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August 14, 2018

VIA ELECTRONIC FILING

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

Re: Consolidated Docket Nos.: 2017-207-E; 2017-305-E; and 2017-370-E

Dear Ms. Boyd:

Please find enclosed for filing on behalf of the South Carolina Office of Regulatory Staff, the Direct Testimony and Exhibits of M. Anthony James and Elizabeth H. Warner, which are due on August 14, 2018.

In addition, we have also included the Cross-Examination of South Carolina Electric & Gas Company's Chief Financial Officer, Iris Griffin, and the Opinion and Order issued by U.S. District Court Judge J. Michelle Childs, on August 6, 2018.

Sincerely,

Andrew M. Bateman

Enclosures

cc: All Parties of Record in Docket No: 2017-207-E (via E-mail)
All Parties of Record in Docket No: 2017-305-E (via E-mail)
All Parties of Record in Docket No: 2017-370-E (via E-mail)
Joseph Melchers, Esquire (via E-Mail)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

BEFORE THE HONORABLE J. MICHELLE CHILDS
IN THE UNITED STATES DISTRICT COURT
PRELIMINARY INJUNCTION
- TESTIMONY OF IRIS GRIFFIN -

South Carolina Electric & Gas Company, Plaintiff,	
-vs.-	3:18-cv-01795 July 30, 2018
Comer H. Randall, in his official capacity as Chairman of the South Carolina Public Service Commission; Swain E. Whitfield, in his official capacity as Commissioner of the South Carolina Public Service Commission; John E. Howard, in his official capacity as Commissioner of the South Carolina Public Service Commission; Elliott F. Elam, Jr., in his official capacity as Commissioner of the South Carolina Public Service Commission; G. O'Neal Hamilton, in his official capacity as Commissioner of the South Carolina Public Service Commission; and Thomas J. Ervin, in his official capacity as Commissioner of the South Carolina Public Service Commission. Defendants.	

A P P E A R A N C E S:

For the Plaintiff: STEVEN J. PUGH, ESQ.
I.S. LEEVY JOHNSON, ESQ.
GEORGE C. JOHNSON, ESQ.
DAVID L. BALSER, ESQ.
JONATHAN R. CHALLY, ESQ.
BRANDON R. KEEL, ESQ.
JULIA C. BARRETT, ESQ.
ASHLEY C. PARRISH, ESQ.

A P P E A R A N C E S (CONTINUED):

For Speaker James H. Lucas:

ROBERT E. TYSON, JR., ESQ.
ROBERT ERVING STEPP, ESQ.
VORDMAN CARLISLE TRAYWICK, ESQ.
MICHAEL JOSEPH ANZELMO, ESQ.

For Senator Hugh Leatherman:

MATTHEW T. RICHARDSON, ESQ.
ERIC AMSTUTZ, ESQ.

For PSC: JOHN M. REAGLE, ESQ.

Court Reporter: Jennifer H. Williams, RPR
United States Court Reporter
901 Richland Street
Columbia, SC 29201

STENOTYPE/COMPUTER-AIDED TRANSCRIPTION
*** *** *** ***

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THE COURT: Thank you. First witness.

MR. PUGH: May I proceed, Your Honor?

THE COURT: Yes, you may.

MR. PUGH: Your Honor, Plaintiff South Carolina Electric & Gas calls Iris Griffin.

THE COURT: Please be sworn in over there.

THE CLERK: Please raise your right hand to be sworn.

IRIS GRIFFIN, after being duly sworn, testifies as follows:

THE COURT: Just pull the microphone to yourself so we can all hear you.

THE WITNESS: Okay.

THE COURT: Thank you. Okay.

MR. PUGH: May I proceed, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. PUGH:

Q Good morning.

A Good morning.

Q Ma'am, would you please tell us your name?

A Iris Griffin.

Q Ms. Griffin, how are you employed?

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1 a payment of a dividend recently by SCANA?
2 A SCANA reduced its dividend payments by about 80 percent.
3 And that would have typically been the portion that would
4 have been provided by the electric business of SCE&G.
5 Q What is the ability of SCE&G -- having invested 5
6 billion dollars, as you've told us, as of July 31, 2017; what
7 is the ability of SCE&G to now simply cut its way back to
8 prosperity?
9 A That would be very -- extremely challenging to do.
10 Q Okay.
11 A You would have significant reductions in operations,
12 reliability investments in our system, in order to be able to
13 accomplish that.
14 Q Okay. Ms. Griffin, those are all my questions. Please
15 answer any these other attorneys may have. Thank you, Your
16 Honor.
17 THE COURT: The Public Service Commission, do you
18 wish to proceed first on any cross examination?
19 MR. REAGLE: No, Your Honor.
20 MR. STEPP: May it please the Court.
21 CROSS EXAMINATION
22 BY MR. STEPP:
23 Q Good morning, Ms. Griffin.
24 A Good morning.
25 Q I'm Bobby Stepp. I represent Speaker Jay Lucas in this

1 proceeding. And I've got a few questions for you, if you
2 don't mind.
3 A No problem.
4 Q You are talking here today about consequences that you
5 say will befall SCE&G should Act 287 and Joint Resolution 278
6 go into effect, correct?
7 A That's correct.
8 Q You're not talking about any damage that has already
9 occurred to SCE&G as a result of anything that's transpired
10 prior to the adoption of this Act, correct?
11 A I think some of the questioning that we just went
12 through did talk about historical things. But, yes; I'm here
13 to talk about the future.
14 Q Could I ask you just to put this microphone a little
15 closer to you?
16 A Sure.
17 Q My ears are not what they used to be.
18 A Is that better?
19 Q That's better. Thank you. But for purposes of what
20 you're telling the Court here today, you're here to testify
21 about consequences that will happen in the future should this
22 Act be allowed to stand, correct?
23 A That's right.
24 Q Do I understand that right?
25 A You do.

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1 Q Not anything, not any harm that SCE&G or SCANA may have
2 already suffered, correct?
3 A Correct.
4 Q All right. Now, in 2017, did SCE&G meet all of its
5 financial obligations?
6 A Yes, we did.
7 Q And did it -- was it operationally ready? You talked
8 about operational readiness with Mr. Pugh, correct?
9 A I did.
10 Q And in 2017, was SCE&G operationally ready?
11 A Yes.
12 Q And in 2017, did SCE&G comply with its long-term
13 contracts for fuel and other materials?
14 A We did.
15 Q And in 2017, was SCE&G able to raise capital?
16 A We were.
17 Q And was SCE&G in 2017 able to borrow money in the bond
18 or other financial markets?
19 A We were not able to go to the long-term bond market due
20 to all the uncertainty in the marketplace related to the
21 nuclear abandonment.
22 Q Did you attempt to --
23 A Yes.
24 Q Did SCE&G attempt to borrow --
25 A We did. We attempted to issue a long-term bond and

1 ultimately were told by our bank group that it was not a good
2 time.
3 Q So, prior to the adoption of the legislation that brings
4 us here, SCE&G was already unable to access the long-term
5 bond market; is that correct?
6 A That's correct. At that point in time, we were able to
7 fund it through the short-term market.
8 Q But that inability to access the long-term bond market
9 had nothing to do with the legislation that hadn't even been
10 passed at this point; is that correct?
11 A That is correct.
12 Q And at this point, are any bonds or other obligations of
13 SCE&G in default?
14 A No.
15 Q Okay. I want to look -- you're familiar -- I think Mr.
16 Pugh asked you if you were familiar with filings that SCE&G
17 and/or SCANA had made with the Securities Exchange
18 Commission, correct?
19 A That's correct.
20 Q Are you familiar with the 10-K report that was filed at
21 the end of 2017?
22 A I am.
23 Q All right. Let me have the -- I've got some technology
24 that of course I can't operate. But perhaps somebody can.
25 MR. PUGH: Can I have a copy?

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1 MR. STEPP: I don't know that I've got one.
2 THE COURT: We're just working on the technology to
3 reach one of the counsel. We'll give it a chance to reboot.
4 (Mr. Stepp hands document to Mr. Pugh.)
5 Q While he is fiddling with that, let me ask you a couple
6 of other questions. Tell me what a 10-K report is, please?
7 Do you know what that is?
8 A I do. It's the annual report we file with the
9 Securities and Exchange Commission related to our finances.
10 Q And it contains audited financial statements of the
11 company; is that correct?
12 A That is correct.
13 Q And is intended to provide the investing public with all
14 of the information that should be regarded as material with
15 respect to any investment or financial decisions relating to
16 the company?
17 A That is correct.
18 Q And of course it goes without saying that the company,
19 SCE&G and SCANA, takes great care to make sure that the
20 information presented is accurate, correct?
21 A That is correct.
22 Q Okay. Now, looking at the PowerPoint, this slide, is
23 this a copy of the first page of the Form 10-K for the year
24 ended December 31, 2017?
25 A It is.

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Q Okay. Now let's look at the next slide, please. Oh. I'm sorry. This is for SCANA and South Carolina Electric & Gas Company, correct?
A That's correct.
Q And so, some of the information in here is broken out specifically with respect to SCE&G, correct?
A That's right.
Q And we'll look at that. All right. Next slide. And this is page 130 of the 2017 10-K. And this was signed on your behalf. But it bears your signature, correct?
A That is correct.
Q And that was signed by you in your capacity as Chief Financial Officer, CEO Vice-President and Chief Financial Officer?
A Correct.
Q Now, I noticed that you told Mr. Pugh, and I saw somewhere in here, you became the CFO in January of 2018, right?
A That's right.
Q So, even though this 10-K is as of 12-31-17, when was it actually submitted?
A I believe it was in -- well, February 22nd.
Q Okay. February 22nd?
A 2018.
Q So by February 22nd you were the CFO?

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A Yes.
Q And did you undertake to make sure you were familiar and comfortable with all the information that was presented in the 2017 10-K prior to permitting your name to be put on it?
A I did.
Q Okay. All right. Now let's look at the next slide, please. This is item 6, page -- I think this is page 33. The page numbers are sort of hard to find in this thing sometimes. But I think it's page 33. And it's got Selected Financial Data. And this is for SCANA, correct?
A Yes. That's correct.
Q And this would include financial information relating to SCE&G?
A That would be consolidated into this, yes.
Q And other subsidiaries of SCANA as well, correct?
A Correct.
Q But SCANA, for 2017, operating revenues were 4 billion -- I want to make sure I've got this number right -- $4,407,000, correct?
A That's correct.
Q So, that was all of the money that came into SCANA during the calendar year for 2017?
A Yes.
Q Okay. And the amount that we're talking about here, I think you've told Mr. Pugh -- I left my notes behind. Excuse

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me. It's about 30 million dollars a month; or, over nine months, about 270 million dollars; is that correct?
A That's correct.
Q And that assumes that SCE&G is going to make a refund of the money from April through August; or April through July, correct?
A Correct.
Q All right. And you understand we're talking for this legislation about that deprivation of that money for that limited period of time?
A I do.
Q And that the final rate, the final ability of SCE&G to recover rates related to the nuclear project, would be determined by the South Carolina Public Service Commission at a later date. You understand?
A I believe that's the case, yes.
Q So, we're here today to talk about 270 million dollars for SCE&G out of total operating revenues for SCANA for last year of 4.4 billion dollars, correct?
A That's correct.
Q All right. Thank you.
A But I would point out that you're looking at revenue. And as I mentioned, we have a lot of expenditures that have to come out of that revenue, such as fuel of over a billion dollars.

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Q Understood. I want to talk about some of those expenditures. Mr. Pugh asked you something about dividends. Do you remember that?
A I do.
Q Now, dividends are payments that a corporation or distributions made by a corporation to its shareholder or shareholders, correct?
A Correct.
Q And they are, for the most part, voluntary by the corporation?
A The corporation's board has the ability to declare them or not to declare them. So, in that respect, they are.
Q Right. They're not mandatory. There is no law that says corporations have to declare them?
A No. No, sir.
Q There is nothing that says that a company has to give money back to its shareholders, correct?
A That is correct.
Q SCANA -- I mean SCE&G -- has historically paid a dividend, correct?
A That's right; very similar to our utility peers.
Q And when we talk about a dividend by SCE&G to its shareholder, we're talking about a payment from SCE&G to SCANA, correct?
A That's correct.

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Q Because SCANA is the only shareholder of SCE&G?
A That's right.
Q Okay. And now, I think I heard you say -- correct me if I'm wrong -- that the board makes the decision about whether to declare a dividend and pay it, right?
A Yes. The board makes that decision.
Q So, for dividends paid by SCE&G, that decision would be made by the SCE&G board, correct?
A That's correct.
Q All right. Now, did you or your predecessor or somebody to your knowledge provide information to the SCE&G board to inform the board about whether to declare a dividend by SCE&G during 2017?
A We would do that. Yes.
Q Okay. And was that -- are you familiar with the information that was presented?
A I am.
Q Okay. Did you participate in the preparation and presentation of that information?
A For which dividends?
Q For 2017.
A Not necessarily for all of 2017. I would have participated in the ones for this year and made that recommendation to the board.
Q Well, do you have any reason to doubt that the

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1 information -- well, let me ask you this. The information
2 was provided to the board for the 2017 dividend decisions,
3 correct?
4 A Yes.
5 Q And do you have any reason to doubt that that
6 information was complete and accurate?
7 A No.
8 Q Okay. Let's look at the next slide, please. Now, this
9 is page 32 of the 10-K. And down at the bottom, it shows --
10 it's got a section relating to SCE&G and it shows dividends
11 paid; is that right, for 2017?
12 A That is correct.
13 Q All right. And so, SCE&G in 2017 declared and paid
14 dividends quarterly, correct?
15 A That's correct.
16 Q And so, on February 16th, in the first quarter, it
17 declared and paid dividends of 76.9 million dollars?
18 A Yes.
19 Q And on April 22nd, for the second quarter, of 78.1
20 million dollars?
21 A Correct.
22 Q And on August 3rd, for the third quarter, of 78.5
23 million dollars?
24 A That's correct.
25 Q And on October 26th, for the final quarter, 80.6 million

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1 dollars, right?
2 A That's correct.
3 Q And so, that's totaled up there conveniently, I think,
4 of 79 million -- I didn't highlight that. I'm sorry. But
5 $79,640,000 in dividends? No. I'm sorry. That's wrong.
6 It's 314 million dollars; is that right?
7 A I'm not as good at doing math in my head as I used to
8 be, but that looks to be approximately right.
9 Q All right. And just assume with me that that math is
10 correct. 314 million dollars, was that about the same amount
11 that SCE&G board had declared in dividends in previous years?
12 A It would have been similar.
13 Q So, 2017, the declaration and payment of the dividend in
14 2017 was similar to what had been declared and paid by SCE&G
15 in prior years, correct?
16 A That's correct.
17 Q Okay. And now -- and so, this money went to SCANA,
18 correct?
19 A That's right.
20 Q How does it get paid? Does it just get transferred out
21 of an SCE&G account in a SCANA account?
22 A The funds would be transferred from subsidiary accounts,
23 including SCE&G to SCANA, and then SCANA would pay the check
24 to the investors.
25 Q Okay. But that's a cash transaction, correct?

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A It is.
Q So, each time one of these dividends was declared and paid, the corresponding amount of money; for example, in February of 2017, SCE&G took 76.9 million dollars and gave it to SCANA?
A That's correct.
Q In cash?
A In cash.
Q And the same would be true for the other transactions as well?
A That's correct.
Q Now, did you or anyone else to your knowledge during 2017 ever tell the board that the payment of 314 million dollars in dividends would cause SCE&G irreparable harm?
A I have no knowledge of that.
Q But you didn't?
A I did not, no.
Q Do you have any reason to think that if the board had been told by you, a CFO, or your predecessor, a CFO, that the payment of those dividends would result in irreparable harm that the board would have paid them?
A I would think not.
Q Now, you told Mr. Pugh that there had been some downgrades to the credit rating of SCE&G, correct?
A That's correct.

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1 Q Now, I looked earlier at the declaration. You filed a
2 declaration back on July the 2nd; is that correct?
3 A That's correct.
4 Q Did you look that over in preparation for your
5 testimony?
6 A I did.
7 Q In your Declaration, in paragraph 12, you mention a
8 Fitch downgrade on September the 29th, 2017? Do you remember
9 that?
10 A That should be correct.
11 Q Does that sound right?
12 A It does. If there is a copy, I'd like to see that, if
13 possible.
14 Q And you also reference -- I don't need to go through all
15 of them -- but a Standard & Poor on September 29, correct?
16 A That's correct.
17 Q And Wolfe Research and Williams Capital also in
18 September of 2017, correct?
19 A I remember those reports are referenced.
20 Q Okay.
21 A I don't remember the dates that we used, no.
22 Q So, my point being that during 2017, SCE&G experienced
23 downgrades to its credit rating by various credit reporting
24 agencies, correct?
25 A That's correct.

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1 Q And I think this is obvious, but let me make sure; that
2 when those downgrades happen, those downgrades are made known
3 to the company. So, they were known to SCE&G?
4 A That is correct.
5 Q Painfully so probably, right?
6 A That is correct.
7 Q Okay. Now, you mentioned in response to a question from
8 Mr. Pugh that SCANA has suffered a downgrade in February of
9 this year; is that right?
10 A Yes.
11 Q But SCANA is not the Plaintiff in this case, is it?
12 A No, they're not. But SCE&G has also been impacted.
13 Q All right. And yet -- I guess my question is this, Ms.
14 Griffin -- after all those downgrades in September, on
15 October 26th, if we look back at the 10-K, the Board of
16 Directors of SCE&G still considered that it had adequate cash
17 and other resources to afford a dividend of 80.6 million
18 dollars, correct?
19 A That's correct.
20 Q And I would assume that the downgrades that we just
21 talked about that happened in the last part of 2017 were
22 known to the board when that decision was made, correct?
23 A Yes.
24 Q Now, let's look at the next slide, please. Still in the
25 10-K; this is on page 114. Let me pull some of this out here

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1 if I can. This is towards the end of the report. And it
2 talks about claims of litigation. And are you familiar with
3 this part of the report?
4 A I am.
5 Q And it contains this statement that I pulled out here.
6 It says: Known and knowable conditions and events when
7 considered in the aggregate as of the date of issuance of
8 these financial statements do not suggest it is probable that
9 the Company and Consolidated SCE&G will not be able to meet
10 obligations as they come due over the next 12 months. Boy,
11 that's law speak if there ever was one.
12 A There are a lot of lawyers involved.
13 Q And another way to say that, that known and knowable,
14 there was nothing known or knowable as of 12-31-17 that
15 suggested that SCANA and SCE&G would not be able to meet
16 their obligations over the succeeding 12 months?
17 A That's right. That's the first sentence of that.
18 Q That's a fair restatement of that?
19 A Yes.
20 Q And over the next 12 months would be from 12-31-17 to
21 12-31-18, correct?
22 A Correct.
23 Q And so, despite the downgrades, despite the payment of
24 dividends, despite all the other events that transpired in
25 2017, it was the position of the company that none of that

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1 made it probable that the company could not meet its
2 obligations for the succeeding 12 months, correct?
3 A That's right. That's an assessment we make at a point
4 in time. So that was the assessment at the end of the year.
5 And you'll see the second sentence of that paragraph that
6 you've highlighted there talks about possible future actions
7 and impact they could have.
8 Q Okay. We'll get to that in a minute. I think I've got
9 one more piece here. Now, this is back on page 14. And this
10 is still from the 10-K. And here on page 14, the company
11 reported to the SCE&G that there is uncertainty as to whether
12 the Company and Consolidated SCE&G will be able to recover
13 costs expended for the nuclear project, and a reasonable
14 return on those costs, under the abandonment provisions of
15 the BLRA or through other means; is that correct?
16 A That's correct.
17 Q So, way back, at the end of 2017, SCE&G already
18 considered it uncertain that it would be able to recover its
19 costs for the nuclear project, right?
20 A That's correct.
21 Q And it already considered that its status under the
22 BLRA, for lack of a better term, was uncertain, correct?
23 A That is true.
24 Q So it was already taking into account and reporting to
25 the investing public and to the SEC they might not get that

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1 money back, correct?
2 A That's correct. But our assessment at that time was not
3 the magnitude of reduction that we've seen now.
4 Q Well, this doesn't quantify that magnitude at all.
5 A You're correct.
6 Q It just says it may not be able to recover any costs.
7 Correct?
8 A We said will be able to recover costs, yes.
9 Q But it doesn't say --
10 A It doesn't give any magnitude.
11 Q It doesn't give any magnitude. It just says it's
12 uncertain whether we'll be able to recover costs and a
13 reasonable return of those costs. And my only point is that
14 this didn't pop up in June or July of this year. That issue
15 had been on the table, had been something that SCANA had been
16 confronting, SCE&G had been confronting for some time,
17 correct?
18 A That's correct.
19 Q Basically ever since the decision to abandon the nuclear
20 project, correct?
21 A Shortly thereafter, yes.
22 Q And yet, even with that uncertainty, still the report of
23 the company to the SEC and to the general public at the end
24 of 2017 was, it's probable; with all that being taken into
25 account, it's still probable we're going to be meet all of

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1 our obligations for the succeeding 12 months, correct?
2 A That's correct.
3 Q Okay. Now, you mentioned a dividend cut; is that
4 correct?
5 A Yes.
6 Q Now, that's a SCANA decision to cut dividends, correct?
7 A That's the board's decision, yes.
8 Q Right. Has SCE&G yet made a decision to cut dividends?
9 Correct? Has it?
10 A The board has approved the dividend payment that
11 included a very small amount from the gas business of SCE&G.
12 So, SCE&G's dividend has been paid that was related to the
13 gas business.
14 Q Okay. So, the board of SCE&G has it within its power
15 for 2018 to reduce or eliminate dividends completely,
16 correct?
17 A It does. Right.
18 Q And if the board were to reduce dividends, or to
19 eliminate dividends for this year; compared with 2017, that
20 would put 314 million dollars back into the account of SCE&G,
21 correct?
22 A From a cash perspective. But that would cause massive
23 upheaval in our shareholder base. Because there are many
24 shareholders who cannot hold our stock if we don't pay a
25 dividend.

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1 Q Well, the harm that you are here to tell the Court about
2 is not harm to your shareholders. It's harm to the company,
3 correct?
4 A That's correct.
5 Q Right. And you mentioned Exhibit 5. Do you remember
6 that; the pro forma return on equity for 2017, assuming that
7 something happened. Does this assume that SCE&G's rate was
8 permanently reduced by 14.8 percent?
9 A This assumes an annual impact of the rate reduction
10 that's been proposed.
11 Q So an annual impact certainly means that more than the
12 temporary rate cut that we're here to talk about is being
13 considered here?
14 A Right. This would be 12 months.
15 Q This would be 12 months. We're only here to talk about
16 nine months, for one thing. So, that's not accurate on its
17 face with respect to Act 287, correct?
18 COURT REPORTER: Is there an answer?
19 A Yes. That's correct. Not specifically to the Act.
20 Q And then, going forward, if that were to remain in
21 effect, that return on equity would be approximately the
22 same?
23 A That's right.
24 Q Correct? Now, tell me exactly what return on equity is.
25 What does that 5.16 percent actually mean?

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A That's probably the amount of return that an equity investor can expect from their investment.
Q So, if all of this were to go into effect over a 12-month period; or, arguably, permanently, an SCE&G shareholder could expect to get a return of 5.16 percent on his or her investment?
A On this business, yes.
Q Yeah. Okay. I've got some stuff I'd like to get that on.

MR. PUGH: Object to the sidebar, Your Honor.

PLAINTIFF'S ATTORNEY:

MR. STEPP: I withdraw it, Your Honor.

THE COURT: Sustained.

Q And you say that the utility company average was 9.5 percent?
A Yes.
Q Has the average utility company abandoned a nuclear power project in the midst of its construction it having invested 5 million dollars in it?
A No.
Q Let's look at slide 9, I think, please. Oh, well, I'm sorry. Still on 114. It also contains this statement. Management believes as of the date of issuance of these financial statements it has access to available sources of cash to pay obligations when due over the next 12 months.

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Correct?
A That's correct.
Q And that would be for the period of 2018?
A Correct.
Q Notwithstanding everything that we've already talked about?
A That's correct.
Q All right. Let's go to the next one. And, indeed, the company also reported -- I think consistent with what we already said -- that regulatory legislative judicial proceedings outside of the company's and SCE&G's control may result in the temporary or permanent suspension of approximately 445 million annually of rates being collected under the BLRA?
A That's correct.
Q So that was something that was contemplated as possible?
A It was contemplated as possible, yes.
Q It was a known or knowable condition as of 12-31-2017?
A Yes.
Q But we're not here to talk about this 445 million dollars. We're here just to talk about the difference in the experimental rate, correct?
A That's right.
Q All right. Next. Now, in the first quarter of 2018, SCE&G also filed what they call a 10-Q report; is that

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1 correct?
2 A That's correct.
3 Q A quarterly report. Still with the SEC, right?
4 A Yes.
5 Q And this is for the period ending March 31, 2018?
6 A Correct.
7 Q And again, this was SCANA and SCE&G, correct?
8 A Yes.
9 Q All right. Now --
10 MR. PUGH: Excuse me. Do you have a copy of that
11 one for me?
12 MR. STEPP: Oh. Sorry.
13 (Document handed to Mr. Pugh.)
14 MR. STEPP: Your Honor, at this point, let me
15 proffer the 10-K as Defense -- collectively Defendants' 1?
16 Defendants' Exhibit 1?
17 COURT REPORTER: In evidence, Your Honor?
18 THE COURT: There's no objection, correct?
19 MR. PUGH: No. Although I guess we probably need
20 to make it Intervenors' 1.
21 MR. STEPP: Okay. Intervenors' 1. That's fine.
22 MR. PUGH: Just so we're clear.
23 MR. RICHARDSON: 10-Q is already Defendant's
24 Exhibit 3. 10-K is Exhibit 2, Defendants' Exhibit 2 on the
25 list. I'm sorry, Bobby.

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1 THE COURT: So, just --
2 MR. STEPP: Your Honor, I'm sorry. It's on the
3 list as Defendant's 2.
4 THE COURT: Okay.
5 MR. STEPP: But Mr. Pugh wants us to distinguish
6 between Defendants and Intervenors. So, perhaps it should be
7 admitted as Intervenors' 2.
8 THE COURT: Sure.
9 MR. PUGH: Without objection, Your Honor.
10 THE COURT: Thank you.
11 (WHEREUPON, Intervenors' Exhibit No. 2 is received
12 in evidence.)
13 MR. STEPP: Okay. And the -- and now I am showing
14 the witness the 3-31-2018 Form 10-Q filed by SCANA and SCE&G
15 with the SEC. And I will proffer that as Intervenors' 3.
16 It's on the list at Defendant's 3.
17 THE COURT: You may proceed.
18 Q Okay. Thank you. All right. Let's have the next
19 slide. Now, this is page 40 of the 10-Q. Now, you would
20 have been CFO when this was submitted, correct?
21 A That's correct.
22 Q So you're completely familiar with this I'm sure?
23 A I am.
24 Q Participated in its preparation and were comfortable
25 that all the information is accurate and complete?

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A Correct.
Q Okay. And on page 40, the 10-Q reports -- and I'm not going to read all this. But you can see it before you. But it reports that on January 31, 2018, the House had passed a Bill that would have reduced rates under the BLRA, correct?
A Correct.
Q And it also reports that the Senate had enacted similar legislation, although they were different in some respects, and that both of those were then pending before the General Assembly, correct?
A Correct.
Q So, as of 3-31-18, the pendency of the predecessors to the legislation that brings us together today were of public record and were known to SCE&G?
A That's correct.
Q Okay. And the House version as it was originally introduced suspended the revised rate completely for a period of time. Are you familiar with that?
A I do remember that; yes, sir.
Q And the Senate version as it was originally contemplated reduced the rate to 5 percent, correct?
A Correct.
Q And what came out of the Compromise Committee was a reduction for nine months to 3 percent basically, correct?
A Correct.

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1 Q All right. But this was all known to SCE&G at the time
2 it happened; and certainly by the time the 10-Q was filed,
3 correct?
4 A That's correct.
5 Q Next slide, please. Now, on page 41 of the 10-Q under
6 Impairment Considerations, again, the company reports, as it
7 did in the 10-K, the possibility that because of the
8 contentious nature of the reviews by legislative committees
9 and others, the adverse impact that would result if proposed
10 legislation is enacted, and the request being considered by
11 the Public Service Commission that could result in the
12 suspension of rates currently being collected, there is
13 significant uncertainty as to SCE&G's ultimate ability to
14 fully recover its costs of Unit 2 and Unit 3 and a return on
15 them from its customers, correct?
16 A Correct.
17 Q So this was reported, and that uncertainty was known to
18 the company as of that point?
19 A That's correct.
20 Q Correct? And as reported on page 41, the concern being
21 reported there is a permanent reduction of the revised rate,
22 correct?
23 A Are you referring not to this sentence but the paragraph
24 you just showed me prior to this one, or --
25 Q Yeah. The highlighted paragraph, is that contemplating

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a permanent reduction of the revised rate?
A Yes. This one is saying that we may not be able to recover our costs. So, yeah; that would be permanent.
Q And of course there hadn't been a permanent reduction or a revised rate as of yet, correct?
A Correct.
Q But Act 275 and Joint Resolution 278 did affect an interim reduction, although not elimination of the rate, for period of time, correct?
A Correct.
Q So, not everything that was forecast here has come to pass, but a little part of it has, correct?
A That's right.
Q Let's see slide 12. Now, again, we saw this same statement I think in the 10-K. But as of March 31, 2018, SCE&G told the SEC that management believes that as of the date of the issuance of these financial statements, it has access to available sources of cash to pay obligations when due over the next 12 months. Correct?
A That's correct.
Q And so, not withstanding the pendency of that legislation, notwithstanding the concern that all the costs may never be recovered, it was still the position of the company at that point that it had access to sufficient cash to meet its obligations, correct?

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A That is right. We could pull from our credit lines.
Q Okay. Next slide. And then, similar to what we have seen before, the company as of 3-31 again reiterates that known and knowable conditions and events when considered in the aggregate as of the date of issuance of these financial statements do not suggest it is probable that the company and consolidated SCE&G will not be able to meet its obligations as they come due over the next 12 months. Correct?
A Correct.
Q That statement was made? And as we said before, another way to say that is, in light of everything that was known or knowable, it was still probable that the company could meet all its obligation for 12 months going forward; now from March 31, 2018 through March 31, 2019, correct?
A Correct.
Q And that included -- the known and knowable conditions included the pendency of the legislation and the uncertainty of recovery of costs, correct?
A Correct.
Q All right. Now, Ms. Griffin, since Act 287 became effective on July the 2nd, has SCE&G been denied any access to capital between July the 2nd and today?
A No. Not that I'm aware of.
Q Has SCE&G met all of its obligations when they became due in that same period of time?

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A We have.
Q And there have not been any further downgrades to SCE&G's credit ratings during that period of time, correct?
A During that period of time.
Q And SCE&G's stock value has not declined during that period of time, has it?
A I would have to look today. But --
Q Well, we'll look at other things. Ms. Griffin, has SCE&G or SCANA, either one, filed anything with the SEC to amend, modify, or supplement in any way any of the statements made in the 12-31 10-K or 3-31 10-Q?
A We have not.
Q Have you caused the Declaration that you submitted in this case to be submitted to the SEC and filed and made public?
A I can't recall if it was filed with the SEC or not. I do not think it was. I think it's been made public on our company's website.
Q Do you think that the threat of irreparable injury to SCE&G is a fact or circumstance that the investment public ought to know?
A Yes.
Q But you haven't told them, have you?
A We have disclosed numerous times in these documents that you've shown, particularly in Note 10 to these statements,

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1 that there are significant risks associated with recovery of
2 the nuclear costs.
3 Q Right. But I don't see anywhere in anything that I have
4 seen where SCANA told SEC that it was suffering irreparable
5 injury.
6 A No. We did not use those words.
7 Q Thank you. That's all I have for you.
8 A You're welcome.
9 THE COURT: Thank you.
10 MR. PUGH: Your Honor, for the record --
11 COURT REPORTER: Could you speak up, please?
12 MR. PUGH: I'm sorry. For the record, SCE&G would
13 object that the Intervenors obviously have exactly this same
14 posture and arguments in this case. And for the Intervenors
15 to each take a turn with Ms. Griffin I think would be
16 duplicative and not the best use of our time and frankly
17 unfair to the process we find ourselves in today.
18 THE COURT: Okay. In fairness, they are parties.
19 So they'll have the opportunity to examine Ms. Griffin. But
20 I would ask that they not cover the same ground. They should
21 make different points. And I assume that they will, because
22 all of their opening statements were different.
23 MR. PUGH: Thank you, Your Honor.
24 MR. RICHARDSON: We'll do the best we can, Your
25 Honor. I'll be happy to get guidance from Mr. Pugh or the

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Court if I end up in the same place.

THE COURT: Okay.

MR. RICHARDSON: I do want to try and make sure that this Court and the witness have all the Exhibits, the first three at least, of the Intervenors' 1, 2, 3. It's the SCANA Schedule 14A.

THE COURT: I need 1 and 3.

MR. RICHARDSON: All right.

(Documents handed to the Court.)

MR. RICHARDSON: Everybody ready?

THE COURT: Yes.

MR. RICHARDSON: May it please the Court.

THE COURT: Yes.

MR. RICHARDSON: Thank you.

CROSS EXAMINATION

BY MR. RICHARDSON:

Q Hello, Ms. Griffin.

A Hello.

Q Thank you for being here and establishing a lot of the factual record for us. Isn't it true that SCE&G had to complete the construction of the nuclear plant by the end of 2020 for the 2 billion dollar in production tax credits?

A Yeah. That is correct. There were efforts underway when we abandoned the project to have those dates extended. But that is correct, at the time.

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1 Q And when SCE&G abandoned the project July 31 of 2017,
2 the schedule on file with the PSC was that the substantial
3 completion dates would be by the end of 2020. Wasn't that
4 right?
5 A I don't recall that specifically, but I would assume
6 that it had to be in order for us to continue to get revised
7 rates recovery at the time.
8 Q Yes. And isn't it true that SCE&G never changed the
9 schedule beyond the 2020 date for substantial completion?
10 A Not that I recall.
11 Q And isn't it true that the Bechtel report that was
12 provided to SCE&G said that the substantial completion date
13 should be 2023?
14 MR. PUGH: Objection. Hearsay. Relevance.
15 MR. RICHARDSON: It's a report that --
16 THE COURT: To the extent that you know.
17 A I have never read the Bechtel report.
18 Q You have never seen the Bechtel report?
19 A I have not.
20 Q Even after it became public?
21 A That is correct.
22 Q And you signed into the SEC statements?
23 A I am. There are a lot of disclosures in this SEC
24 statement that talk about challenges that the project has
25 faced and challenges that we face relevant to recovery of

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1 those costs.
2 Q And in the Complaint that was filed in this case, you
3 verified it, did you not?
4 A I did.
5 Q Which means you attested to the truth and the accuracy
6 of all the statements in it?
7 A That is correct.
8 Q And so, isn't it true that in 2017, before abandonment,
9 that SCE&G concluded that it would not have been able to
10 complete Unit 2 until the end of 2022 and Unit 3 until
11 March 31 of 2024?
12 A That would be correct.
13 Q It's paragraph 152 of the original Complaint. And that
14 was a conclusion that you are swearing is true before
15 abandonment occurred?
16 A That was part of the analysis that the team undertook to
17 decide whether or not to abandon the project. That's
18 correct. We saw those dates and the costs associated with
19 them and determined it was not fair to continue.
20 Q Okay. And you do know that the Bechtel report got
21 publicly disclosed on September 24th of 2017, don't you?
22 A I do know it was publicly disclosed, yes.
23 Q And that there was a Santee Cooper Bechtel Report Action
24 Plan that was publicly disclosed on September 29th, 2017?
25 MR. PUGH: Object to the form of hearsay,

1 relevance.
2 MR. RICHARDSON: I'm asking if she was aware that
3 it was publicly disclosed. It's a pretty big occurrence.
4 A I'm aware that the Santee Cooper information was also
5 disclosed, yes.
6 Q And then you're aware that the AG opinion, that the Base
7 Load Review Act finding it might be unconstitutional was
8 September 26th, 2017?
9 A Yes.
10 Q And were you aware that in February the House
11 unanimously -- almost overwhelmingly -- passed a version of
12 House Bill 4375 that required a complete suspension of all
13 revised rates and a cash refund of all the cash that had been
14 collected up to that date; about 2 billion dollars?
15 A I am aware, yes.
16 Q And on July the 2nd, after the Act had been passed, are
17 you aware that SCE&G asked the PSC to implement the
18 experimental rate on August the 7th?
19 A Yes. With the first billing cycle in August, which
20 would be approximately August 7th. Yes.
21 Q And are you also aware that they did note raise any
22 issues about the confiscatory nature of the experimental rate
23 or any other Constitutional challenges to the Public Service
24 Commission? Are you aware of that?
25 MR. PUGH: Object. Misstates the record in the

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1 underlying proceeding.
2 MR. RICHARDSON: I'm just asking if she's aware of
3 the letter July the 2nd by SCE&G filed with the Public
4 Service Commission which specifically says, we're going to
5 federal court on these issues; we're not coming to you on
6 them.
7 THE COURT: Well, the letter speaks for itself.
8 MR. PUGH: It speaks for itself. Thank you.
9 THE COURT: Yes. But to the extent she is aware of
10 the letter, and then whatever her understanding of what the
11 statement, she can reveal.
12 MR. RICHARDSON: Thank you.
13 A Yes. I'm aware of the letter that was filed.
14 Q And you're aware that SCE&G offered to propose to escrow
15 all of the revised rates that had been ordered to be
16 suspended from collection between now and December during the
17 pendency of this case?
18 A Yes. I'm aware that was an alternative we offered.
19 Q You're aware that that was what was offered by SCE&G?
20 A Yes.
21 Q And while the money was in escrow, would SCE&G be able
22 to use it?
23 A No. We would not.
24 Q In your familiarity with the dividends of SCANA and its
25 shareholders, is it true that there have been 260 consecutive

1 quarters of dividends paid by SCANA?
2 A I would need to verify 260. But, yes; there are many
3 consecutive quarters of dividends paid by SCANA.
4 Q And are you aware that it was increased every year? The
5 dividend was increased every year since 2010, at least?
6 A Generally, yes.
7 Q And are you aware of the adjusted payout ratios, the
8 dividends to its percentage of earnings?
9 A I am.
10 Q And has it always been more than 55 percent adjusted
11 payout ratio until this most recent reduction?
12 A Correct.
13 Q And during the last three years, are you aware that the
14 dividends payout ratio is greater than 75 percent of the peer
15 utilities?
16 A Yes.
17 Q Excuse me. I'm trying to limit the ground we're
18 covering again. The South Carolina annual meeting for
19 shareholder approval of the merger is tomorrow morning here
20 in Columbia?
21 A That is correct.
22 Q And on Thursday, South Carolina Electric & Gas has to
23 file its direct testimony on the permanent rate proceeding to
24 the PSC?
25 A Yes.

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Q And you are submitting sworn testimony on Thursday?
A I will be.
Q Is it final?
A I haven't seen a final version of it yet. I know it's still being edited this weekend.
Q Now, you are not testifying today that this temporary rate reduction for these advanced financing costs requires the impairment of a writeoff of any of the construction or financing costs as an asset?
A No. That's correct. As long as the reduction is temporary, we do not think it would require a writeoff.
Q Thank you. In the 10-Q which is Intervenors' Exhibit 3, do you have that in front of you?
A I do.
Q And just as Mr. Stepp pointed out, you sign these statements, don't you?
A That is correct.
Q And attest to their accuracy and completeness?
A Yes.
Q If you don't mind, on the bottom left of these copies, it has a page 22 of 5155. I'm not sure that's the page of the document, but it's the page of the printout.
A Okay.
Q And do you see that that is a SCE&G condensed, consolidated statement of cash flows?

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1 A Yes.
2 Q In the very bottom five lines, do you see proceeds from
3 issuance of debt and the money pool borrowings net?
4 A I do.
5 Q Doesn't that mean that SCE&G borrowed 250 million
6 dollars in the first quarter of 2018?
7 A The proceeds at issuance of debt, I believe that relates
8 to withdrawing 100 million dollars from our credit lines from
9 our banks. And then the money pool borrowing, those are
10 funds that we use at the utility company to fund each sub.
11 Q And so, you don't fund all your capital expenditures or
12 other expenditures through cash flow from operations, do you?
13 A We do not.
14 Q And if I can get you, if you don't mind, to move on to
15 page 81 of 155; you see that it's actually part of the
16 management discussion I believe? There are notes to the
17 financial statements? It's talking about affiliated
18 transactions --
19 A Yes.
20 Q -- at the top? Excuse me. If you'll look at the
21 paragraph just above the bottom chart where it starts: SCE&G
22 provided ...
23 A Yes.
24 Q I'm going to read it, and you just tell me if that's
25 true and accurate. SCE&G provided 110.7 million dollars to a

1 rabbi trust consolidated with SCANA in connection with the
2 potential change and control arising from the merger
3 agreement.
4 A That's correct.
5 Q And if you don't mind, turn to page 98 of 155. That is
6 going to be page 56 of the actual report. But in the last
7 full paragraph under other liquidity requirements and
8 restrictions --
9 A Yes.
10 Q -- do you see the sentence -- it's a long one. It's the
11 penultimate sentence that starts: In January 2018?
12 A Yes.
13 Q And it also says: Approximately 110 million was placed
14 in a rabbi trust designated as irrevocable subject to change
15 of control to fund payments pursuant to this and certain
16 other deferred compensation, incentive, and retirement plans
17 which might arise in connection with a change of control
18 and/or termination of employment or service if and when such
19 payments become due. Did I read that correctly?
20 A You did.
21 Q And is that to secure the payments of key senior
22 leadership after a change of control if you were to lose your
23 position?
24 A It's not just for senior leadership. It's for a
25 multitude of leaders in the company.

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1 Q How many?
2 A I don't have a specific number. But there are managers
3 and directors in the plan as well.
4 Q And one more before we move to a different document and
5 come back to this issue. Page 100 of 155 at the bottom, it's
6 just the next page you've got to flip to to get to it. The
7 last three sentences of that paragraph in the middle, it's
8 the third full paragraph down, it starts with: Cash
9 provided. If you'd go to the second sentence: The company's
10 decision in 2017?
11 A Yes.
12 Q Can I get you to read those next three sentences and
13 just verify that those are true and accurate?
14 A The company's decision in 2017 to stop construction of
15 Units 2 and 3.
16 Q Just read it to yourself. I'll ask you a question.
17 A Oh. Perfect. That's much better. Yes. It's true.
18 Q And so, doesn't this mean that abandonment is going to
19 provide SCE&G with both a tax refund and a tax deduction
20 which will increase the cash flows?
21 A That's correct.
22 Q And significantly increase the cash flows?
23 A We received in July of this year about 200 million
24 dollars from a refund, from these tax refunds that you're
25 talking about.

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1 Q And that's just the beginning, isn't it?
2 A There will be more deductions that we take over time.
3 So we'll pay less in taxes over time.
4 Q More than a billion dollars up front, right?
5 A In total for the project, yes.
6 Q I want to ask you to turn, if you don't mind, to
7 Plaintiff's Exhibit 1. It is a Schedule 14 which contains in
8 it the proxy statement for the merger?
9 A Yes.
10 Q I'm going to ask you, if you don't mind, it's again
11 different numbering. But if you look at the bottom left
12 corner, page 98 of 254, which gives us -- that's page 80 of
13 the proxy statement, the merger-related compensation?
14 A Yes.
15 Q And there it details, you know, at least the top six
16 senior executives of SCANA and what their merger-related
17 compensation would be. Isn't that right?
18 A That's correct.
19 Q And Mr. Addison is going to get almost 10 million
20 dollars. And these are the numbers, right, that are
21 protected by the rabbi trust money, right? This compensation
22 is what is secured by the irrevocable contribution to the
23 rabbi trust, right?
24 A That is correct. Our change of control policy if the
25 merger is completed and you lose your job. So, those people

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1 who lost their jobs through the merger would be recipients of
2 that.
3 Q And this is provided as incentive to the senior
4 executives to complete the deal, complete the merger?
5 A And to stay through completion of the merger.
6 Q And to stay. And for you, since you've become CFO,
7 you're part of this senior group, you'd get 3 million
8 dollars?
9 A That's correct.
10 Q And then, as you have pointed out, there's more than
11 just senior executives. If you go right down the line, it
12 says: Other executive officers. And then it just aggregates
13 the other executive officers and how much they would get?
14 A That's correct.
15 Q If I can ask you to turn to one more page in the 10-Q.
16 102 out of 254, if you'd look at the bottom left.
17 A In the 10-Q or in the --
18 Q I'm sorry. You're right. In the proxy statement that
19 is part of Schedule 14A, Exhibit 1.
20 A You said page 102?
21 Q 102 of 254.
22 A Okay.
23 Q And in that top paragraph, and in this whole page, it's
24 talking about a settlement scenario that SCE&G, that you all
25 essentially calculated when you were -- before the merger was

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1 agreed to of what SCANA could accept without having any
2 financial -- or without -- essentially having and also
3 maintain its investment grade credit rating, right?
4 A Investment grade credit metrics, yes.
5 Q Well, let's read the sentence that's the -- I'm going to
6 read the sentence, the third sentence from the bottom of the
7 first full paragraph. The financial forecast under the 9.75
8 regulatory settlement scenario reflects circumstances under
9 which SCE&G would provide the largest reduction in
10 electricity rates on a stand-alone basis while maintaining an
11 investment grade credit rating for SCANA.
12 A That's right. And the metric part of that is what's
13 under our control. So we would have been focused on the
14 metric piece of the rating.
15 Q But this statement I just read is what you signed?
16 A That's right.
17 Q Is that true and accurate?
18 A Yes.
19 Q You just explained to me why it's true?
20 A Right. I'm just saying that I can't tell you the
21 qualitative aspects. The rating agencies can do whatever
22 they choose. But we were looking at metrics that would
23 support an investment grade rating.
24 Q And part of this scenario that you all calculated, that
25 9.75 percent, was a permanent cut; isn't that right?

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1 A That's correct.
2 Q And that permanent cut, as you've explained already,
3 would also require a write-down of assets in this scenario of
4 1.8 billion dollars, right?
5 A That's correct.
6 Q And in that scenario, management says that that
7 permanent cut, with the writeoff of 1.8 billion in assets,
8 would maintain the investment grade credit rating for SCANA,
9 right?
10 A Yes.
11 Q And the temporary rate wouldn't require a writeoff of
12 any assets?
13 A Not -- no. It would not.
14 Q You already have Plaintiff's Exhibit 5 in front of you.
15 You remember Mr. Pugh was asking you about page 3. And I
16 know Mr. Stepp touched on this. On page 2, I wanted to ask
17 you that there is -- if you don't mind, explain to us how the
18 return -- it's not on page 2 -- but the return on debt was
19 calculated?
20 A The return on debt is based on the average debt we have
21 outstanding. So, the rates that we owe on that debt.
22 Q And that's aggregated, or is that --
23 A It is.
24 Q -- for all debt?
25 A It's aggregated for SCE&G.

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Q And how about, how is the return on equity calculated?
A The return on equity is what falls out after you meet your other obligations. So, the debt holders get paid first. And you fund operations. And then the remnants are what is left for equity investors.
Q Okay. And in preparing this pro forma with the adjustments, what is assumed as to the reduction in revised rates?
A An annual reduction of approximately 367 million dollars.
Q And that was -- would have been effective January 1st of 2017?
A Yes. This looks at a 12-month period.
Q And on page 2 of Exhibit 5 in the bottom right, line 23, it shows the adjusted rate of return of 5.49 rate of return, right?
A That's right.
Q And that shows you can still meet any debt payments, right? Even under this scenario?
A Our debt payments?
Q Yeah. The debt cost is actually less than 5.49 even under the assumptions.
A Well, the embedded cost of debt that you see on page 11 of that Exhibit is 5.86.
Q So, not quite, but almost?

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A Yeah.
Q And on page 3, you talk about the return on equity. And that is after all the debt has been paid, isn't it?
A Yes.
Q So, that's lost profit, right --
A Yes.
Q -- that you're talking about?
A Rate of return, yes.
Q But it's still a return on equity, meaning you're still making profits?
A Yes.
Q At this rate, 5.16, after all the debt is paid?
A Yes.
Q And isn't it true that new debt in 2018 would cause less than the 5.16 percent return of equity?
A New debt?
Q New debt in 2018.
A It would depend on the length of time. But generally, I would say, yes, based on the overall market conditions.
Q About 4.5 percent?
A I don't know. How long are you looking at for a period there?
Q The comparable debt that you all --
A I mean, thirty-year debt is going to cost more than two-year debt and five-year debt.

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1 Q Okay. No question the nuclear plant is not constructed,
2 is it?
3 A No.
4 Q It's not being constructed?
5 A That's correct.
6 Q It hasn't been under construction since July 31 of 2017?
7 A That's correct.
8 Q And it hasn't been on schedule or on budget since at
9 least July 31 of 2017, because of that, right?
10 A Because we're not constructing, right.
11 Q And you know that SCE&G can recover even capital and
12 financing costs in the permanent abandonment rate proceeding;
13 isn't that right?
14 A Yes.
15 Q And, for example, in your affidavit in paragraph 27, you
16 talked about construction costs that you haven't yet asked
17 for -- financing costs -- until the abandonment proceeding,
18 right?
19 A That's right.
20 Q And you know that for SCE&G to recover financing costs
21 at all, but also under the revised rates, that it has to be
22 honest and prudent about incurring those costs and staying on
23 schedule, don't you?
24 A Yes.
25 Q And you're not testifying that -- or excuse me. You're

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not quantifying -- because I think Mr. Stepp has covered it -- that you have access to the guideline markets? We've illustrated that already. But you're not trying to quantify today any increase in the financing costs that may result from these experimental rates taking effect, are you?

A No, I'm not quantifying that.

Q And you're not testifying about any specific capital expenditures that would have to be cut if the experimental rate takes effect, are you?

A I know the company is already cutting back on spending. But I'm not specifically talking about any items today, no.

Q Yes. But I am asking specifically about capital expenditures, because that's one of the levels of harm that, you know, you all are talking about may occur. You haven't said it has occurred. I'm just asking; you don't have any specific capital expenditures that you know of that would have to be cut if the experimental rate takes effect next week?

A I do know we are delaying purchasing some capital expenditures at this point.

Q What are those?

A There's a step-up transformer related to our Saluda Hydro Station. That's the one that comes to mind right now. There is a list of contingency items that we have.

Q Contingency meaning you all haven't cut any of these

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capital expenditures?
A No. Some of them are being reduced at this point.
Q And so, no capital expenditures have been canceled yet, have they?
A Well, the step-up transformer has been delayed. It has not been canceled. Right.
Q Delayed?
A That's correct.
Q Yeah. And the 10-Q -- you know this -- that we had looked at earlier, shows capital expenditures of about 500 million. I think you testified about that already. For 2018. And that hasn't been revised? That number is still accurate, right?
A That's correct. It still there.
Q You pointed in your testimony to two financial analysts that had a negative outlook on SCANA. But there are others who have had positive reactions recently; isn't that right?
A Equity analysts? Yes.
Q Yeah. And about the Act itself, too, right?
A I don't know if I've seen any positive reports on the Act itself.
Q This is Intervenors' Exhibit 4. Ms. Griffin, I've handed you what is a Moody's rating action that confirmed their rating outlook on July the 2nd, 2018. Do you see that?
A That's right.

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1 Q Have you seen this before?
2 A I have.
3 Q And in the introductory paragraph, it's the fourth
4 paragraph down, the statement reads: The ratings
5 confirmations consider the manageable impact of the
6 legislated revenue reduction on SCE&G's and SCANA's credit
7 quality metrics, especially in light of the dividend cut,
8 while also recognizing that the ultimate authority for
9 establishing permanent rate remains with the PSC. Is that
10 right?
11 A That's right.
12 Q Intervenors' Exhibit 5. I've handed you Intervenors'
13 Exhibit 5 which is Moody's credit opinion dated July 23,
14 2108. Have you seen this?
15 A I have. This relates to SCANA Corporation.
16 Q And would you turn to page 5, the fifth paragraph down,
17 the last paragraph before the new section. And it reads:
18 Importantly, the new laws clearly acknowledge the permanent
19 rate making authority remains with the PSC a credit positive.
20 In addition, although the time for a decision has been
21 extended from the normal statutory requirement of six months
22 post filing, the law now requires a decision in the current
23 proceeding by December 21, 2018. This should allow for a
24 rational process and limits the time for additional
25 uncertainty. Do you see that?

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A I do. There is also a third sentence there as well.
Q Do what?
A I said there's also a third sentence there that discusses the challenges in determining if the rates will be fair and reasonable.
Q They'd have to be fair and reasonable, right?
A I think this is expressing concern about that.
Q It says: The PSC looks to implement permanent that are fair and reasonable?
A It says: We believe the politically-charged environment that mandated the temporary cuts will weigh heavily on the PSC as it looks to implement permanent rates that are fair and reasonable.
Q True. But what does that have to do with the Act?
A I think they're ex pressing concern that the Act could impact the PSC's decision and cause them not to create rates that are fair and reasonable.
Q And would that be any basis for irreparable harm? I mean, we've still got a permanent rate proceeding that the PSC -- they recognize the PSC is going -- has a rational -- has enough time to decide the matter and --
A Right.
Q -- implement rates that are fair and reasonable. Do you all have any problem with that process?
A No. I think if the rates are fair and reasonable, that

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1 would be fine. I think that one of their criteria for
2 setting rates is the regulatory environment. So, I think
3 they're speaking to that here.
4 Q This is Intervenors' Exhibit 6. And you're familiar
5 with MorningStar, aren't you?
6 A I am.
7 Q It's one of the national well-known analysts?
8 A They're one of our analysts, yes.
9 Q If you turn over their analyst notes on the penultimate
10 page of this Exhibit, do you see the fourth paragraph down
11 where it says: Financially, a temporary rate code is more of
12 a poke than a punch for SCANA?
13 A I do.
14 Q And that's part of what you all -- you all receive these
15 reports and review them?
16 A Yes. This is one of many reports.
17 Q All of SCANA's credit ratings are investment grade;
18 isn't that right?
19 A All of SCE&G's are investment grade.
20 Q All of SCE&G's?
21 A Yes.
22 Q And even if they're downgraded, they're still going to
23 have access to capital, won't they?
24 A Presumably, we could still access our credit lines with
25 our banks.

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Q I mean, there is a junk bond market, right? It's just more expensive?
A It is more expensive, and it's not as reliable.
Q No one has told you that the reliability of SCE&G's electric service will decline because of the temporary suspension of rates, have they?
A Our Vice-President of Operations for Electric has expressed concern that he is having to reduce tree trimming budgets as part of this. So, he thinks that could impact reliability. He has expressed that to me internally.
Q Tree trimming budgets?
A Mm-hmm (affirmative). We trim trees around our lines and so that when storms come through, there are fewer limbs to fall on the lines and create power outages. So, we've had to reduce those budgets.
Q And even though we've seen all of the -- over a billion dollars of access to cash to meet all your needs, you all have told him to stop cutting trees around the --
A No. We have not told him to stop cutting trees. He's reduced his budget. So, there are some areas that he would like to spend money on that he is not right now because of budget restraints of the company.
Q As part of the senior executive team of SCANA, you all are okay under the circumstances we've just read about in the 10-Q and 10-K allowing him to quit the electric service or

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1 liability of electric service at jeopardy by not cutting all
2 the trees?
3 A He is not putting overall reliability for electric
4 service in jeopardy. I'm just speaking to the fact that we
5 have cut budgets at the company.
6 Q There may be some problems if the trees touch the wires?
7 A Yes. They would cause outages.
8 Q Oh. And you know, being -- working with the analysts,
9 presentations, answering questions, you know that these
10 capital and financial markets are evaluating the future PSC
11 decision, just as we have talked about with the MorningStar,
12 about the permanent abandonment rates, don't you?
13 A They are looking at that, yes.
14 Q And they're not looking at this Act any more, are they?
15 A I don't know that. I would say that's true.
16 Q It's been over a month. Have there been any rating
17 changes?
18 A No. There have not, because they're looking at this
19 injunction hearing.
20 Q About the temporary rates?
21 A Yes.
22 Q For which there's no cut in assets, no impairment of
23 assets?
24 A There would be no impairment of assets.
25 Q In your affidavit on page 4, your Declaration in this

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1 case is paragraph 10, you say that SCE&G's only return on its
2 investment in the new nuclear project is the revised rates.
3 But that's not true, is it? You've got the permanent
4 abandonment rate proceeding pending, don't you?
5 A Well, that's -- we don't have any rates in effect for
6 that at this point.
7 Q But --
8 A So, the current return that we have is due to the
9 revised rates that we're collecting.
10 Q The 2 billion dollars you've already collected?
11 A That we have collected, yes.
12 Q Okay. And the petition for billions more over decades
13 in the permanent abandonment rate proceeding, right?
14 A That's correct.
15 Q In your affidavit on page 8, paragraph 31, you talk
16 about a permanent abandonment rate having cascading effects
17 that will impede the ability to mitigate losses. That's not
18 this case, is it? A permanent rate reduction?
19 A A permanent rate reduction, no; that's not this case.
20 Q That's not what the Act did, did it?
21 A That's correct.
22 Q And, you know, the same in paragraph 32. You talk
23 about, you know, a rate reduction could lead to problems and
24 could ultimately be irreversible. But we've talked about
25 that. There is no impairment of assets here. And the

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1 analysis that was done on the 9.75 percent showed that this
2 can be done without harming the credit rating, haven't we?
3 A We have shown that could not harm the credit metrics,
4 yes.
5 Q And in paragraph 35, you talk about the credit
6 downgrades discussed above. But those weren't because of
7 this Act, were they?
8 A I don't have the document that you're referring to to
9 know what you're --
10 Q Well, there have been no credit upgrades -- I mean
11 credit changes -- since this Act, have there?
12 A That's correct.
13 Q And in paragraphs 36 --
14 THE COURT: Excuse me. Do you have a little ways
15 to go?
16 MR. RICHARDSON: Actually, I do not. I've got I'd
17 say five minutes.
18 THE COURT: All right. That's fine.
19 Q Paragraphs 36 through 38, you talk about this fuel
20 company contract and that happened in the past, because it
21 says: Following the credit downgrades. Did it happen back
22 in February, or did that happen back in October?
23 A That it was in February.
24 Q Okay. But that's another incident that wasn't caused by
25 the Act?

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A No. That was meant to be indicative of what we could expect if the Act is put in place.
Q And you talk about Dominion, having this condition of the merger. You now know that Dominion does not consider the Act to be a failure of that condition, don't you?
A I've read in The State Newspaper that that was what happened.
Q As CFO, in a month, you have not checked in with Dominion about whether they consider an express condition of the merger agreement to have been --
A Dominion has not notified us that they are planning to walk from the deal at this point in time.
Q And so, in paragraph 41, when you say: If they exercise their rights, has not become consummated, there will be a material impact; there is no evidence of that today, is it?
A I think if you read the other rating agency reports, you would see that they are counting on the Dominion merger to help us through this financial time.
Q I'm talking about the irreparable harm you all are claiming. They haven't indicated to you that they're going to walk away at all. So, there is no irreparable harm from the Act based on Dominion's position with the merger?
A That's right. Dominion has not indicated they're going to walk at this time.
Q Now, there is a document in PSC 305 in which ORS was

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1 asking for a permanent cut to all revised rates and possibly
2 a cash refund of all that had been collected. And in
3 response to that, you filed an affidavit on January -- or
4 signed it January 22nd of 2018. Do you remember that?
5 A I do.
6 Q And this affidavit also wasn't talking about the Act?
7 A That's right.
8 Q It was talking about the rate, the permanent abandonment
9 rate by ORS?
10 A That's correct.
11 Q And part of this, in paragraph 31, you said if the
12 revised rates are disallowed, there will be no return on the
13 4.7 billion dollar investment. And that statement was about
14 the permanent rate, not the temporary rates, right?
15 A That's correct.
16 Q Okay. And that's not true under the Act?
17 A That's right. Because the Act is temporary.
18 Q Thank you. Until the Act takes effect about a year
19 after abandonment, isn't it true the ratepayers have been the
20 ones to feel the full consequences of financing the nuclear
21 plant construction?
22 A The ratepayers have been funding the nuclear, yes.
23 Q And the shareholders until this most recent announcement
24 have received full benefit and a full increase in dividends?
25 A No. Dividend was just reduced recently. And they've

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1 lost significant stock value throughout the course of time.
2 Q Hmm. And they're still -- as we've seen in Exhibit 5
3 even, they're still achieving a positive rate of return on
4 equity?
5 A That's correct.
6 Q So, last, I think I need to ask you; you're not
7 testifying today that the Base Load Review Act guaranteed
8 SCE&G recovery of every dollar it spent and all of its
9 expected profits regardless of the prudencey or other reasons
10 for abandonment, are you?
11 A No. I'm not testifying to that.
12 MR. RICHARDSON: Thank you, Your Honor. No further
13 questions.
14 THE COURT: Thank you.
15 MR. PUGH: I'm going to have a decent amount of
16 redirect, Your Honor.
17 THE COURT: Absolutely. And we're going to go
18 ahead and stick with our schedule. And we will recess for
19 lunch at this time, and we'll be back at 1:50.
20 MR. PUGH: And I think for planning purposes, Your
21 Honor, I ought to be able to with the break streamline and
22 hopefully be done in 15 minutes, 20 tops. Thank you.
23 THE COURT: I never hold a lawyer to those kind of
24 statements.
25 MR. PUGH: I didn't say it depends on the number of

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1 questions. I said time.
2 MR. BALSER: Your Honor, while we are in court, we
3 have filed our oppositions to the motions to Dismiss.
4 THE COURT: Thank you.
5 MR. BALSER: I have a hard copy for the Court, if
6 you'd like to me to hand it up.
7 THE COURT: Yes. Thank you.
8 (Document handed to the Court.)
9 THE COURT: I just need to mention that the witness
10 has stepped down. I remind her that she is under oath and
11 that she cannot speak to anybody about her testimony. Thank
12 you.
13 (WHEREUPON, a lunch break is taken.)
14 THE COURT: I would ask that the witness come back
15 to the stand, please. Okay. We're ready to proceed with the
16 continuation of the cross examination. I'm sorry. The
17 redirect.
18 MR. PUGH: Yes, Your Honor. May it please the
19 Court.
20 THE COURT: Yes.
21 DIRECT EXAMINATION
22 BY MR. PUGH:
23 Q Good afternoon, Ms. Griffin.
24 A Good afternoon.
25 Q I'll try to be brief. You were shown a number of

Q You were asked questions earlier about whether or not the company had ever disclosed the fact of the new legislation, that being Act number 258 or 257, to the SEC. Does this help your memory in that regard?

A It does. Yes.

Q So, in fact, the company did disclose to the SEC the new legislation in its 8-K report dated July 16th, 2018?

A That is correct.

MR. PUGH: Your Honor, we would like to print off and move this 8-K report which I will provide hard copies of which will be Plaintiff's Exhibit No. 53.

MR. STEPP: Fifty-six?

MR. PUGH: Fifty-three.

THE COURT: That will be admitted then.

(WHEREUPON, Plaintiff's Exhibit No. 53 is admitted into evidence.)

MR. PUGH: And I'll do that during a break. Nothing further. Thank you, Judge.

THE COURT: Thank you. Any recross?

MR. STEPP: No questions, Your Honor.

MR. RICHARDSON: Nothing further.

THE COURT: Thank you. Okay. You can step down.

***

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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s/Jennifer H. Williams

_____ August 3, 2018

Jennifer H. Williams, RPR

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

South Carolina Electric & Gas Company, Plaintiff, v. Cromer H. Randall, in his official capacity as Chairman of the South Carolina Public Service Commission; Swain E. Whitfield, in his official capacity as Commissioner of the South Carolina Public Service Commission; John E. Howard, in his official capacity as Commissioner of the South Carolina Public Service Commission; Elliot F. Elam, Jr., in his official capacity as Commissioner of the South Carolina Public Service Commission; G. O'Neal Hamilton, in his official capacity as Commissioner of the South Carolina Public Service Commission; and Thomas J. Ervin, in his official capacity as Commissioner of the South Carolina Public Service Commission, Defendants.[2]	)	Civil Action No.: 3:18-cv-01795-JMC **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND OPINION DENYING SCE&G'S MOTION FOR PRELIMINARY INJUNCTION**[1]

Plaintiff South Carolina Electric & Gas Company ("SCE&G") brings this action pursuant to 42 U.S.C. § 1983 alleging constitutional claims against the following Defendants in their

[1] Rule 52 of the Federal Rules of Civil Procedure requires the court to "state the findings and conclusions that support" the "granting or refusing [of] an interlocutory injunction." Fed. R. Civ. P. 52(a)(2). To the extent any findings of fact constitute conclusions of law, they are adopted as such; to the extent any conclusions of law constitute findings of fact, they are so adopted. Moreover, as this is a preliminary injunction, any facts identified "are not final determinations of disputed matters." *EZ Gard Indus., Inc. v. XO Athletic Co.*, No. 07-CV-4769 (JMR/FLN), 2008 WL 1827490, at *1 n.1 (D. Minn. Apr. 23, 2008).

[2] On July 1, 2018, the terms of former Defendants Robert T. Bockman and Elizabeth Fleming expired; Thomas J. Ervin began his term as a Commissioner of the South Carolina Public Service Commission; and, Cromer H. Randall became the Chairman of the South Carolina Public Service Commission. Pursuant to Federal Rule of Civil Procedure 25(d), Plaintiff substituted the new Defendants accordingly in its Amended Verified Complaint. (*Compare* ECF No. 1, *with* ECF No. 68.)

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official capacities as Commissioners of the South Carolina Public Service Commission ("PSC"): Swain E. Whitfield, Comer H. Randall, John E. Howard, Elliot F. Elam, Jr., Thomas J. Ervin, and G. O'Neal Hamilton (collectively, "Defendants"). (ECF No. 68.) Specifically, SCE&G alleges that its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; the Bill of Attainder Clause of Article 1, § 10 of the United States Constitution; and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution were violated when the South Carolina General Assembly passed (1) Act of June 28, 2018, 2018 South Carolina Laws Act 287 (H.B. 4375) ("Act 287"[3]) and (2) Act of July 2, 2018, 2018 South Carolina Laws Resolution 285 (S. 0954) ("Resolution 285").[4] (ECF No. 68 at 7 ¶ 18 & 47 ¶ 239–53 ¶ 284.)

This matter is before the court on SCE&G's Motion for Preliminary Injunction (ECF No. 5), which is opposed by Defendants and by South Carolina House of Representatives Speaker Jay Lucas ("Speaker Lucas"), South Carolina Senate President Pro Tempore Hugh K. Leatherman, Sr. ("President Leatherman") (together, "Intervenor Defendants"), and South Carolina Attorney General Alan Wilson ("Attorney General Wilson").[5] (ECF Nos. 31, 54, 59, 61.) For the reasons set forth in detail below, the court **DENIES** SCE&G's Motion for

[3] "Act 287" was ratified as "R287," but is enumerated as Act 258. To be consistent with the filings in this case, the court will refer to Act of June 28, 2018, 2018 South Carolina Laws Act 287 as "Act 287."

[4] "The PSC is charged with implementing the provisions of" Act 287 and Resolution 285. (ECF No. 68 at 6–7 ¶ 17.) According to SCE&G, "[e]ach of the defendants, as individual Commissioners on the PSC, have been, and are expected to be, personally involved in taking actions to implement [] Act [287 and Resolution 285] and violate SCE&G's constitutional rights." (*Id.*)

[5] On July 18, 2018, the court granted Motions to Intervene filed by Intervenor Defendants. (ECF Nos. 41, 82.) Additionally, on July 5, 2018, Attorney General Wilson moved to file an Amicus Brief (ECF No. 10) and the court granted Attorney General Wilson's Motion on July 12, 2018. (ECF Nos. 27, 87.)

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Preliminary Injunction. (ECF No. 5.)

I. JURISDICTION

1. The court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) because SCE&G is suing Defendants pursuant to 28 U.S.C. § 1983 for violations of its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution; the Bill of Attainder Clause of Article 1, § 10 of the United States Constitution; and the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. (ECF No. 68 at 7 ¶ 18.)

2. Additionally, the court has determined that its exercise of jurisdiction is not constrained by application of the Johnson Act, 28 U.S.C. § 1342, *Younger* abstention, *Pullman* abstention, *Burford* abstention, or sovereign immunity. (*See* ECF No. 97 at 7–19.)

II. FINDINGS OF FACT RELEVANT TO PENDING MOTION

3. This case arises out of SCE&G's abandonment of the construction of two nuclear reactors known as V.C. Summer Units 2 and 3 (the "Project") in Jenkinsville, South Carolina, and the South Carolina General Assembly's passage of Act 287 and Resolution 285. (*E.g.*, ECF No. 68 at 1–2.)

4. The purpose of the Project was to increase SCE&G's base load capacity and enable it to meet the electricity demands of its South Carolina customers.[6] (*See* ECF No. 68 at 7 ¶ 20, 13 ¶ 54–14 ¶ 61.)

5. SCE&G's incentive for the Project occurred as a result of the South Carolina General Assembly's passage of the Base Load Review Act, S.C. Code Ann. § 58-33-210 *et seq*.

[6] "Base load" is defined as "the minimum amount of electric power delivered or required over a given period of time at a steady rate." U.S. Energy Information Administration, *Glossary*, https://www.eia.gov/tools/glossary/index.php?id=B (last visited on Aug. 6, 2018).

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(2015[7]) ("BLRA"), which became "effective upon signature of the Governor on May 3, 2007." S.C. Code Ann. § 58-33-210.[8]

6. The PSC is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State." S.C. Code Ann. § 58-3-140(A). As a result, all rates charged by a utility in the state of South Carolina must be approved by the PSC. *See* S.C. Code Ann. §§ 58-27-820, -830.

7. On May 30, 2008, SCE&G filed a Combined Application for Certificate of Environmental Compatibility, Public Convenience and Necessity[9] (the "Application") with the PSC, pursuant to the BLRA. (ECF No. 68 at 14 ¶ 65.) SCE&G sought approval for construction of the Project based on a projected cost of $6.3 billion. (*Id.* ¶ 64.) SCE&G initially projected that it would complete V.C. Summer Unit 2 by April 1, 2016, and Unit 3 by January 1, 2019. (ECF No. 68-2 at 17.) In order to avail itself of tax credits and to get the revised rates under the BLRA, SCE&G needed to complete the Project by 2020. (ECF No. 99 at 58:20–23.) SCE&G

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[7] All South Carolina Code sections from Title 58 are included in the 2015 codification of Title 58, and the court declines to repeat the year in each citation.

[8] "The [stated] purpose of the BLRA 'is to provide for the recovery of the prudently incurred costs associated with new base load plants . . . when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs.'" *S.C. Energy Users Comm. v. SCE&G*, 764 S.E.2d 913, 916 (S.C. 2014) (quoting *S.C. Energy Users Comm. v. Pub. Serv. Comm'n of S.C.*, 697 S.E.2d 587, 592 (S.C. 2010) (citing S.C. Code Ann. § 58-33-210)). The BLRA permitted utilities to apply for a "base load review order," which would establish that if a base load plant is constructed or being constructed in accordance with an approved construction schedule and approved capital costs estimates, then the plant's financing of capital costs for construction may be recovered through utility rates. S.C. Code Ann. §§ 58-33-220(4), 58-33-275.

[9] A "combined application" is "a base load review application which is combined with an application for a certificate under the Utility Facility Siting and Environmental Protection Act." S.C. Code Ann. § 58-33-220(6).

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later amended the scheduling dates to convey that it would not complete Unit 2 until 2022 and Unit 3 until 2024. (*Id.* at 60:8–12.)

8. On March 2, 2009, the PSC approved SCE&G's Application to construct the Project finding that its construction "is reasonable and prudent." (*See* ECF No. 68-3 at 6 ¶ 11; *see also* ECF Nos. 68-1, 68-2.)

9. SCE&G began construction on the Project. (ECF No. 68 at 20 ¶ 96.)

10. On nine occasions between 2008 and 2016, the PSC approved SCE&G's revised-rate requests, permitting it to recover for the capital costs of the Project amounting to $445 million annually. (ECF Nos. 68-6 to 68-14.[10])

11. As of September 30, 2017, SCE&G has invested approximately $5 billion on the Project and $316 million in transmission costs related to delivery facilities. (ECF No. 99 at 14:16–23; ECF No. 68 at 26 ¶ 124.)

12. Ratepayers have paid to SCE&G roughly $2 billion in revised rates for financing the Project. (ECF No. 99 at 61:10–15.)

13. On July 31, 2017, SCE&G "announced that it would cease construction of the [Project's] Units and request recovery of its abandoned costs, an outcome expressly contemplated by the BLRA." (ECF No. 68 at 31–32 ¶ 158.)

14. On August 1, 2017, SCE&G filed a Petition for Prudency Determination Regarding Abandonment, Amendments to the Construction Schedule, Capital Cost Schedule and Other Terms of the BLRA Orders for the V.C. Summer Units 2 & 3 and Related Matters (the "Petition") with the PSC to abandon construction of the Project. (ECF No. 68 at 32 ¶ 159.) In

[10] PSC Order No. 2009-104(A), PSC Order No. 2009-696, PSC Order No. 2010-625, PSC Order No. 2011-738, PSC Order No. 2012-761, PSC Order No. 2013-680(A), PSC Order No. 2014-785, Order No. 2015-712, and PSC Order No. 2016-758.

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the Petition, SCE&G alleges that it asked the PSC to "enter an order finding that SCE&G's decision to abandon the construction of the [V.C. Summer] Units was reasonable and prudent" and "sought authorization to calculate revised rates reflecting SCE&G's incurred construction costs and costs of abandonment, pursuant to the BLRA." (*Id.* ¶¶ 160–61.)

15. On August 9, 2017, the South Carolina Office of Regulatory Staff ("ORS") moved to dismiss SCE&G's Petition. (*Id.* ¶ 162.)

16. SCE&G contends that it voluntarily withdrew its Petition on August 15, 2017, "after legislative leadership demanded more time for legislators to review the project and threatened to bring the South Carolina General Assembly back into a special session for the specific purpose of preventing SCE&G from recovering its abandoned costs." (*Id.* ¶¶ 164–165.)

17. On January 12, 2018, SCE&G and Dominion Energy, Inc., filed a Joint Application and Petition ("Joint Petition"), PSC Docket 2017-370-E, with the PSC for review and approval of the merger between SCE&G and Dominion. (ECF No. 31-1.) In the Joint Petition, SCE&G requested that the PSC permit SCE&G to recover up to $5 billion from ratepayers over the next 20 years for the abandoned Project. (*Id.* at 51–52.)

18. SCE&G alleges that in response to the Project's abandonment, the South Carolina General Assembly passed Act 287 and Resolution 285. (ECF No. 68 at 36 ¶ 177.) Act 287 became law on June 28, 2018, and Resolution 285 became law on July 2, 2018. Act 287 instructs the PSC to set utility rates for SCE&G at a level equal to their current rates less the increases previously granted under the BLRA within five (5) days of the passage of the Act. 2018 S.C. Acts 258 § 3. Act 287 specified that the "experimental rate" would be effective from the PSC's implementation until the conclusion of the proceedings currently before the PSC regarding the Project. *Id.*

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19. Additionally, Resolution 285 prohibited the PSC from holding a hearing on the pending dockets[11] prior to November 1, 2018, and instructed the PSC to issue a final decision in the abandonment proceedings by December 21, 2018. 2018 S.C. Acts 285 § 1.

20. Both the Act and the Resolution repealed any sections of law in conflict with their operation. 2018 S.C. Acts 258 § 2; 2018 S.C. Acts 285 § 3.

21. Act 287 also repealed the BLRA for any future projects and provided definitions for prudency, imprudency, and fraud. 2018 S.C. Acts 258 §§ 1, 2.

22. On June 29, 2018, SCE&G filed its Verified Complaint for Declaratory Judgment and Temporary, Preliminary, and Permanent Injunctive Relief against Defendants pursuant to 42 U.S.C. § 1983 challenging the constitutionality of both Act 287 and Resolution 285, asserting the elimination of the rate increases violates SCE&G's constitutional rights and "impermissibly interfere[s] with interstate commerce." (ECF No. 68 at 2 ¶ 2.) This lawsuit does not challenge

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[11] The PSC "currently has several pending dockets in which it will need to address complex issues surrounding the prudency of the costs incurred on the Project, the prudency of abandonment, whether and to what extent revised rates are recoverable, and the final rate SCE&G will be permitted to charge its ratepayers." (ECF No. 52-1 at 20.) The matters are identified as:

> Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 and Associated Consumer Benefits and Cost Recovery Plans, Docket No. 2017-370-E;
>
> Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant Respondent, Docket No. 2017-207-E; and
>
> Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric and Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920, Docket No. 2017-305-E.

(ECF No. 31 at 7.) SCE&G is the only utility with pending docket matters before the PSC concerning the BLRA. The court is informed that the aforementioned matters have been consolidated. (*Id.*)

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or seek review of any PSC order. (*Id.* at 3 ¶ 4.)

23. On July 2, 2018, SCE&G moved for a preliminary injunction based on its constitutional claims. (ECF No. 5.) SCE&G seeks relief from the alleged unconstitutional legislative enactment of Act 287 and Resolution 285. More specifically, SCE&G seeks to enjoin Defendants from future implementation of Act 287 and Resolution 285. SCE&G does not seek to enjoin any PSC orders regarding SCE&G's project construction, capital cost schedules, or rate increases.[12]

24. On July 2, 2018, SCE&G sent the PSC a letter informing it that SCE&G had filed the instant Motion for Preliminary Injunction and requesting that the PSC consent to the injunction. (ECF No. 94-36.)

25. On July 2, 2018, the PSC issued Order No. 2018-459 (ordered by Defendants Elam, Ervin, Hamilton, Howard, Randall, and Whitfield) directing SCE&G to calculate a reduction in its retail electric rates and tariffs by approximately 15% and to submit full tariff sheet summaries. (ECF No. 94-37.)

26. On July 3, 2018, SCE&G sent the PSC a letter and attached the requested tariff sheet summaries. (ECF No. 94-40.)

27. On July 3, 2018, the PSC issued Order No. 2018-460 (ordered by Defendants Elam, Ervin, Hamilton, Howard, Randall, and Whitfield), setting an experimental rate requiring SCE&G to reduce its electric rates as required by Act 287. (*See* ECF No. 33-4.) The PSC's July 3, 2018 Order directs SCE&G to begin implementing the experimental rate in the first billing cycle in August, which begins on August 7, 2018. (ECF No. 33-4; ECF No. 9 at 2.) The

[12] Those orders include: PSC Order 2008-196 (E) approving SCE&G's combined application (ECF No. 68-1 to 68-3); PSC Order No. 2009-104(A) approving initial capital cost schedule and construction schedule (*id.*); and eleven PSC Orders approving SCE&G's requests for rate increases (ECF Nos. 68-6 to 68-14).

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experimental rate is a monthly reduction of 14.8% for SCE&G's customers. (ECF No. 99 at 91:5–9.)

28. Act 287's requirement of an experimental rate, effective from April 1, 2018, forces SCE&G to (1) "refund" to customers $120 million collected from April to August 2018, and (2) lose approximately $30 million per month until the PSC's final decision on the abandonment proceedings. (*Id.* at 16:16–22, 17:5–16.)

29. On July 16, 2018, Defendants filed opposition to SCE&G's Motion for Preliminary Injunction. (ECF No. 31.)

30. On July 20, 2018, Defendants and Intervenor Defendants filed Motions to Dismiss pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure. (ECF Nos. 48, 50, 52.)

31. On July 23, 2018, Attorney General Wilson filed an Amicus Brief opposing SCE&G's Motion for Preliminary Injunction.[13] (ECF No. 54.)

32. On July 25, 2018, Intervenor Defendants filed opposition to the instant Motion for Preliminary Injunction. (ECF Nos. 59, 61.)

33. On July 26, 2018, the court granted in part and denied in part the Motions to Dismiss, dismissed the Complaint, and granted SCE&G leave to file an amended complaint until July 27, 2018. (ECF No. 67.)

34. On July 27, 2018, SCE&G filed a Verified Amended Complaint, renewing its request that the court: (1) "Enter a declaratory judgment declaring Act 287 and Resolution 285 are unconstitutional in that they constitute an unlawful taking; violate the substantive and procedural components of the Due Process Clause, and constitute an unlawful bill of attainder";

[13] After SCE&G filed its Amended Complaint (ECF No. 68), Attorney General Wilson renewed his Amicus Brief with leave from the Court. (ECF Nos. 85, 87.)

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and (2) "Enter a temporary, preliminary and permanent injunction directing the Chairman and Commissioners of the PSC, and their officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with them, to refrain from implementing Act [287] and Joint Resolution [285]." (ECF No. 68 at 53.)

35. On July 28, 2018, Defendants and Intervenor Defendants filed renewed Motions to Dismiss pursuant to Rules 12(b)(1) and (b)(6). (ECF Nos. 76, 77, 78.)

36. On July 30, 2018, SCE&G filed a Memorandum in Opposition to Defendants and Intervenor Defendants' Motions to Dismiss. (ECF No. 91.)

37. The court heard the parties' arguments regarding the Preliminary Injunction and renewed Motions to Dismiss during a hearing on July 30–31, 2018. (ECF Nos. 92, 95.)

38. On August 1, 2018, SCE&G filed a Reply to the Opposition Briefs to its Motion for Preliminary Injunction. (ECF No. 96.)

39. On August 2, 2018, the court denied the renewed Motions to Dismiss. (ECF No. 97.)

40. As discussed below, upon review of the extensive briefing on the instant Motion and hearing the parties' detailed arguments, the court finds that the legal issues in dispute weigh against granting SCE&G the requested relief. The parties' positions are discussed in greater detail below in the context of SCE&G's specific allegations.

III. LEGAL STANDARD AND ANALYSIS

A. Preliminary Injunctions Generally

41. The court's authority to issue a preliminary injunction arises from Rule 65, but "it is an extraordinary remedy never awarded as of right." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A party seeking a preliminary injunction must establish all four of the

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following elements: (1) he is likely to succeed on the merits; (2) he is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his favor; and (4) an injunction is in the public interest. *Id.*; *The Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346–47 (4th Cir. 2009).

42. The Fourth Circuit no longer recognizes a "flexible interplay among the four criteria for a preliminary injunction." *Real Truth*, 575 F.3d at 347. Each of these requirements "must be fulfilled as articulated." *De la Fuente v. S.C. Dem. Party*, CA No. 3:16-cv-00322-CMC, 2016 WL 741317, at *2 (D.S.C. Feb. 25, 2016).

43. "The traditional purpose of a preliminary injunction is to protect the status quo and to prevent irreparable harm during the pendency of the lawsuit ultimately to preserve the court's ability to render a meaningful judgment on the merits." *De La Fuenta*, 2016 WL 741317, at *2.

B. <u>SCE&G's Request for Relief</u>

44. SCE&G seeks a preliminary injunction that: (a) stays the effect of Act 287 and Resolution 285; and (b) enjoins Defendants from instituting or implementing any of Act 287 and Resolution 285's provisions, "including its mandated retail electric rate reduction and refund provisions, until further order of the Court."[14] (ECF No. 5 at 1.)

C. <u>The Court's Review</u>

45. In support of its Motion for Preliminary Injunction, SCE&G relies on its Memorandum of Law (ECF No. 5-1), Reply Memorandum (ECF No. 96), the PSC's June 28, 2018 notice of special commission business meeting, and the Declaration of Iris N. Griffin (ECF

[14] The parties do not offer argument as to whether SCE&G is seeking a prohibitory or a mandatory preliminary injunction and, as such, which standard is to be applied. However, because the preliminary injunction SCE&G seeks is not appropriate under the less stringent standard, the court need not resolve this dispute.

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No. 5-3), SCE&G's Senior Vice President and Chief Financial Officer and Treasurer.

46. In opposition to the Motion for Preliminary Injunction, Defendants rely on their Memorandum of Law (ECF No. 31), a Joint Application and Petition by SCE&G and Dominion Energy, Inc., for review and approval of their merger (ECF No. 31-1), a September 26, 2017 Petition for rate relief filed by the ORS with the PSC (ECF No. 31-2), and the PSC's July 5, 2018 hearing officer directive (ECF No. 31-3).

47. In opposition to the Motion for Preliminary Injunction, President Leatherman relies on his Memorandum of Law (ECF No. 59).

48. In opposition to the Motion for Preliminary Injunction, Speaker Lucas relies on his Memorandum of Law (ECF No. 61).

49. In opposition to the Motion for Preliminary Injunction, Attorney General Wilson relies on his Amicus Brief (ECF No. 54) and his Supplement to the Amicus Brief. (ECF No. 85.)

50. The court heard testimony from various witnesses and oral argument from the parties' counsel on July 30 to July 31, 2018. (ECF Nos. 92, 95.)

51. The parties make a plethora of arguments regarding the meritorious value of SCE&G's claims. This court finds that SCE&G has not met its burden under the standard the Supreme Court set out in *Winter*. Because SCE&G cannot show that all elements required for injunctive relief are met, the court refuses to grant injunctive relief to SCE&G. The court addresses below the vitality of SCE&G's assertions under the requirements set forth in *Winter* and reiterated by the Fourth Circuit in *Real Truth*.

IV. SPECIFIC FINDINGS AND CONCLUSIONS

A. Clear Showing of Likely Success on the Merits

52. "[P]laintiffs seeking preliminary injunctions must demonstrate that they are likely

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to succeed on the merits." *Pashby v. Delia*, 709 F.3d 307, 321 (4th Cir. 2013) (citing *Winter*, 555 U.S. at 20). "Although this inquiry requires plaintiffs seeking injunctions to make a 'clear showing' that they are likely to succeed at trial, *Real Truth*, 575 F.3d at 345, plaintiffs need not show a certainty of success, *see* 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2948.3 (2d ed. 1995); *Pashby*, 709 F.3d at 321.

i. *SCE&G Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Claim for an Unconstitutional Taking Based on a Redefinition of Property Rights and/or a Confiscatory Rate.*

53. SCE&G asserts that Act 287 and Resolution 285 violate the Takings Clause of the Fifth Amendment because they confiscate SCE&G's property by cutting its rates to "confiscatory levels." (ECF No. 5-1 at 4; *see also* ECF No. 68 at 48 ¶¶ 251–52.) More specifically, SCE&G asserts that Act 287 and Resolution 285 (1) "set[] a confiscatory rate that prevents SCE&G from earning enough revenue for its capital costs and, in fact, 'jeapordize[s]' SCE&G's 'financial integrity,'" (2) "prohibit[] SCE&G from recovering a reasonable return on its investment, takes away SCE&G's ability to charge rates sufficient to recover amounts spent in reliance on the BLRA, would allow Dominion Energy to back out of a company-sustaining merger, and jeopardizes SCE&G's ability to access capital to fund short-term operations," (3) "make[] no attempt to determine the effect of the experimental rate on SCE&G," and (4) "mandate[] an arbitrary experimental rate and authorizes the PSC to adjust the rate, only if and when the PSC in its sole discretion deems it necessary." (ECF No. 5-1 at 18.)

54. Both the United States Constitution and South Carolina Constitution prohibit the government from taking property without just compensation. U.S. Const. amends. V, XIV;[15] S.C. Const. art. I, § 13.[16]

[15] The Fifth Amendment to the Constitution of the United States declares that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. "The

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55. "The Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981)). "[B]ecause the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied." *Id.* at 194 n.13. "The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action." *Id.*

56. "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679, 692–93 (1923). "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." *Id.* at 693. "A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally." *Id.*

Takings Clause of the Fifth Amendment[] [is] applicable to the States through the Fourteenth Amendment." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001) (citing *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897)).

[16] The South Carolina Constitution provides that "private property shall not be taken for private use without the consent of the owner, nor for public use with just compensation being first made for the property." S.C. Const. art. I, § 13.

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57. A utility is only allowed "just and reasonable" rates that strike a balance between investors and ratepayers. *Permian Basin Area Rate Cases*, 30 U.S. 747, 770 (1968). In this regard, rates cannot be so low as to be confiscatory to the utility but so high as to burden the consumer. *Mims v. Edgefield City Water*, 299 S.E.2d 484, 486 (S.C. 1983) (citing *Bluefield*).

58. The United States Constitution expressly "protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307–08 (1989) (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) (A rate is too low if it is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law."); *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense."); *FPC v. Texaco Inc.*, 417 U.S. 380, 391–392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level.")). "If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne*, 488 U.S. at 308.

59. However, "a regulatory taking claim against a state is not ripe until (1) the state agency imposing the allegedly confiscatory regulation has taken final action against the plaintiff's property and (2) the plaintiff has pursued all available remedies under state law."[17]

[17] The court's exercise of its power of judicial review rests upon Article III of the Constitution and depends on the existence of a case or controversy. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Ripeness is a "subset[ ] of Article III's command that the courts resolve disputes, rather than emit random advice." *Bryant v. Cheney*, 924 F.2d 525, 529 (4th Cir. 1991). The purpose of the ripeness doctrine "is to prevent the courts, through premature adjudication, from

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U.S. W. Commc'ns v. MFS Intelenet, Inc., 193 F.3d 1112, 1126 (9th Cir. 1999) (citing *Williamson Cty.*, 473 U.S. at 186–97); *see also Sansotta v. Town of Nags Head*, 724 F.3d 533, 544 (4th Cir. 2013) ("For a takings claim against a state or its political subdivisions to be ripe in federal court, the plaintiff must first have sought compensation "through the procedures the State has provided for doing so.") (citing *Williamson Cty.*, 473 U.S. at 194). "Because the Takings Clause simply requires the payment of just compensation, not necessarily payment before or simultaneous with the taking, a plaintiff must first seek compensation from the state via the procedures that the state has established before suing the state in federal court." *Sansotta*, 724 F.3d at 544 (citing *Williamson Cty.*, 473 U.S. at 195).[18]

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entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985); *see also Miller v. Brown*, 462 F.3d 312, 318–19 (4th Cir. 2006). A case is ripe for judicial decision where the issues are purely legal in nature, relate to an action which is final, and is not dependent on future uncertainties or contingencies. *Miller*, 462 F.3d at 319. In determining whether a case is ripe for review, the court must balance "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Retail Indus. Leaders Ass'n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007). Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200–201 (1983); *see also Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981). "Ripeness is, thus, a question of timing." *Smith v. United States*, C/A No. 6:08-0203-CMC-WMC, 2008 WL 906699, at *3 (D.S.C. Apr. 1, 2008) (citing *Stinson v. Sullivan*, No. 1:07-cv-01311 LJO SMS HC, 2008 WL 115124, at *2 (E.D. Cal. Jan. 11, 2008) (citation omitted)). "The burden of proving ripeness falls on the party bringing suit." *Miller*, 462 F.3d at 319.

[18] In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), the plaintiff complained that the county's application of its zoning regulations to plaintiff's real estate development amounted to a taking without just compensation. *Id.* at 182. The Court took care to note that the trial court "granted a directed verdict to [the county] on the substantive due process and equal protection claims, and the jury found that respondent had not been denied procedural due process. Those issues are not before us." *Id.*, n.4. Thus, the only due process claim asserted by the plaintiff was a claim of a taking in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 197. The Court held that the regulatory taking claim was unripe due to plaintiff's failure to seek a variance, *Id.* at 191–94, and because plaintiff had failed to "seek compensation through the procedures the State has provided for doing so." *Id.* at 194. Without

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60. Upon review, the court observes that neither Act 287 nor Resolution 285 sets the specific experimental rate that SCE&G alleges constitutes a taking. Act 287 did instruct Defendants to exercise their authority and "provide an experimental rate that customers . . . shall pay during the pendency of litigation currently before the commission . . . ." 2018 S.C. Acts 258 § 3. However, Resolution 285 prevents Defendants from issuing a final rate determination until at least November 1, 2018, but no later than December 21, 2018. 2018 S.C. Acts 285 § 1.

61. Because of the foregoing, SCE&G is unable to satisfy the first *Williamson County* prong since the court has already concluded that Defendants have not taken final action against SCE&G's alleged property by implementing a rate that is confiscatory. (ECF No. 67 at 19, 22.)

62. The court further observes that even if it found that SCE&G satisfied the first *Williamson County* prong, it is unable to satisfy the second prong showing that it was denied just compensation because there is not any evidence in the record that SCE&G pursued to completion an inverse condemnation action in state court.[19] *See Williamson Cty.*, 473 U.S. at 196–97 ("Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature."); *see also, e.g.*, *Carolina Chloride, Inc. v. Richland Cty.*, 714 S.E.2d 869, 877 (S.C. 2011) ("Inverse condemnation is a cause of action by a property owner against a governmental entity to recover

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> judging the merits of the due process taking claim, the Court held that that claim was also premature due to plaintiff's failure to seek a variance. *Id.* at 199–200.

Salt Creek, L.P. v. City of Warr Acres, No. Civ. 01-1500-F, 2002 WL 32026152, at *9 (W.D. Okla. June 13, 2002).

[19] An inverse condemnation "may result from government-imposed limitations on the use of private property." *Byrd v. City of Hartsville*, 620 S.E.2d 76, 79 (S.C. 2005). "Private property" is property that is "protected from public appropriation–over which the owner has exclusive and absolute rights." Private property, *Black's Law Dictionary* (10th ed. 2014).

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the value of property that has been effectively 'taken' by the governmental entity, although not through the process of eminent domain.") (citation omitted).

63. Because SCE&G has failed to meet either prong of the test articulated in *Williamson County*, which requires final action by the state against the property owner, SCE&G cannot show a likelihood of success on the merits at this time on its claim asserting the seizing of its property by cutting rates to "confiscatory levels" in violation of the Takings Clause.[20]

ii. SCE&G Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Claim Alleging a Violation of Substantive and Procedural Due Process.

64. The Fourteenth Amendment prohibits states from depriving a person of property without substantive and procedural due process. U.S. Const. amend. XIV.

65. To succeed on a substantive due process claim, SCE&G must show "(1) that [it] had property or a property interest; (2) that the state deprived [it] of this property or property interest; and (3) that the state's action falls so far beyond the outer limits of legitimate governmental action that *no process* could cure the deficiency." *Quinn v. Bd. of Cty. Comm'rs for Queen Anne's Cty., Md.*, 862 F.3d 433, 443 (4th Cir. 2017) (quoting *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 827 (4th Cir. 1995)).

66. To succeed on a procedural due process claim, SCE&G must show (1) "[it] ha[s] a constitutionally cognizable life, liberty, or property interest," *Sansotta*, 724 F.3d at 540; (2) "that the deprivation of that interest was caused by 'some form of state action,'" *Id.* (quoting *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 145 (4th Cir. 2009)); and

[20] Even though "[r]ipeness is a question of subject matter jurisdiction," the *Williamson County* requirement is not "a jurisdictional rule." *Sansotta*, 724 F.3d at 545, 548. Moreover, in Defendants and Intervenor Defendants Motions to Dismiss, they did not raise the issue of ripeness. Ripeness is not the same as the abstention issues that were raised by Defendants and Intervenor Defendants. "Because a district court can abstain only when it has subject matter jurisdiction, a case must be ripe before a district court may abstain." *Sansotta*, 724 F.3d at 548 (citing *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

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(3) "that the procedures employed were constitutionally inadequate," *Patterson*, 566 F.3d at 145.

67. SCE&G cannot establish it is likely to prevail on the merits of its due process challenges because SCE&G has not shown at this time it clearly has a property interest in revised rates under the BLRA.[21]

68. The Constitution does not create property interests. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Property interests are "created and their dimensions defined by existing rules or understandings that stem from an independent source such as state law—rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Id.* "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it . . . . He must have a legitimate claim of entitlement to it." *Id.*; *see also Beckham v. Harris*, 756 F.2d 1032, 1036 (4th Cir. 1985) ("The sufficiency of such a legitimate claim of entitlement must be decided by reference to state law, as evidenced by state statutes, local ordinances, rules, or mutually explicit understandings that support the claim." (citation omitted)).

69. Under South Carolina law, "[t]o determine if the expectation of entitlement is sufficient 'will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [agency] . . . .'" *Grimsley v. S.C. Law Enf't Div.*, 721 S.E.2d 423, 427 (S.C. 2012) (quoting *Jacobson v. Hannifin*, 627 F.2d 177, 180 (9th Cir. 1980)); *Doyle v. City of Medford*, 606 F.3d 667, 672 (9th Cir. 2010) ("A regulation granting broad discretion

[21] The court's inquiry is not whether SCE&G "*may* collect PSC-approved rates following its abandonment announcement" (ECF No. 91-1 at 30 (emphasis added)), but whether SCE&G is *entitled* to collect PSC-approved rates. Under S.C. Code Ann. § 58-27-820, SCE&G may be required to accept the current PSC-approved rates, but that does not inform whether SCE&G holds an entitlement in those rates now that it has abandoned the Project.

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to a decision-maker does not create a property interest."); *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, Kan.*, 927 F.2d 1111, 1116 (10th Cir. 1991) ("When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker . . . .").

70. SCE&G posits the South Carolina Supreme Court "has held that a law that guarantees a person a future payment creates a cognizable property interest in that payment." (ECF No. 5-1 at 18 (citing *Grimsley*).)

71. Additionally, SCE&G asserts the BLRA, in two of its subsections, contains mandatory language "entitl[ing] SCE&G to collect rate payments so as to recover its prudently incurred capital costs related to the nuclear facility construction and the cost of that capital." (ECF No. 5-1 at 20.)

72. SCE&G first points to S.C. Code Ann. § 58-33-275(A), which provides, "[A] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates so long as that plant is constructed or being constructed within the parameters of (1) the approved construction schedule including contingencies; and (2) the approved capital costs estimates including specific contingencies." (*See also* ECF No. 5-1 at 19.)

73. Under S.C. Code Ann. § 58-33-275(A), the capital costs to construct a nuclear plant are prudent and properly included in rates "*so long as*" (1) the plant is "constructed or being constructed" and (2) "within the parameters of . . . the approved construction schedule . . . and . . . the approved capital costs estimates" (emphasis added). *See also* S.C. Code Ann. § 58-33-275(C) ("*So long as the plant is constructed or being constructed* in accordance with the

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approved schedules, estimates, and projections . . . the utility must be allowed to recover its capital costs related to the plant through revised rate filings or general rate proceedings." (emphasis added)).

74. The phrase "so long as" is "not purely [a] temporal construction[]; more often than not, [it] express[es] a condition rather than a time limit." Bryan A. Garner, *Garner's Dictionary of Legal Usage* 82 (3d ed. 2011). *See also Moro v. State*, 351 P.3d 1, 32 (Or. 2015) ("[T]he phrase 'as long as'[22] means 'provided that,' *Webster's Third New Int'l Dictionary* 129 (unabridged ed.[ ]2002), and serves the same function as the phrase 'if and only if,' Rodney Huddleston and Geoffrey K. Pullum, *The Cambridge Grammar of the English Language* 758 (2002).").

75. Because, under S.C. Code Ann. § 58-33-275(A), the final and binding nature of a base load review order is conditioned upon whether (1) the plant is "constructed or being constructed" (2) "within the parameters of . . . the approved construction schedule . . . and . . . the approved capital costs estimates," it is not clear that any entitlement exists where a nuclear plant is not constructed or being constructed.[23]

76. Accordingly, S.C. Code Ann. § 58-33-275(A) constrains the discretion of the PSC in setting utility rates according to its own base load review orders only *so long as* a nuclear

[22] The phrases "so long as" and "as long as" are defined together by Garner, *see* Garner, *supra* ¶ 74.

[23] SCE&G asserts Act 287 "forces SCE&G to fork over $100 million it previously recovered in lawful rates." (ECF No. 5-1 at 26.) The court notes that the PSC's July 3, 2018 Order does require SCE&G to refund ratepayers, mandating a "one-time credit for the months of April, May, June and July should be implemented with the August 2018 billing cycle." (ECF No. 33-4.) However, SCE&G does not challenge the PSC's July 3, 2018 Order. (ECF No. 68 at 3 paragraph 4.) Act 287 instructs the PSC how to calculate the experimental rate and the period to which that rate should apply, but does not mandate a "refund," as suggested by SCE&G. (ECF No. 99 at 16:16–22.) Furthermore, because SCE&G abandoned the Project on July 31, 2017, SCE&G cannot legitimately claim an entitlement to revised rates collected after abandonment because it was no longer constructing the Project.

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plant is constructed or being constructed within the parameters of the approved construction schedule and the approved capital costs.

77. The court understands there to be three different rate periods at issue. This first period is the time during which SCE&G was either constructing or otherwise abandoning the Project and charging ratepayers the revised rates approved by the nine base load review orders of the PSC. The second rate period is the time during which SCE&G was no longer constructing the Project but continued to charge the revised rates. The third time period will be governed by the outcome of the abandonment proceedings currently ongoing before the PSC, as the PSC must determine when SCE&G was either no longer constructing the Project or otherwise abandoning the Project and whether SCE&G's decision to abandon was prudent, entitling SCE&G to continue to recover the capital costs of the Project. *See* S.C. Code Ann. § 58-33-280(K).

78. The period during which S.C. Code Ann. § 58-33-275(A) may create a property interest would be the first, as it would coincide with language "so long as the plant is constructed or being constructed." S.C. Code Ann. § 58-33-275(A). During this period, a utility's claim of an entitlement to having its capital costs included in rates may be legitimate, as the statute uses language generally held to be mandatory like "shall." *See* S.C. Code Ann. § 58-33-275(A) ("[A] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates . . . ."). *See also Trumball Invs., Ltd. I v. Wachovia Bank, N.A.*, 436 F.3d 443, 447 (4th Cir. 2006) (stating "'shall' typically is mandatory in nature"). However, during the second and third periods, the "so long as the plant is constructed or being constructed" language ceases to constrain the discretion of the PSC,

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decreasing the legitimacy of any expectation of entitlement to include the capital costs in rates.

79. Similarly, the language in S.C. Code Ann. § 58-33-280(K) constrains the discretion of the PSC only insofar as "the utility . . . prov[es] by a preponderance of the evidence that the decision to abandon construction of the plant was prudent."

80. Accordingly, in the event of abandonment after a base load review order approving rate recovery has been issued, the capital costs "shall nonetheless be recoverable . . . *provided that*" the utility can prove the greater weight of the evidence shows the decision to abandon the plant was prudent. S.C. Code Ann. § 58-33-280(K) (emphasis added).

81. The mandatory language "shall nonetheless be recoverable" does not significantly restrict the discretion of the PSC because it can deny a utility recovery of its capital costs if the PSC determines the utility did not establish by a preponderance of the evidence that the utility's decision to abandon was prudent. *See also* S.C. Code Ann. § 58-33-225(G) ("If the utility decides to abandon the project after issuance of a prudency determination . . . the preconstruction costs related to that project *may be* deferred . . . and *may be* included in rates in the utility's *next* general rate proceeding or revised rates proceeding, *provided that* as to the decision to abandon the plant, the utility shall bear the burden of proving by a preponderance of the evidence that the decision was prudent." (emphasis added)).

82. Accordingly, SCE&G has not clearly shown that S.C. Code Ann. §§ 58-33-275(A) or 58-33-280(K) significantly limit the discretion of the PSC.

83. Furthermore, no section of the BLRA limits the power of the South Carolina General Assembly to regulate utility rates. *See Doyle*, 606 F.3d at 672 ("A regulation granting broad discretion to a decision-maker does not create a property interest."). *See also* S.C. Const. art. IX, § 1 ("The General Assembly shall provide for appropriate regulation of common

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carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.”).

84. Even though the South Carolina General Assembly has entrusted the PSC with rate-making power, this grant of power is still subordinate to the General Assembly’s rate-making authority. *See Duquesne*, 488 U.S. at 313–14 (“It cannot seriously be contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions. We have never doubted that state legislatures are competent bodies to set utility rates.”); *Glendale Water Corp. of Florence v. City of Florence*, 265 S.E.2d 41, 42 (S.C. 1980) (stating the PSC was “creat[ed] by the General Assembly [and] derive[es] all its powers therefrom”); *Piedmont & N. Ry. Co. v. Scott*, 24 S.E.2d 353, 361 (S.C. 1943) (“If the conditions referred to in the [PSC] order are such that they should be remedied[,] this is a matter for the General Assembly, either by direct legislation to that end, or legislation enlarging the powers of the [PSC].”).

85. Based on the foregoing, SCE&G’s expectation of entitlement under S.C. Code Ann. § 58-33-275(A) and S.C. Code Ann. § 58-33-280(K) is not legitimate or sufficient because the statutes do not significantly limit the discretion of the PSC or the South Carolina General Assembly. *See Grimsley*, 721 S.E.2d at 427 (“To determine if the expectation of entitlement is sufficient ‘will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [agency] . . . .’” (quoting *Jacobson*, 627 F.2d at 180)); *Jacobs*, 927 F.2d at 1116 (“When analyzing whether a plaintiff presents a legitimate claim of entitlement, we focus on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome.”).

86. To the extent S.C. Code Ann. § 58-33-275(A) does create a property interest, that

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interest exists only "*so long as*" (1) the plant is "constructed or being constructed" (2) "within the parameters of . . . the approved construction schedule . . . and . . . the approved capital costs estimates." S.C. Code Ann. § 58-33-275(A) (emphasis added). *See Doyle*, 606 F.3d at 673 ("A factual contingency does not necessarily preclude the creation of a protected property interest. . . . [A] statute may create a property interest if it mandates a benefit when specific non-discretionary factual criteria are met.").

87. The phrase "so long as" in S.C. Code Ann. § 58-33-275(A) conditions retention of any alleged property interest under S.C. Code Ann. § 58-33-275(A) on whether (1) the plant is "constructed or being constructed" (2) "within the parameters of . . . the approved construction schedule . . . and . . . the approved capital costs estimates." *See Texaco, Inc. v. Short*, 454 U.S. 516, 526 (1982) ("We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.").

88. SCE&G's abandonment of the Project, (ECF No. 5-1 at 7–8), means SCE&G is no longer performing the conditions necessary to retain any alleged property right under S.C. Code Ann. § 58-33-275(A), likely extinguishing any entitlement SCE&G could claim under S.C. Code Ann. § 58-33-275(A).

89. To the extent S.C. Code Ann. § 58-33-280(K) creates a property interest, the phrase "provided that" in S.C. Code Ann. § 58-33-280(K) conditions any alleged interest upon SCE&G showing by a preponderance of the evidence that the utility's decision to abandon construction of the plant was prudent. S.C. Code Ann. § 58-33-280(K).

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90. SCE&G cannot claim an entitlement under S.C. Code Ann. § 58-33-280(K) until it makes this showing to the PSC. *See* S.C. Code Ann. § 58-33-280(K) ("[T]he costs . . . related to the plant *shall nonetheless be recoverable . . . provided that the utility bear the burden of proving by a preponderance of the evidence that the decision to abandon the plant was prudent*." (emphasis added)).

91. Moreover the South Carolina General Assembly can likely extinguish property interests it has created if the conditions on which those interests depend are not met. *See United States v. Locke*, 471 U.S. 84, 104 (1985) ("Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.") *See also Seldovia Native Ass'n, Inc. v. United States*, 35 Fed. Cl. 761, 773 (1996) (stating Congress "has the power to extinguish property interests it has created if the beneficiaries of the grant do not meet any conditions precedent").

92. Upon SCE&G's abandonment of the Project, and thus failure to perform the necessary statutory conditions defined under S.C. Code Ann. § 58-33-275(A), the South Carolina General Assembly passed Act 287 and Resolution 285, exercising its power to regulate utility rates and "to impose new regulatory constraints on the way in which [any alleged property] rights are used, or to condition their continued retention on performance of certain affirmative duties." *Locke*, 471 U.S. at 104.

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93. Thus, because SCE&G has not shown it has a property interest under the BLRA, it has failed to establish a clear showing of likely success as to the merits of its claim for substantive and procedural due process.

iii. SCE&G Cannot Establish a Clear Showing of Likely Success as to the Merits of Its Claim for a Bill of Attainder.

94. The United States Constitution prohibits states from enacting "bills of attainder." U.S. Const. art. 1, § 10.

95. A statute is an unconstitutional bill of attainder if it "determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 468 (1977). The Supreme Court later clarified that the *Nixon* definition contains three (3) elements: "specification of the affected persons, punishment, and a lack of a judicial trial." *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984).

96. A law may not be directed at "an identifiable individual," *Nixon*, 433 U.S. at 468;[24] however, a law does not automatically violate the prohibition on bills of attainder by referring to an individual. *Id.* at 471–72.

97. In *Nixon*, the law in question addressed policies for the storage of presidential papers. *Nixon*, 433 U.S. at 472. The law accepted the storage arrangements of the papers of all former presidents except Nixon, specifically provided for the preservation of Nixon's materials, and established a process for reviewing the general standards regarding the storage of presidential papers. *Nixon*, 433 U.S. at 472. Portions of the law only affected President Nixon

[24] Defendants suggest that SCE&G may not assert that Act 287 is a bill of attainder because it is a corporation. (ECF No. 31 at 15–16 (citing *A Helping Hand, LLC v. Balt. Cty., Md.*, 299 F. Supp. 2d 501 n.3 (D. Md. 2004)).) However, the court in *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338 (2d Cir. 2002), held "that corporations must be considered 'individual[s],' that may not be singled out for punishment under the Bill of Attainder Clause in Article I, Section 10." *Consol. Edison*, 292 F.3d at 349 (citation omitted).

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and his papers, but he was "a legitimate class of one" because "[t]he Presidential papers of all [other] former Presidents . . . were already housed in functioning Presidential libraries" and "he alone has entered into a depository agreement, . . . which by its terms called for the destruction of certain of the materials." *Nixon*, 433 U.S. at 472. As a result, "Congress ha[d] reason for concern solely with the preservation of [Nixon's] materials," and it was permissible for Congress to specifically address the storage of his materials. *Nixon*, 433 U.S. at 472.

98. Section 3 of Act 287, the portion addressing the creation and implementation of the experimental rate, identifies a single utility and changes only that utility's rates. *See* 2018 S.C. Acts 258 § 3 (creating S.C. Code Ann. § 58-334-10 ("(A) The investor-owned utility holding the majority interest in the V. C. Summer Nuclear Reactor Units 2 and 3 at Jenkinsville, South Carolina, has entered into a merger agreement with an out-of-state investor-owned utility. . . . (B) . . . This rate shall apply to all customers of the investor-owned utility identified in subsection (A), which has imposed nine rate increases for the purpose of funding the V. C. Summer project.")). By definition, there cannot be more than one "utility holding the majority interest in the V.C. Summer Nuclear Reactor Units 2 and 3 at Jenkinsville, South Carolina . . . ." Moreover, Act 287's references to SCE&G's potential merger with Dominion Energy, Inc. and the revised rates granted to SCE&G during the Project's construction further indicate that the South Carolina General Assembly intended for Act 287 to affect only SCE&G.

99. However, SCE&G constitutes a legitimate class of one because SCE&G is the only utility to avail itself of the BLRA and recover capital costs from a base load project, *see* South Carolina Office of Regulatory Staff, *Historical Electric Residential Bills* (listing SCE&G as the only utility to receive a rate increase from the BLRA since its enactment in 2007), http://www.regulatorystaff.sc.gov/electric/Pages/RateAdjustments.aspx (last visited Aug. 3,

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2018).

100. Similar to *Nixon*, Act 287 contains both a general policy decision and a solution to a unique set of facts existing at the time of the law's passage. In *Nixon*, Congress decided to review the policies affecting the storage of all presidential papers–that is, to establish a general policy. *Nixon*, 433 U.S. at 472. Act 287 represents a determination by the South Carolina General Assembly that the public interest requires the repeal of the BLRA. *See* 2018 S.C. Acts 258 § 2 (preventing any further applications under the BLRA and repealing the BLRA upon the conclusion of the abandonment proceedings concerning the Project). After establishing a new policy, the law in *Nixon* addressed the circumstances surrounding President Nixon's papers–the only ones that were not stored in a presidential library. *Nixon*, 433 U.S. at 472. Similarly, Act 287, after making a generalized policy determination about the BLRA, addresses the specifics of SCE&G's rates. 2018 S.C. Acts 258 § 3 ("The General Assembly has determined that Section 1, Article IX of the Constitution requires that the General Assembly exercise its authority to set certain utility rates for the purpose of protecting the public interest until a determination can be made by the appropriate regulatory and judicial authorities.").

101. Thus, while Act 287 does specify an individual affected by the law, that individual constitutes a legitimate class of one.

102. Moreover, even if Act 287 does impermissibly target SCE&G, SCE&G has not established a clear showing that the legislation is punitive.

103. When considering whether legislative enactment is punitive, courts consider "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative records

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'evinces a [legislative] intent to punish.'" *Selective Serv.*, 468 U.S. at 852 (quoting *Nixon*, 433 U.S. at 475–76, 478). These three tests are referred to as the historical, functional, and motivational tests, respectively. *Nixon*, 433 U.S. at 472–84. Legislation need not satisfy all three tests to qualify as a bill of attainder. *Selective Serv.*, 468 U.S. at 853.

104. Traditionally, bills of attainder occurred when legislative power was used to (1) sentence "a named individual or identifiable members of a group to death," (2) imprison, banish, and punitively confiscate one's property by the sovereign"; or (3) bar "designated individuals or groups from participation in specified employments or vocations." *Nixon*, 433 U.S. at 474. "The only traditional punishment implicated here is punitive confiscation of property." *Consol. Edison Co. of N.Y. v. Pataki*, 292 F.3d 338, 351 (2d Cir. 2002). However, because the court finds that SCE&G does not have a property interest at issue at this time, *supra* p. 18 ¶ 62, it is unable to demonstrate that Act 287 satisfies the historical connotation of a bill of attainder.

105. The Supreme Court has also applied a functional approach "analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475–76 (citing, *e.g.*, *Hawker v. New York*, 170 U.S. 189, 193–194 (1898); *Dent v. West Virginia*, 129 U.S. 114, 128 (1889); *Trop v. Dulles*, 356 U.S. 86, 96–97 (1958); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–169 (1963)). "Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers." *Id.*

106. In Act 287, the South Carolina General Assembly states that its purpose is "to set certain utility rates for the purpose of protecting the public interest until a determination can be made by the appropriate regulatory and judicial authorities." 2018 S.C. Acts 258 § 3. However,

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in Resolution 285, the South Carolina General Assembly recognized that SCE&G "has legal rights and remedies that must be considered and respected throughout the process of resolving cost recovery issues for the abandoned Project, yet believes that recognition of SC[][E&G]'s legal rights and remedies does not require that [] customers continue to pay one hundred percent of the rates previously authorized by the Commission when the Project was expected, upon completion to provide valuable services to the customers; . . . ." 2018 S.C. Acts 285.

107. SCE&G relies on *Consolidated Edison* to stand for the proposition that "eliminating harm to innocent third parties is a purpose consistent with punishment," 292 F.3d at 352; however, that case is not similar to the case now before the court. In *Consolidated Edison*, the New York State Assembly passed a law which found that Consolidated Edison failed to exercise reasonable care in its management of a nuclear reactor and prohibited the recovery of any of the costs which resulted from that action. 292 F.3d at 344 ("[T]he Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000 outage at the Indian Point 2 Nuclear Facility. . . . [T]he New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs . . . ." (citing 2000 N.Y. Laws 190)). The New York State Assembly used the law at issue in *Consolidated Edison* to establish that the utility had acted imprudently. *Id.*

108. In this case, the South Carolina General Assembly made no determination in Act 287 about the prudency of SCE&G's actions, instead leaving that determination to the PSC. *See* 2018 S.C. Acts 258 § 1. Furthermore, the New York State Assembly in *Consolidated Edison* permanently prevented recovery of the costs associated with the company's mismanagement.

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Consol. Edison, 292 F.3d at 344. In contrast, the experimental rate set in Act 287 is only a temporary bar on the recovery of SCE&G's costs of the Project. SCE&G could still recover its costs in the abandonment proceedings determined by the PSC. Accordingly, the court is not persuaded that the purpose of Act 287 is to punish SCE&G.

109. The "third recognized test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a[n] [] intent to punish." *Nixon*, 433 U.S. at 478 (citing *United States v. Lovett*, 328 U.S. 303, 308–314 (1946); *Kennedy*, 372 U.S. at 169–170). The record must reflect a clear legislative intent to punish. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."). "Statements by a smattering of legislators 'do not constitute [the required] unmistakable evidence of punitive intent.'" *Consol. Edison Co.*, 292 F.3d at 354 (quoting *Selective Serv.*, 468 U.S. at 856 n.15). The court considered the transcript of the South Carolina Senate's June 27, 2018 hearing submitted by SCE&G. (ECF No. 94-6.) Upon review, the court is not persuaded at this time that the transcript provides justification for the conclusion that Act 287 evinces a legislative intent to punish.[25]

110. As to the third element for a bill of attainder, Act 287 establishes the experimental rate without the protections of a judicial trial. *See* 2018 S.C. Acts 258 § 3 (instructing the PSC to set the experimental rate without conducting a hearing on the matter).

111. Because SCE&G has failed to meet all elements of the test articulated by the United States Supreme Court in *Nixon* and *Selective Service*, which requires the infliction of

[25] At the preliminary injunction hearing, SCE&G presented statements of a few members of the South Carolina General Assembly who allegedly wanted to punish the company. However, there are numerous instances where state senators expressly stated that their goal was not to punish SCE&G. (*See* ECF No. 94-6 at 49:8–19, 50:1–3, 51:17–22, 60:1–5.)

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punishment upon an identifiable individual without a trial, SCE&G cannot show a likelihood of success on the merits on its claim asserting a bill of attainder.

B. Likelihood of Suffering Irreparable Harm Absent an Injunction, The Balance of Equities, and the Public Interest Factors

112. Generally, in determining whether to grant a motion for injunctive relief, "[t]he court must also consider the balance of hardships between the litigants and the impact on the public at large prior to issuing an injunction." *Uhlig, LLC v. Shirley*, C/A No. 6:08-cv-01208-JMC, 2012 WL 2458062, at *4 (D.S.C. June 27, 2012).

113. However, SCE&G has not made a clear showing that it will likely succeed on the merits because the law on the questions at the heart of the dispute does not favor its positions. Therefore, because SCE&G cannot show a likelihood of success on the merits, this court need not address the other necessary elements for preliminary injunctive relief. *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 608 F.3d 217, 225 (5th Cir. 2010) ("Because we have determined that Plaintiffs cannot show a substantial likelihood of success on the merits, we need not address FEMA's additional arguments regarding the other necessary elements for preliminary injunctive relief. The holding on the initial element is sufficient to vacate the injunction."); *Coleman v. Chase Bank*, C/A No. 3:14-cv-101, 2014 WL 2533400, at *3 (E.D. Va. June 5, 2014) ("Because Plaintiffs cannot show a likelihood of success on the merits, the Court need not address the remaining factors.").

V. CONCLUSION

114. In sum, SCE&G has not established that it is clearly likely to succeed on the merits of its claims. For the foregoing reasons and after careful consideration of the entire record, the court **DENIES** SCE&G's Motion for Preliminary Injunction. (ECF No. 5.)

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IT IS SO ORDERED.

United States District Judge

August 6, 2018
Columbia, South Carolina