issues attached to those arguments. It further represents this Commission’s effort to bring finality and stability for SCE&G’s customers in this matter. Therefore, we find this issue was appropriately addressed in our Order.

Moreover, the rates Petitioners seek to have refunded were approved in final orders of the Commission. None of the Petitioners have alleged that SCE&G’s revised rates collections were not authorized by revised rates orders duly issued by this Commission. As mentioned above, “the Commission is created by statute and its authority is limited to that granted by the legislature.” *Nucor Steel*, 310 S.C. at 543, 426 S.E.2d at 321–22. The

³ This appears to be a reference to the U.S. Supreme Court’s general acknowledgment that “courts are without authority to set aside any rate selected by the [Federal Power] Commission which is within a ‘zone of reasonableness.’” *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 767, 88 S.Ct 1344, 1360, 20 L.Ed.2d 312, ___ (1968).

statutes under which the Commission regulates electric utilities authorize the Commission to set rates prospectively. *See* S.C. Code Ann. §§ 58-27-810 *et seq.* The only exception to prospective rate regulation is found in S.C. Code Ann. § 58-27-960, which allow refunds of unreasonable, excessive or discriminatory amounts, but not where, as here, “the charge has been authorized by law.” *S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n*, 275 S.C. 487, 488, 272 S.E.2d 793, 794 (1980). This is in keeping with South Carolina’s general prohibition on retroactive ratemaking as long recognized by the South Carolina Supreme Court. *See Porter v. S.C. Pub. Ser. Comm’n*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1977).

Additionally, FOE/Sierra argues that “SCE&G lost the benefit of the BLRA bargain when it ceased construction of the nuclear construction project ‘within the parameters’ of the approved Commission construction and capital cost order, as required by S.C. Code Ann. § 58-33-275(A).” FOE/Sierra Pet. ¶ 2. However, S.C. Code Ann. § 58-33-280(K) explicitly governs cost recovery after abandonment, as is the case here, and it expressly authorizes cost recovery in these circumstances. The more specific S.C. Code Ann. § 58-33-280(K), rather than the more general S.C. Code Ann. § 58-33-275(A) on which FOE/Sierra relies, expressly contradicts FOE/Sierra’s argument. It does not require continued construction to support cost recovery, and it authorizes recovery in precisely the circumstances applicable to the Project.

ORS argues that the filed-rate doctrine does not apply to the previously collected revised rates because the Commission may disallow recovery of imprudent capital costs under S.C. Code Ann. § 58-33-280(K). ORS Pet. at 13-14. This argument misinterprets that statute. S.C. Code Ann. § 58-33-280(K) authorizes the Commission to set rates for

the recovery of investment in abandoned BLRA projects prospectively. In calculating those prospective rates, the Commission may exclude investment that it determines to have been imprudent. Nothing in this statute authorizes refunds and reparations of rates lawfully collected beyond that allowed under S.C. Code Ann. § 58-27-960 and *S.C. Elec. & Gas Co. v. Pub. Serv. Comm’n*, 275 S.C. at 488, 272 S.E.2d at 794. To read such an authority into the statute would violate the prohibition on retroactive rate making.⁴

D. Merger Conditions

SCCCL/SACE alleges that it was error for the Commission to approve the merger between SCANA and Dominion Energy without including adequate conditions “to fully protect SCE&G’s captive retail ratepayers from costs that arise from affiliate transactions involving unnecessary pipeline capacity.” SCCCL/SACE Pet. at 1-2. Petitioners make specific reference to the Atlantic Coast Pipeline (“ACP”), of which Dominion Energy is a 48% owner. Likewise, FOE/Sierra and ORS assert that the Commission erred in approving the proposed merger without assuring that the merger was adequately conditioned to protect the public interest and to protect ratepayers from the imposition of unjust and unreasonable rates, again with reference to the ACP. *See* FOE/Sierra Pet. ¶ 7; ORS Pet. at 17. None of the Petitioners cite any statutes or regulations requiring such conditions as

⁴ The Commission notes that ORS also asserts that the South Carolina Supreme Court recognized an exception to the filed rate doctrine in *Edge v. State Farm Mutual Auto Insurance Company*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005). ORS Pet. at 15-16. Specifically, ORS argues that the filed rate doctrine does not apply if regulatory approval for the rate was obtained through fraudulent means. *Id.* However, in *Edge*, the South Carolina Supreme Court did not hold that there are exceptions to the doctrine but, rather, merely cited with approval what other jurisdictions have found to be exceptions to the doctrine. The Court has not spoken to the details of such an exception. *Id.* at 519, 623 S.E.2d at 392 (“Although not applicable in the present case, we also recognize there are several exceptions as set out above which may prevent its application.”).

part of the Commission’s approval of this merger.⁵ However, even if such conditions were required, Order No. 2018-804 adequately addressed them, as explained below.

1. The Atlantic Coast Pipeline

Petitioners suggest that the Commission is legally mandated under general public interest principles to take action in this proceeding to protect ratepayers from future, potentially unjustified affiliate transactions involving the hypothetical extension of the ACP into South Carolina. FOE/Sierra Pet. ¶ 7. The Commission finds this request to be premature. There is currently no proposal to extend the ACP into South Carolina, therefore, there is no affiliate transaction to review.

Absent a contrary agreement by the utility, the review and approval of affiliate transactions or intercompany dealings properly comes before the Commission when there is an actual transaction and the utility seeks to include its costs in rates or otherwise brings it before the Commission. *See, e.g., Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n*, 338 S.C. 92, 525 S.E.2d 863 (1999). “To the extent a transaction [*i.e.*, an affiliate transaction] is not done at ‘arms-length,’ or is found by the PSC to be unreasonable, it is properly excluded from the rate-base, thereby ensuring that improper or unreasonable transaction costs are not passed on to rate-payers.” *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm’n*, 357 S.C. 232, 239, 593 S.E.2d 148, 152 (2004).

⁵ SCCCL/SACE reference the statute requiring the South Carolina Energy Office to promulgate a Plan for State Energy Policy and setting forth general policy goals to inform that plan. However, this statute confers no specific regulatory authorities on this Commission. The statute authorizes the State Energy Office to formulate the required plan and provides that “[t]he State Energy Office must not function as a regulatory body.” S.C. Code Ann. § 48-52-410.

Accordingly, in the general course of regulation, when affiliate transactions are presented for ratemaking review, the Commission will “review and analyze [the transactions] and determine if they are reasonable.” *Id.* at 237; 593 S.E.2d at 151. In this case, as required by South Carolina law, the Commission will conduct a review of transactions involving the ACP if and when (1) the ACP is actually extended into South Carolina; and (2) SCE&G seeks a rate adjustment or other Commission review of any associated affiliate transactions. The Petitioners seek merger conditions to govern future speculative transactions. The Commission finds that imposing such conditions is neither called for under current South Carolina law nor regulatory policy.

Under S.C. Code Ann. Section 58-27-2090, this Commission already has broad oversight authority over all persons or corporations affiliated with a jurisdictional electrical utility. The burden of proof is on the utility to establish the reasonableness, fairness, and absence of injurious effect upon the public interest regarding fees or charges growing out of any transactions. Unless those standards are met, as determined by the Commission, the fees and charges shall not be allowed by the Commission for rate-making purposes.

Moreover, Order No. 92-931 places additional reporting requirements on SCE&G and SCANA's regulated affiliated companies regarding affiliate transactions, including the transfer of real property. Post-merger, these requirements apply to Dominion as well. The requirements in our Order No. 2018-804 go even further. Some of those requirements memorialize the settlement agreement between Transcontinental Gas Pipeline Company, SCE&G, and Dominion Energy where those parties have voluntarily agreed to certain protections that will apply if SCE&G seeks to secure more than 100,000 dekatherms per

day (dt/d) of additional natural gas transmission capacity from an interstate pipeline. In such cases, SCE&G will be required to issue a Request for Proposal (RFP). If SCE&G chooses to purchase capacity that is not the least-cost capacity offered, then SCE&G must request a public proceeding before the Commission to justify the purchase. Also, pages 100-101 of our Order set out significant and far-reaching merger conditions regarding affiliate transactions between Dominion and SCE&G.

The Commission finds that the affiliate transaction provisions voluntarily agreed to by SCE&G and Dominion Energy and contained in in Order No. 2018-804, and as supplemented by the Commission’s existing regulatory powers, are more than adequate to protect the public interest related to affiliate transactions in the context of this merger. The Petitioners point to no legal or factual error on the part of the Commission in this regard or make any effort to demonstrate why these conditions are insufficient to protect the interest of the public and ratepayers. Rehearing on these matters is denied. We do hold, however, that if Dominion chooses to file an application with FERC regarding the extension of the Atlantic Coast Pipeline into South Carolina, that it file copies with the ORS and the Commission.

2. *Energy Efficiency Programs*

FOE/Sierra also alleges that the Commission should require that the merger assure implementation of effective energy efficiency programs and policies and access to expanded renewable energy resources. *See* FOE/Sierra Pet. ¶ 7. And, FOE/Sierra and AARP both assert that the Commission should require Dominion Energy to provide additional protections for low-income and other special needs customers. *Id.*; AARP Pet.

¶ 5. However, as SCE&G’s witness, John Raftery testified, such matters are more appropriately addressed in the context of a rate-making or energy efficiency proceeding, such as SCE&G’s annual fuel case. Tr. at 2434-10–2434-11, 2434-13–3434-14.

Even so, as part of the settlement agreement with the South Carolina Solar Business Alliance, SCE&G also agreed to (1) develop a protocol for the curtailment of dispatchable resources in circumstances where curtailment of solar resources is necessary due to system conditions or is otherwise required; (2) devise and propose modifications to SCE&G’s interconnection procedures to address operating conditions that may necessitate curtailment; and (3) consider an additional power purchase agreement form to accommodate the addition of energy storage resources to solar generating facilities that currently have power purchase agreements with SCE&G. Order No. 2018-804 at 33. Further, SCE&G has agreed (1) to make fixed-price contracts at avoided costs available to independent power producers for durations of not less than ten years; (2) apply to the Commission for approval of avoided cost rates for storage as a separate resource or for technology-neutral avoided cost rates for dispatchable renewable generating facilities, such as solar plus storage; and (3) add certain clarifying language regarding Variable Integration Charges in new Public Utility Regulatory Policies Act of 1978 (PURPA) Qualifying Facility power purchase agreements. These provisions were voluntarily agreed to by SCE&G and Dominion Energy and, at their request, are included in the terms of Order No. 2018-804. As supplemented by the Commission’s existing regulatory power over renewable energy and energy efficiency programs, they adequately protect the public interest related to renewable energy and energy efficiency in the context of this merger.

With regard to protections for low-income and other special needs customers, this Commission has addressed the issue in Order No. 2018-804, at pp. 104-105, wherein it strongly encouraged Dominion to implement a similar program to its Energy Share Program and other low-income programs such as the electric cooperatives' Round-Up programs for its South Carolina ratepayers. Further, in response to the Commission's request, Dominion filed its Customer Education Program and issued a news release on January 2, 2019 that announced its commitment to implement "an EnergyShare-like program in South Carolina to assist low-income, elderly, disabled and veteran customers." See Exhibit 2, page 2 of 3 attached to the January 2, 2019 correspondence of K. Chad Burgess to Jocelyn G. Boyd. Accordingly, the Commission and Dominion have already addressed the issue of additional protections for low-income and other special needs customers.

3. Bill Requirements

Petitioners assert that the Commission should require the utility to explicitly itemize the portion of the customer bill associated with the abandoned nuclear project costs. See FOE/Sierra Pet. ¶ 7. The Commission declines to do so for reasons of law and sound regulatory policy.

As a matter of regulatory policy, the Commission favors simplicity and clarity in customer billing. Including a separately stated charge for the Capital Cost Rider Component on customers' bills will frustrate that policy. Accordingly, the Commission's regulations currently set forth the information that must be provided on customers' electric

bills. Specifically, S.C. Code Ann. Reg. 103-339(2) provides that bills issued by electric utilities under the Commission’s jurisdiction must reflect the following information:

- a. The reading of the meter at the beginning and at the end of the period for which the bill is rendered.
- b. The date on which the meter was read, and the date of billing and the latest date on which it may be paid without incurring a penalty, and the method of calculating such penalty.
- c. The number and kind of units metered.
- d. The applicable rate schedule, or identification of the applicable rate schedule. If the actual rates are not shown, the bill shall carry a statement to the effect that the applicable rate schedule will be furnished on request.
- e. Any estimated usage shall be clearly marked with the word “estimate” or “estimated bill.”
- f. Any conversions from meter reading units to billing units or any information necessary to determine billing units from recording or other devices, or any other factors used in determining the bill. In lieu of such information on the bill, a statement must be on the bill advising that such information can be obtained by contacting the electrical utility’s local office.
- g. Amount for electrical usage (base rate).
- h. Amount of South Carolina Sales Tax (dollars and cents).
- i. Total amount due.
- j. Number of days for which bill is rendered or beginning and
- k. The ending dates for the billing period.

From a legal standpoint, changing the standard for what information should be provided on electric bills is properly implemented through regulatory amendment. *See Myers v. S.C. Dep’t of Health & Human Servs.*, 418 S.C. 608, 620, 795 S.E.2d 301, 307 (Ct. App. 2016) (“When [an agency’s] action or statement so fills out the statutory scheme that upon application one need only determine whether a given case is within the rule’s criterion, then it is a binding norm which should be enacted as a regulation”) (citations omitted). In fact, the Commission has recognized this to be the case on two previous occasions:

[I]ssuing an order in this proceeding is not the appropriate manner in which to implement a change to S.C. Code Ann. Regs. 103-339(2). Rather, the appropriate mechanism for such a change would be to initiate a rulemaking proceeding where the Commission receives public comment and the General Assembly has the requisite opportunity to review and approve the regulation.

Order No. 2012-884 at 12; *see also* Order No. 2012-951 (denying an identical request for relief for the same reasons set forth in Order No. 2012-884).

Petitioners have not presented any argument demonstrating a change in law, regulation, or regulatory policy is warranted here. *See 330 Concord St. Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 517, 424 S.E.2d 538, 540 (Ct. App. 1992) (“An administrative agency . . . cannot act arbitrarily in failing to follow established precedent.”). Therefore, the request is denied.

E. Return on Equity (“ROE”)

ORS and Mr. Knapp argue that “the Commission erred in awarding an excessively high ROE to the Joint Applicants for recovery of Project costs.” ORS Pet. at 18; *see* Knapp Pet. ¶ 7. The Commission disagrees. In Order No. 2018-804, at pages 89-90, the Commission adopted as a reasonable and accurate assessment of SCE&G’s cost of equity the results of the analysis provided by SCE&G witness, Mr. Hevert. The Commission found that “there is ample evidence and reason to conclude that the analyses conducted by Mr. Hevert are accurate and reliable estimates of SCE&G’s cost of equity.” On that basis, the Commission found that “the Company’s current cost of equity most likely ranges from 10.25% to 11% as determined by Mr. Hevert, and that the most likely point estimate of the cost of equity is 10.75%, assuming that the merger is approved.” *Id.* at 90.

The Commission declined to adopt as reasonable the testimony of ORS's expert, Mr. Baudino. He based his analysis on companies with more favorable credit and risk profiles than SCE&G, which, as he admitted, result in ROEs that are lower than those that would actually be required by SCE&G's investors given its risk profile. Tr. at 861-866. For that reason, Mr. Baudino's analysis does not accurately reflect SCE&G's actual cost of capital, and would compromise the ability of SCE&G to fund utility operations and to do so at reasonable costs and terms. Tr. at 1781. The decision to adopt Mr. Hevert's return on equity calculation is supported by the evidence and is neither capricious nor arbitrary. *See S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 598, 244 S.E.2d 278, 282 (1978) (finding that a return of equity is appropriate if supported by the evidence and neither capricious nor arbitrary). It supports a cost of equity of 10.75%.

However, to provide additional bill mitigation to customers, in proposing Plan-B Levelized, Dominion Energy and SCE&G agreed to lower the ROE to be applied to the NND capital costs to 9.9%. Agreeing to a lower ROE on this investment than would otherwise be authorized is clearly within the rights of Dominion Energy and SCE&G. Law and logic support the Commission accepting this voluntary reduction in ROE and setting rates on a lower ROE than the evidence justified.

The Commission also rejects ORS's assertion that the 9.9% ROE on Project costs rewards SCE&G for mismanagement. The actual market cost of SCE&G equity is accurately estimated at 10.75%. The 9.9% return is substantially lower. Furthermore, the 9.9% ROE does not provide any recovery whatsoever on the write-offs and customer benefits for which Dominion Energy investors will be solely responsible. Considering all

of these factors, the Commission finds that the 9.9% ROE to be applied to Project costs in no way rewards SCE&G investors for mismanagement as ORS suggests.

F. The TCJA Calculations

In Order No. 2018-804, the Commission ruled that it was appropriate for SCE&G to use the twelve months ended December 31, 2017, to calculate savings to customers under the Federal Tax Cuts and Jobs Act of 2018 (“TCJA”). The TCJA savings are being passed through to customers through the Tax Rider approved in this proceeding.

For the reasons stated in the testimony of SCE&G witnesses Ms. Nagy and Ms. Griffin, the Commission reaffirms its decision that 2017 calendar year data provide the most accurate basis on which to measure savings from the TCJA. Tr. at 991-16-9-121; 2020-52-2020-54. At the time of hearing, 2017 was the most recent calendar year for which tax liabilities could be calculated. ORS asserts that the Commission should be required to adopt the tax saving calculation performed by its witness, Mr. Lane Kollen, using seven-year-old data. In no sense is Mr. Kollen’s approach more “exact” than that adopted in Order No. 2018-804. Specifically, calculations based on 2017 data provide a more accurate measure of actual tax saving than calculations based on relatively stale 2011 data. For that reason, the Commission did not adopt Mr. Kollen’s calculations.

ORS argues that the use of 2017 data is not consistent with the Commission guidance in generic Docket No. 2017-381-A, specifically Order No. 2018-308, concerning TCJA ratemaking. The nature of the alleged inconsistency is not apparent. ORS asserts that the use of 2017 test year data is inconsistent with the requirement that utilities begin

recording TCJA savings to a regulatory liability account on January 1, 2018. But there is no inconsistency.

SCE&G in fact began recording TCJA savings to regulatory accounts on January 1, 2018, and the balance in that account will be refunded to customers beginning with the first billing cycle of February 2019, as Order No. 2018-804 provides at page 112. The use of test year 2017 data to measure the amount of savings in no way conflicts with the fact that the savings, as so measured, have been recorded as required by Order No. 2018-308 beginning on January 1, 2018, and the benefits will shortly begin flowing to customers. To the extent that there is any other conflict between Order No. 2018-804 and the generic guidance given in Order No. 2018-308, the Commission affirms that the terms of Order No. 2018-804 concerning the TCJA are fully justified by the record in this proceeding and should be applied. Any putative contrary terms in Order No. 2018-308 are waived as to this matter.

ORS further asserts that the calculation of tax benefits approved in Order No. 2018-804 does not pass along the full amount of tax savings from the TCJA to customers. ORS Pet. at 19. The Commission is hindered in responding to this allegation because ORS provides no factual or legal basis for it. Accordingly, under *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010), this claim must be considered to be waived. Nonetheless, the Commission affirms that the record is replete with evidence establishing that the calculation of the Tax Rider is appropriate as a matter of law and regulatory policy and that the full measure of appropriate and reasonably anticipated benefits from the TCJA are properly being returned to customers.

G. Pre-2015 Abandonment Claims

FOE/Sierra claims that the evidence in the record required the Commission to enter a finding that SCE&G should have abandoned the Project as much as “ten years earlier,” than July 2017. *See* FOE/Sierra Pet. ¶ 5. Specifically, FOE/Sierra points again to Dr. Mark Cooper’s 2012 analysis that abandonment at that time “was the only prudent course.” *Id.* FOE/Sierra also point to Dr. Cooper’s testimony regarding claimed mismanagement of the Project beginning in 2012 to support the claim that costs prior to 2015 were also imprudent. *Id.*

Similarly, AARP contends that the Order “barely mentions the evidence presented by AARP’s expert witness Scott Rubin and it does not address the reliability of his testimony.” AARP Pet. ¶ 4(a). Actually, Mr. Rubin’s testimony is discussed on pp. 44, 45, and 47 of Order No. 2018. The testimony argued that the Project should have been cancelled during 2013, or, at the latest, mid-2014. Tr. at 1908-7. As was stated in Order No. 2018-804 at 45, Mr. Rubin largely bases this contention on information regarding module delay, specifically, the CA-20 module. Tr. at 1908-13-1908-15.

To the contrary, the Commission properly held in Order No. 2018-804 that the economic analyses presented by SCE&G were tested in Docket No. 2008-196-E and were found to be based on reasonable and industry-standard methodologies. Furthermore, this analysis and the updated analyses performed in 2012, 2015, and 2016 were well justified, not materially flawed, and reflected reasonable information and assumptions at the time they were prepared. They established the economic prudence of continuing construction of the Project through 2016 and beyond. *See In re South Carolina Elec. & Gas Company,*

Order No. 90-655, dated July 3, 1990, Docket No. 89-6-E at 7 (The Commission “must evaluate the prudence of [a] decision and the [ensuing] actions at the time the decision was made and the actions undertaken.”).

The Commission gave full consideration to the testimony of FOE/Sierra’s witness, Dr. Cooper, and AARP’s witness, Mr. Rubin, but in carefully weighing the relevant evidence of record and evaluating the witnesses’ positions and ability to observe and know the accurate facts at the time decisions were made, found that the testimony of SCE&G and its witness, Dr. Joseph M. Lynch, to be more credible. *See Mkt. St. Ry. Co. v. R.R. Comm’n of State of Cal.*, 324 U.S. 548, 560 (1945) (holding that experts’ judgments do not bind commissions and that “[t]heir testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission’s estimate of the reasonableness of their conclusions and the force of their reasoning”). The Commission is entitled to determine what weight should be given to the testimony of the witnesses. *Porter v. S.C. Pub. Serv. Comm’n*, 333 S.C. 12, 507 S.E. 2d 328 (1998). As reflected in Order No. 2018-804, this Commission made specific findings that the analyses conducted by SCE&G in support of the Project were reasonable and credible. Order No. 2018-804 at 46.

Specifically, in Dockets 2012-203-E, 2015-103-E and 2016-223-E, Dr. Lynch presented economic analyses comparing the alternative of continuing construction of the nuclear units to that of stopping construction and building combined cycle units instead. *See* Order No. 2012-884 at 28-32; Order No. 2015-661 at 62-63; Docket No. 2016-223-E, Tr. at 783. In all three dockets, SCE&G’s analyses showed that continuing construction of

the nuclear units was in the best interest of customers. The Commission evaluated both Dr. Cooper's and Dr. Lynch's 2012 analyses in 2012, and did so again in the present dockets. It determined that Dr. Lynch's "analyses and their underlying assumptions were well justified in the record in that case and entirely reasonable and proper." Order No. 2018-804 at 45. The Commission further found that Dr. Lynch's subsequent analyses "reflected reasonable information and assumption" and "show the reasonableness of continuing construction" in 2012, 2015 and 2016. *Id.* at 46. The Commission finds no basis in the Petitions to alter those rulings.

Additionally, AARP claims that the Order should have specifically addressed Santee Cooper's attempt to sell its portion of the Project in 2011. *See* AARP Pet. ¶ 4a. The Commission does not agree. The Order referenced the extensive analyses prepared by Dr. Lynch and reviewed by ORS and the parties in past proceedings, which conclusively established the economic logic of continuing the Project through 2017. Order No. 2018-804 at 46. Santee Cooper's inability to resell its interest in the Project is at best circumstantial evidence of the Project's economic value to SCE&G's customers and is of limited relevance in comparison to the direct analysis Dr. Lynch performed.

Furthermore, the Commission finds that Santee Cooper's resale of its interest in the project would depend on many extraneous factors such as the current supply portfolio of neighboring utilities, their load growth projections, the cost of wheeling power across intervening transmission systems to them, and local regulatory and political attitudes toward nuclear power. These extraneous factors make the success of Santee Cooper's

marketing efforts of highly questionable relevance in assessing the value of continuing the Project to SCE&G’s customers.

Additionally, the Commission ruled on the prudence of continuing construction when it entered its rate orders in the prior dockets. *See, e.g.*, Order No. 2016-794, Ex. 2. Accordingly, the Petitioners are collaterally estopped from re-opening the issue here. *See Carman v. S. Carolina Alcoholic Beverage Control Comm’n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (S.C. 1994) (holding that an agency erred by reconsidering the legal effect of prior actions when the legal effect had been determined in a prior decision by the agency); *Bennett v. S.C. Dep’t of Corr.*, 305 S.C. 310, 312, 408 S.E.2d 230, 231 (S.C. 1991) (doctrine of collateral estoppel applies in administrative proceedings). Indeed, the South Carolina Supreme Court has directly held that prior prudence determinations made under the BLRA “may not be challenged or reopened in any subsequent proceedings.” *S.C. Energy Users Committee v. S. Carolina Elec. and Gas*, 410 S.C. 348, 359, 764 S.E.2d 913, 918 (S.C. 2014) (quoting S.C. Code Ann. § 58-33-275(B)). Because the prudence of previously considered costs is not properly before the Commission, it would be error for us to review it again. However, even if the Commission were to re-evaluate the previously approved costs, the evidence of record shows that they were properly determined to be prudent at the time.

H. Bifurcation of the Proceedings

Mr. Knapp asserts that the Commission erred in denying a motion filed by the SCCCL/SACE for the Commission to bifurcate or sequence the hearing held in this matter. *See* Knapp Pet. ¶ 3. Mr. Knapp argues that issues pertaining to the merger unduly

influenced the Commission's decisions in this matter regarding cost recovery of the abandoned nuclear plants. *Id.* As the Commission has previously ruled, however, the rate and regulatory issues associated with the merger and the abandonment of the Project are factually and legally related. Both sets of issues were raised and considered by the Commission in Docket No. 2017-370-E. Order No. 2018-634 at 1-2. Because that docket was filed under the provisions of the BLRA, Act No. 258 of 2018, by its terms, required the Commission to rule upon both the merger and the associated rate issues no later than December 21, 2018. Therefore, it was not feasible for the requests made in Docket No. 2017-370-E to be separately considered in multiple or bifurcated proceedings.

In addition, soon after the Joint Application in Docket No. 2017-370-E was filed, multiple parties supported consolidation of these matters and the proposed procedural schedule based on consolidation. Mr. Knapp failed to make a timely objection to that proposal.

Based on its powers over proceedings before it, the Commission was well within its discretion to consider these issues as part of a single hearing. Doing so avoided the inevitable duplication, delay, confusion, disorder, and waste of administrative resources that would have resulted from holding multiple hearings in this matter. *See* S.C. Code Ann. Regs. 103-802.

I. Procedural Due Process

AARP further alleges that prior proceedings under the BLRA did not grant AARP a full and fair opportunity to challenge the prudence of the nuclear project in violation of constitutional due process. *See* AARP Pet. ¶ 1. At the outset, the Commission notes that

AARP presents no argument, factual basis, or authority to support its contention in this regard or to demonstrate error by the Commission. Such a general, non-specific, and conclusory statement as to the alleged unconstitutionality of the BLRA on “due process” grounds simply is insufficient to put the Commission and parties on notice of any specific alleged constitutional defect and do not provide an adequate opportunity for the Commission to identify a specific problem with the application of the BLRA and address it on rehearing. *See, e.g., S.C. Dep’t of Soc. Serv. v. Mother ex rel. Minor Child*, 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (finding claim of violation of due process abandoned where party made a conclusory argument without citation of any authority to support her claim); *R & G Const., Inc. v. Lowcountry Regional Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (“An issue is deemed abandoned if the argument in the brief is only conclusory.”) *Camp v. Camp*, 386 S.C. at 575, 689 S.E.2d at 636 (lack of specificity in a petition for rehearing constitutes waiver of the issue).

Even so, a party may not complain of a due process violation if he has had recourse to a constitutionally sufficient administrative procedure, but declined or failed to take advantage of it. *Zaman v. S.C. State Bd. Of Med. Exam’rs*, 305 S.C. 281, 408 S.E.2d 213 (1991). The remedy for the specific harm AARP alleges—the lack of a full and fair opportunity to challenge the prudence of the nuclear project—was for AARP to have sought intervention as a party of record in the prior BLRA proceedings. AARP had every right and opportunity to do so. AARP cannot now challenge the Commission’s decision in this matter on due process grounds when it failed to avail itself of its rights to participate in the prior proceedings.

J. Limited Review of Plans

Mr. Knapp alleges that the Commission arbitrarily and capriciously chose to limit its consideration of the issues in these dockets to only two specific regulatory plans—the ORS Optimal Benefits Plan and the Plan–B Levelized. *See* Knapp Pet. ¶ 5. However, this is not the case. The Commission fully considered all issues raised by the Petitioners and other parties and evidence presented in these dockets. The Commission then concluded that Plan–B Levelized appropriately resolved the rate and regulatory matters associated with the abandonment of the Project. In drafting Order No. 2018-804, the Commission chose ORS’s Optimal Benefits Plan as an appropriate point of comparison for presenting its reasons for choosing Plan–B Levelized, but the Commission in no way limited its consideration of other proposals as Mr. Knapp asserts. Mr. Knapp and certain other parties made proposals which were even more restrictive, and hence posed more risk to customers’ interests, than the Optimal Benefits Plan. As stated in Order No. 2018-804, the Commission’s reasons for choosing Plan–B Levelized over the Optimal Benefits Plan apply *a fortiori* to the proposals made by other parties. In any case, all such proposals were given due consideration.

K. Securitization

Mr. Knapp states that the Commission erred by not considering the prospective use of securitization in Order No. 2018-804. *See* Knapp Pet. ¶ 8. But including a securitization mandate in Order No. 2018-804 would have been inappropriate for several reasons.

First, Dominion Energy’s witnesses were clear that including a securitization mandate in Order No. 2018-804 would defeat the merger economics, prevent Dominion

Energy from closing the merger and thus make it impossible for customers to receive the merger benefits provided under Plan–B Levelized. Tr. at 4217-10–4217-12, 4263-64.

Furthermore, the feasibility and cost of any future securitization proposal necessarily depends on the terms of the enabling legislation, the financial markets’ assessment of that legislation, the resulting credit rating of the securities to be offered, and other factors such as the breakup fees that bondholders would have to be paid in order to extinguish their interests and allow SCE&G to be recapitalized. Securitization proposals are entirely hypothetical at this stage. There is no enabling legislation and nothing for markets to evaluate. Costs and benefits of a securitization transaction are not subject to quantification at this time. It is unclear whether there is market capacity for a securitization transaction of the size necessary to securitize the NND costs. Furthermore, while the Commission has statutory authority to approve securities issued by utilities, it presently has no factual, legislative or statutory basis to order securitization at this time.

L. Other Issues

Several of the Petitions for Rehearing or Reconsideration consist largely of alleged lists of errors presented in conclusory language unsupported by citations to the transcript of record or any sort of sustained legal or regulatory analysis.⁶ As such, the assertions of errors are insufficient standing alone to support a petition for rehearing or reconsideration. *See Potter v. Spartanburg Sch. Dist.* 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) (“An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory.”).

⁶ See FOE/Sierra Pet. ¶¶ 1-7; AARP Pet. ¶¶ 1, 5; Knapp Pet. ¶¶ 1-8.

Contrary to Petitioners' conclusory assertions, Order No. 2018-804 is a comprehensive order setting forth specific findings and conclusions regarding the matters raised in this proceeding. It is based on a thorough review and analysis of the facts and evidence presented in the hearing in this matter, including that presented in the public hearings. Upon review, the Commission finds that the Petitioners do not raise any issues of law or fact that were omitted from consideration or misconstrued by the Commission in the prior order, except as explained above. Indeed, the preponderance of the evidence, the law, and sound rate-making policy support each of the findings and conclusions contained in Order No. 2018-804.⁷ Should any Petitioner assert that it intended to raise challenges that are not discussed here, the Commission's failure to discuss them is the result of the Petitioner failing to raise those challenges with clarity and specificity as S.C. Code Ann. Reg. § 103-825(4) and *Camp* require. Those challenges are deemed to be abandoned.

M. Request of Jerry Harvell

On January 9, 2018, Jerry Harvell, a customer of SCE&G, filed a document purporting to be a request for reconsideration of all of the Commission's findings in Order No. 2018-804. However, S.C. Code Ann. Section 58-27-2150 limits such requests to a "party to the proceeding." Mr. Harvell was not a party of record to the proceeding and, therefore, does not have standing to file a request for reconsideration. His request, therefore, must be dismissed.

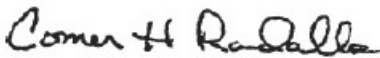
⁷ The letter of Lynn Teague was not an actual petition; rather, it was a letter in support of the Petitioners. Therefore, no action needs to be taken specifically with regard to Ms. Teague's letter, and to the extent that there is any argument that action should be taken, any request in the letter is denied for the reasons explained in this Order.

CONCLUSION

The Commission has considered the issues presented in the Petitions for Rehearing or Reconsideration. There is substantial, adequate, and sufficient evidence contained in the record to support the Commission’s decision to approve the merger and Plan–B Levelized as proposed by SCE&G and Dominion Energy. In addition, the merger conditions set forth in Order No. 2018-804 and the settlements agreements entered into by various parties protect the public interest and those of ratepayers as it pertains to the issues presented in this proceeding. Therefore, based upon the testimony and evidence contained in the record before us, the Petitions do not present sufficient grounds to modify, amend, or rehear the matter decided in Order No. 2018-804, except as explained above, and, accordingly, the Commission denies the Petitions.

This Order shall remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:


Comer H. “Randy” Randall, Chairman

ATTEST:


Jocelyn Boyd, Chief Clerk/Administrator

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Orders as filed in Docket Nos. E-22, Sub 551 and G-5, Sub 585 were served electronically or via U.S. mail, first-class, postage prepaid, upon all parties of record.

This, the 12th day of March, 2019.

/s/Andrea R. Kells

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