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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001900

Duke Energy Carolinas, LLC, Appellant-Respondent,

v.

Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., the South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc., Respondents

Of whom South Carolina Energy Users Committee and The South Carolina Office of Regulatory Staff are Respondent-Appellant

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REPLY BRIEF OF RESPONDENT- APPELLANT SOUTH CAROLINA ENERGY USERS COMMITTEE

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I

DUKE ENERGY CAROLINAS, LLC SHOULD BE DENIED ANY RECOVERY OF ITS NUCLEAR PLANT PRECONSTRUCTION COSTS, BECAUSE THE BASE LOAD REVIEW ACT SUPPORTING RECOVERY OF PRECONSTRUCTION COSTS HAD BEEN REPEALED AND CONSEQUENTLY, DUKE WAS FORECLOSED FROM RECOVERY OF THESE COSTS.

In 2007, Duke elected to recover its preconstruction costs pursuant to the BLRA[1]. Order No. 2008-417. Duke's second and final project development order authorized Duke recovery of $60 million in project development costs as of June 30, 2012. Order No. 2011-454. Act 258 prohibited any further proceedings under the BLRA after June 28, 2018. For reasons it has failed to explain, Duke chose to delay recovery of its preconstruction costs for six years, waiting until after the repeal of the BLRA. While Act 258 foreclosed recovery under the BLRA, it was Duke's calculated decision to relinquish its rights to recovery of preconstruction costs under the BLRA, Duke chose instead to attempt to double its recovery by proceeding under S.C. Code Ann. Sections 58-27-820 and 870. Having elected to avail itself of the benefits of the BLRA, Duke is now estopped from recovering its project development costs under any other statute. The responsibility for Duke's failure to recover its preconstruction costs rests solely with Duke, not the General Assembly.

The Appellant-Respondent's brief fails to address Duke's decision to delay recovery of its preconstruction costs. The only reasonable inference from this record for Duke's delay was to

[1] The Base Load Review Act, S.C. Code Ann. Sections 58-33-210 et seq.

permit the AFUDC[2] to swell its recovery from ratepayers.[3] Duke's calculated risk to delay recovery of its preconstruction costs paid off, doubling Duke's recovery from $60 million authorized pursuant to the BLRA, to $125 million granted by the Commission in Order No. 2019-323 below.

Duke argues that the BLRA and S.C. Code Ann. Sections 58-27-820 and 870 were complementary permitting Duke to file for recovery of its project development costs under each statute at Duke's "option." Appellant-Respondent's brief at p. 8. In 2008, Duke had the option to proceed under the BLRA or S.C. Code Ann. Sections 58-27-820 and 870 to recover its preconstruction costs. Having elected to proceed under the BLRA in 2008, Duke elected its remedy and is foreclosed from recovery of these costs pursuant to any other statute. For the reasons set out in Respondent-Appellant's brief, Duke is estopped from recovery here. See Respondent-Appellant's brief at pp. 11- 16.[4]

Duke attempts to bolster its position by citing remarks purportedly made concerning the repeal of the BLRA by State Senator Massey. Appellant-Respondent's brief at pp. 10 – 11. This Court has held that "[i]t is a settled principle in the interpretation of statutes that even where there is some ambiguity or some uncertainty in the language used, resort cannot be had to the opinions

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[2] The BLRA defines the AFUDC as the allowance for funds used during construction of a nuclear plant S.C. Code Ann. Section 58-33-220(1). See Respondent-Appellant's brief at pp. 4-6.

[3] AFUDC ballooned to $248 million in Duke's filing from $68 million on June 30, 2012. See Respondent-Appellant's brief at pp. 4-6.

[4] Duke argues that SCEUC failed to preserve its election of remedies argument found at Respondent-Appellant's brief at 11 – 16. Duke is mistaken. Relying, inter alia upon, the authority of *Carter v. Associated Petroleum Carriers*, 235 S.C. 80, 110 S.E.2d 8(1959), holding evidence of substantial compliance with statute necessary to demonstrate election to bring oneself within the protections of a statute; *White v. Livingston*, 234 S.C. 74, 106 S.E.2d 892 (1959), holding doctrine of election of remedies estopped party from bringing an action to enforce a deed after having first brought an action to set aside the deed; and *Lawson v. Rogers*, 312 S.C. 492, 435 S.E.2d 853(1993), holding doctrine of election of remedies estopped parties from bringing an action in tort after having first brought an action for an accounting. SCEUC raised the argument in its prehearing brief at pp 7-8, in its Petition for Rehearing at p. 3 and in its brief on appeal at pp. 11-16. (Appendix to R. pp. 7-8; R. p. 4038).

of legislators or of others concerned in the enactment of the law, for the purpose of ascertaining the intent of the legislature." *Greenville Baseball, Inc. v. Bearden,* 200 S.C. 363, 371,20 S.E. 2d 813, 817 (1942) (prohibiting affidavits of State Senators who were members of the State Senate when the act in question was adopted). Likewise, the South Carolina Supreme Court has also provided that *even if* there are no committee reports or reports of legislative debates, testimony of an author regarding the meaning of a statute is inadmissible. *Bowaters Carolina Corp. v. Smith,* 257 S.C. 563, 572, 186 S.E. 2d 761, 764 (1972). Moreover, in *Kennedy v. S.C. Retirement System,* 345 S.C. 339, 354-54, 549 S.E. 2d 243, 250 (2001), the South Carolina Supreme Court held that the testimony of an executive branch officer, as the "author" of a legislative amendment, was not admissible as evidence of legislative intent. "Such testimony of what [one] intended as 'author' of the amendment, as well as what problems he intended the amendment to address, are not proper legislative history for a court to take into account." *Id.* At 354, 549 S.E. 2d at 251.

Citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989), Duke argues that construing the repeal of the BLRA by Act 258 to foreclose the utility from recovering its preconstruction costs would be confiscatory and violative of due process. Appellant-Respondent's brief at p. 11. Duke misreads *Duquesne.* In *Duquesne,* the U.S. Supreme Court upheld a Pennsylvania statute which directed the Pennsylvania Public Utilities Commission ("PUC") to authorize rates on only those utility costs which were used and useful for the public. As here, Duquesne Light Co. and other utilities sought recovery of their costs from abandoned nuclear projects from the PUC. As here, it was undisputed in *Duquesne* that the costs were not used and useful. During the proceedings before the PUC for recovery of the abandonment costs, the Pennsylvania legislature enacted a statute that required the PUC to limit recovery of only those costs that were used and useful for the public. On appeal from the PUC, the Pennsylvania Supreme

Court held that since the costs were not serving the public and did not constitute an operating expense, no constitutional rights to recovery attached to them. The U.S. Supreme Court in *Duquesne Light Co. v. Barasch*, affirmed embracing the reasoning of the Pennsylvania Supreme Court holding that a "state scheme of utility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to eh public." *Duquesne,* 488 U.S. 299, 302.

The BLRA upended traditional ratemaking by awarding electrical utilities recovery of their nuclear costs before the nuclear plants were used and useful. The General Assembly was fully aware that the State's electrical utilities had expended substantial amounts on nuclear plants which would never generate electricity. By prohibiting future proceedings under the BLRA in Act 258, the General Assembly directed that only those costs that are used and useful may be recovered in rates. Consequently, Act 258 passes constitutional muster under *Duquesne. Duquesne*, 488 U.S. 299, 315.

Citing *Duquesne*, Duke further argues that to prohibit recovery of its preconstruction costs is confiscatory and violative of due process. However, the decision in *Duquesne* compels the opposite conclusion. *Duquesne* requires Duke to demonstrate that the denial of recovery of its preconstruction costs would jeopardize the financial integrity of the utility and generate revenues inadequate to compensate equity holders. *Duquesne,* 488 U.S. 299, 311 - 312. Duke has offered no such proof, nor could it. Duke's South Carolina annual revenue in the test year prior to filing its November 2018 rate case was $1,613,934,000 (R. p. 5119; Hearing Ex. 10; Smith Ex. 1, page 1). If Duke were to be denied annual recovery of $11 million in preconstruction costs, Duke's test year revenue would be reduced by .68%.[5] Duke cannot seriously suggest that reversing the

[5] The Commission awarded Duke a net revenue increase of $106,931,000 (preceding the application of the EDIT rider). (R. p. 3906; Order No. 2019 -323 at p. 20).

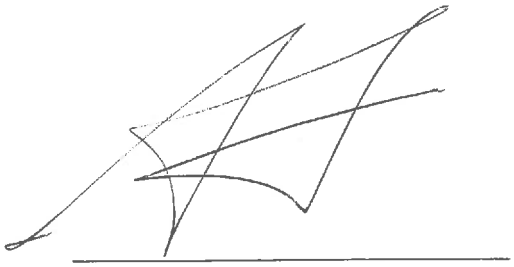
award of preconstruction costs would adversely affect the financial integrity of the utility or inadequately compensate the shareholders. Nor does it.

Duke argues that since it demonstrated the prudency of the decision to incur preconstruction costs and that those costs were found to be prudent by the Commission below, the ratepayers were not prejudiced by Duke's second bite of the apple. Appellant-Respondent's brief at p. 9. Duke's argument is simplistic. Having first obtained project development orders under the BLRA, Duke mitigated its risk associated with its decision to proceed to recover its project development costs under S.C. Code Ann. Sections 58-27-820 and 870. As a practical matter, the prudency of Duke's decision to invest in the preconstruction costs had been determined in Duke's BLRA dockets.

CONCLUSION

For the foregoing reasons and those set out in Appellant-Respondent's brief, the repeal of the BLRA by Act 258 foreclosed Duke from recovery of its preconstruction costs. Accordingly, the South Carolina Energy Users Committee respectfully requests that the Supreme Court reverse the award to Duke of recovery of $125 million in preconstruction costs and remand with instructions to the Public Service Commission to eliminate these costs from rates.

[Signature on next page]



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