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PUBLIC UTILITIES AND PUBLIC TRANSPORTATION Public Service Commission: Enact the “Georgia Nuclear Energy Financing Act”; Amend Section 25 of Chapter 2 of Title 46, Relating to the Procedure for Changing Any Rate, Charge, Classification, or Service, so as to Provide for a Utility to Recover from Its Customers the Costs of Financing Associated with the Construction of a Nuclear Generating Plant; Provide a Short Title; Provide for the Calculation and Collection of the Financing Costs; Provide for the Georgia Public Service Commission to Exercise Discretion in Setting the Level of

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PUBLIC UTILITIES AND PUBLIC TRANSPORTATION

Public Service Commission: Enact the “Georgia Nuclear Energy Financing Act”; Amend Section 25 of Chapter 2 of Title 46, Relating to the Procedure for Changing Any Rate, Charge, Classification, or Service, so as to Provide for a Utility to Recover from Its Customers the Costs of Financing Associated with the Construction of a Nuclear Generating Plant; Provide a Short Title; Provide for the Calculation and Collection of the Financing Costs; Provide for the Georgia Public Service Commission to Exercise Discretion in Setting the Level of Assistance for Senior and Low Income Customers; Provide the Commission with the Authority to Authorize Any Specific Accounting Treatment for the Costs Recovered; Provide for Review by the Commission As to Whether the Costs Recovered Are Being Properly Recorded; Provide for Related Matters; Provide for an Effective date; Repeal Conflicting Laws; and for Other Purposes.

CODE SECTION:	O.C.G.A § 46-2-25 (amended)
BILL NUMBER:	SB 31
ACT NUMBER:	13
GEORGIA LAWS:	2009 Ga. Laws 39
SUMMARY:	The Act allows for a power utility company to charge its customers for the financing costs of building a nuclear power plant during construction of the plant. The Act allows the financing costs to be recovered through an accounting method called Construction Work in Progress (CWIP).
EFFECTIVE DATE:	April 21, 2009

History

Though the Georgia Nuclear Energy Financing Act applies to all power utilities in Georgia, the bill was the product of intense lobbying by Georgia Power.¹ Specifically, Georgia Power's lobbying efforts focused on plans to build two new reactors at an existing nuclear plant.

The Alvin W. Vogtle Electric Generating Plant (Plant Vogtle) is located near Waynesboro, Georgia, south of Augusta along the Savannah River.² Plant Vogtle is jointly owned by Georgia Power, Oglethorpe Power Corporation, the Municipal Electric Authority of Georgia, and Dalton Utilities.³ Georgia Power began planning Plant Vogtle in 1971, but construction was suspended in 1974 because of financial problems.⁴ In response, Georgia Power scratched two of the four reactors originally planned for Plant Vogtle and resumed construction in 1977.⁵ The two completed reactors, Units one and two, came online for commercial electric power production in 1987 and 1989, respectively.⁶ Plant Vogtle became Georgia's second nuclear plant, behind only the Edwin I. Hatch Nuclear Plant, which began producing electricity in 1975.⁷ About twenty percent of Georgia's total electric generating capacity comes from the nuclear power provided by Plant Vogtle and Plant Hatch.⁸

1. Associated Press, *Georgia Power Lobbyists Push Hard on Nuke Charges*, WRDW.com, Feb. 22, 2009, <http://www.wrdw.com/home/headlines/40055322.html>; Interview with Sen. Ed Tarver (D-22nd) (Mar. 19, 2009) [hereinafter Tarver Interview].

2. SOUTHERN COMPANY, *VOGTLE: ALVIN W. VOGTLE ELECTRIC GENERATING PLANT 1*, <http://www.southerncompany.com/nuclearenergy/pdf/vogtleBrochure.pdf> (last visited Dec. 17, 2009). [hereinafter VOGTLE].

3. VOGTLE, *supra* note 2, at 1, 12. Georgia Power is 45.7% owner of Plant Vogtle. Southern Company, *Plant Vogtle*, <http://www.southerncompany.com/nuclearenergy/vogtle.aspx> (last visited Dec. 17, 2009).

4. VOGTLE, *supra* note 2, at 1; Robert Luke, *Second Reactor Starts Up at Plant Vogtle; Nuclear Sources to Provide 20% of State's Electricity*, ATLANTA J.-CONST., May 20, 1989, at E01.

5. Luke, *supra* note 4.

6. VOGTLE, *supra* note 2, at 1.

7. Southern Company, *Plant Hatch*, <http://www.southerncompany.com/nuclearenergy/hatch.aspx> (last visited Dec. 17, 2009). Plant Hatch and Plant Vogtle are owned by the same four entities. VOGTLE, *supra* note 2, at 12.

8. VOGTLE, *supra* note 2, at 12.

Southern Nuclear, a subsidiary of Georgia Power's parent organization, Southern Company, operates Plant Vogtle.⁹ The plant provides enough energy to power approximately 600,000 homes throughout the Southeast.¹⁰ As the population in the region continues to increase, the need for energy also increases.¹¹ The United States Department of Energy estimates forty percent of the U.S. population will live in the Southeast by 2030, and Georgia's population is estimated to grow by four million during that time.¹² Accordingly, Georgia Power plans to increase its power output by building two additional reactors at Plant Vogtle, Units three and four.¹³

On August 15, 2006, Southern Nuclear filed an early site permit application with the Nuclear Regulatory Commission (NRC) for the purposes of determining if the site was suitable for constructing the two additional reactors.¹⁴ On March 31, 2008, Southern Nuclear took another step towards constructing the reactors, announcing it had filed for a Combined Construction and Operating License with the NRC.¹⁵ Neither the early site permit nor the operating license authorize the construction of Units three and four; the proposed additions to the plant must still be approved by both state and federal governments.¹⁶

Before the introduction of Senate Bill (SB) 31, the Public Service Commission (Commission), not the utility company, had broad discretion in determining how a utility company recovers financing costs from ratepayers.¹⁷ The Commission generally allowed for costs to be recovered once the plant began providing service; in contrast,

9. Southern Company, Southern Nuclear, http://www.southerncompany.com/nuclearenergy/southern_nuclear.aspx (last visited Dec. 17, 2009).

10. VOGTLE, *supra* note 2, at 1–2.

11. *Id.* at 2, 7.

12. *Id.* at 7.

13. Kristi E. Swartz, *Deal Reached for Georgia Power Nuclear Reactors*, ATLANTA J.-CONST., Apr. 8, 2008, http://www.ajc.com/services/content/business/stories/2008/04/08/nuke_0409.html.

14. Rob Pavey, *Early Reactor Plan Given OK by Regulatory Group*, AUGUSTA CHRON., Aug. 19, 2008, http://chronicle.augusta.com/stories/081908/met_469933.shtml.

15. *Plant Vogtle Expansion Sought, Would Add Jobs to Power Facility*, AUGUSTA CHRON., Mar. 31, 2008, http://chronicle.augusta.com/stories/latest/lat_033108_vogtle.shtml.

16. Swartz, *supra* note 13.

17. *See* Petition for Writ of Mandamus, Declaratory Judgment, Injunctive Relief, and Judicial Review at Exhibit C, *Fulton County Taxpayers Found., Inc. v. Ga. Pub. Serv. Comm'n*, No. 2009 CV 168493 (Fulton County Super. Ct. Apr. 29, 2009).

SB 31 allows for the recovery of costs while the plant is under construction.¹⁸

The Georgia Nuclear Energy Financing Act follows similar bills in other southern states. North Carolina, South Carolina, Florida, and Louisiana have all previously approved the recovery of costs during the construction of nuclear plants.¹⁹ The motivation behind SB 31 was to keep Georgia competitive by creating jobs and lowering energy costs for manufacturing.²⁰

Bill Tracking of SB 31

Consideration and Passage by the Senate

SB 31 was sponsored by Senators Don Balfour (R-9th), Ed Tarver (D-22nd), Chip Rogers (R-21st), J.B. Powell (D-23rd), Ross Tolleson (R-20th), and Mitch Seabaugh (R-28th).²¹ SB 31 was first read by the Senate on January 26, 2009 and was then assigned to the Regulated Industries and Utilities (RI&U) committee.²² The Senate read SB 31 for the second time on February 6, 2009.²³ The bill undertook to amend Georgia Code section 46-2-25 as the means to enact the “Georgia Nuclear Energy Financing Act.”²⁴ The pre-amendment Code section consisted of subsections (a) through (e).²⁵ The Act amended Code section 46-2-25 by adding subsections (c)(1) through (c)(5).²⁶ Code section 46-2-25(c), before its amendment, set out the process a utility needed to adhere to in order to obtain the Commission’s approval for increasing consumer rates.²⁷ Alternatively, if the utility was unable to obtain the Commission’s approval, pre-amendment section (c) stated that no rate increase

18. *Id.*; see also O.C.G.A. § 46-2-25 (Supp. 2009).

19. Sue Sturgis, *Power Politics: Big Nuclear’s Money Grab*, INST. S. STUD., Mar. 2, 2009, <http://southernstudies.org/2009/03/power-politics-big-nuclears-money-grab.html>.

20. Tarver Interview, *supra* note 1; see discussion *infra* Potential Positive Impacts of the Bill.

21. SB 31, as introduced, 2009 Ga. Gen. Assem.

22. State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009.

23. See *id.*

24. *Id.*

25. 1972 Ga. Laws 137, § 1; 1976 Ga. Laws 419, § 1; 2002 Ga. Laws 475, § 2.

26. SB 31, as introduced, 2009 Ga. Gen. Assem.; O.C.G.A. § 46-2-25 (Supp. 2009).

27. 1972 Ga. Laws 137, § 1(c).

could go into effect unless the utility posted a bond to cover the loss if the utility's endeavor—for which the rate increase was imposed—failed.²⁸ This was the portion of the law that the Georgia Nuclear Energy Financing Act most substantially altered.

The RI&U committee proposed and voted out a substitute version on February 5, 2009, making changes to sections (c)(1), (c)(2), and (c)(3).²⁹ Section (c)(1) amended the language of the Act to allow the utility to recover costs based on its “actual cost of debt, as reflected in its annual surveillance report filed with the [C]ommission.”³⁰ Section (c)(1) was also amended to provide for the senior and low income exception.³¹ Section (c)(2) was amended to include the words “are prudent” when describing the Commission's scope of authority to review the costs.³² Section (c)(2) was also amended to make clear that the Commission and the utility are free to agree to apply earnings against costs in future rate cases.³³ Section (c)(3)(A) was not amended substantively, but it corrected a typographical error, removing the qualifying language—“except as provided in subparagraph (B) of this paragraph”³⁴—and replacing the phrase “after July 1, 2009” with “on or after July 1, 2009.”³⁵ Likewise, section (c)(3)(B) was clarified by specifying that plants certified “on or after January 1, 2009 and before July 1, 2009” could begin recovering costs on January 1, 2011, rather than simply stating that plants certified “on or before July 1, 2009”³⁶ shall begin recovering costs on January 1, 2011.³⁷

28. *Id.*

29. State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009; *see also* SB 31 (SCS), 2009 Ga. Gen. Assem.

30. SB 31 (SCS), § 2, p. 1–2, ln. 19–33, 2009 Ga. Gen. Assem.

31. *Id.*

32. *Id.* at § 2, p. 2, ln. 34–36.

33. *Id.*

34. SB 31, as introduced, § 2(c.1)(3)(A), 2009 Ga. Gen. Assem.

35. SB 31 (SCS), § 2, p. 2, ln. 37–45, 2009 Ga. Gen. Assem.

36. SB 31, as introduced, § 2(c.1)(3)(B), 2009 Ga. Gen. Assem.

37. State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009; *see also* SB 31 (SCS), § 2, p. 2, ln. 46–52, 2009 Ga. Gen. Assem.

First Floor Amendment

On the Senate floor, the Act was amended to strike the “prudent” language from section (c)(2) and to modify the wording of that sentence to read, “[t]he [C]ommission shall have the authority to authorize any specific accounting treatment for the costs recovered pursuant to this subsection and to review whether costs recovered pursuant to this subsection are being properly recorded.”³⁸ This change altered the Commission’s ability to influence the cost of the project. The Commission previously had the authority to review the objective prudence of the costs being recorded. After the change to section (c)(2), the Commission can dictate the accounting treatment used in reporting the costs of building the plant.³⁹ This amendment was advocated by Allison Wall of the Georgia Watch organization and requires the Commission to consider Georgia Power’s entire balance sheet when determining how much of its costs should be recovered.⁴⁰ For example, without this amendment, only the utility’s costs on the nuclear power plant project could be considered before reimbursement.⁴¹ With the amendment, however, if the utility has profits from other projects, the Commission has the power to require that those profits offset the costs of the current project before the utility’s being reimbursed.⁴² This amendment was authored by President Pro Tempore of the Senate, Tommie Williams (R-19th).⁴³

Second Floor Amendment

The second Senate floor amendment qualified the provisions for low income and elderly customers, restricting income assistance to those who were at or below two hundred percent of the federal

38. SB 31 (SFA) (09 AM 36 1119), 2009 Ga. Gen. Assem.

39. *See id.*; SB 31, as introduced, 2009 Ga. Gen. Assem.

40. *See* Tarver Interview, *supra* note 1; Interview with Allison Wall and Danny Orrock, Georgia Watch (Apr. 7, 2009) [hereinafter Wall Interview].

41. *See* Tarver Interview, *supra* note 1; Wall Interview, *supra* note 40.

42. *See* Tarver Interview, *supra* note 1; Wall Interview, *supra* note 40.

43. SB 31 (SFA) (09 AM 36 1119), 2009 Ga. Gen. Assem.

poverty level.⁴⁴ This amendment was sponsored by Senator Renee Unterman (R-45th).⁴⁵

Consideration and Passage by the House

On February 12, 2009, the House first read SB 31; the bill was then assigned to the Energy, Utility and Telecommunications (EU&T) committee.⁴⁶ The bill was read for a second time on February 17, 2009.⁴⁷ The EU&T Committee met on February 23, 2009 to discuss SB 31.⁴⁸ In the February 23 EU&T committee meeting, Representative Wix (D-33rd) moved to amend the bill (“the Wix amendment”).⁴⁹ The Wix amendment was not approved by the EU&T Committee, however, and the EU&T committee favorably reported SB 31, as it was passed in the Senate, on February 24, 2009.⁵⁰ On February 26, 2009, the House read SB 31 for a third time. It was passed and adopted without any modifications to the Senate version, and it was immediately transmitted back to the Senate. On April 8, 2009, SB 31 was sent to Governor Perdue, and on April 21, 2009, he signed it into law.⁵¹

The Act

The Act amends Code section 46-2-25(c) to provide for the utility to “recover . . . the costs of financing associated with the construction of a nuclear generating plant.”⁵² The Act sets out in section (c)(1) the

44. SB 31 (SFA) (09 AM 14 0884), 2009 Ga. Gen. Assem.

45. *Id.*

46. State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009.

47. *Id.*

48. Georgia Legislative Network Archive, Energy, Utilities, and Telecommunications Committee Agenda, Feb. 23, 2009, http://www.legis.ga.gov/legis/2009_10/house/Committees/publicUtilities/energyArchives.htm.

49. *See* Failed EU&T House Committee Amendment to SB 31, introduced by Rep. Don Wix (D-33rd), Feb. 23, 2009.

50. *Id.*; *see also* Georgia Legislative Network Archive, Energy, Utilities, and Telecommunications Committee, Feb. 23, 2009 at 1 hr., 26 min., 30 sec. (vote by the EU&T House Committee), http://www.legis.ga.gov/legis/2009_10/house/Committees/publicUtilities/energyArchives.htm; State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009.

51. State of Georgia Final Composite Status Sheet, SB 31, Apr. 3, 2009.

52. O.C.G.A. § 46-2-25 (Supp. 2009).

utility's ability to recover for the cost of building the nuclear power plant as the plant is being built.⁵³ Before the Act, the Code did not allow a utility to begin recovering its costs until after a project was completed.⁵⁴ Section (c)(1) also provides a floor and a ceiling indicating which customers the rate tariff can be imposed on. The rate tariff may not be imposed on senior or low income customers.⁵⁵ Section (c)(1) then mandates that the tariff, without income assistance, will be imposed on anyone above two hundred percent of the federal poverty level.⁵⁶ The Act also changes section (c)(2) in a way that alters the Commission's previous ability to review the objective prudence of the costs being recorded to now allow the Commission to dictate the accounting treatment used in reporting the costs of building the plant.⁵⁷

Potential Positive Impact of the Bill

A strong motivating factor behind passing SB 31 was job creation.⁵⁸ SB 31 was considered by the legislature at a time when the unemployment rate in Georgia hovered around eight percent.⁵⁹ Rep. Balfour (R-9th) predicted the creation of 3,500 jobs from the jobs created for constructing the plants and the permanent jobs for those operating the plants.⁶⁰

53. *Id.*

54. 1972 Ga. Laws 137, § 1(c).

55. O.C.G.A. § 46-2-25(c)(1) (Supp. 2009).

56. *Id.*

57. SB 31 (SFA) (09 AM 36 1119), 2009 Ga. Gen. Assem.

58. See Tarver Interview, *supra* note 1; see also Video Recording of House Proceedings, Feb. 26, 2009 at 1 hr., 37 min. (remarks by Rep. David Lucas (D-139th)), http://www.georgia.gov/00/article/0,2086,4802_6107103_129987579,00.html [hereinafter House Video]; *id.* at 1 hr., 40 min. (remarks by Rep. Debbie Buckner (D-130th)); *Issue In-Depth: Consumer Protection Legislation: Beneficial Measures Unfairly Maligned*, ATLANTA J.-CONST., Mar. 29, 2009, at A17, available at http://www.ajc.com/cherokee/content/printedition/2009/03/29/equaled0329.html?cxntlid=inform_artr ("The Georgia Legislature's No. 1 focus this session has been stimulating the economy, *creating jobs* The generators alone will create over 3,500 jobs over the next eight years.") (emphasis added).

59. House Video, *supra* note 58, at 2 hr., 22 min. (remarks by Rep. Randal Mangham (D-94th)); Georgia Dep't of Labor, Georgia Unemployment Rate, http://www.dol.state.ga.us/pdf/pr/lf_georgia.pdf (last visited Dec. 17, 2009) [hereinafter Georgia Dep't of Labor].

60. Video Recording of Senate Proceedings, Feb. 26, 2009 at 1 hr., 12 min. (remarks by Sen. Don Balfour (R-9th)), http://www.georgia.gov/00/article/0,2086,4802_6107103_129987583,00.html.

Another impetus for SB 31 and the construction of Vogtle reactors three and four was the potential for additional nuclear energy to keep energy costs low to attract and retain manufacturing businesses in Georgia.⁶¹ Bills similar to SB 31, containing similar CWIP financing, were introduced in neighboring states such as Florida, Alabama, South Carolina, and Tennessee.⁶² Proponents of SB 31 predict that failing to expand Georgia's nuclear power source would make Georgia lose potential for manufacturing job creation, and therefore less competitive than its neighbors.⁶³ Nuclear energy is a relatively cheap energy source, making states with a strong supply of nuclear energy an attractive place for large consumers of energy, such as manufacturing plants, to operate.

Most emphasized by supporters of SB 31 is the total cost savings that the CWIP financing will bring to Georgia Power's customers.⁶⁴ Some predict that CWIP financing will ultimately save the utility's customers \$300 million.⁶⁵ Without CWIP financing, customers of Georgia Power would still pay for the cost of the plant, but they would do so after the project's completion and after the financing charges had accrued.⁶⁶ Proponents of SB 31 point out that consumers, by paying for the costs in the present rather than in the future, will not have to pay financing costs.

Unintended Consequences of the Bill

Although having Georgia Power customers pay upfront rather than after the fact might save them from paying financing costs, critics of SB 31 point out that this extra charge comes during a recession in the

61. Tarver Interview, *supra* note 1.

62. Margaret Newkirk, *Nuclear Bill Gets a Push in Georgia; Florida's Undoing: State Points to Its Neighbor As Reason to Pass Senate Bill 31 Here*, ATLANTA J.-CONST., Feb. 24, 2009, at 1C ("Southern states in particular have recently passed laws mandating early nuclear fees. Georgia Power says a similar mandate here would help it compete with those states' utilities for construction capital.").

63. Tarver Interview, *supra* note 1.

64. *Id.*

65. House Video, *supra* note 58, at 2 hr., 40 min. (remarks by Rep. Randal Mangham (D-94th)); *Utilities: Bill to Finance New Nuclear Reactors Clear Georgia House*, ENERGY POL'Y & MARKETS, Feb. 27, 2009, at 9 ("Proponents of the measure say the subsidy will save the utility about \$300 million in financing costs from the \$6.4 billion total estimated cost.").

66. House Video, *supra* note 58, at 2 hr., 40 min. (remarks by Rep. Mark Hatfield (R-177th)).

United States.⁶⁷ Unemployment is high and many are struggling to save their homes from foreclosure.⁶⁸ Critics note that although the charge on consumers' monthly power bill is only, at present, \$1.30, consumers are nevertheless saving every penny during this time of financial insecurity.⁶⁹

In addition, skeptics note that small businesses and residential users will likely bear a larger burden of the cost associated with building Vogtle reactors three and four.⁷⁰ This is because the language in section (c)(1) directs that the "financing costs shall be recovered from each customer through a separate rate tariff and allocated on an equal percentage basis to standard base tariffs which are designed to collect embedded capacity costs."⁷¹ Embedded capacity costs are those costs which "keep the lights on," and are set to a fixed, rather than a variable rate.⁷² Most all residential and small business consumers bills are comprised of one hundred percent embedded capacity costs.⁷³ Most large industrial users' bills, however, are comprised of a percentage of embedded capacity costs and a percentage of marginal or incremental rate power that is available at real time pricing.⁷⁴ Marginal or incremental rates, as the name suggests, are a variable rate, as opposed to embedded capacity costs, which are set to a fixed rate.⁷⁵

For example, a typical industrial consumer's power bill might be comprised of sixty percent embedded rates and forty percent real time pricing.⁷⁶ The charges imposed by SB 31 are apportioned "equally" based on the consumer's consumption of embedded

67. House Video, *supra* note 58, at 1 hr., 25 min. (remarks by Rep. Georganna Sinkfield (D-60th)).

68. Georgia Dep't of Labor, *supra* note 59.

69. House Video, *supra* note 58, at 1 hr., 25 min. (remarks by Rep. Georganna Sinkfield (D-60th)).

70. See Wall Interview, *supra* note 40; House Video, *supra* note 58, at 1 hr., 40 min. (remarks by Rep. Debbie Buckner (D-130th)); *id.* at 1 hr., 57 min. (remarks by Rep. Al Williams (D-165th)).

71. SB 31, as passed House, 2009 Ga. Gen. Assem.

72. Georgia Power, About Our Pricing, http://www.georgiapower.com/pricing/aboutrates_gapower.asp#time (last visited Dec. 17, 2009) ("Real-Time Pricing: This rate is offered to customers using larger amounts of energy. Real-Time Pricing enables these customers to buy energy real-time on the energy market at reduced rates.").

73. *Id.*

74. *Id.*

75. *Id.*

76. See Wall Interview, *supra* note 40.

rates.⁷⁷ Thus, an industrial consumer will only be picking up sixty percent of its share of the charges imposed by its bill and will be getting a forty percent discount, but residential consumers will bear one hundred percent of their share.

Lastly, those opposed to the bill argue that SB 31 promotes the increased use of nuclear energy, which—although it is considered a “clean” energy source—is nevertheless nonrenewable.⁷⁸ These critics point out that now is the time to look to developing renewable energy sources in Georgia rather than wedding Georgia Power consumers to nuclear energy as their source of power.⁷⁹ These renewable energy supporters note the number of jobs that renewable energy could bring to Georgia, and that renewable energy is the route that progressive states are taking.⁸⁰

Constitutionality of the Bill

Constitutionality of CWIP

CWIP, a utility’s ability to recover costs from its ratepayers during construction, is not unconstitutional unless a state has explicitly made it so. For example, in 1976, Missouri voters approved an amendment to the state’s constitution prohibiting CWIP.⁸¹ Conflict about the construction of a nuclear plant in Missouri and the utility’s ability to recover costs using CWIP gave rise to the amendment.⁸² Because no similar constitutional provision prohibiting CWIP exists in Georgia, CWIP is not itself unconstitutional.

77. See O.C.G.A. § 46-2-25(c)(1) (Supp. 2009) (“[F]inancing costs shall be recovered from each customer through a separate rate tariff and allocated on an equal percentage basis to standard base tariffs which are designed to collect embedded capacity costs.”).

78. House Video, *supra* note 58, at 2 hr., 22 min., 53 sec. (remarks by Rep. Randal Mangham (D-94th)).

79. *Id.*

80. *Id.*

81. Henry J. Waters III, *CWIP Battle: Arguing over Nuclear Power*, COLUMBIA DAILY TRIB., Feb. 7, 2009, available at <http://www.columbiatribune.com/news/2009/feb/07/cwip-battle/>.

82. *Id.*

Constitutionality of Legislature's Regulation of Rates over the Commission

At first glance, the legislature's usurping of rate-making power from the Commission would seem to create a constitutional question. The Commission is a constitutionally created body consisting of five members, each elected for six-year terms.⁸³ The state constitution charges the Commission with general supervision of all common carriers and utilities in Georgia, including power companies.⁸⁴ As to the Commission's rate-making authority, the constitution states that "[t]he Commission shall have exclusive power to determine what are just and reasonable rates and charges to be made by any person, firm, or corporation subject to its jurisdiction."⁸⁵ The Georgia Supreme Court has interpreted this section, however, to mean that the Public Service Commission, rather than any other agency of the *executive branch*, has authority to regulate public utilities. As the Georgia Supreme Court noted, "[t]his grant of authority of the Public Service Commission, to the exclusion of other executive branch agencies, does *not* mean that the General Assembly has divested itself of its constitutional power to regulate public utilities."⁸⁶ The Georgia Supreme Court's guidance resolves this constitutional issue, granting the legislature the power to regulate utilities like Georgia Power.

Current Georgia law supports the idea that there is likely no constitutional issue as to the use of CWIP or the legislature's power to pass this bill and regulate the utilities over the power of the Commission. Two lawsuits have been filed in Georgia state courts, however, challenging these aspects of the Act.

Legal Challenges to SB 31

Two groups have challenged SB 31 in Georgia state courts. The Fulton County Taxpayers Foundation (FCTF) filed a petition for mandamus, declaratory judgment, injunctive relief, and judicial

83. O.C.G.A. § 46-2-1 (Supp. 2009).

84. *Id.* § 46-2-20(a).

85. *Id.* § 46-2-23(a).

86. *Lasseter v. Ga. Pub. Serv. Comm'n*, 319 S.E.2d 824, 828 (Ga. 1984) (emphasis added).

review on April 29, 2009 with the Fulton County Superior Court.⁸⁷ The group contends SB 31 is unconstitutional because it represents an unauthorized encroachment by the General Assembly on the regulation of utilities; violates the substantive due process rights of the Fulton County taxpayers; violates equal protection by exempting large industrial customers; creates an unconstitutional gratuity for Georgia Power and its stockholders; constitutes a private tax or fee; and, furthers Georgia Power's monopoly as a regulated utility in Georgia.⁸⁸ Additionally, the FCTF argues the rate increase exemption made for large industrial users is unfair and burdens small businesses.⁸⁹ The petition asks for mandamus and injunctive relief against the Commission, specifically requesting the court to require the Commission comply with the state constitution and to enjoin the Commission from taking action in conjunction with SB 31.⁹⁰ As of December 17, 2009, the FCTF case is pending before the Superior Court.

On June 15, 2009, the Southern Alliance for Clean Energy (SACE) filed a petition regarding SB 31 in the Fulton County Superior Court.⁹¹ Like the FCTF, the SACE contends SB 31 is unconstitutional under both the state and federal constitutions.⁹² The SACE requested judicial review of the Commission's Amended Certification Order that certified reactors three and four of Plant Vogtle and granted Georgia Power's request to use CWIP to recover construction costs.⁹³ As of December 17, 2009, this case is also pending before the Superior Court.

87. Petition for Writ of Mandamus, Declaratory Judgment, Injunctive Relief, and Judicial Review, Fulton County Taxpayers Found., Inc. v. Ga. Pub. Serv. Comm'n, No. 2009 CV 168493 (Fulton County Super. Ct. Apr. 29, 2009).

88. *Id.*

89. Ewa Kochanska, *Environmental and Conservative Groups Filed Lawsuits Against Georgia Power, Sonny Purdue*, ATLANTA POL. BUZZ EXAMINER, July 14, 2009, available at <http://www.examiner.com/x-6571-Atlanta-Political-Buzz-Examiner~y2009m7d14-Environmental-and-Conservative-groups-filed-lawsuits-against-Georgia-Power-Sonny-Perdue>.

90. *Id.*

91. Petition for Judicial Review and Declaratory Judgment, S. Alliance for Clean Energy, Inc. v. Ga. Pub. Serv. Comm'n, No. 2009 CV 170648 (Fulton County Super. Ct. June 15, 2009).

92. *Id.*

93. *Id.* at 1; see also Petition for Judicial Review and Declaratory Judgment at Exhibit A, S. Alliance for Clean Energy, Inc. v. Ga. Pub. Serv. Comm'n, No. 2009 CV 170648 (Fulton County Super. Ct. June 15, 2009); Kochanska, *supra* note 89.

Issues Left Unresolved by the Bill

Opponents of the Act argue it leaves several issues unresolved. First, the Act contains no refund provision if the plant is not built.⁹⁴ If, in the case of Plant Vogtle, Georgia Power began to build the additional reactors but then stopped construction sometime after 2011, but still before completion, Georgia Power would keep the payments made by ratepayers up until that point.⁹⁵

Second, there is no timeline in the Act for the construction of the plant. As with the construction of Plant Vogtle in the 1970s, financial difficulties can stall a project for several years. If Georgia Power encountered financial problems in building reactors three and four at Plant Vogtle and were forced to temporarily stop construction, Georgia Power could continue to charge consumers CWIP. Additionally, the Act does not relieve ratepayers of their obligation to pay if the plant is not built within a certain period of time.⁹⁶ There is no provision in the Act that either encourages or requires Georgia Power, or any other utility, to meet deadlines for construction.

Third, there is no limit on the amount that ratepayers will be charged for any given project. Nuclear power plant construction is expensive, and projects have a tendency to go over budget due to the fluctuating costs of labor and supplies and the inaccuracies and unforeseen costs in construction bids.⁹⁷ This has previously been the case for Plant Vogtle. The original estimate to build the plant (consisting of four reactors) was \$660 million, but in the end, it cost \$8.8 billion to build only two of the four planned reactors.⁹⁸ SB 31, therefore, fails to limit the potential of cost overruns by failing to impose a limit on the amount of costs a utility may recover from its consumers.

Without a refund provision, an imposition of a timeline for construction, or a limit to the amount a utility can recover, the Act

94. Wall Interview, *supra* note 40.

95. *Id.*

96. *Id.*

97. Swartz, *supra* note 13; Wall Interview, *supra* note 40; House Video, *supra* note 58, at 1 hr., 20 min. (remarks by Rep. Alan Powell (D-29th)).

98. Wall Interview, *supra* note 40.

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fails to address how much ratepayers will be responsible for contributing to nuclear power plant construction, how long they will have to pay, and if they will ever receive the power for which they are paying.

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