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SACE Telepress Event – Westinghouse Bankruptcy

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Ever so often in the wake of major financial or other disasters we hear phrases like "no one could have foreseen….". There are legal considerations at work here of course. If expensive events could have been foreseen, then someone had a duty to take action to prevent or to mitigate them.

Billions of dollars are at stake this time. There are rafts of stockholders, bondholders, suppliers and customers who may be required to bear large losses. The customers are in a particularly vulnerable position if the bankruptcy court rulings shift substantial costs and risks from Westinghouse to the utilities building the Vogtle and Summer units because the regulators who are supposed to protect them can only do so by finding utility conduct to have been imprudent. Yet many of those same regulators have approved the utility decisions, often in the wake of warnings that they should either not do so or should attach protective measures. Let's start with the question of foreseeability, and let's concede the no one warning of potential problems with the Vogtle or Summer projects actually said that Westinghouse would file for bankruptcy in early 2017. But that's like a souse slinking home penniless telling his family "No one could have foreseen" that the underdog on whom he had bet the milk money, leading by ten lengths in the home stretch, would pull up lame.

Prudence is not prophecy. It is the taking of reasonable precautions against reasonably foreseeable events.

Are nuclear cost overruns foreseeable? Look no further than the operating Vogtle units which overran their original cost estimates by billions of dollars. Every state in a crescent from the Carolinas to the Pacific Northwest felt the impacts of a nine-figure nuclear cost overrun in the 1970s and 1980s, as did most of the northeast. Are plant delays foreseeable? All of these plants were delayed by at least a year, some by more than a decade. More than half of all the units ever begun in the U.S. were cancelled.

By 1985 the combination of cost overruns, delays and cancellations had caused Forbes Magazine to opine that nuclear power constituted "the greatest managerial disaster in business history … only the blind, or the biased, can now think that most of the money has been well spent".

Is bankruptcy foreseeable? A number of utilities went bankrupt under the burden of nuclear cost overruns in the 1980s. The Seabrook nuclear plant alone caused several. Cajun and Wabash, two large electric cooperatives went under. The Washington Public Power Supply System defaulted on its bonds, at the time the largest municipal bond default in U.S. history. El Paso Electric also went broke.

The difference between those bankruptcies and this one lies in the position in the supply chain. Southern Company may have learned from earlier experience and negotiated penalties and cost ceilings into its contracts, but now one doesn't know whether those provisions will survive the bankruptcy process.

Of course, such provisions could have been written into the regulatory approvals as well. The relevant regulatory commissions were urged to do so but shied away when the utilities objected to giving their customers the same protections that they had insisted on for their investors.

Perhaps the most important overall lesson that I can offer is the need to avoid commitments to costs that are open-ended and unlimited. Investors have proven unwilling to shoulder such exposure. This is the reason that no nuclear plants have been ordered since the 1970s, and it is the reason that the nuclear industry has sought state regulatory changes laying the unlimited exposure off on the customers (as well as federal loan guarantees assigning similar exposure to the taxpayers). Regulators should be clear as to the limits on the amounts that can be charged to the customers, and those limits should not exceed the costs of the next best alternatives. By setting and enforcing such limits, the Commission will be benefiting both customers and utility investors as well as the Florida economy.

What makes nuclear projects so hard to finance conventionally is not expense and complexity but risk – risk of cost overruns, risk that the owners will not be able to meet schedules, risk that the plant will be canceled or will operate poorly, risk that demand will be overestimated, risk that other technologies will be available at lower costs. Of course, all of these things happened in this industry in the last three decades, so they are not abstract concerns…..

It is late but perhaps not too late for Georgians and South Carolinians to insist to get capable bankruptcy advice and to impose the ceilings on the cost of these projects if they are to be allowed to go forward at all. The customers have already lost billions on them, but they shouldn't toss good money after bad.