**Before the**
**Public Service Commission of South Carolina**

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| **Application of Dominion Energy South Carolina, Incorporated for Adjustment of Rates and Charges (See Commission Order No. 2020-313)** | **Docket No. 2020-125-E** |

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# Direct Testimony of Scott Hempling

## On Behalf of the South Carolina Department of Consumer Affairs

**November 10, 2020**

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# Direct Testimony of Scott Hempling

## On Behalf of the South Carolina Department of Consumer Affairs

## I. Purpose and qualifications

**Q. State your name and address.**

**A.** Scott Hempling, 417 St. Lawrence Dr., Silver Spring MD 20901.

**Q. On whose behalf are you testifying?**

**A.** The South Carolina Department of Consumer Affairs.

**Q. What is the purpose of your testimony?**

**A.** DESC has proposed charging its electricity customers $2.3 billion annually. I offer the Commission principles to apply in deciding these questions:

- Is all of DESC's requested $2.3 billion justified by its performance? Is all of that $2.3 billion in cost actually prudent cost?
- Do DESC's incentive compensation plans place its executives and managers in conflict with customers?

**Q. Have you reviewed DESC's Application and Direct Testimony filed in this docket?**

**A.** Yes.

**Q. What are your main conclusions?**

**A.** ***First:*** Nowhere in DESC's application, or in any of its ten witnesses' direct testimony, is there any evidence that the requested $2.3 billion is the reasonable cost of serving DESC's customers. The South Carolina Supreme Court has held that the "ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility."[1] In proposing

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[1] *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-110 (2011) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-87 (1992)).

$2.3 billion in costs without justifying those costs, DESC fails this test. DESC will likely argue that a "presumption of prudence" relieves it having to provide any evidence of prudence. But a utility protected by government from competition deserves no automatic presumption of prudence, particularly when that utility is controlled by a holding company with no South Carolina experience—one that has offered here no sign of removing the causes of SCE&G's V.C. Summer problems.

***Second:*** DESC compensates its employees, especially its executives, in ways that reward them for acting adversely to customers. No matter how excellent their operational performance, no one receives any incentive compensation unless Dominion Energy's Board decides that Dominion Energy has made enough money. So at the threshold, operational excellence is completely irrelevant to incentive compensation. If Dominion Energy does make any incentive compensation available, everyone's compensation is influenced by earnings; for executives, earnings are the dominant influence. In a competitive market, tying compensation to earnings makes sense, because ample earnings depend on satisfied customers. But in a monopoly market, increasing earnings conflicts unavoidably with serving customers at lowest feasible cost.

Executive compensation therefore should be based on efficiencies, not earnings. And since DESC says its goal is to avoid rate increases, executive compensation also should depend on avoiding rate increases whenever possible. DESC's incentive compensation plans do the opposite.

Merely removing the conflicting compensation from the revenue requirement—as the Commission has done before—does not remove the conflict. I recommend that the Commission direct DESC to change its incentive compensation plans, so that everyone's full compensation is based solely on how well they carry out DESC's regulatory responsibility: to provide reliable service at no more than reasonable cost.

**Q. Describe your employment background, education and experience.**

**A.** I began my legal career in 1984 at a private law firm, where I represented municipal power systems and others on transmission access, holding company structures, nuclear power plant construction prudence and producer-pipeline gas contracts, among other matters. From 1987 to 1990, I was an attorney at a public interest organization, working on electric utility issues. From 1990 to 2006, I had my own law practice, advising public and private sector clients—primarily state regulatory commissions, and also municipal systems, independent power producers, consumer advocates, public interest organizations and utilities—with an emphasis on electric utility regulation.

From October 2006 through August 2011, I was Executive Director of the National Regulatory Research Institute (NRRI). Founded by the National Association of Regulatory Utility Commissioners, NRRI is a Section 501(c)(3) organization, funded primarily by state utility regulatory commissions to provide research to regulatory decision-makers. As Executive Director, I was responsible for working with commissioners and commission staff at all 51 state-level regulatory agencies to develop and carry out research priorities in electricity, gas, telecommunications and water. In addition to overseeing the planning and publication of over 80 research papers by NRRI's staff experts and outside consultants, I published my own research papers, advised contract clients (including state commissions, regional transmission organizations, private industry and international institutions), and wrote monthly essays on effective regulation.

In September 2011, I returned to private practice. I have focused on writing books and research papers, providing expert testimony, advising regulatory agencies and others, and teaching courses and seminars on the law and policy of utility regulation. Beginning in 2011 and continuing through the present, I teach public utility law (and for three years, taught regulatory litigation) as an adjunct professor at Georgetown University Law Center.

My book on public utility law, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction,* was published by the American Bar Association in 2013. A second edition is in process. My book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators,* was published by NRRI in 2010.I published a second, expanded edition in 2013.My book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* was published by Edward Elgar Publishing in October 2020. I have written several dozen articles on utility regulation for publication in law journals, trade journals and books.

I have taught utility law seminars to attendees from all fifty states and all industry sectors. Internationally, I have taught seminars or presented at industry conferences in Australia, Canada, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru and Vanuatu. As a subcontractor to the U.S. Department of State, I have advised the six nations of Central America on the regulatory infrastructure necessary to accommodate and encourage cross-national electricity transactions.

I received a B.A. *cum laude* from Yale University in 1978, where I majored in Economics and Political Science, and in Music. I received a J.D. *magna cum laude* from

Georgetown University Law Center in 1984. I am a member of the Bars of the District of Columbia and Maryland.

My resume is attached to this testimony. More information is available at www.scotthemplinglaw.com.

**Q. Before what fora have you presented testimony?**

**A.** I have presented testimony before the state commissions of California, Connecticut, District of Columbia, Hawai`i, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, North Carolina, Oklahoma, Texas, Vermont and Wisconsin. I have also submitted testimony to federal district courts in Florida, Minnesota, Montana and Wisconsin. These proceedings are listed on my resume. This proceeding is the first time I have testified before the South Carolina Public Service Commission. In the early 2000s I advised the Commission on an SCE&G rate case; and also presented in Columbia several public legal seminars attended by some members and staff of the Commission.

## II. DESC fails to show that its proposed rates reflect only the prudent cost of performance

**Q. What is the purpose of this Part II?**

**A.** In **Part II.A**, I explain the necessity of tying a utility's costs to its performance. Customers don't pay for costs; they pay for performance. In **Part II.B**, I explain that the costs underlying Commission-set rates must be prudent costs. DESC's witnesses fail both tests. They neither justify DESC's costs in terms of its performance, nor show that the proposed costs are prudent costs. I then turn, in **Part II.C**, to DESC's unfortunate choice of persuasion techniques. DESC says it seeks an increase of $178 million; but what it wants the Commission to approve is total revenue of $2.3 billion. And by comparing its proposed 7.75% increase to the CPI's 14% increase, DESC makes multiple apples-oranges errors.

### *A. DESC fails to justify its costs in terms of its performance*

**Q. Describe the connection between a utility's costs and its performance.**

**A.** For any product or service, customers don't pay for costs; they pay for performance. That universal fact applies to electricity. Customers are not mere "ratepayers"—people who pay rates. Customers are people who pay for performance.

Yet when utilities seek rate increases, they talk more about their costs than their performance. This habit then frames the regulatory process, with participants focusing on "What are the utility's costs?" rather than "How good is the utility's performance?" We ask utilities what they are spending—accounting data, rather than what they are achieving—performance data. We set rates to recover costs instead of calibrating compensation to performance. This practice does not serve the public interest.

Performance means more than keeping electric current flowing at non-abusive rates. It means educating and empowering customers to make cost-effective choices about when and how much to consume. Performance means diversifying products, suppliers and the utility's workforce. It means removing blockages to new market entrants, so that customers can experience alternatives to our decades-old monopoly market structure; and so that energy conservation, demand response, storage and distributed generation can compete with the incumbent utility's conventional resources.

So when a utility seeks approval of its costs, it should explain how those costs are justified by its performance. Only then can a commission establish a revenue requirement that aligns the rates customers pay with the performance they receive. In short: To decide whether DESC deserves all of its proposed $2.3 billion in costs, the Commission needs to verify that those costs are justified by DESC's performance.

**Q. Do DESC's witnesses adequately justify DESC's costs in terms of its performance?**

**A.** No. Some DESC witnesses do discuss performance:

- Mr. Blevins discusses safety, reliability, response to extreme weather, customer service, smart meters, energy efficiency, staffing, emissions reductions, and operations at V.C. Summer No. 1.[2]
- Mr. Kissam discusses safety, reliability, storm resiliency, forced outage rates, environmental effects, transmission construction, distribution improvements and customer service.[3]

But these topics all fall within DESC's normal obligation to serve. Dominion Energy accepted that obligation when it acquired SCANA. Merely carrying out an obligation to serve does not by itself justify a $178 million rate increase or a $2.3 billion annual revenue requirement.

Mr. Blevins and Mr. Kissam do describe utility actions, and Ms. Griffin discusses rate increase "drivers"; but none of thees three, nor any other witness, shows that DESC's costs represent the least-cost means of carrying out those actions—or that those actions produced outcomes that satisfy the Commission's standards for performance.

[2] Blevins Direct at 18-22.

[3] Kissam Direct at 3-11, 17, 19-20, 21-25, 28-33, 48-51, 51-57.

**Q. Do any other witnesses discuss performance?**

**A.** Mr. Blevins and Mr. Long discuss efforts to create merger "synergies." But these efforts don't necessarily justify a rate increase; the associated costs should have been exceeded by savings that Dominion Energy "pledged to pass through . . . to customers following the first electric base rate case after the merger."[4] Dominion Energy made that pledge in return for receiving the Commission's permission to buy control of a monopoly franchise protected by government from competition. In any event, Mr. Blevin and Mr. Long offer no evidence that these "synergies" were achieved cost-effectively.

Mr. Kissam does compare DESC's performance on safety and forced outages to the performance of other utilities.[5] But without data on those other utilities' service quality, the comparison doesn't help the Commission assess DESC's performance; if the other utilities performed poorly, we know only that DESC performs less poorly. And the comparison tells us nothing about cost-effectiveness because the witnesses don't compare DESC's costs to those other companies' costs.

Because DESC has a state-granted monopoly, it has no competitors. Because it has no competitors, it can't gain or lose customers based on its performance. So it is natural for DESC to focus more on its costs than its performance. But the Commission cannot sever costs from performance. Customers don't pay for costs; customers pay for performance.

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[4] *Friends of the Earth and Sierra Club v. South Carolina Electric & Gas*, *et al.*, Order No. 2018-804, slip op. at 57 (Dec. 21, 2018) (Order Addressing South Carolina Electric & Gas Nuclear Dockets).

[5] Kissam Direct at 3:15 (safety); 16-17 (forced outage).

### *B. DESC fails to show that its costs are prudent*

**Q. What is the purpose of this Part II.B?**

**A.** Even where a utility has connected its costs to its performance, those costs deserve recovery only if they are reasonable. Costs are reasonable only if they are prudent, and if the assets and operations they support are used and useful. Part II.B.1 describes the prudence standard—the requirement that a utility operate at lowest feasible cost. Part II.B.2 explains that DESC has provided no evidence that its proposed costs satisfy the prudence standard. DESC might argue that it has no obligation to provide evidence of its prudence because it enjoys a rebuttable presumption of prudence. I explain in Part II.B.3 that given SCE&G's V.C. Summer experience, DESC's lack of South Carolina experience, and the absence of competitive pressures that would induce DESC's prudence, the company deserves no automatic presumption of prudence.

***1. The just-and-reasonable standard requires prudence—operating at lowest feasible cost***

**Q. What is the prudence standard?**

**A.** A South Carolina utility's rates must be just and reasonable.[6] A utility will satisfy that requirement only if it "operate[s] with all reasonable economies";[7] incurs the "lowest feasible cost";[8] and uses "all available cost savings opportunities."[9]

To evaluate the reasonableness of a utility's costs, regulators use prudence analysis. Prudence analysis tests whether a utility has behaved reasonably, based on industry norms; it asks whether the utility has used all available professional tools objectively and competently.[10] Prudence requires "[c]arefulness, precaution, attentiveness, and good judgment. . . ."[11] It requires "sagacity or shrewdness in management of affairs"; "skill or

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[6] S.C § 58-27-810 ("Every rate made, demanded or received by any electrical utility . . . shall be just and reasonable.").

[7] *El Paso Natural Gas Co. v. FPC*, 281 F.2d 567, 573 (5th Cir. 1960).

[8] *Potomac Elec. Power Co. v. Pub. Serv. Comm'n of the D.C.*, 661 A.2d 131, 137 (D.C. 1995). *See also State of Oklahoma v. Oklahoma Gas & Electric*, 1975 OK 40, 536 P.2d 887, 891 (1975) (requiring Commission to set "lowest reasonable rates consistent with the interests of the public and the utilities").

[9] *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co.*, 36 FPC 61, 70 (1966), *aff'd sub nom. Midwestern Gas Transmission Co. v. FPC*, 388 F.2d 444 (7th Cir. 1968). The Federal Power Commission later rescinded its decision on unrelated grounds. *Knoxville Utils. Bd. Vv. E. Tenn. Natural Gas Co.*, 40 FPC 172 (1968).

[10] *See, e.g.*, Appeal of *Conservation Law Found., Inc.*,. 507 A.2d 652, 673 (N.H. 1986) (describing the prudence standard as "essentially apply[ing] an analogue of the common law negligence standard").

[11] *Wisconsin Public Service Corp. v. Public Service Comm.*, 156 Wis. 2d 611, 617-18 (1990) (quoting Black's Law Dictionary).

good judgment in the use of resources";[12] and "a thorough, complete, and accurate evaluation of alternatives."[13] Prudence analysis asks "whether the process leading to the decision was a logical one . . . ."[14] A commission's judgment about whether a utility acted reasonably, and about whether its decision-making process was appropriate, must take into account the consequences of error.[15] So when the stake is billions of dollars—customers' dollars—the required level of care is high. As this Commission has stated, a "regulated monopoly . . . owes a heightened responsibility to its customers."[16]

Finally, in prudence analysis hindsight is irrelevant, since a reasonable utility can act only on facts known or reasonably knowable at the time of its decision.[17]

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[12] *Business & Professional People for the Pub. Interest v. Commerce Comm.*, 665 N.E.2d 553, 556, 558 (Ill. 1996).

[13] *Wisconsin Electric Power Company's Request for Declaratory Ruling Approving a Proposed Plan to Increase Generation in Wisconsin. Application of Wisconsin Energy Corporation for Approval to Acquire the Stock of WICOR*, 2001 Wisc. PUC LEXIS 69 (Oct. 17, 2001).

[14] *Gulf States Utilities Co. v. Louisiana Pub. Serv. Comm.*, 578 So.2d 71, 85 (La. 1991). *See also Cambridge Elec. Light Co.*, D.P.U. 87-2A-1, 86 P.U.R.4th 574 (Mass. Dep't of Pub. Utils. Sept. 3, 1987) (asking whether the utility used "a reasonable decision-making process to arrive at a course of action and, given the facts as they were or should have been known at the time, responded in a reasonable manner").

[15] *Baltimore Gas & Elec. Co.*, Case No. 8520/8520A, 1989 Md. PSC LEXIS 85, at 6-7, 24 (Md. Pub. Serv. Comm. 1989) (stressing the "high standard of care" required for maintenance practices and procedures at baseload plants, given the "high cost consequences of outages").

[16] *Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs*, Docket No. 2018-318-E; Order No. 2019-341 at page 82, 2019 SC ENV LEXIS 11 at Part IV.H (May 21, 2019).

[17] *Waukesha Gas & Electric Co. v. Railroad Com*, 181 Wis. 281 (1923) (holding that "the question of whether or not the investment was prudent must be determined as of the time when it was made"). *See also Boston Edison Co.*, D.P.U. 906, 46 P.U.R.4th 431

**Q. How does the prudence standard help achieve the purposes of regulation?**

**A.** Within its assigned territory, each South Carolina utility has a legal monopoly over retail electric service. Without regulatory standards—along with consequences for not meeting those standards—a company protected from competition lacks incentive to perform as if subject to competition:

> Managements of unregulated business subject to the free interplay of competitive forces have no alternative to efficiency. If they are to remain competitive, they must constantly be on the lookout for cost economies and cost savings. . .. Public utility management, on the other hand, does not have quite the same incentive.[18]

Effective regulation replicates the pressures of competition. "[T]he state through its commission takes the place of competition and furnishes the regulation which competition cannot give."[19] For "[i]f a competitive enterprise tried to impose on its customers costs from imprudent actions, the customers could take their business to a more efficient provider. A utility's ratepayers have no such choice."[20]

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(Mass. Dep't of Pub. Utils. Apr. 30, 1982) (prudence analysis must consider "all conditions and circumstances which were known or which reasonably should have been known at the time the decisions were made"), *aff'd sub nom*. *Att'y Gen. v. Mass. Dep't of Pub. Utils.*, 455 N.E.2d 414 (Mass. 1983).

[18] *Midwestern Gas*, *supra* at 70.

[19] *Delmarva Power & Light Co. v. Public Service Comm'n of Maryland*, 370 Md. 1, 6 (Md. 2002) (quoting Oscar L. Pond, *A Treatise on the Law of Public Utilities* 29-31 § 901 (3d ed.1925)). *See also* Alfred Kahn, *The Economics of Regulation: Principles and Institutions* (1971, 1988), Vol. 2 at 112 (stressing the "importance of making regulation more intelligent and more effective in those circumstances in which competition is simply infeasible").

[20] *Long Island Lighting Co.*, Case No. 27563, 71 P.U.R.4th 262, 1985 N.Y. PUC LEXIS 40 (N.Y. Pub. Serv. Comm'n Nov. 16, 1985).

If a competitive company acts imprudently (or imprudently fails to act), it incurs costs its competitors don't incur; or, it fails to achieve savings its competitors achieve. The equilibrium market price will reflect the lower costs of the prudent competitors. Because the imprudent seller cannot charge more than the market price without losing customers, that seller cannot recover its excess costs. Knowing of this inevitable consequence, companies in competitive markets strive toward prudence. They "have no alternative to efficiency."[21]

Prudence review is regulation's substitute for competition's consequences. "A utility's motivation to act prudently arises from the prospect that imprudent costs may be disallowed."[22] When competition or regulation operates effectively, the shareholder and customer interests align. Customer satisfaction gets the company a strong market position and healthy earnings; shareholder satisfaction gets the customers ample investment in the services they want at the quality they want.

Regulation cannot produce results equivalent to competition, of course. Regulated utilities have an obligation to serve all paying customers. This obligation to serve includes an obligation to plan to serve, and to be ready to serve, all customers in all foreseeable circumstances. Companies in competitive markets, in contrast, have only the obligations they accept contractually (along with any imposed by statute or rule). Because these differences in obligation produce differences in cost, regulation cannot produce results equivalent to competition. But regulation should create pressures comparable to

[21] *Midwestern Gas Transmission Co.*, *supra*, 36 FPC at 70.

[22] *Gulf States Utilities Co.*, *supra*, 578 So.2d at 85.

competition—so that the utility achieves, and its customers experience, performance as comparable to competition as possible.

**Q. Is a utility's responsibility to perform prudently a continuing responsibility?**

**A.** Yes. As the Wisconsin Commission has held: "A decision which is initially prudent may become imprudent if a utility ignores new circumstances which it knew or should have known of and which should have led to a reevaluation of options."[23] A utility has a continuing responsibility to respond to "changing circumstances or new challenges that arise as a project progresses."[24] This regulatory principle emulates competition. As the then Iowa State Commerce Commission declared, when insisting that Iowa's utilities continue to monitor the costs of their decisions: "In the real world of competitive enterprise, management officials must continuously rethink prior decisions as new events unfold. Those who fail to stay on top of current events lose out to their competition."[25]

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[23] *Application of Wisconsin Public Service Corporation for Authority to Increase Its Electric and Natural Gas Rates*, 1987 Wisc. PUC LEXIS 50, 86 P.U.R.4th 357 (1987) (finding imprudent WPS's failure to protest its property tax payments, and referencing a previous decision where it "found a utility imprudent for failing to reevaluate its position in light of new information and for failing to make a cost comparison of the options available to it"); citing Docket No. 6630-ER-14, upheld in *Wisconsin Electric Power Company v. Public Service Commission*, *et al*., No. 82-1249 (Wis. App. August 4, 1983).

[24] *Gulf States Utilities Co.*, *supra*, 578 So. 2d at 85 (citing *Long Island Lighting Co.*, Case No. 27563, 71 P.U.R.4th 262 (N.Y. Pub. Serv. Comm'n Nov. 16, 1985); and *Central Vermont Public Service Corp.*, Docket No. 5132, 83 P.U.R.4th 532 (Vt. Pub. Serv. Bd. May 15, 1987)).

[25] *Iowa Power & Light Co.*, Nos. RPU-78-27, RPU-78-30, RPU-80-36, slip op. at 6-7 (Iowa State Commerce Comm'n Feb. 19, 1982); quoted in *Iowa Pub. Serv. Co.*, 46 P.U.R.4th 339, 368, 1982 WL 993176 (Iowa State Commerce Comm'n 1982).

### *2. DESC provided no evidence of its prudence*

**Q. What types of evidence demonstrate prudence?**

**A.** To test a utility's proposed rates for cost-effectiveness, a commission should compare the utility's performance against objective indices that track subjects like cost levels, service quality, reliability, executive productivity, safety and workforce diversity.

**Q. Has DESC provided the necessary evidence?**

**A.** No, DESC has provided no such evidence. Consider:

- Mr. Rooks deals with rate design. He calculates the charges necessary to recover from customers the full revenue requirement. He does not address the prudence of the costs underlying the revenue requirement.
- Dr. Vander Weide testifies about return on rate base. He does not address the reasonableness of the costs making up the rate base.
- Mr. Spanos addresses depreciation expense connected to the rate base. He does not address the reasonableness of the costs making up the rate base.
- Mr. Coffer testifies about accounting adjustments. He does not address the prudence of the costs underlying those adjustments.
- Mr. Kochems allocates to each customer category a portion of the proposed revenue requirement. He does not address the reasonableness of the revenue requirement.
- Ms. Griffin describes what she calls the "drivers" of DESC's $178 million increase. But she testifies only about what the company spent or intends to spend; not about whether the spending is prudent. She describes what she views as legitimate needs but offers no evidence that DESC's spending on those needs is cost-effective. She does mention saving $45 million through merger synergies; but achieving those savings was, I assume, a pre-rate case assumption supporting the Commission's approval of Dominion Energy's acquisition of SCANA.
- Mr. Blevins, like Ms. Griffin, testifies about "drivers" and merger savings, but he presents no metrics on whether actual spending is cost-effective.
- Mr. Kissam, as I discussed in Part II.A, describes elements of DESC's performance, but he does not deal with cost or cost-effectiveness.
- Mr. Long describes synergies achieved from the acquisition, but does not address the reasonableness of costs underlying DESC's requested rates.

- Ms. Elbert defends the company's executive compensation plans—a subject I address in Part III.

In short, DESC has presented no evidence that its $2.3 billion cost is a prudent cost.

***3. Given SCE&G's V.C. Summer experience, DESC's lack of South Carolina experience, and the absence of competition that would induce prudence, DESC deserves no presumption of prudence***

**Q. Explain the presumption of prudence.**

**A.** The presumption of prudence currently imposes on South Carolina's captive utility customers the burden of showing their monopoly utility's imprudence. In this subsection I explain the presumption, critique it, then offer the Commission ideas for how to correct the presumption's infirmities.

Like many jurisdictions, South Carolina distinguishes a utility's legal burden of proof from the so-called "burden of production"—the practical responsibility of producing evidence to satisfy the burden of proof. The South Carolina Supreme Court has held that "the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility."[26] This burden of proof, rooted in utility rate statutes, is sometimes called the "risk of non-persuasion."[27] A utility that fails to carry its burden of proof on an issue loses that issue.

Commissions typically help the utility meet its burden of proof. They do so by granting the utility a rebuttable presumption of prudence. The presumption has this effect: the utility need not provide any evidence of its prudence unless an intervenor, or the

[26] *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-110 (2011).

[27] *See generally* James Fleming, Jr., "Burdens of Proof," 47 *Va. L. Rev*. 51 (1961).

commission, first produces evidence of imprudence—evidence creating "serious doubt" about the utility's prudence. Even when the intervenor produces that evidence of imprudence, the intervenor doesn't win the issue; the intervenor has merely rebutted the presumption of prudence. The utility then has an opportunity to produce affirmative evidence of its prudence. That evidence, if it sufficiently counters the intervenor's evidence, satisfies the utility's burden of proof.[28]

So if a utility's rate application has no evidence of its prudence, and if no intervenor produces evidence of imprudence, the utility's presumption of prudence remains unrebutted. The utility will have "proved" its prudence. The commission then allows the utility to impose on ratepayers its full costs, without the commission having seen any evidence of the prudence of those costs.

This treatment—deferential to the utility, costly to the customers—is used in South Carolina. That is why DESC can ask this Commission to approve $2.3 billion in costs though it has offered no evidence of prudence. As the state's Supreme Court has explained:

> Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence. This evidence may be provided . . . through the Commission's broad investigatory powers. The

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[28] *See*, *e.g.*, *State ex rel. GS Techs. Operating Co. v. Pub. Serv. Comm'n of Mo*., 116 S.W.3d 680, 694 (Mo. Ct. App. 2003) (explaining that if the intervenor creates "serious doubt," the utility has "the burden of dispelling these doubts and proving the questioned expenditure to have been prudent"). Some describe the intervenor's burden as a "burden of proof," but that terminology is technically inaccurate. Under regulatory statutes, the utility always has the burden of proof—the obligation to show that its proposed rate is just and reasonable. The intervenor's burden is more accurately labeled the "burden of going forward" or the "burden of production."

> ultimate burden of showing every reasonable effort to minimize . . . costs remains on the utility.[29]

**Q. Have the courts ever offered reasoning or facts to support the presumption of prudence?**

**A.** Not that I can find, with one exception I discuss below. In neither *Utility Services* nor *Hamm* did the Court provide any basis, in law, logic or policy, for the presumption it described. Neither opinion provides a basis for why an intervenor or a commission, having no inside information about the utility's decisions, and insufficient resources to obtain and process that information, should be required to, or could practically, build a case on imprudence. Neither opinion explains why one should assume that a company protected from competition will be motivated to act as if it were subject to competition. In both *Utility Services* and *Hamm*, the Court merely repeated the presumption without explaining it or supporting it with reference to any South Carolina statute or other legal source.

The Court did cite precedents. But when one reviews these precedents, one finds that they too cite the presumption without explaining it or supporting it, legally or logically. These precedents all trace back, finally, to Justice Brandeis's famous concurrence in *Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n of Mo.*, 262 U.S. 276 (1923), where he stated (at 289 n.1):

> The term "prudent investment" is not used in a critical sense. There should not be excluded, from the finding of the base, investments which, under ordinary circumstances, would be deemed reasonable. The term is applied for the purpose of excluding what might be found to be dishonest or obviously wasteful or imprudent expenditures. Every investment may be

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[29] *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 109-110 (2011) (quoting *Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 286-87 (1992)).

> assumed to have been made in the exercise of reasonable judgment, unless the contrary is shown.

But there too, Justice Brandeis gave no rationale—statutory, constitutional or policy—for "assum[ing]" that a monopoly always incurs its costs "in the exercise of reasonable judgment." His passive voice ("may be assumed") yields no information about the source of the assumption.

**Q. Are there reasons to modify the presumption for purposes of this rate case?**

**A.** Yes, several. This rate case is former SCE&G's first since the Commission in 2018 dealt with SCE&G's V.C. Summer costs. The Commission's 2018 opinion called attention to a "loss of trust resulting from [SCE&G's] lack of transparency," including the utility's failure to disclose the Bechtel Report to the Commission and the Office of Regulatory Staff.[30] In the current case, none of Dominion Energy's ten witnesses offers any evidence that it has corrected the SCE&G and SCANA practices that caused the Commission, the State and its citizens so much concern. Under these circumstances, a 97-year-old presumption unsupported by any court's explanation is too weak a foundation for freeing DESC from any obligation to justify its costs.

A presumption of prudence is especially inappropriate for a utility that faces little competition. DESC is protected by state government from competition at retail. And for two decades now, SCE&G has failed to take the actions most other utilities have taken to expose their generation costs to competition at wholesale—actions like

- joining a regional transmission organization so that electricity transmission—our industry's highways of commerce—can allow low-cost wholesale producers to compete for South Carolina's favor;

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[30] *Friends of the Earth and Sierra Club*, *supra*, slip op. at 18.

- participating in organized markets for energy and capacity, so that in every hour the state's utilities are buying the lowest-cost electricity available in that hour; and

- committing to use competitive bidding, independently monitored, for all new power supply sources.[31]

Searching for defenses of the presumption, I found this court statement: "In dealing with non-affiliates the pressures of a competitive market and the fact of arm's length bargaining for goods and services allows us to assume, in absence of a showing to the contrary, that [the utility's] operating expenditures are legitimate."[32] This statement lacks logic. DESC might buy its inputs from a competitive market, but it sells at retail into its government-protected monopoly market. So it has no urgent reason to choose the least-cost suppliers—or to operate so efficiently as to reduce its dependence on outside suppliers. Under these conditions, a utility will act as if subject to competition only if the Commission replicates the pressures of competition. A presumption of prudence fails that test.

Equally important, a South Carolina utility increases its profit by increasing its rate base—by adding to its physical assets, financed with its own capital expenditures. The higher the capital expenditure, the higher the rate base; the higher the rate base, the higher the profit. That those capital expenditures are subject to Commission review does not change the utility's incentive and opportunity to increase the rate base—especially if its actions to expand the rate base enjoy a presumption of prudence.

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[31] *Cf.* John R. Hicks, "Annual Survey of Economic Theory: The Theory of Monopoly," 3 *Econometrica* 1, 8 (1935) ("[("[T]he best of all monopoly profits is a quiet life.")..").

[32] *Boise Water Corp. v. Idaho Pub. Utils. Comm'n*, 97 Idaho 832, 838 (1976) (cited by *Hamm*, *supra*, 309 S.C. at 286).

Neither *Utility Services* nor *Hamm*, nor any of the opinions they cite, addresses any of these concerns—concerns about a presumption of prudence unconnected to any stated principle of law or logic.

**Q. In this rate case, how should the Commissioners modify the presumption of prudence?**

**A.** I have given multiple reasons to reject the presumption. But I recognize that the state Supreme Court has, at least in the past, required it. What then can the Commissioners do? The Commissioners need not, and should not, suspend the skepticism that any objective person would have about the likelihood that a company, government-protected from competition, will automatically and universally act as if subject to competition. The Commissioners need not, and should not, give the utility a free pass—effectively converting the rebuttal presumption into a conclusive finding of prudence.

Consider the Florida Commission's response when Gulf Power, a Southern Company subsidiary, sought rate base recovery of, and return on, its investment in coal inventory. The utility's sole evidentiary support was "the collective wisdom of the company's management." The Commission was unimpressed:

> With all deference to Gulf's management, a policy followed by management that has such a tremendous financial impact on ratepayers must be substantiated with more than an assertion that it is the result of collective management wisdom. We do not wish to substitute our judgment for that of management. However, we insist that management's judgment be substantiated in a way that permits intelligent review of it.

The Commission then described the type of evidence that would show prudence:

> [Substantiating management's judgment] can best be accomplished by performance of an analysis or study that identifies all of the major factors that influence development of a coal inventory policy, indicates the relative weight that should be attached to each factor, and evaluates the benefits and costs, in light of these factors, associated with a range of alternate coal

> inventory levels. . .. In the absence of that kind of empirical support for its position, we find that the Company failed to carry its burden of proof.[33]

In this rate proceeding, Dominion Energy's first since SCANA's V.C. Summer troubles, the Commission should require real evidence of prudent performance—objective facts showing that the DESC's costs are the lowest feasible costs—rather than the one-sided subjectivity that one sees in DESC's pre-filed testimony. The Commission should require those facts on any issue for which the Commission has reasonable skepticism about the utility's prudence. This need for affirmative effort by the Commission is especially large to the extent intervenors do not have ready access to the information and resources necessary to raise doubt about DESC's prudence.[34]

My recommended approach neither conflicts with the judicially-prescribed presumption, nor requires the utility to justify every dollar spent. The Commission can specify expenditures for which it requires affirmative evidence of reasonableness. By applying the presumption surgically rather than universally, the Commission would avoid the generic presumption's adverse effect—an auto-acceptance of an unsupported presumption that all costs are prudent unless shown otherwise.

DESC might argue that eliminating the presumption "would place an impossible burden on the utility of anticipating the basis of every intervenor's objection and of coming

[33] *Gulf Power Co. v. Fla. Pub. Serv. Comm'n*, 453 So.2d 799, 804 (Fla. 1984).

[34] *People ex rel. Hartigan v. Illinois*, 117 Ill.2d 120, 135-36, 510 N.E.2d 865 (1987) ("It is possible that no person or entity will seek to intervene when a rate increase is sought; in other cases, those who intervene may lack the financial resources or the incentive to launch a vigorous challenge to all aspects of the increase. . . . Requiring intervenors to establish unreasonableness is therefore no substitute for requiring proof of reasonableness.")

forward with evidence during its case in chief with respect to each objection."[35] Not under my surgical approach, where the Commission would thoughtfully identify cost areas warranting skepticism. A reflexive unthinking application of an unjustified presumption would preclude such Commission care. And if it turns out that the presumption is an unavoidable inference from the statutory language, the Commission should recommend to the General Assembly a statutory change, so that "a sense of confidence in the ratemaking process [can] be instilled."[36]

The Commission should require DESC to show every reasonable effort to minimize its costs.[37] The Commission would be using its broad discretion to lead—to question the courts' reflexive repeating of this presumption, and then to modify it. For the Commission "is not merely an arbitrator between a utility seeking a rate increase and any parties who

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[35] *Chicago v. Illinois Commerce Comm'n*., 133 Ill. App.3d 435, 442-43 (Ill. App. 1985), 478 N.W.2d 1369, *modified by statute as noted in Hartigan*, *supra*, 117 Ill.2d at 132-33.

[36] *See People ex rel. Hartigan*, *supra*, 117 Ill.2d at 133-34 (holding that sec. 30.1 of Illinois statute, requiring Commission to conduct an audit of major additions to electric plant before allowing the costs in rates, "removed any need for the presumption of reasonableness that may have existed when the Commission had no comprehensive vehicle for examining costs. . . . [T]he legislative history . . . suggests that an affirmative showing of the reasonableness of a utility's construction-related costs is necessary if a sense of confidence in the ratemaking process is to be instilled in those consumers who are required to pay the increased rates resulting from those costs.").

[37] *Cf. Utils. Servs. of S.C.*, *supra*, 392 S.C. at 110, quoting *Hamm*, *supra* for the proposition that the utility bears the "ultimate burden of showing every reasonable effort to minimize . . . costs." In *Hamm,* the specific costs at issue were fuel costs. In *Utils. Servs.*, the Court replaced "fuel" with an ellipsis, signaling its view that the utility's obligation to minimize costs applies to all costs.

happen to oppose it. Rather, the Commission is an investigator and regulator of the utilities. . . ."[38] Or as the Second Circuit stated:

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.[39]

If the Commission supports its action with reasons based on its expertise and experience, reviewing courts will have cause to reconsider; and, I hope, to accept a Commission view that the presumption is but a policy within the Commission's power to modify when appropriate.

### *C. DESC frames its proposed rate increase in ways that distract from both the company's performance and its prudence*

#### *1. By citing only the $178 million increase, DESC diverts attention from the $2.3 billion total*

**Q. Has DESC framed its application accurately?**

**A.** No. DESC has framed its application as a request for an "increase in revenues of approximately $178 million or 7.75%."[40] This framing is inaccurate. DESC is not asking the Commission to approve an increase of $178 million; it is asking the Commission to approve total revenues of $2.3 billion.[41]

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[38] *Hartigan*, *supra*, 117 Ill.2d at 135.

[39] *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965) (referring to the Federal Power Commission).

[40] Aug. 14 Application at ¶ 12.

[41] See Rooks Direct Testimony, Exhibit ___ (AWR-1); Application, Exhibit C-2, at 2 of 4, line 1.

To set DESC's rates, the Commission must determine DESC's total revenue requirement. The question before the Commission, therefore, is not "Should DESC get a $178 million increase?" The question is "Does it cost $2.3 billion a year to serve this service territory?" Framing the case as solely about $178 million allows the company to avoid scrutiny of the full $2.3 billion.

**Q. Are you saying that the Commission has unfettered discretion over the entire proposed $2.3 billion?**

**A.** No. While what is at stake is $2.3 billion rather than $178 million, there is a catch. The Commission cannot upset legitimate shareholder expectations arising from prior Commission orders. Doing so would violate statutory law (the filed rate doctrine and its offspring, the prohibition against retroactive ratemaking[42]); and under some situations the constitutional protection against taking of private property without just compensation. So if the Commission previously found a specific utility action prudent, and assuming the utility had not withheld evidence indicating imprudence, the Commission cannot now disallow the costs associated with that specific action.

But that legal constraint hardly leaves the Commission powerless. I have worded the preceding paragraph carefully to avoid misinterpretation. Just because the *decision to construct or operate* an asset was prudent initially does not mean that *continuing with that asset or operation* will be prudent perpetually. Suppose, for example, that in 1990 the Commission allowed into rate base the full cost of a coal-fired generator on the grounds that, at that time, the utility's choice of that option, and the associated costs, were prudent.

[42] For detail on these two doctrines, see my *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (American Bar Assoc. 2013) at chapters 9 and 10, respectively.

Simple enough. But suppose that now, in 2020, the Commission determines that the prudent course is to retire the plant, replacing it with some combination of gas, renewable energy and energy efficiency. While the Commission certainly cannot revisit its 1990 decision that the plant and its costs were prudent, the Commission could decide that continuing to operate the plant is imprudent—and then disallow from the revenue requirement the excess of (a) the costs of continued operation over (b) the full costs of the prudent alternatives.

Turning from the hypothetical to this proceeding: Because the question is not whether a $178 million increase is justified but whether it costs $2.3 billion annually to run this company, the Commission should ask whether the assets and operations underlying the $2.3 billion are still the most cost-effective way to provide electric service.

***2. Comparing DESC's proposed 7.75% increase to the CPI's 14% increase lacks forthrightness***

**Q. Is comparing DESC's 7.75% increase with the CPI's 14% increase a logical, forthright comparison?**

**A.** No. Both DESC's Application and Mr. Blevins's Direct Testimony compare, for the eight-year period since SCE&G's last price increase, the proposed increase of 7.75% with the Consumer Price Index's increase of 14%.[43] These situations are not comparable, for at least four reasons.

*Different cost structures:* The CPI basket of products' cost structure does not resemble the utility's cost structure. Indeed, DESC admitted that no one at DESC performed or reviewed any analysis of the similarities or differences between the two cost

[43] See Application at ¶ 13; Blevins Direct at 9:15-19.

structures.[44] DESC insists that no analysis was "considered necessary given the use made of this measure of inflation in Mr. Blevins' testimony as an indication of inflation in the U.S. economy generally during the period since the last rate proceeding and the test period on which it was based."[45] This statement also lacks forthrightness. DESC and Mr. Blevins cite the CPI's 14% increase not merely to provide "an indication of inflation" since the last rate case; they cite the 14% so as to compare it to the proposed increase of 7.75%. For the reasons explained here, that comparison is false.

*Different demand curves:* The prices that go into the CPI are affected by demand curves for the products in the basket; those demand curves are not necessarily comparable to DESC customers' demand curves for electricity. If, for example, demand for the CPI products was rising while demand for electricity was falling, or the two were rising or falling at different rates (a certainty), a comparison between the two increases would have no use.

*The influence of historic costs:* Part of DESC's (in fact any utility's) revenue requirement is depreciation expense and return on undepreciated rate base. Both those numbers are based on historic costs. Historic costs in rate base don't rise over time; for rate purposes they decline over time because each year's depreciation expense is subtracted from rate base. So DESC's non-historic costs (which could include rate base additions) must have risen by more than 7.75%.

[44] DESC Response to DCA Interrogatory 1-9(b).

[45] *Id.*

*Most importantly: The 7.75% reflects only the proposed increase in base rates; it omits the cost increases that SCE&G has collected from customers via the utility's various passthrough clauses and riders*.[46] Other problems with the comparison aside, a comparison of the CPI with the utility's costs would make at least superficial sense only if we include all the utility's costs. Omitting from the comparison the increases in costs recovered through passthrough clauses and riders makes the comparison false. Offered an opportunity to acknowledge the error, DESC declined, saying that "[i]ncreases or reductions in the cost of those items are outside of the scope of the comparison and have no effect on it."[47] Omitting cost increases from a comparison of cost increases of course affects the comparison.

On this improper comparison of 7.75% with 14%, I urge the Commission not to view DESC's presentational decision as mere advocacy—a normal and acceptable part of the Company vs. Customers swordfight in which we hope sparks will illuminate truth. This comparison is smoke that hides the truth. It is not mere error of logic and fact; it is an effort to persuade using devices that depart from logic and fact. I recommend that this 2020 Commission make clear to all parties, their witnesses and their attorneys (attorneys being the individuals who actually file the testimony) that some persuasion strategies not only

[46] See DESC Response to DCA Interrogatory 1-9(c) ("Cost items which are subject to pass through are not included in this rate proceeding or in the 7.75% rate increase requested here.").

[47] DESC Response to DCA Interrogatory 1-9(c).

violate norms of integrity and transparency; they cause the Commission to lose trust in those who use them.

## III. DESC’s incentive compensation plans reward executives for acting adversely to customers

**Q. What is the purpose of this Part III?**

**A.** I alert the Commission that DESC’s incentive compensation plans reward executives—in fact all employees at DESC and their ultimate superiors at Dominion Energy—for taking actions that are adverse to customers.

Executive compensation plans should align the interests of investors and customers. DESC’s plan does the opposite, because rewards depend heavily on earnings. In a competitive market, a company’s earnings depend on attracting and keeping customers, so paying compensation based on earnings need not conflict with the interests of customers. But DESC’s earnings don't depend much on attracting and keeping its customers, because its customers have no choice but to buy from DESC. So its efforts to increase its earnings can conflict with the customers’ interests. If incentive compensation rises with earnings—as does DESC’s and Dominion Energy’s incentive compensation—it can reward executives and managers for taking actions that raise customers’ rates. I recommend ways for the Commission to eliminate this conflict.

### ***A. Incentive compensation plans should align the legitimate interests of investors and customers***

**Q. What regulatory concerns arise from utility compensation plans?**

**A.** Spread over billions of kilowatt-hours, the actual dollars in compensation plans affect customers only minutely. But decisions made by utility employees affect customers substantially. The problem presented by incentive compensation is less its size than its shape.

When a utility bases incentive compensation on earnings or stock price, or when it compensates employees with stock rather than dollars, it causes conflict with multiple regulatory priorities. Given that conflict, the Commission cannot assume that the utility's proposed rates are just-and-reasonable rates. Consider three examples.

*Basing compensation on short-term earnings rewards cost-cutting.* Cost-cutting helps customers only if it eliminates imprudence; not if it defers necessary maintenance, deprives utility employees of the pay they need to perform at their best, or reduces the types of research and development that support innovation. When a utility or its holding company compensates its executives based on short-term earnings, they have an incentive to game the regulatory process by proposing rate levels that exceed the expected cost of service.

*Basing compensation on stock price, along with paying compensation in stock, rewards executives who choose rate-based capital expenditures over less expensive measures.* Large capital expenditures make a company debt-heavy, therefore less able to respond nimbly to new technologies that empower customers to save on their bills. These capital expenditures become sunk costs that all customers have to pay off before they can enjoy new forms of supply, like solar self-supply. But since rate-basing increases earnings, basing executive compensation on earnings produces outcomes adverse to customers.

*Basing compensation on market share rewards efforts to gain market dominance—not through merit but through acquisitions and anticompetitive conduct.* At a time when customers need and deserve more diversity of services and more competition among the providers of those services, utility executives should not be rewarded for taking actions that reduce diversity and impede competition. But basing compensation on earnings and stock price, both of which rise as the competition faced by the utility diminishes, does exactly that.

### *B. DESC's compensation plans produce unnecessary conflict between executives and customers*

**Q. What is your general conclusion about DESC's compensation plans?**

**A.** DESC today has an "Annual Incentive Plan" (AIP). SCANA had a Long-Term Incentive Plan, which Ms. Elbert states (Direct at 20:3-4) was terminated after Dominion Energy acquired SCANA. These plans embody the conflicts of interest I just described. All employees, from bottom to top, are rewarded for helping the company increase its earnings. For most employees, the plans also recognize operational contributions; but earnings are always a factor, thereby diluting the influence of operations. Moreover, the importance of earnings to an employee's compensation rises with that employee's place in the hierarchy. So the executives and managers with the most influence have the largest incentive to use that influence to increase the company's earnings. Their conflict of interest permeates the company.[48]

[48] My understanding of these two plans is based on Ms. Elbert's testimony and her responses to our discovery questions. Though I found her testimony unclear in parts, I hope the following digest is accurate. I expect that any clarification from DESC will not affect my core point: that incentive compensation at DESC is heavily dependent on earnings; and

**Q. Describe the Annual Incentive Plan.**

**A.** All executives and employees of DESC have an opportunity to receive extra compensation through DESC's Annual Incentive Plan. The annual amount in the Plan, for possible payments to DESC employees, is determined not by the leaders of DESC but by members of the Compensation, Governance, and Nominating Committee of the Dominion Energy Board. Though earnings do not influence the "target" amount initially set by "management,"[49] the Committee has full discretion to lower that target amount to zero, or to double it, "based on the operating earnings per share target it sets each year and its assessment of how well the Company has met those targets each during the year."[50] It appears that the "operating earnings per share" are the earnings not of DESC but of the holding company that controls DESC, Dominion Energy.[51]

If the Committee, after considering Dominion Energy's earnings, does make incentive compensation available, individuals receive that compensation based on "points earned by individual employees or their business units." Points are awarded (Ms. Elbert does not specify who does the awarding) based on the "business unit" outcomes in two

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that those highest in the hierarchy have the most stake in earnings, and therefore the largest conflict with the customers' interests.

[49] Ms. Elbert does not clarify whether "management" refers to DESC or to Dominion Energy, or to which individuals in either company. She also does not explain the method by which management sets the "target" amount.

[50] DESC Response to DCA Interrogatory 1-14.

[51] Elbert Direct at 11:18-20 (referring to a "target" of $4.20 operating earnings per share. Ms. Elbert does not make explicit whether the "$4.20 operating EPS" refers to DESC earnings or Dominion Energy earnings, but the immediately preceding reference to "Dominion Energy's financial performance" implies that "4.20 operating EPS" refers to Dominion Energy earnings.

categories: “financial goals” (Ms. Elbert did not say whether the “financial goals” are those of DESC or of Dominion Energy or how they are measured) and “operating and stewardship accomplishments” (the latter defined as “safety, diversity and inclusion, environmental goals, and other operating and stewardship goals”).[52] The ratio in this mix varies with the person’s place in the hierarchy. As I understand Ms. Elbert’s testimony, an individual can receive up to 100 points, allocated between the financial and operational categories as follows:[53]

- “For individual contributors,” 75 points for operating and stewardship; 25 points for financial goals.
- “For supervisors, managers, and other non-executive leaders,” 65 points for operating and stewardship, 35 points for financial.
- For vice presidents and senior vice presidents, 50 points for operating and stewardship, 50 points for financial.
- For “the most senior leaders (the CEO, Executive Vice Presidents, and business unit CEOs of Dominion Energy),” *i.e.*, the individuals with the most influence, the financial-to-stewardship ratios exceeded 50%. Ms. Elbert states that “none of these individuals were employed by DESC or DESS [Dominion Energy Southeast Service, the service company] during the test year”; meaning, presumably, that they were executives of Dominion Energy—the ones at the top of the influence hierarchy.

[52] Explaining “business unit,”," Ms. Elbert states: “DESC was treated as part of the Southeastern Energy Group business unit in this case.” Elbert Direct at 14:6-7, supplemented by her footnote 3: “In 2019, the Southeast Energy Group included DESC employees and other legacy SCANA employees, including those of DESS and legacy PSNC.”." DESS is Dominion Energy Southeast Services, a central services company that employs legacy SCANA employees. Elbert Direct at 2 note 1. The testimony nowhere explains “PSNC.”."

The definition as a whole is ambiguous because the term “included,”," as opposed to “consisted of,”," could mean there are other people not listed in that description.

[53] Elbert Direct at 13:1-17.

Also, vice presidents and senior vice presidents could receive compensation based on the financials of the holding company, Dominion Energy. Specifically:[54]

- Vice Presidents and Senior Vice Presidents "could have earned 15 points based on the consolidated financial goal."[55]
- "Dominion Energy's Executive Vice Presidents and business unit CEOs could have earned 40 points based on the consolidated financial goal."
- "The Dominion Energy CEO could have earned 85 of 100 points based on the consolidated financial goal."

**Q. What problems for consumers does the Annual Incentive Plan present?**

**A.** The Plan presents at least five sources of conflict between DESC and its customers:

*The threshold criterion is holding company earnings:* No one, no matter how excellent their performance, receives any incentive compensation unless unnamed individuals on the Board of Dominion Energy, a company that before 2018 had no South Carolina history, decides that Dominion Energy has made enough money from its operations (only some of which involve South Carolina). So, at the threshold, operational excellence is completely irrelevant to incentive compensation. DESC employees could perform heroically for the consumer—restoring service after storms, fixing downed wires, installing automated meters, answering phone calls, speeding solar interconnections, all in record time—yet not receive an extra dime if the compensation Committee is dissatisfied with the holding company's earnings.

[54] Elbert Direct at 17:16-18.4.

[55] It was not clear from Ms. Elbert's testimony whether these officials were employed by DESC, by Dominion Energy, or both.

*Each person's award is influenced by earnings:* If the Committee does make incentive compensation available (again, based solely on Dominion Energy's earnings), the amount paid to any person will be influenced, at minimum by 25% and with a maximum exceeding 50%, by DESC's earnings. The higher a person is in the hierarchy, the more influence they have over DESC's actions, and so the more that influence will be guided by earnings. At DESC or Dominion Energy, there are 12 individuals who have especially large control of or influence over DESC's "financial, operational, capital expenditure or rate decisions or practices." According to Ms. Elbert, each of these individuals, listed in the margin, has at least 50% of his or her incentive compensation based on financial considerations rather than operational considerations.[56]

*For five "named executive officers" (NEOs—Farrell, Chapman, Blue, Koonce and Leopold), funding of the 2019 Plan was tied **solely** to achievement of predetermined*

[56] DCA's Interrogatory No. 1-15 asked DESC to "Identify all individuals employed by affiliates of DESC, at the level of Senior Vice President or above, who have control or influence of DESC's financial, operational, capital expenditure or rate decisions or practices." DESC's response listed these individuals:

Thomas Farrell, II, Executive Chairman
Robert M. Blue, President and Chief Executive Officer
James R. Chapman, Executive Vice President, Chief Financial Officer and Treasurer
Diane Leopold, Executive Vice President and Chief Operating Officer
Carter M. Reid, Executive Vice President, Chief of Staff and Corporate Secretary and President, Dominion Energy Services
P. Rodney Blevins, President, Dominion Energy South Carolina
W. Keller Kissam, President, Electric Operations (Dominion Energy South Carolina)
Michele L. Cardiff, Senior Vice President, Controller and Chief Accounting Officer
Mark D. Mitchell, Senior Vice President, Project Construction
Corynne S. Arnett, Senior Vice President, Regulatory Affairs and Customer Experience
Daniel G. Stoddard, Senior Vice President, Chief Nuclear Officer and President, Contracted Assets
Gerald T. Bischof, Senior Vice President, Nuclear Operations & Fleet Performance

*consolidated operating EPS goals.* The Committee did, however, retain discretion to reduce the payout "for any NEO for any reason, including missed business segment financial targets or failure to satisfy operating and stewardship goals." For 2019, the Committee said it would cut the plan funding by 50% if earnings were at $3.80 per share; and would provide the NEOs zero funding if earnings were below $3.80 per share.[57] Again, top leadership is personally motivated to increase earnings—even if doing so raises rates to customers.

*A preference for rate base solutions is unavoidable:* In a utility monopoly context, where (a) earnings rise with rate base, (b) a rise in rate base means a rise in rates, and (c) customers have no choice but to pay those rates, a desire to increase earnings conflicts directly with customers' interests.

*A preference for cost-cutting is unavoidable:* In a utility monopoly context, where (a) earnings rise as executives cut costs, (b) cost-cutting can reduce service quality, and (c) customers have no choice but to accept the quality of service that the utility provides, a desire to increase earnings again conflicts directly with customers' interests.

**Q. Describe the Long-Term Incentive Plan.**

**A.** Separate from the Annual Incentive Plan is the Long-Term Incentive Plan. I do not critique the Long-Term Plan in detail because Ms. Elbert stated that it terminated with Dominion Energy's acquisition of SCANA.[58] Whatever remaining benefits individuals receive from

[57] *Dominion Energy 2020 Proxy Statement* at 43-44.

[58] Elbert Direct at 20:3-4 ("This legacy long-term incentive plan was terminated at the time of the merger.").

this Plan are, I assume, contractual obligations that the Commission cannot lawfully require Dominion Energy to adjust.

But still: The stock rights granted under this Plan place the top executives in precisely the conflict position I have described. Consider these amounts granted to the top five, in the form of restricted stock:

| Name | 2019 Target Performance Grant | 2019 Restricted Stock Grant | 2019 Total Target Long-Term Incentive Award |
|---|---|---|---|
| Thomas F. Farrell, II | $ 5,741,835 | $ 5,741,835 | $ 11,483,670 |
| James R. Chapman | $ 675,000 | $ 675,000 | $ 1,350,000 |
| Robert M. Blue | $ 855,000 | $ 855,000 | $ 1,710,000 |
| Paul D. Koonce | $ 855,000 | $ 855,000 | $ 1,710,000 |
| Diane Leopold | $ 855,000 | $ 855,000 | $ 1,710,000[59] |

The individuals with the most influence over DESC's rate cases and capital expenditures—two events that have large long-term effects on customer costs—are individuals whose total compensation is affected heavily by stock price, which in turn is heavily affected by capital expenditures, and by rate case decisions that include decisions on return on equity and capital expenditures. These top individuals face incentives that do not align with, and in fact conflict with, lowering rates to customers. This Commission has never addressed this conflict. It should do so now.

**Q. Do you have a concern with long-term incentive plans generally?**

**A.** No, not if they cause no conflict between shareholder interests and customer interests. On that point, I disagree with Ms. Elbert's stated justification for long-term incentive plans. She argues:

> Without a long-term incentive plan, the Company would need to increase other aspects of its compensation program, such as base pay or AIP, to provide a competitive pay package for leaders and other key employees. *In*

[59] *Dominion Energy 2020 Proxy Statement* at 46.

> *doing so, the Company would lose the benefit of using the long-term incentive plan to tie the compensation of its leadership to achieving its goal of long-term financial viability and sustainability of the enterprise, which are important for the protection of customers' interests.* Together with the AIP, the long-term incentive plan maintains a balanced focus for key employees between goals that have shorter and longer time horizons.[60]

Respectfully, the italicized sentence reflects a fundamental misunderstanding of the roles of a utility, its executives and its regulators. A utility's "long-term financial viability and sustainability" is the necessary result of two things: prudent utility management and lawful regulatory rate-setting. Salaries sufficient to attract and retain excellent individuals should produce prudent management decisions. Those prudent management decisions yield, in turn, reliable service at reasonable cost. Standard ratemaking then compensates the utility for that reasonable cost and a fair return on equity. There is no justification for extras. And if extras are desirable, they can be paid in cash, conditioned on achievement of commission-specified operational and service quality standards. There is no need to connect those extras to earnings or stock value.

**Q. Isn't the practice of basing compensation on earnings common in competitive markets?**

**A.** Yes, but not every practice common in competitive markets transfers comfortably to regulated utility monopoly markets. Under competition, a company's financial results depend on satisfying customers, because customers can always leave for other companies. So, a plan based on the company's financial results has no necessary conflict with the customers' interests. But a utility monopoly's customers cannot leave for other companies. So the potential for conflict is constant. In competitive markets, if executive pay conflicts

[60] Elbert Direct at 19:2-10 (emphasis added).

with company performance, competition intervenes. In a utility monopoly market, the commission must intervene.

Ms. Elbert states: "Ultimately, operating earnings and other financial measures show whether or not the organization has been cost effective in delivering service within the revenue available to it."[61] Possibly correct in a competitive market, this statement is not correct in a monopoly market. Under vigorous competition, profit depends on customer satisfaction, because a company that fails to manage costs in ways that help customers, loses out to competitors who do. A monopoly utility cannot lose customers to competitors; so by cutting costs below the level approved in a rate case it increases its profit regardless of how those cuts affect its customers. Consequently, "financial measures" do not prove "cost effective[ness]." And because ratemaking is always prospective, a utility has a profit incentive to cut its costs below the commission-approved level: The utility can keep the savings until the next rate case; at which time, and only at that time, an alert regulator could lower that approved cost level, prospectively only, to the just-achieved cost level. Indeed, utility witnesses routinely praise this "regulatory lag"—their ability to add to their earnings by cutting costs between rate cases—as a reason why we should assume they are efficient. But it is also a reason why commissions face the constant worry that utilities' rate case applications will propose cost levels that exceed the utility's actual costs.

Ms. Elbert also argues that with incentive plans, "[p]ressures to increase rates will be reduced." Under traditional cost-based regulation, this statement is not necessarily true. Because earnings rise with rate base, employees will make more money if they persuade

[61] Elbert Direct at 22:5-7.

the Commission to adopt solutions that increase rate base instead of solutions that reduce the need for more rate base. Indeed, if Ms. Elbert's goal is to avoid rate increases, why not base executive compensation on avoiding rate increases rather than on increasing earnings?

I reemphasize: There is no problem with paying top dollar for top workers, with rewarding superlative performance with superlative compensation. As this Commission has held, "it is just, reasonable, and consistent with sound regulatory policy to allow the Company to recover a portion of the cost of incentive pay for its officers and employees through rates."[62] The problem at Dominion Energy and DESC is not their compensation's size but its shape.

DESC might respond that their executives always put customers first, that they would never seek to increase earnings or stock value at the expense of customers. I intend nothing personal. As a regulatory practitioner I have met many fine engineers who keep our lights on and financial experts who keep our utilities financed. But the Commission cannot ignore the obvious: Members of the Dominion Energy Board have spent hundreds of millions of shareholder dollars on the assumption that executives are motivated by earnings. If the executives now want to say that the Board has been mistaken, so be it. Then those same executives should readily agree to my recommendation in Part III.D below—that the Commission direct DESC to modify all plans so that incentive compensation is based solely on operational benefits for the customers.

[62] *Application of Duke Energy Progress, LLC for Adjustments in Electric Rate Schedules and Tariffs*, Docket No. 2018-318-E, Order No. 2019-341, 2019 SC ENV LEXIS 11at Part IV.I (May 21, 2019).

### *C. Removing a compensation plan's consumer-harming elements does not involve the Commission in "running the company"*

**Q. If the Commission prohibits executive compensation plans that conflict with the customer interest, will it cross some boundary that separates regulating the company from running the company?**

**A.** No. DESC might argue that this Commission cannot address executive pay—other than determining whether to include it in the revenue requirement—because of what is sometimes called the "management prerogative doctrine." Interpreting utility statutes, some courts draw this rough line: Regulators do outcomes (e.g., prices, quality, safety); while utilities do inputs (e.g., corporate organization, purchasing practices, hiring and firing).[63]

That line is far from clear, however, because regulators approve or disapprove plenty of inputs, like fuel contracts, purchased power agreements, generating units, mergers and acquisitions, and refinancings. And they have overall responsibility for ensuring that the utility carries out its obligation to serve reliably and cost-effectively. Prohibiting a utility from rewarding executives for actions that harm customers is not running the utility; it's protecting consumers who cannot protect themselves. That is precisely what regulators should do.

[63] I discuss this case law in my *Regulating Public Utility Performance*, *supra* at Chapter 2.D.3.d.

### *D. Solution: Align executive compensation with operational performance, unconflicted by financial performance*

In the past, the Commission has disallowed a portion of incentive compensation.[64] I don't recommend disallowance because disallowance doesn't change the plan. Again, the problem is not the plan's size but its shape. To eliminate the conflicts, the Commission should require DESC to replace the current plan with one that aligns the executives' and employees' interests with the customers' interests.

The Commission has stated that compensation is "under the control and discretion of management. The Commission does not direct the Company to compensate its employees under one method or another."[65] I agree. Discretion over the details should lie with the company. But the Commission can identify its priorities, then require the utility to align compensation with those priorities. The Commission can, and should, require that compensation plans link executive pay to indices that advance efficiency—indices like generating unit heat rates, nuclear unit downtime, advance meter installations, distribution losses, cost reductions and customer conservation—and that they not link pay with earnings.

The legendary business management scholar Peter Drucker wrote: "What is measured, improves." Why not also link executive pay to evidence of a customer-oriented, excellence-demanding employee culture—evidence of professional development and

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[64] *See*, *e.g.*, *Application of Duke Energy Progress*, Docket No. 2018-318-E; Order No. 2019-341, 2019 SC ENV LEXIS 11 (May 21, 2019) at Part IV.I (disallowing for recovery 75% of the South Carolina allocation of Duke Energy CEO Lynn Good's compensation and 50% of the compensation of the Company's next three highest executives).

[65] *Id.*

upward mobility; evidence of employee diversity that reflects customer diversity? Workers keep machines running, customers informed and the public safe. Worker morale affects company performance. Since the purpose of regulation is performance, aligning executive pay with worker morale serves the purpose of regulation.

I reiterate: To base executive pay on operational performance is not to discount financial performance. In competitive markets, financial success depends on competitive success. For regulated monopolies, financial success depends on satisfying commission-set standards, because then a commission will set rates that compensate the utility appropriately for meeting those standards. In this way, and only in this way, will executive compensation and customer interests align.

**Q. Does your recommendation apply to executives of Dominion Energy as well as employees of DESC? And if so, how can the Commission require Dominion Energy to change its compensation policies if Dominion Energy is not subject to the Commission's jurisdiction?**

**A.** My recommendation applies to Dominion Energy's executives as well as to DESC's employees. It is unfortunate for consumers that the members of the 2018 Commission did not condition Dominion Energy's acquisition of SCANA on both companies' eliminating those compensation features that place executives in conflict with customers. There is, however, a solution. The Commission can declare that DESC's right to provide service through a state-protected monopoly is prospectively conditioned on Dominion Energy's agreeing to change its executives' compensation. If Dominion Energy objects, those objections will provide the Commission and the General Assembly with essential information about whether SCE&G's continued control by Dominion Energy is good for South Carolina's customers.

**Q. Does this conclude your Direct Testimony?**

**A.** Yes.

## Scott Hempling, Attorney at Law

Scott Hempling is an attorney, expert witness, author and teacher. As an attorney, he has assisted clients from all industry sectors—regulators, utilities, consumer organizations, independent competitors and environmental organizations. As an expert witness, he has testified numerous times before state commissions and before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Belgium, Canada, Central America, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru and Vanuatu.

Hempling's legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, was published by the American Bar Association in 2013. It has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." His book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* was published by Edward Elgar Publishing in Fall 2020. His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has circulated throughout Latin America, through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía, REGULATEL (an association of telecommunications regulators from Europe and Latin America) and the World Energy Forum. The essays continue monthly at www.scotthemplinglaw.com.

His articles have appeared in the *Energy Bar Journal*, the *Electricity Journal*, *Energy Regulation Quarterly, Public Utilities Fortnightly*, *ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy and state–federal jurisdictional issues. From 2006 to 2011, he was the Executive Director of the National Regulatory Research Institute.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches public utility law and has taught regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. He is a member of the District of Columbia and Maryland Bars. More detail is available at www.scotthemplinglaw.com.

## Education

B.A. *cum laude*, Yale University, 1978. Two majors: Economics and Political Science, Music. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

J.D. *magna cum laude*, Georgetown University Law Center, 1984. Recipient of *American Jurisprudence* award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

## Professional Experience

President, Scott Hempling, Attorney at Law LLC (2011–present).

Adjunct Professor, Georgetown University Law Center (2011–present).

Executive Director, National Regulatory Research Institute (2006–2011).

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006).

Attorney, Environmental Action Foundation (1987–1990).

Associate, Spiegel and McDiarmid (1984–1987).

## Past Clients

**Independent Power Producers and Marketers**

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, EnerTran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

**Investor-Owned Utilities**

Madison Gas & Electric, Oklahoma Gas & Electric.

**Legislative Bodies and Executive Departments**

South Carolina Department of Administration, South Carolina Senate, Vermont Legislature.

**Municipalities and Counties**

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; Texas Cities; City of Winter Park, Florida.

**Public Interest Organizations**

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, D.C. Consumer Utility Board, Energy Foundation, Environmental Action

Foundation, Environmental Defense Fund, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists.

**Regulatory Commissions and Consumer Agencies**

Arkansas Attorney General, Arkansas Public Service Commission, Arizona Corporation Commission, Australia Energy Regulator, British Columbia Office of the Auditor General, British Columbia Utility Commission, California Public Advocates Office, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawai'i Public Utilities Commission, Hawai'i Office of Planning, Indiana Utility Regulatory Commission, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Comisión Reguladora de Energía, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, South Carolina Department of Administration, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

## Testimony Before Legislative Bodies

**United States Senate**

Committee on Energy and Natural Resources, May 2008 (addressing the adequacy of state and federal regulation of electric utility holding company structures).

Committee on Energy and Natural Resources, Feb. 2002 (analyzing bill to amend the Public Utility Holding Company Act) (PUHCA).

Committee on Energy and Natural Resources, May 1993 (analyzing bill to transfer PUHCA functions from SEC to FERC).

Committee on Banking and Urban Affairs, Sept. 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, March 1991 (analyzing proposed amendment to PUHCA).

Committee on Energy and Natural Resources, Nov. 1989 (analyzing proposed amendment to PUHCA).

**United States House of Representatives**

Subcommittees on Energy and Power and Telecommunications and Finance, Commerce Committee, Oct. 1995 (regulation of public utility holding companies).

Subcommittee on Energy and Power, Energy and Commerce Committee, July 1994 (analyzing future of the electric industry).

Subcommittee on Energy and Power, Energy and Commerce Committee, May 1991 (analyzing proposed amendment to PUHCA).

Subcommittee on Environment, Energy and Natural Resources, Government Operations Committee, Oct. 1990 (assessing electric utility policies of FERC).

Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing "independent power producers" and PUHCA).

**State Legislatures**

Judiciary Committee, South Carolina Senate (2000) (discussing options for introducing retail electricity competition).

Commerce Committee, Arkansas General Assembly (1999) (discussing legislation to introduce retail electricity competition).

Health Access Oversight Committee, Vermont General Assembly (1999) (discussing options for state regulation of prescription drug pricing).

Electricity Restructuring Task Force, Virginia General Assembly (1999) (discussing options for introducing retail electricity competition).

Study Committee, North Carolina Legislature (1999) (discussing legislation to introduce retail electricity competition).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997) (discussing options for introducing retail electricity competition).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

## Testimony before Commissions, Courts and Arbitration Panels

Oklahoma Corporation Commission: Principles relating to prudence and used-and-usefulness in the context of a scrubber investment (2019).

Louisiana Public Service Commission: Utility holding company's acquisition of merchant generation company (2018).

District of Columbia Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Maryland Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

Kansas Corporation Commission: Utility holding company acquisition of utility holding company (2016-2017).

U.S. District Court for Middle District of Florida: Effect of disaffiliation, mandated by Public Utility Holding Company Act, on corporation's liability under the Comprehensive Environmental Response, Compensation, and Liability Act (2016).

New Jersey Board of Public Utilities: Transfer of utility transmission assets to holding company affiliate (2015-2016) (application withdrawn).

Hawaii Public Utilities Commission: Holding company acquisition of utility holding company (2015-2016).

Louisiana Public Service Commission: Holding company acquisition of utility holding company (2015).

Connecticut Public Utilities Regulatory Authority: Holding company acquisition of utility holding company (2015).

District of Columbia Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2014-15).

Mississippi Public Service Commission: Utility holding company's divestiture of its utility subsidiaries' transmission assets to an independent transmission company (2013).

U.S. District Court for Minnesota: Effects of Minnesota statute limiting reliance on fossil fuels (2013).

Tobacco Arbitration Panel: Principles for regulating cigarette manufacturers (on behalf of State of Maryland) (2012).

Illinois Commerce Commission: Performance-based ratemaking (2012).

Maryland Public Service Commission: Holding company acquisition of utility holding company (2011).

California Public Utilities Commission: Performance-based ratemaking (2011).

Superior Court of Justice, Ontario, Canada: Renewable energy contractual relations under the Public Utility Regulatory Policies Act (2007).

Florida arbitration panel: Financial responsibility for stranded investment arising from municipalization (2003).

Minnesota Public Utilities Commission: Transmission expansion for renewable power producers (2002).

U.S. District Court for Wisconsin: State corporate structure regulation in relation to the Commerce Clause of the U.S. Constitution (2002).

New Jersey Board of Public Utilities: Conditions for provider of last resort service (2001).

Indiana Utility Regulatory Commission: Risks of overcharging ratepayers using "fair value" rate base (2001).

North Carolina Utilities Commission: Effect of merger on state regulatory powers (2000).

Wisconsin Public Service Commission: Effect of merger on state regulatory powers (2000).

New Jersey Board of Public Utilities: Affiliate relations in telecommunications sector (1999).

Illinois Commerce Commission: Affiliate relations and mixing of utility and non-utility businesses (1998).

Texas Public Utilities Commission: "Incentive" ratemaking, introduction of competition (1996).

Vermont Public Service Board: Cost allocation and interaffiliate pricing between service company and utility affiliates (1990).

# Publications

## Books

*Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020).

*Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* (American Bar Association 2013).

*Preside or Lead? The Attributes and Actions of Effective Regulators* (2d edition 2013).

## Articles, Papers and Book Chapters

"Electricity Formula Rate Plans and Multi-year Rate Plans: Can They Serve the Public Interest, and How?" in Hunter, Herrera Anchustegui, Crossley, and Álvarez, *Routledge Handbook of Energy Law* (2020).

"Inconsistent with the Public Interest: FERC's Three Decades of Deference to Electricity Consolidation," *Energy Law Journal* (Fall 2018), available at https://www.eba-net.org/assets/1/6/15-233-312-Hempling_[FINAL]1.pdf.

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"Regulatory Capture: Sources and Solutions," *Emory Corporate Governance and Accountability Review* Vol. 1, Issue 1 (August 2014), available at http://law.emory.edu/ecgar/content/volume-1/issue-1/essays/regulatory-capture.html.

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"Broadband's Role in Smart Grid's Success," in Noam, Pupillo, and Kranz, *Broadband Networks, Smart Grids and Climate Change* (Springer 2013).

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"Cost-Effective Demand Response Requires Coordinated State-Federal Actions" (National Regulatory Research Institute 2011).

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"Electric Utility Holding Companies: The New Regulatory Challenges," *Land Economics*, Vol. 71, No. 3 (Aug. 1995).

*Is Competition Here? An Evaluation of Defects in the Market for Generation* (National Independent Energy Producers 1995) (co-author).

*The Regulatory Treatment of Embedded Costs Exceeding Market Prices: Transition to a Competitive Electric Generation Market* (1994) (with Ken Rose and Robert Burns).

"Depolarizing the Debate: Can Retail Wheeling Coexist with Integrated Resource Planning?" *The Electricity Journal* (Apr. 1994).

*Reducing Ratepayer Risk: State Regulation of Electric Utility Expansion.* (American Association of Retired Persons 1993).

"'Incentives' for Purchased Power: Compensation for Risk or Reward for Inefficiency?" *The Electricity Journal* (Sept. 1993).

"Making Competition Work," *The Electricity Journal* (June 1993).

"Confusing 'Competitors' With 'Competition.'" *Public Utilities Fortnightly* (March 15, 1991).

"The Retail Ratepayer's Stake in Wholesale Transmission Access," *Public Utilities Fortnightly* (July 19, 1990).

"Preserving Fair Competition: The Case for the Public Utility Holding Company Act," *The Electricity Journal* (Jan./Feb. 1990).

"Opportunity Cost Pricing." *Wheeling and Transmission Monthly* (Oct. 1989).

"Corporate Restructuring and Consumer Risk: Is the SEC Enforcing the Public Utility Holding Company Act?" *The Electricity Journal* (July 1988).

"The Legal Standard of 'Prudent Utility Practices' in the Context of Joint Construction Projects," *NRECA/APPA Newsletter Legal Reporting Service* (Dec. 1984/Jan. 1985) (co-author).

## Speaker and Lecturer

**United States:** American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association; American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week;* Electricity Consumers Resource Council; Energy Bureau; *Energy Daily;* Executive Enterprises; Exnet; Federal Energy Bar Association; Harvard Electricity Policy Group; Indiana State Bar Association; Infocast; King Abdullah Petroleum Studies and Research Center; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Michigan State University Public Utilities Institute; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New Mexico State University Regulatory Studies Program; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Center; Puerto Rico Institute of Public Policy; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; Universidad del Turabo (Puerto Rico); United Nations Association at Georgetown Law; U.S. Department of Energy Forum on Electricity Issues; U.S. Department of Energy Solar Energies Technology Office; U.S. Environmental Protection Agency; Western Interstate Energy Board; Wisconsin Public Utilities Institute; Wisconsin Bar-Public Utilities Section; Yale Alumni in Energy; Yale School of Forestry and Environmental Studies.

**International:** Australian Competition and Consumer Commission; Australian Energy Regulator; Bergen Center for Competition Law & Economics, University of Bergen (Norway); British Columbia Utilities Commission; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); Comisión Reguladora de Energía (Mexico); The Energy and Resources Institute (India); Government & Policy Think Tank, Sharif University Institute of Technology (Iran); Independent Power Producers Association of India; India Institute of Technology at Kanpur; Ludwig-Maximilians-Universitat (Munich, Germany); Management Development Institute (Gurgaon, India); National Association of Water Utility Regulators (Rome, Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigeria Electric Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India); Regulatel (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); Utilities Regulatory Authority of Vanuatu; World Regulatory Forum.

## Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello): Riderwood Village Retirement Community (2003-present); St. Paul Episcopal Church (///Centreville, MD).