

IN THE SUPERIOR COURT OF FULTON COUNTY

THE STATE OF GEORGIA

FULTON COUNTY TAXPAYERS)	
FOUNDATION, INC. and JOHN S.)	
SHERMAN, an individual,)	
)	
Plaintiffs/Petitioners,)	Civil Action File No.
)	_____
v.)	
)	
GEORGIA PUBLIC SERVICE)	
COMMISSION, H. DOUG EVERETT,)	
LAUREN “BUBBA” MCDONALD, JR.,)	
ROBERT B. BAKER, CHUCK EATON,)	
STAN WISE, and SONNY PERDUE in)	
his official capacity as Governor of the)	
State of Georgia,)	
)	
)	
Defendants/Respondents.)	

**PETITION FOR WRIT OF MANDAMUS, DECLARATORY JUDGMENT,
INJUNCTIVE RELIEF AND JUDICIAL REVIEW**

COME NOW Plaintiffs/Petitioners Fulton County Taxpayers Foundation, Inc. and John S. Sherman (together, “Petitioners”) and hereby file this Petition for Writ of Mandamus, Declaratory Judgment, Injunctive Relief and Judicial Review against the above-named Defendants/Respondents, and show as follows:

INTRODUCTION

This Petition requests that this Court declare unconstitutional Senate Bill 31, a bill entitled the “Georgia Nuclear Energy Financing Act” (“SB 31”), for the reasons described in Counts I through ____ below. A true and accurate copy of SB 31, as obtained from the

General Assembly's website, is attached hereto as *Exhibit "A"*. copy Defendant Governor Perdue signed SB 31 into law on April 21, 2009. SB 31 by its terms proposes to impose on the people of the State of Georgia who purchase electric power from the Georgia Power Company a new tariff to finance the construction of nuclear generating plants. This Petition also seeks a writ of mandamus and injunctive relief against the Georgia Public Service Commission and its commission members in their official and capacities (collectively, the "PSC"), requiring the PSC to comply with the Constitution of the State of Georgia and preliminarily and permanently enjoining the PSC from taking any action in reliance upon SB 31.

This Petition also requests this Court, pursuant to O.C.G.A. § 50-13-19, to review an Amended Certification Order issued by the PSC on March 30, 2009 in Docket No. 27800 (the "Certification Order"). A true and accurate copy of the Certification Order, as obtained from the Commission, is attached hereto as *Exhibit "B"*. The PSC Order by its terms was issued in reliance upon SB 31. The PSC Order is illegal and unconstitutional on the same basis that SB 31 is illegal and unconstitutional. The PSC Order is further illegal for the reasons set forth in Counts _____ below.

Parties, Jurisdiction and Venue

1. Petitioner Fulton County Taxpayers Foundation, Inc (the "Foundation") is a Georgia non-profit corporation which has among its members thousands of persons who are citizens of, and who own land in, Fulton County, Georgia. The Foundation has as one of its

core missions the support of legal action to insure the just enactment of laws affecting the citizens of Fulton County. Many (thousands) of the members of the Foundation are residential and/or retail rate paying customers of the Georgia Power Company.

2. Petitioner John S. Sherman is a resident, citizen and taxpayer of the City of Atlanta, Fulton County, Georgia. Mr. Sherman is also President of the Foundation. Petitioner Sherman is further a residential rate paying customer of the Georgia Power Company.

3. Petitioners have standing to bring and file this Petition in respect of Counts _____ pursuant to O.C.G.A. § 9-4-1, *et seq.* (the “Declaratory Judgment Act”) and O.C.G.A. § 9-5-1, *et seq.*, as well as §§ 9-6-20 and 9-6-24, to seek a declaration by the Court that SB 31 is unconstitutional for the reasons stated herein, and further to compel Defendants to perform their official constitutional duties, and to invoke the Court’s equitable power to restrain the *ultra vires* and unconstitutional acts of the Defendants described hereinbelow.

4. Counts ___ of this Petition seek judicial review of the PSC Order and are therefore expressly authorized pursuant to O.C.G.A. § 50-13-1, *et seq.*, the Georgia Administrative Procedures Act (the “APA”), which permits “persons” aggrieved by a decision of a governmental agency, and who have exhausted their administrative remedies, to appeal that decision. *O.C.G.A. § 50-13-19(a)*. The APA requires that petitions requesting review of orders of the PSC be brought before the Superior Court of Fulton County. *O.C.G.A. § 50-13-19(b)*.

5. Petitioners filed a Notice of Intent to Intervene and Application to Intervene in PSC Docket No. 27800 on April 9, 2009, together with an Application for Reconsideration. As of the filing of this Petition, the PSC has not acted on the PCS Applications.

6. The membership of Petitioner FCTF consists of thousands of Georgia Power customers rate who will be damaged by the PSC Order, and such persons are therefore aggrieved by the PSC Order. Petitioner Sherman is a customer of Georgia Power and will be damaged and aggrieved by the PSC Order,

7. As of filing of this Petition within the 30 day period of the effective date of the Certification Order, Petitioners have exhausted their administrative remedies, in that the PSC has made no ruling on Petitioners' Application to Intervene and Application for Reconsideration.

8. Defendants Sonny Perdue, sued only in his capacity as Governor of the State of Georgia, is subject to the jurisdiction of this Court, and may be served at the Office of the Governor at Room 203 of the Georgia State Capitol Building, Atlanta, Georgia 30334. Defendant Sonny Perdue is a public officer in the State of Georgia. Among other duties, pursuant to Article V, Section II, Paragraph II of the Constitution of the State of Georgia, Defendant Perdue, in his official capacity as Governor of the State of Georgia, is responsible for enforcing the Georgia Constitution.

9. Defendants Georgia Public Service Commission (the "Commission") is a constitutional board of the State of Georgia, created and existing pursuant to _____ of the Constitution of the State of Georgia, and may be served by

serving its Chairman, H. Doug Everett, at the Commission's office at 244 Washington Street, S.W., Atlanta, Georgia 30334.

10. Defendants H. Doug Everett, Lauren "Bubba" McDonald, Jr., Robert B. Baker, Jr., Chuck Eaton and Stan Wise are the elected members of the Commission and are named as defendants in their official and personal capacities.

11. Jurisdiction and venue are proper in this Court.

Background

12. On August 1, 2008, the Georgia Power Company initiated Docket # 27800 with the PSC, a proceeding purportedly brought under the Integrated Resource Planning Act, O.C.G.A. § 46-3A-1 *et seq.*, seeking from the PSC, among other things, certification for Units 3 and 4 of Plant Vogtle, an update to Georgia Power's 2007 Integrated Resource Plan, and approval from the PSC to place construction work in progress ("CWIP") in the rate base of certain Georgia Power customers beginning January 1, 2011 in order to pre-pay the debt and equity requirement in connection with the construction costs of Units 3 and 4 at Plant Vogtle.

13. February 26, 2009, before the PSC had issued an order in Docket # 27800, the Georgia General Assembly adopted Senate Bill 31, known as the "Georgia Nuclear Energy Financing Act", a true and accurate copy of which (obtained from the General Assembly's website) is attached hereto as Exhibit "A" ("SB 31").

14. Defendant Governor Perdue Signed SB 31 into law on April 21, 2009.

15. SB 31 by its terms imposes on certain customers of the Georgia Power Company a new tariff to finance the construction of nuclear generating plants (the Nuclear Tariff”). In other, words, SB 31 mandated the outcome of PSC Docket # 27800 in terms of the CWIP in rate base decision by directing the PSC to impose the Nuclear Tariff on certain Georgia Power customers.

16. Despite PSC’ s staff analysis indicating a negative net present value of \$740 million of the life of the Vogtle plants (i.e., a loss of \$740 million resulting from the forced pre-payments) (*See PSC staff analysis of SB 31 attached hereto as Exhibit ____*), the PSC adopted is Amended Certification Order on March 30, 2009 (the “Certification Order), approving, among other things, CWIP in rate base in clear reliance on SB 31 (*See PSC staff analysis of SB 31 attached hereto as Exhibit ____*).

Applicable Law

17. Article IV, Section I, Paragraph I(a) of the Constitution of the State of Georgia (“There shall be a Public Service Commission for the regulation of utilities”).

18. Rights to due process and equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia.

19. Title 42, Article 21, Subchapter I, §1983 of the Unites States Code (“Everyone who, under color of any statute, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured”).

20. Article III, Section VI, Paragraph VI(a) of the Constitution of the State of Georgia, which prohibits gratuities.

21. Article VII, Section I, Paragraph III(a) of the Constitution of the State of Georgia (“All taxes shall be levied and collected under general laws *and for public purposes only.*”) (emphasis supplied). *See e.g. Gunby v. Yates*, 214 Ga. 17, 19 (1958)(A “tax” under Georgia law is “an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered.”). “An assessment levied in excess of the benefit provided arbitrarily deprives a person of his property”. *Monticello, Ltd. V. Atlanta*, 231 Ga. 382, 386 (1998).

22. Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia (“The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of *defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.*”) (emphasis supplied).

23. O.C.G.A. § 46-2-25, O.C.G.A. § 46-2-26.1, O.C.G.A. § 46-3A-1 *et seq.*

Count I – Declaratory Judgment as to SB 31
Unauthorized Encroachment by General Assembly

24. Plaintiffs incorporate by reference paragraphs 1 through 22 of this Petition as if fully set forth herein.

25. This is a count seeking a declaratory judgment by virtue of the provisions of the Declaratory Judgment Act.

26. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Article IV, Section I, Paragraph I(a) of the Constitution of the State of Georgia (“There shall be a Public Service Commission for the regulation of utilities”), as an unconstitutional encroachment by the Georgia General Assembly into the PSC’s status as a constitutional board entrusted by the people of the State of Georgia to fix rates charged by regulated utility companies. SB 31 purports to mandate the imposition of the “Nuclear Tariff” on certain retail customers of Georgia Power, thereby taking away the rate making authority and discretion from the PSC. That is facially unconstitutional.

27. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Article IV, Section I, Paragraph I(a) of the Constitution of the State of Georgia. Plaintiffs show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

28. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count II – Declaratory Judgment as to SB 31
Violation of Substantive Due Process

29. Plaintiffs incorporate by reference paragraphs 1 through 28 of this Petition as if fully set forth herein.

30. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Plaintiffs' rights to substantive due process under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia.

31. Plaintiffs show, by way of the PSC staff analysis attached as *Exhibit A*, that SB 31 will result in a net present value loss in the amount of \$740 million of the life of the Vogtle plants. That is an unconstitutional confiscation and deprivation of Plaintiffs' property, in violation of Plaintiffs' rights to substantive due process under the State and Federal Constitutions.

32. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Plaintiffs' rights to substantive due process under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia. Plaintiffs show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

33. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count III – Declaratory Judgment as to SB 31
Violation of Equal Protection

34. Plaintiffs incorporate by reference paragraphs 1 through 33 of this Petition as if fully set forth herein.

35. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Plaintiffs’ rights to equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia.

36. Plaintiffs show, by way of the PSC staff analysis attached as *Exhibit A*, that certain large industrial customers of Georgia Power are exempted from paying the by the Nuclear Tariff imposed by SB 31. That is an unconstitutional discrimination against Plaintiffs, in violation of Plaintiffs’ rights to equal protection under the State and Federal Constitutions.

37. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Plaintiffs’ rights to equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia. Plaintiffs

show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

38. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count III – Declaratory Judgment as to SB 31
Violation of Equal Protection

39. Plaintiffs incorporate by reference paragraphs 1 through 38 of this Petition as if fully set forth herein.

40. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Plaintiffs' rights to equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia.

41. Plaintiffs show, by way of the PSC staff analysis attached as *Exhibit A*, that certain large industrial customers of Georgia Power are exempted from paying the by the Nuclear Tariff imposed by SB 31. That is an unconstitutional discrimination against Plaintiffs, in violation of Plaintiffs' rights to equal protection under the State and Federal Constitutions.

42. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Plaintiffs' rights to equal

protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia. Plaintiffs show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

43. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count IV– Declaratory Judgment as to SB 31
Unconstitutional Gratuity

44. Plaintiffs incorporate by reference paragraphs 1 through 43 of this Petition as if fully set forth herein.

45. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Article III, Section VI, Paragraph VI(a) of the Constitution of the State of Georgia, which prohibits gratuities. The adoption of the Nuclear Tariff by the Georgia General Assembly creates an unconstitutional gratuity in favor of Georgia Power and its stockholders, for, among other reasons, paying such stockholders of Georgia Power a return on equity in excess of \$1 billion before the Vogtle plants are even put into service, i.e., for services which have not been rendered.

46. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Article III, Section VI,

Paragraph VI(a) of the Constitution of the State of Georgia. Plaintiffs show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

47. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count V– Declaratory Judgment as to SB 31
Unconstitutional Private Tax or Fee

48. Plaintiffs incorporate by reference paragraphs 1 through 47 of this Petition as if fully set forth herein.

49. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Article VII, Section I, Paragraph III(a) of the Constitution of the State of Georgia (“All taxes shall be levied and collected under general laws *and for public purposes only.*”) (emphasis supplied). *See e.g. Gunby v. Yates*, 214 Ga. 17, 19 (1958)(A “tax” under Georgia law is “an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered.”).

50. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Article VII, Section I, Paragraph III(a) of the Constitution of the State of Georgia. Plaintiffs show that they are

entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

52. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count VI– Declaratory Judgment as to SB 31
Unconstitutional Act in Furtherance of a Monopoly

53. Plaintiffs incorporate by reference paragraphs 1 through 52 of this Petition as if fully set forth herein.

54. Plaintiffs show that there is an actual controversy between Plaintiffs and Defendant Perdue, growing out of the enactment and enforcement of SB 31, in that SB 31 violates Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia (“The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of *defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.*”) (emphasis supplied).

55. Plaintiffs show the Nuclear Tariff providing CWIP in rate base for Units 3 and 4 of Plant Vogtle unconstitutionally encourages Georgia Power’s existing monopoly as a regulated utility in Georgia, to the detriment of Georgia Power customers and the citizens of the State of Georgia.

56. Plaintiffs allege that their rights with reference to said controversy are that Plaintiffs are entitled to a judicial declaration that SB 31 violates Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia. Plaintiffs show that they are entitled to a declaration of these rights, and a declaration with reference to their legal relations thereto.

57. Plaintiffs show that the court should designate a time not earlier than 20 days after the date of service hereof, and that process issue thereon for a trial of this controversy, unless the parties consent in writing to an earlier trial.

Count VII – Judicial Review of the Certification Order

58. Plaintiffs incorporate by reference paragraphs 1 through 57 of this Petition as if fully set forth herein.

59. This is a petition for judicial review of the Certification Order brought under the Georgia Administrative Procedures Act (the “APA”) which permits entities or individuals aggrieved by a decision of a government agency, and who have exhausted their administrative remedies, to appeal that decision. O.C.G.A. § 50-13-19(a).

60. Plaintiffs are aggrieved by the PSC’s Certification Order, and have exhausted their existing administrative remedies as of this filing of this petition.

61. Plaintiffs have filed this petition for judicial review under O.C.G.A. § 50-13-19 within thirty (30) days of the March 30, 2009 effective date of the PSC’s Certification Order.

62. O.C.G.A. § 50-13-19(h) provides Plaintiffs that this Court shall reverse, modify, and/or remand the PSC's Certification Order if substantial rights of the Plaintiffs have been prejudiced because the PSC's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

63. The PSC's Certification Order is contrary to the standards set forth in O.C.G.A. § 50-13-19(h) on the following grounds:

- A. The Certification Order incorporates a mandated tariff, imposed on the PSC by the Georgia General Assembly pursuant to SB 31, so the Certification Order constitutes and facilitate a violation of Article IV, Section I, Paragraph I(a) of the Constitution of the State of Georgia ("There shall be a Public Service Commission for the regulation of utilities"), as an unconstitutional encroachment by the Georgia General Assembly into the PSC's status as a constitutional board entrusted by the people of the State of Georgia to fix rates charged by regulated utility companies.
- B. The Certification Order violates Plaintiffs' rights to substantive due process under the 14th Amendment of the Constitution of the United States of

America and Article I, Section I, Paragraph I of the Constitution of the State of Georgia. Plaintiffs show, by way of the PSC staff analysis attached as *Exhibit A*, that the Certification Order will result in a net present value loss in the amount of \$740 million of the life of the Vogtle plants. That is an unconstitutional confiscation and deprivation of Plaintiffs' property, in violation of Plaintiffs' rights to substantive due process under the State and Federal Constitutions.

- C. The Certification Order violates Plaintiffs' rights to equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraph II of the Constitution of the State of Georgia. Plaintiffs show, by way of the PSC staff analysis attached as *Exhibit A*, that certain large industrial customers of Georgia Power are exempted from paying the by the Nuclear Tariff imposed by Certification Order. That is an unconstitutional discrimination against Plaintiffs, in violation of Plaintiffs' rights to equal protection under the State and Federal Constitutions.
- D. The Certification Order violates Article III, Section VI, Paragraph VI(a) of the Constitution of the State of Georgia, which prohibits gratuities. The adoption of the Nuclear Tariff in the Certification Order creates an unconstitutional gratuity in favor of Georgia Power and its stockholders, for, among other reasons, paying such stockholders of Georgia Power a return on

equity in excess of \$1 billion before the Vogtle plants are even put into service, i.e., for services which have not been rendered.

- E. The Certification Order violates Article VII, Section I, Paragraph III(a) of the Constitution of the State of Georgia (“All taxes shall be levied and collected under general laws *and for public purposes only.*”) (emphasis supplied). *See e.g. Gunby v. Yates*, 214 Ga. 17, 19 (1958)(A “tax” under Georgia law is “an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or a service rendered.”).
- F. The Certification Order violates Article III, Section VI, Paragraph V(c) of the Constitution of the State of Georgia (“The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of *defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.*”) (emphasis supplied). Plaintiffs show the Nuclear Tariff providing CWIP in rate base for Units 3 and 4 of Plant Vogtle unconstitutionally encourages Georgia Power’s existing monopoly as a regulated utility in Georgia, to the detriment of Georgia Power customers and the citizens of the State of Georgia.
- G. Though the proceeding resulting in the Certification Order was purportedly brought as a proceeding under the Integrated Resource Planning Act,

O.C.G.A. § 46-3A-1 *et seq.*, by incorporating CWIP in rate base into the proceeding, the proceeding morphed into a rate case governed by O.C.G.A. § 46-2-25, and therefore, among other things, the CWIP tariff portion of the Certification Order was approved in violation of the “test period” statute, O.C.G.A. § 46-2-26.1. *See e.g. Georgia Power Company v. Georgia Industrial Group*, 214 Ga. App. 196, 199 (1994) (distinguishing demand-side costs from construction costs, holding that demand-side costs could be determined outside “traditional ratemaking principles”, confirming that decisions concerning construction costs are governed by such “traditional ratemaking principles”). This is particularly borne out by two factors. First, the CWIP base rate tariff amounts proposed by Georgia Power became well-publicized, so the Commission understood precisely the amounts it was approving.¹ Second, SB 31, on which the Commission so heavily relied, is an amendment to O.C.G.A. § 46-2-25, the rate case statute. The Commission’s reliance on new language in O.C.G.A. § 46-2-25 as the legal basis for the CWIP in rate base decision very clearly makes this proceeding a rate case proceeding, albeit an illegal one, because all applicable rate case procedures were not followed, including, without limitation, the “test period” requirement of O.C.G.A. § 46-2-26.1.

¹ *See e.g.* February 5, 2009 article in the Atlanta-Journal Constitution: “The company has proposed a fee that would add about \$1.30 to a typical homeowner’s monthly bill in 2011. The fee would ratchet up to \$9.10 per month by 2017.”

- H. CWIP in rate base is illegal in Georgia with respect to Georgia Power electric plants. Under Georgia law, construction costs of a Georgia Power electric plant can only be added to the rate base after completion of the plant. *O.C.G.A. § 46-3A-7(a)* (“So long as the commission has not modified or revoked the certificate for an electric plant under Code Section 46-3A-6 and to the extent the utility seeks to add to its rate base *upon completion of the plant . . .*”). Accordingly, the Certification Order purporting to authorize CWIP in rate base for Units 3 and 4 at Plant Vogtle violates *O.C.G.A. § 46-3A-7(a)*.
- I. The Certification Order improperly relied upon SB 31 for the legal conclusion authorizing CWIP in rate base. The effective date of the Certification Order is March 30, 2009. SB 31 did not become law until April 21, 2009, and therefore could not have been the legal basis for the CWIP in rate base component of the Certification Order. *See Certification Order*, p. 10 (“The passage of SB 31 significantly altered the framework under which the Commission operates as it relates to the recovery of construction financing costs on nuclear power plants. SB 31 mandates the recovery of financing costs and such recovery may begin within five years of the Commission’s certification of the nuclear generating facility. *In essence the passage of SB 31 removes the issue of recovering financing cost by use of the CWIP approach from this proceeding*, though at the date of the Commission’s

decision in this Docket, SB 31 had not become law.”) (emphasis supplied).

Basing the CWIP in rate base decision on a then unsigned bill of the General Assembly, which was of no legal consequence whatsoever as of the effective date of the Certification Order, is gross legal error.

Count VIII – §1983 Claim Against Commission Members

64. Plaintiffs incorporate by reference paragraphs 1 through 63 of this Petition as if fully set forth herein.

65. By adopting the Certification Order depriving Plaintiffs of their rights to due process and equal protection under the 14th Amendment of the Constitution of the United States of America and Article I, Section I, Paragraphs I and II of the Constitution of the State of Georgia, the Commission members have violated Title 42, Article 21, Subchapter I, §1983 of the United States Code (“Everyone who, under color of any statute, . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured): §1983 creates a claim against Commission members in their personal capacities.

Count IX – Writ of Mandamus Against Commission Members

66. Plaintiffs incorporate by reference paragraphs 1 through 65 of this Petition as if fully set forth herein.

67. Pursuant to O.C.G.A. §§ 9-6-20 *et seq.*, Plaintiffs seek a writ of mandamus from the Court compelling the Commission members, in their official capacities, to comply

with the Constitution of the State of Georgia, including specifically, without limitation, the Constitutional provisions described in Counts _____ above, thereby requiring the Commission members to reverse the Certification Order and otherwise requiring the Commission members to decide Docket No. 27800 according to Constitutional mandate.

68 There is no issue of fact raised by Plaintiffs' request for a writ of mandamus. O.C.G.A. §§ 9-6-27(b).

69. If Plaintiffs are denied judicial review of the Certification Order under the APA, Plaintiffs have no adequate remedy at law, and a defect of legal justice will result by the Commission members failure to perform their official public duties. In such event, only the mandamus and injunctive relief that this Court can provide will address the Commission members' failure to perform their official public duties and to enjoin their unlawful and *ultra vires* approval of CWIP in rate base for Units 3 and 4 at Plant Vogtle. WHEREFORE, Plaintiffs pray:

(a) That this Court issue a mandamus nisi to the Defendants requiring such Defendants to show cause at a time and place to be designated by the Court, not less than ten days nor more than thirty days from the this date, why a mandamus should not be issued against such Defendants, (i) ordering such Defendants to perform their official public duties as mandated by Article III, Section V, Paragraph II of the Constitution of the State of Georgia, (ii) ordering such Defendants to immediately and permanently cease and desist

from enacting SB 31 and HB 63 into law, and (iii) otherwise requiring such Defendants to diligently perform their public duties under the Constitution of the State of Georgia; and that on the hearing the mandamus may be made absolute;

(b) That this Court declare SB 31 to be a bill for raising revenue and/or appropriating money originating from the Georgia Senate and therefore in violation of Article III, Section V, Paragraph II of the Constitution of the State of Georgia;

(c) That this Court declare HB 63 to be a bill for raising revenue and/or appropriating money which was improperly substituted by the Georgia Senate, in violation of Article III, Section V, Paragraph II of the Constitution of the State of Georgia;

(d) That this Court enjoin, both permanently and pende lite, the Defendants from enacting into law SB 31 and HB 63;

(e) That the Court issue a mandatory injunction compelling Governor Perdue to veto SB 31 and HB 63;

(f) That the Court issue a mandatory injunction compelling Secretary of State Handel to not accept deposit of or otherwise certify SB 31 or HB 63 as duly adopted laws;

(g) That process issue in terms of requiring Defendants to answer the declaratory judgments aspects of this Petition as provided by law;

- (h) For attorney' s fees and costs incurred in this action; and
- (i) For such other and further relief as this Court deems meet and equitable.

This the 29th day of April, 2009.

WOODHAM AND ASSOCIATES, LLC

John F. Woodham
Georgia Bar. No 775066
Counsel for Plaintiffs

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