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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2022-000463

Daufuskie Island Utility Company, Inc.,

Appellant,

v.

South Carolina Office of Regulatory Staff,
Haig Point Club and Community Association, Inc.,
Melrose Property Owner's Association, Inc.,
Bloody Point Property Owner's Association, and
Beach Field Properties, LLC,

Respondents.

INITIAL BRIEF OF APPELLANT

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I. THE FINDINGS AND CONCLUSIONS OF PUBLIC SERVICE COMMISSION ORDER 2022-79 DENYING DIUC PERMISSION TO IMPLEMENT A REPARATIONS SURCHARGE RATE WERE LEGALLY ERRONEOUS, ARBITRARY, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND PREJUDICED SUBSTANTIAL RIGHTS OF DIUC. THIS COURT SHOULD REVERSE THE ORDER.

A. The relief sought by DIUC is not retroactive ratemaking.

B. DIUC I and DIUC II rendered Order 2015-846 and Order 2018-68 invalid and unlawful. Subsequent requests on remand are not improper collateral attacks on the Orders.

C. This Court should specifically rule that making a prevailing party whole via reparations surcharge rates following a successful appeal is not retroactive ratemaking.

D. The Commission committed legal error and made an arbitrary determination that the requested reparations surcharge rates are not constitutionally necessary.

E. The record establishes that DIUC did not have financial resources to obtain a bond under S.C. Code § 58-5-240 to collect its proposed rates pending the second appeal. Financial inability to obtain such a bond does not foreclose DIUC from receiving the reparations surcharge rates sought.

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STATEMENT OF THE ISSUE ON APPEAL

I. Whether this Court should reverse or modify South Carolina Public Service Commission Order 2022-79 because the Order's findings and conclusions denying DIUC permission to implement a reparations surcharge rates were legally erroneous, arbitrary, unsupported by substantial evidence, and prejudiced substantial rights of DIUC.

STATEMENT OF THE CASE

On June 9, 2015, DIUC, the sole provider of water and sewer service to a service area on Daufuskie Island, Beaufort County, South Carolina, applied to the Public Service Commission of South Carolina for approval of a new schedule of rates and charges for water and sewer service ("the Application"). (CITE) The Application was filed pursuant to S.C. Code Ann. Section 58-5-240 and 10 S.C. Code Ann. Regs. 103-712.4.A and 103.512.4.A. In its Application, DIUC utilized a historic 2014 test year, with known and measurable adjustments for 2015 expectations.

On December 8, 2015, the Commission entered its first rate order captioned Order Approving Settlement Among Certain Parties and Ruling on Application for Adjustments in Rates. (Order 2015-846) DIUC appealed and this Court reversed the Commission and remanded the matter for a de novo hearing. DIUC v. S.C. Office of Reg. Staff, 420 S.C. 305, 803 S.E.2d 280 (2017) ("DIUC I").

Two years later, on December 6 and 7, 2017, the Commission held a second hearing on the Application and entered its Order on Rehearing. (Order 2018-68) DIUC appealed the Order on Rehearing. This Court again reversed the Commission, remanding the matter for a third hearing before the Commission. DIUC v. S.C. Office Reg. Staff, 427 S.C. 458, 832 S.E.2d 572 (2019), reh'g denied (Sept. 27, 2019) ("DIUC II").

After nearly another two years following the second reversal, the parties addressed multiple discovery issues and disagreements about how the matter should proceed given the previous rulings of this Court in DIUC I and DIUC II. Ultimately, the third hearing (technically a second rehearing) was scheduled by the Commission for March 2, 2021.

Prior to the scheduled second rehearing on remand, the parties reached agreement as to settlement terms which they jointly proposed to the Commission by filing a copy of the parties'

Settlement Agreement on February 18, 2021, and a Proposed Consent Order Approving Settlement on February 19, 2021. (CITE and CITE) DIUC and ORS also both submitted prefiled testimony in support of the proposed settlement and consent order. (CITE and CITE)

On February 25, 2021, the Commission convened a settlement hearing wherein the Commission considered the Settlement Agreement and the testimony of settlement witnesses for DIUC and for ORS. (Transcript, February 25, 2021) The Commission entered a directive approving the Settlement Agreement on February 25, 2021, followed by a full order, Order 2021-132, entered March 30, 2021. (CITE and CITE) Order 2021-132 was captioned "Order Approving Settlement Agreement and Further Procedure." In Order 2021-132, the Commission approved the Settlement Agreement finding it is "just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." (Order 2021-132 at p. 7) Pursuant to the Order Approving Settlement Agreement and Further Procedure, DIUC was permitted to implement rates referred to as the 2021 Rates (as defined in the Settlement Agreement and reflected in the attachments thereto) for services beginning March 1, 2021. (Order 2021-132) A 108.9% increase was requested in DIUC's 2015 Application; therefore DIUC was limited to that increase amount.

At the time of the Settlement Agreement, DIUC's request for a reparations rate surcharge was pending within the case. (See generally DIUC Supplemental Brief Re Second Remand) The parties could not agree regarding that remaining rate component. So, the Settlement Agreement, and ultimately the Approval Order, included the following provisions to explain that even after entry of a settlement order, the rate applications proceeding docket would remain open while the parties addressed the remaining rate issue of DIUC's request to implement a reparations surcharge rate. Order 2021-132 stated:

> DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. ORS and the Intervenors disagree.
>
> [* * *]
>
> The Settlement Agreement contains a procedure whereby after this Commission's decision regarding the proposed Settlement Agreement, the Parties can brief the matter [of DIUC's request for reparations] to the Commission for its further determination in this case. The Settlement Agreement provides for notice and a briefing schedule on this issue.
>
> The Parties agree that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary. The Parties reserve their right to appeal the Commission's decision regarding this issue

(Settlement Approval Order at 4-5)

Pursuant to the terms of the Settlement Approval Order and the Settlement Agreement, the parties briefed the issue of reparations surcharge rates. (CITE DIUC and CITE ORS and CITE POAs and CITE DIUC Reply) On August 27, 2021, the Commission issued a Notice of Oral Arguments setting oral arguments regarding the reparations surcharge rate issue for Tuesday, November 30, 2021. (CITE)

Via Order 2021-581 entered August 25, 2021, the Commission granted the parties' request to submit proposed orders on the reparations rate issue. (Order 2021-581) On September 22, 2021, the parties each submitted proposed orders. (CITE and CITE and CITE).

On November 30, 2021, the Commission heard oral argument from the parties. (CITE Transcript) On January 27, 2022, the Commission entered Order 2022-79, captioned as "Order

Denying Request of DIUC to Impose Reparation Surcharges on Customers." (CITE) The Order denied the reparations rate surcharges sought by DIUC.

DIUC timely filed a Petition for Rehearing and/or Reconsideration of Order 2022-79. (CITE) ORS filed a response to the Petition. (CITE) The POAs did not respond in opposition to DIUC's Petition for Rehearing and/or Reconsideration. DIUC filed a Reply to the ORS Response regarding Rehearing. (CITE) On April 11, 2022, the Commission entered Order 2022-242 Denying Rehearing and/or Reconsideration of Order 2022-79. (CITE)

On April 14, 2022, DIUC initiated this Appeal by filing its Notice of Appeal. (CITE). The Office of the Clerk of this Court assigned the appeal Appellate Case No. 2022-000463.

NOTE

For ease of reference in briefing this Appeal, the terms "reparation," "reparations," "reparations surcharge rate," and "surcharge rate" shall all mean and refer to DIUC's request for the following one-time surcharges (as opposed to an ongoing tariff rate):

1. To implement a surcharge to collect the 108.9% increase it should have been allowed beginning on October 1, 2017, through March 1, 2021. A surcharge would be added to customer bills to recover the shortfall in revenues and return on investment for that period of time, with interest at the allowed 9.31% equity return.

2. To implement a surcharge to collect reimbursement of the credit/refund made to the customers with the January 1, 2018, billing when the 108.9% increase was not allowed to begin on October 1, 2017. A surcharge would be added to customer bills to recover the credits/refunds, with interest at the allowed 9.31% equity return.

STATEMENT OF FACTS

The Rate Application and Initial Hearing

On June 9, 2015, Daufuskie Island Utility Company, Inc., the sole provider of water and sewer service to a service area that encompasses Daufuskie Island, Beaufort County, South Carolina ("DIUC"), applied to the Public Service Commission (the "Commission" or "PSC"), for approval of a new schedule of rates and charges for water and sewer service ("the Application"). (CITE). The Application was filed pursuant to S.C. Code Ann. Section 58-5-240 and 10 S.C. Code Ann. Regs. 103-712.4.A and 103.512.4.A. The Application sought increased rates based upon a 2014 test year, with known and measurable adjustments for 2015 expectations. (CITE)

On July 23, 2015, the Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, (collectively "Intervenors") filed a Petition to Intervene. The petition was granted. The South Carolina Office of Regulatory Staff ("ORS") also appeared via counsel.

On October 28, 2015, the Commission conducted a hearing on DIUC's Application. On December 8, 2015, the Commissions entered an Order on the Application, but did not grant the relief requested by DIUC. Instead, the Commission entered Order 2015-846 adopting a "Settlement Agreement" between ORS and the POAs to which DIUC was not a party and which granted only 43% of DIUC's requested revenue increase. (CITE) In Order 2015-846 the Commission adopted every adjustment proposed by ORS in testimony and the "Settlement Agreement," effectively rejecting all of DIUC's testimony, evidence, and analysis. DIUC filed a timely Petition for Reconsideration and/or Rehearing on December 21, 2015, and explained to the Commission that the 43% increase would not provide DIUC sufficient income to pay debt service on its existing (and PSC approved loans) or generate funds to pay necessary operating

expenses. (Appellant's Brief, 2016-00652, 10-20-16 and DIUC Pet. for Recon., 12-21-2015) By Order No. 2016-50 dated February 25, 2016, the Commission denied the Petition for Reconsideration and/or Rehearing.

DIUC's First Appeal and DIUC I.

On March 22, 2016, DIUC served its Notice of Appeal of Order 2015-846 and Order 2016-50 and the Commission's complete adoption of all the positions and adjustments proposed by ORS and the POAs in opposition to DIUC. The Office of the Clerk of the Supreme Court assigned the matter Appellate Case No. 2016-000652. In its appeal DIUC asserted that by adopting the adjustments in the Settlement Agreement, Order 2015-846 violated Commission Settlement Policies and Procedures because DIUC was not involved in the Settlement Agreement. DIUC also appealed the Commission's findings on five adjustments: Property Taxes, Management Fees, Rate Case Expenses, Bad Debt, and Rate Base arguing the findings were not based upon the reliable, probative, and substantial evidence in the record.

Pending this appeal of the 43% rate increase approved by Order No. 2015-846, DIUC placed its proposed full 108.9% rate increase into effect beginning the second quarter of 2016 pursuant to S.C. Code § 58-5-240(D). Pursuant to Section 58-5-240(D), the rates collected were subject to refund if the final rates turned out to be less that the 108.9% increase charged under bond.[1]

The Supreme Court heard oral argument on the appeal on December 14, 2016, and on July 26, 2017, issued its Opinion. The Court ruled for DIUC, reversed Commission Order 2015-846, and remanded to the Commission finding:

[T]he Settlement Agreement did not resolve *any* issues between the parties, but

[1] Any refunds due would also include annual interest of 12% on the difference billed to each customer.

> rather was merely an agreement between the POAs and ORS not to object to one another's pre-filed testimony, and to accept ORS's recommendations and adjustments should the Commission adopt them. Furthermore, the Settlement Agreement contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission. Therefore, we hold the Commission erred in approving and adopting the Settlement Agreement and DIUC is entitled to a new hearing in which the parties may present any additional evidence.

DIUC I, 420 S.C. at 315, 803 S.E.2d at 286.

The Court also explained, "While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal." Id. As to the three adjustments addressed, the Court concluded that:

1. The substantial evidence in the record supported inclusion of the Elevated Storage Tank and facilities in Rate Base/Utility Plant In Service;
2. DIUC is entitled to rates sufficient to cover the tax obligations DIUC presented in its Application; and
3. The Commission's decision to allow a bad debt expense of only $30,852 was unsupported by the evidence in the record.

Although the Opinion did not individually analyze DIUC's other appellate issues regarding the Commission's decision disallowing $699,631 of additional utility plant costs from DIUC's rate base, reduction of the amount of management fees, and rejection of certain rate case expenses incurred by DIUC, the Court did state that in addition the three adjustments discussed specifically, Order 2015-846 "contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission." DIUC I, 420 S.C. at 315, 803 S.E.2d at 286. Based on these findings, the Court reversed and remanded the matter "for a new hearing as to all issues." Id. The issues referred to by the Court are Commission Order 2015-846's adjustments to Property Taxes, Plant In Service, Bad Debts, Management Fees, and Rate Case Expenses. Id.

Rehearing On First Remand to the Commission Pursuant to DIUC I

After remand to the Commission, the parties engaged in additional discovery then submitted prefiled rehearing testimony of their witnesses. The rehearing was convened on December 6, 2017. On December 20, 2017, the Commission issued a one-page order allowing a $950,166 revenue increase (more than doubling the previous 43% increase to an 88.5% increase). (CITE) The Commission indicated that a full order would be issued at a subsequent time. (CITE) On January 31, 2018, the Commission entered its decision, docketed as Order No. 2018-68 ("Order on Rehearing"). (Order 2018-68) DIUC filed a timely Petition for Reconsideration and/or Rehearing on February 20, 2018, asserting the Commission erred by not allowing proper recover in rates for DIUC's proposed Rate Case Expenses, Rate Base/Utility Plant In Service, and Accumulated Depreciation/Depreciation Expense. (Pet. Recon.) By Order No. 2018-346 dated May 16, 2018, the Commission denied DIUC's Petition for Reconsideration and/or Rehearing. (Order 2018-346)

The Order on Rehearing granted an 88.5% rate increase effective for the fourth quarter of 2017 (for service rendered from October 1 through December 31, 2017) to be billed with DIUC's January 1, 2018, billing. Because the allowed rate increase was less than the 108.9% revenue increase DIUC put into effect under bond after the first Order (pursuant to S.C. Code § 58-5-240(D) and subject to refund), DIUC had two options: (a) seek additional bonds to allow future collection of the full 108.9% increase, or (b) start collecting the lower 88.5% increase and refund/credit each customer for the difference between 108.9% that had been paid from July 1, 2016, to September 30, 2017, plus annual interest at 12%.

Unfortunately for DIUC, due to the costs of the appeal and rehearing combined with the $60,782 it had already spent for the previous bonds, DIUC was unable to obtain additional bonds

that would allow it to collect the full 108.9% rates pending appeal of the 88.5% increase allowed by Order 2018-68 on rehearing. (Mtn. to Reconsider Directives with Affidavit of Guastella) DIUC was left without any bonding option.[2] So, DIUC implemented rates at the 88.5% increase and with ORS's approval initiated refunds/credits to customers for the difference between 108.9% that had been paid in response to DIUC's July 1, 2016 billing for service provided from April 1, 2016, to September 30, 2017, plus annual interest at 12%. The refunded amount totaled $232,542. (DIUC Reply In Support of Request for Reparations at 1)

DIUC's Second Appeal and DIUC II

On June 13, 2018, DIUC served its Notice of Appeal of Order No. 2018-68 and Order No. 2018-346 (collectively referred to herein as "Order 2018-68" and "Order on Rehearing"). (Second Notice of Appeal) The Office of the Clerk of the Supreme Court assigned the second appeal Appellate Case No. 2018-001107.

In its second appeal DIUC asserted the Commission erred in excluding $542,978 from DIUC's Rate Case Expenses and the Commission erred in removing $699,361 from DIUC's Rate Base/Utility Plant In Service. In DIUC I these same categories of adjustments (Rate Case Expenses and Rate Base) were among the "multiple" issues reversed and remanded by the Court because there was no support for the Commission's adjustments to them; however, the Court did

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[2] In its Petition for Rehearing of Order 2022-79 Denying Reparations, DIUC specifically requested that "the Commission to find that DIUC had no *choice* [in late 2017] about obtaining additional bonds under S.C. Code § 58-5-240(D)." DIUC pleaded, "Because ORS has put DIUC through two years of litigation, ORS effectively exhausted all reserves and DIUC could not obtain further bonds." (Pet. Rehearing, 2-16-22 at 19) Notably, the Commission refused to make that finding and, instead, used the request for a finding against DIUC stating, "This Commission has never made a finding of fact in this proceeding that DIUC could not afford a bond." (Order 2022-79 at 23) As discussed in Section I. E., infra, ORS and the Commission have both used DIUC's inability to afford bonds as a grounds to deny of the reparations rate relief by arguing the sole remedy available to DIUC had to be exercised in 2017 via S.C. Code § 58-5-240(D).

not provide specific "guidance" for these items as it did for the others. See generally DIUC I, 420 S.C. 305, 803 S.E.2d 280 (2017). On remand and rehearing ORS and the Commission both continued to exclude $699,361 from Rate Base/Plant In Service, as they had in the original proceeding and Order 2015-846 in 2017. The Rate Case Expenses at issue included some formerly approved costs and some new ones introduced on remand; ORS and the Commission changed their position on the previously approved costs by applying a higher standard to justify rejecting the total of $542,978 in Rate Case Expenses attributable to the work of Guastella Associates.

After hearing oral argument on April 18, 2019, this Court entered its decision in favor of the Appellant, DIUC. See DIUC v. S.C. Office Reg. Staff, 427 S.C. 458, 832 S.E.2d 572 (2019), reh'g denied (Sept. 27, 2019) (hereinafter "DIUC II").

In its opinion in DIUC II, this Court addressed DIUC's assertion that ORS and the Commission allowed certain Rate Case Expenses in the initial proceeding but after losing the first appeal of DIUC I, ORS and the Commission denied DIUC recovery for the very same expenses on remand. DIUC argued the higher standard applied by ORS and the Commission was improper. This Court agreed:

> DIUC argues ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order. At oral argument on this second appeal, when pressed by the Court to respond to DIUC's "retaliation" argument, appellate counsel for ORS conceded a heightened standard had been employed. Counsel stated, "Was it a higher standard than was previously applied? It certainly was a different standard," and "I don't believe it was a lesser standard, you are correct." Pressed further, counsel stated, "You're right. There is a difference ... [in] the way we handled the methodology ...." Finally, a Justice of the Court challenged counsel, "The reason that [the rate case expenses] were paid the first go around ..., but disallowed the next time, is because of the higher level of scrutiny." Counsel responded, "At the end of the day I think that's a fair characterization."

DIUC II, 427 S.C. at 460, 832 S.E.2d at 573.[3]

However, this Court also expressed very specific concerns about how DIUC was treated after obtaining a reversal of in the first appeal:

> … these retaliatory actions by ORS are deeply troubling. We rightly demand more of governmental representatives—like ORS—than such an unprofessional approach to the legitimate financial interests of South Carolina businesses, *and* of South Carolina utility ratepayers. Likewise, we expect more respect for the rulings of this Court than administrative officers exhibit when they retaliate against parties who prevail against them on appeal.

DIUC II, 427 S.C. at 460-461, 832 S.E.2d at 573. The Court further explained:

> Additionally, in contrast to the commission's assessment of the invoices in its order after the initial hearing, the commission heavily scrutinized the format of the Guastella invoices on remand. The commission's order on remand provides, "The Commission agrees with ORS.... The evidence shows that a large sum of what DIUC seeks was based on invoices that could not be verified." The commission's order denying DIUC's motion for reconsideration also provides, "ORS ... completed a thorough review of all invoices from Guastella Associates, and found that they 'contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid.' " However, the commission expressed these concerns with the invoices only in its evaluation on remand. The commission's harsher treatment of the *same* invoices on remand—of which rate case expenses were previously awarded—convinces us the commission itself employed a retaliatory standard of scrutiny.

DIUC II, 427 S.C. at 462-463, 832 S.E.2d at 574.

Concluding reversal was essential to the rights of DIUC, this Court held:

> The commission's denial of DIUC's rate case expenses it previously permitted was arbitrary because DIUC's evidence was subjected to a retaliatory, higher standard of scrutiny on remand. As counsel for ORS conceded, "The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny." This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.

DIUC II, 427 S.C. at 464, 832 S.E.2d at 575

[3] The Opinion also stated, "We appreciate the professionalism of appellate counsel as an officer of the court in giving candid answers to our direct questions. We do not attribute the actions of ORS to its appellate counsel." DIUC II, 427 S.C. at 460, 832 S.E.2d at 573

Second Remand to the Commission Pursuant to DIUC II

Following the second appeal and subsequent remand to the Commission, counsel for DIUC filed a written request asking the Commission to take immediate action following the second remand. (Letter, Gressette to Hon. Boyd, November 15, 2019) In response, the Commission sought input from ORS. (Order 2019-824, December 4, 2019) Responding by letter dated December 6, 2019, ORS stated its position that an additional hearing was required but that if at that third hearing "DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings." (Letter, Bateman to Hon. Boyd, December 6, 2019) The Intervenors, however, took the position that Commission could not "rule on remand absent additional documentary or testimonial evidence to support its decision." (Letter, Pringle to Hon. Boyd, January 16, 2020)

On January 21, 2020, the Commission heard oral argument from the parties as to how the matter should proceed following the second remand from this Court. (Transcript, January 21, 2020, Oral Argument) No immediate action was taken by the Commission.

On April 14, 2020, DIUC filed a Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand. (CITE) The Motion attached a 24-page proposed order. (Proposed Order - CITE) DIUC's Proposed Order addressed correcting Commission Order 2018-68's exclusion of Rate Case Expenses for Guastella Associates costs and its disallowance of $699,361 of DIUC's Utility Plant in Service. The Proposed Order also explained DIUC's request that the Commission correct the insufficient and confiscatory nature of the rates included in Orders 2015-846 and 2018-68 by implementing a reparations surcharge rate. DIUC asserted the correction should be made on the basis that the 108.9% rate increase should have been in effect for service provided from October 1, 2017, through March 31, 2020, instead of the 88.5%

rate increase. (Proposed Order at 2, 15, 22) Further, with respect to the reversal of the refund/credit made to the customers on January 1, 2018, DIUC requested that in order to mitigate the impact on the customers, a separate surcharge be billed to the customers who had previously received the refunds. (Proposed Order at 3)

On May 20, 2020, the Commission entered Order 2020-382, which held DIUC's Motion for Disposition of Proceedings and Entry of Proposed Order on Second Remand in abeyance and instructed the parties and Commission staff to confer as necessary to schedule testimony deadlines for "a limited hearing … to consider rate case expenses, plant in service, and reparations." The parties conferred, proposed testimony deadlines, and pursuant to subsequently filed order, a hearing was scheduled for Thursday, September 3, 2020. (Order 2020-48H)

On June 16, 2020, DIUC filed the Second Rehearing Testimony of John F. Guastella with corresponding Index and Exhibits. On July 7, 2020. ORS filed the Second Rehearing Direct Testimony of Mark Rhoden as well as the Second Rehearing Direct Testimony and Exhibits of Dawn M. Hipp. Despite having asserted the Commission must take additional evidence before issuing an order following the second remand (see Letter, Pringle to Hon. Boyd, January 16, 2020), the Intervenors did not prefile any testimony or exhibits.

Stay of the Proceedings and Further ORS Discovery on Rate Case Expenses

Two weeks after receiving DIUC's direct testimony, ORS served a single Request for Production related to expense for the work of DIUC's manager, Guastella Associates, LLC ("GA"):

> ORS Request 1-1
> Please provide all documents that support Rate Case Expenses of $269,356 as identified in the Second Rehearing Direct Testimony of John F. Guastella (p.17, l.6) including, but not limited to, the calculation, reconciliation and vendor invoices.

(a) Please provide all documentation to demonstrate the invoices that are included in the amount of $269,356 have been paid by DIUC.

(Exhibit A to Mtn to Compel, SC ORS'S First Continuing Request for Production (June 29, 2020)) ORS's Request for Production included a July 10, 2020, response date.

On July 10, 2020, DIUC responded to the Request for Production. (Exhibit B to Mtn to Compel) DIUC objected to the Request as "unduly burdensome" and because the Request "seeks to impose a higher level of scrutiny and an increased burden of production regarding the extensive documentation DIUC has already provided to ORS and to the Commission regarding DIUC's Rate Case Expenses." (Exhibit B, DIUC Response to Request 1-1) In sum, DIUC disagreed with what it viewed as ORS's attempts to ***for a second time*** require further information than it had required in the initial proceeding and ORS's application of a stricter standard of review than that which was applied to the GA invoices at the initial hearing. DIUC asserted the request for more proof than previously required is exactly what the Court found to be retaliatory and improper in DIUC II. But, ORS would not relent and continued to require DIUC to comply with application of the higher standard specifically rejected by this Court in DIUC II). ORS even asked the Commission to halt all proceedings so it could litigate enforcement of this higher, retaliatory standard.

DIUC continued to request relief from the discovery arguing any order(s) enforcing it would require DIUC to relitigate and re-argue the same issues already specifically ruled upon by this Court in DIUC II. (Transcript, October 8, 2020 - Oral Argument)

DIUC reminded the Commission that this Court had specifically ruled this higher level of scrutiny was arbitrary and contrary to DIUC's substantial rights:

> The commission's denial of DIUC's rate case expenses it previously permitted was arbitrary because DIUC's evidence was subjected to a retaliatory, higher standard

> of scrutiny on remand. As counsel for ORS conceded, "The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny." This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed. We remand to the commission for a new hearing.

DIUC II, at p. 464 and 575. Nevertheless, ORS sought to require additional information – proof of whether the invoices were paid (beyond being a properly booked account payable) and production of additional documents not before required. ORS demanded "all documentation that demonstrates payment of these invoices be provided. While certainly not exhaustive, examples of documentation that may indicate payment would include copies of cancelled checks or ACH transactions." (DIUC Response to Motion to Compel, Exhibit C) DIUC focused on the Court's decision in DIUC II and explained:

> [DIUC has provided] ORS with a listing of every single invoice and includes for every invoice: the date of invoice, the invoice number, amount due, amount paid, and date of payment. Id. In addition to this chart, ORS already has every invoice that makes up the $542,978, because they were the subject of extensive ORS testimony in the rehearing. See Transcript of Proceedings (December 6 and 7, 2017) (including testimony of ORS witness Dawn Hipp); see also Order 2018-68 at p.37 (discussing Ms. Hipp's opinions regarding the GA invoices). Comparing the text of Request 1-1 to the Response and the chart provided by DIUC demonstrates DIUC fully responded to the Request.

(DIUC Response to ORS Motion to Compel)

At ORS's request, the Commission stayed the testimony and hearing dates while ORS's demands for more discovery related to its higher standard for evaluating rate case expenses were litigated. That complete process took over 7 months (from June 2020 until February 2021) and involved multiple filings, responses, and hearings.[4]

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[4] S.C. Code § 58-5-240(C) requires the Commission rule on a rate application "within six months after the date the schedule is filed." The Commission may only extend the six-month period for an additional five days. With this third appeal, DIUC's 2015 rate application has passed the 7 year mark. The Commission's decision denying reparations surcharge rates fails to admit that these

Finally, via Directive 2021-15-H entered February 4, 2021, the Commission updated testimony filing dates pursuant to the parties' joint request for a hearing in early March 2021. A hearing was scheduled for March 2, 2021.

In accordance with the schedule, DIUC prefiled testimony as did ORS. Interestingly, ORS planned to present witnesses at the anticipated third hearing to refute this Court's conclusions that the previous actions of ORS with regard to changing the standard on information necessary to justify Rate Case Expenses was improper and retaliatory. ORS had already been allowed to demand discovery consistent with this higher standard and then it prefiled testimony indicating it would defy this Court and again apply the retaliatory standard. A brand new witness was named to accomplish this – Mr. Mark Rhoden, Chief Financial Officer of the Office of Regulatory Staff, who prepared and prefiled testimony opining as follows:

> **Q.** DID YOU REVIEW ORS'S RECOMMENDATION RELATED TO THE RATE CASE EXPENSES REQUESTED BY DIUC?
>
> **A.** Yes. ORS recommended DIUC be allowed to recover $211,600 of the total $794,210 requested. A group of expenses that were not allowed in the amount of $542,978 from Guastella Associates, LLC ("GA") make up the majority of the difference.
>
> [* * *]
>
> The invoices provided by DIUC do not provide that level of information. Upon my review, I concluded that the ORS evaluation was appropriate.

(Second Rehearing Direct Testimony of Mark Rhoden, 7-20-22 at 4-5) It is clear that rather than accepting this Court's ruling, ORS was prepared to relitigate the very same issue that caused this Court such concern in its decision in DIUC II; this time the plan appears to have been to contradict

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unprecedented delays were due in any part to actions and/or omissions of the Commission, ORS, or the POAs.

the Court with testimony from ORS's Chief Financial Officer Mark Rhoden.

The discovery, the Motion to Compel, the fight for a stay and then to compel DIUC to provide information in excess of what was properly required at the first here – all of these make it clear that ORS was going to apply the exact same standard this Court admonished it for using. And it was going to have the ORS Financial Director opine this Court was wrong, even after DIUC II and the rejection of these same arguments in the ORS Motion for Rehearing this Court denied in conjunction with its decision in DIUC II. DIUC would continue to be punished for its appellate wins, just as it was in the first rehearing.

Prior to the scheduled second rehearing, the parties were able to reach agreement as to certain settlement terms which they jointly proposed to the Commission by the filing of a Settlement Agreement on February 18, 2021, and a Proposed Consent Order Approving Settlement on February 19, 2021. DIUC and ORS also both submitted prefiled testimony in support of the proposed settlement and consent order.

On February 25, 2021, the Commission convened a settlement hearing wherein the Commission considered the Settlement Agreement and the testimony of settlement witnesses for DIUC and for ORS. (Transcript, February 25, 2021) Via Order 2021-132, entered March 30, 2021, the Commission approved the Settlement Agreement finding it is "just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." (Order 2021-132 at p. 7) Pursuant to the Order, DIUC was permitted to "implement the 2021 Rates, (as defined in the Settlement Agreement and reflected in the attachments thereto) for services beginning March 1, 2021," and to "include the same in its April 1, 2021, quarterly billing." Id.

The substantive terms of the Settlement Agreement are:

Annual Revenue:
The parties agree to implementation of the 2021 Rates as set forth in the Settlement Agreement and its exhibits. The 2021 Rates are designed and intended to generate $2,267,714 of annual revenue for DIUC [ie, the originally requested 108.9% increase].

Rate Case Expenses:
In addition to the $272,382 of rate case expenses previously recommended for recovery by ORS, approved by the Commission in Order No. 2018-68, and currently reflected in rates charged to customers, the Parties agree to recovery of $542,978 for Guastella Associates' rate case expenses incurred by DIUC through September 30, 2017, and supplemental legal rate case expenses of $95,430, with both amounts to be amortized over a three (3) year period.

Rate Base / Utility Plant in Service:
DIUC's Application included $8,139,260 of reported used and useful facilities included in Utility Plant in Service. Commission Orders 2015-846 and 2018-68 both reduced that amount by $699,361. DIUC will delay seeking recovery of the corresponding $699,361 until its next rate filing, and the Parties agree to reserve their positions as to the $699,361 reduction to Utility Plant in Service for consideration in DIUC's next rate case.[5]

Reparations:
DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. ORS and the Intervenors disagree, so the settlement contains a procedure whereby after the Commission's decision regarding the proposed settlement

[5] Once increased expenses were included in recovery, even if the parties were in agreement about including the $699,361 in Utility Plant In Service, that would result in rates that exceed the noticed revenue of $2,267,722 [aka the 108.9% increase] that DIUC included in its Application.

> agreement, the parties can brief the matter to the Commission for its further determination in this case.

(Order 2021-132, Settlement Agreement at pp. 2-4)

As indicated by the terms of the Settlement Agreement, ORS and the Intervenors agreed that the settlement "serves the public interest," and that it "is reasonable, in the public interest, and in accordance with law and regulatory policy." (Settlement Agreement at pp. 5-6). Likewise, in Settlement Approval Order 2021-132, the Commission found that "the Settlement Agreement is just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest." (Settlement Approval Order 2021-132 at p. 7) The Commission ruled, "The Settlement Agreement (attached as Order Exhibit 1) is hereby approved, effective March 1, 2021." (Order 2021-132 at p. 7)

As to the issue of seeking reparations, the plain language of Settlement Approval Order 2021-132 states:

> DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. ORS and the Intervenors disagree.
>
> [* * *]
>
> The Settlement Agreement contains a procedure whereby after this Commission's decision regarding the proposed Settlement Agreement, the Parties can brief the matter [of DIUC's request for a reparations surcharge rate] to the Commission for its further determination in this case.
>
> [* * *]
>
> The Parties agree that this proceeding, Docket No. 2014-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary. The Parties reserve their right to appeal the Commission's decision regarding this issue.

> [* * *]
>
> After Commission approval of this Settlement Agreement and the issuance of an Order permitting implementation of the 2021 Rates, the Parties shall proceed to present their respective positions to the Commission regarding the DIUC request for reparations.
>
> [* * *]
>
> The Commission has considered the Settlement Agreement and the settlement testimony of the witnesses. Based upon the Parties' submissions, the representations included within the Settlement Agreement, the testimony of the settlement witness, and the record as a whole, the Commission finds the Settlement Agreement is just, fair, and reasonable, is in accord with applicable law and regulatory policy, and is in the public interest.

(Order 2021-132 at 4-9)

Pursuant to the briefing procedure regarding the outstanding issue of reparations, as ordered in the Settlement Approval Order 2021-132, the parties briefed the issue of reparations surcharge rates. On May 17, 2021, DIUC filed its Submission in Support of Request for Reparations with Exhibit A – Affidavit of Guastella and Exbibit B – Remediation and Reparation Schedule. (CITE) ORS and the POAs both filed their respective Briefs in Opposition to DIUC's Request for Reparations. (CITE and CITE) On July 2, 2021, DIUC filed its Reply Brief in Support of Request for Reparations. (CITE)

After receipt of DIUC's Submission in Support of Request for Reparations, on May 27, 2021, ORS filed a Motion to Strike the Affidavit of John F. Guastella. In the Motion ORS argued that the Settlement Agreement allowed the parties to "brief the matter [of reparations] to the Commission for its further determination in this case" but that DIUC should not be allowed to submit its Exhibit A, Affidavit of Guastella, and Exbibit B, Remediation and Reparation Schedule. (Cite) DIUC responded to the Motion and ORS filed a Reply. (CITE and CITE).

Via Order 2021-501, entered July 26, 2021, the Commission ruled that the Settlement Agreement between DIUC and the other parties permitted "a briefing schedule" and provided that the issue of reparations would "be decided on [the parties'] respective written submissions to the

Commission." Order 2021-501 at p. 2. The Commission rejected DIUC's position that a written brief could also include an affidavit. Id. Accordingly, the Commission ordered that paragraph 11-17 of the Affidavit of John Guastella should be stricken from the record of the case.[6]

Via Order 2021-581 entered August 25, 2021, the Commission granted the parties' request to submit proposed orders on the reparations issue. (Order 2021-581) On September 22, 2021, the parties each submitted proposed orders. (CITE and CITE and CITE). DIUC's Proposed Order can be summarized as follows:

> DIUC has a constitutional right to collect revenues sufficient to cover operating expenses and to allow DIUC to earn a reasonable return on investment.
>
> DIUC did not forfeit its rights when circumstances beyond its control extended this case over an expanse of six years.
>
> Because of the grossly excessive delays of this proceeding, DIUC did not collect revenues sufficient to cover operating expenses and to allow DIUC to earn a reasonable return.
>
> Therefore, under the unique facts of this case, reparations rate relief is in order.

(DIUC Proposed Order at 47)

On August 27, 2021, the Commission issued a Notice of Oral Arguments setting oral arguments regarding the reparations issue for Tuesday, November 30, 2021. (CITE) As scheduled, on November 30, 2021, the Commission heard oral argument from the parties on DIUC's request for reparations as addressed in paragraph 8 of the Settlement Agreement.

On January 27, 2022, the Commission entered Order 2022-79 captioned as "Order Denying Request of DIUC to Impose Reparation Surcharges on Customers." (CITE) The Order

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[6] Although ORS' original Motion to Strike sought removal of the entire Affidavit, subsequent to filing the motion, ORS revised its position to only seek an order striking paragraphs 11-17 of the Affidavit. See Order 2021-501 at p. 2.

denied the reparations relief sought by DIUC based upon the Commission's conclusions that can be summarized as:

1. Granting DIUC relief would constitute illegal retroactive ratemaking;

2. DIUC is not entitled to relief because it should have appealed the Commission Order 2021-132 Approving Settlement Agreement and Further Procedure – the very order by which the Commission approved DIUC's right to seek reparations and established a procedure for DIUC to seek reparations;

3. Even though the Commission entered Order 2021-132 approving DIUC's right to continue to seek reparations, three years prior in 2018 DIUC did not post a bond and attempt to collect its then requested rates pursuant to S.C. Code Ann. Section 58-5-240, therefore DIUC is barred from obtaining relief;

4. Even though the Commission entered Order 2021-132 approving DIUC's right to continue to seek reparations and even thought the Commission was aware DIUC sought reparations on constitutional grounds, DIUC should not have followed the approved briefing schedule but, instead, should have appealed Order 2021-132 Approving Settlement Agreement and Further Procedure in order to be able to present its grounds for reparations.

(See Order 2022-79, Conclusions of Law at pp. 33-34))

DIUC timely filed a Petition for Rehearing and/or Reconsideration of Order 2022-79. (CITE) ORS and the POA's filed their respective responses to the Petition. (CITE) and (CITE) On April 11, 2022, the Commission entered Order 2022-242 Denying Rehearing and/or Reconsideration of Order 2022-79. (CITE)

On April 14, 2022, DIUC initiated this Appeal by the filing of its Notice of Appeal. (CITE). The Office of the Clerk of this Court assigned the appeal Appellate Case No. 2022-000463. This is the third appeal within Commission Docket 2014-346-WS. Pursuant to the Settlement Agreement of the parties and approval of the Commission in Order 2021-132, Commission Docket 2014-346-WS remains open.

STANDARD OF REVIEW

South Carolina appellate courts employ a deferential standard of review when reviewing a decision of the Public Service Commission, but will affirm a Commission decision only when substantial evidence supports it. Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). After completing review this Court "may affirm the decision of the agency or remand the case for further proceedings." S.C. Code Ann. § 1-23-380. The Court may also reverse or modify the decision of the Commission "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380.

The party challenging a Commission order "bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." Duke Power Co. v. PSC of S.C., 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (citing Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998) and S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1999)).

"Substantial evidence is not a mere scintilla; rather, it is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the agency." Chisolm v. S.C.Dept. of DMV, 402 S.C. 593, 609, 741 S.E.2d 42, 51 (Ct. App. 2013) (citing Friends of Earth v. Pub. Serv. Comm'n of S.C., 387 S.C. 360, 366, 692 S.E.2d 910, 913 (2010)). "A decision is arbitrary if it is without a rational basis, is based alone on one's will and not upon

any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). "An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without evidentiary support." Smith v. S.C. Ret. System, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App.1999).

Additionally, in order for an appellate court "to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings," the Commission "must make findings which are sufficiently detailed." Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). Those findings of fact "must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. […] Implicit findings of fact are not sufficient." Able Communications, Inc. v. S.C. Pub. Serv. Comm'n, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986).

ARGUMENT

I. THE FINDINGS AND CONCLUSIONS OF PUBLIC SERVICE COMMISSION ORDER 2022-79 DENYING DIUC PERMISSION TO IMPLEMENT A REPARATIONS SURCHARGE WERE LEGALLY ERRONEOUS, ARBITRARY, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND PREJUDICED SUBSTANTIAL RIGHTS OF DIUC. THIS COURT SHOULD REVERSE THE ORDER.

The length of this rate proceeding, the costs DIUC has had to expend to pursue two appeals, and the income DIUC has lost while fighting to obtain a proper rate order cannot be wholly addressed by the prospective implementation of the 2021 Rates effective March 1, 2021 per the Settlement Agreement, even though those negotiated rates allow the maximum revenues withing the original notice provided by the Application. By statute, South Carolina rate cases are decided quickly so the underlying data is realistic and reliable.[7] It is essential to acknowledge that the revenue increase requested by DIUC in the 2015 Application were based upon a test year of 2014. That means the most recent rates via the Settlement Agreement are based upon cost data that is 8 years old. Much has happened to the economy in the 8 years since 2014. Accordingly, DIUC sought from the Commission, and now seeks from this Court, a ruling that DIUC is entitled to recoup the lost revenues that it should have been able to collect, as set forth in the Remediation/Reparation Schedule filed as Exhibit A to DIUC's Submission in Support of Request for Reparations (CITE).

The Commission denied DIUC the right to implement a reparations surcharge rate based upon legally erroneous conclusions that the requested rate relief is somehow not procedurally proper or otherwise not authorized stating, "We hold that granting the Company's request

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[7] See Note 5, supra, citing S.C. Code 58-5-240(D) (Commission must rule on a rate application "within six months after the date the schedule is filed.").

constitutes illegal retroactive ratemaking, which makes the proposed surcharges unjust and unreasonable. In addition, the request suffers from other infirmities which are discussed below." (Order 2022-79 at 6)

The following examination of the Commission's ruling demonstrates the multiple errors requiring reversal by this Court.

A. The relief sought by DIUC is not retroactive ratemaking.

The issue DIUC presented to the Commission was DIUC's request for reparations surcharge rates made necessary by the unique circumstances of this case. Given the positions ORS has taken, the impact of previous Commission Orders, the rulings of this Court to date in DIUC I and DIUC II, and the length of the proceeding (which is still ongoing), the requested corrective relief is necessary to prevent DIUC from being further punished for circumstances it did nothing to create. That is not a request for retroactive ratemaking.

Order 2022-79 cites Porter v. SCPSC, 328 S.C. 222, 493 S.E.2d 92 (1997), for the primary principle underlying the prohibition on retroactive ratemaking which is that the avoidance of retroactive ratemaking ensures "customers who use service provided by a utility should pay for its production rather than requiring future ratepayers to pay for past use." (Order 2022-79 at 7) However, that is not a basis for rejecting the relief requested, because the reparations DIUC seeks will not impose on any customer charges for the usage of water or sewer services by any other customer. As explained by DIUC's written filings and at oral argument on this matter, no customer will pay for another customer's usage or rates; to ensure this, since this rate proceeding began DIUC has kept records of past payments and refunds to each customer so that precise surcharge amounts due for each account can be calculated then billed. (See Prefiled Second Rehearing Testimony of John F. Guastella with Exhibits at Exhibit JFG-RR3 stating ("As

required, DIUC has kept records of payments by each customer so that precise amounts would be charged to each customer."))

DIUC's specific reparations requests even by their plain terms demonstrate there are a reconciliation within this proceeding (which remains open by agreement of the parties and order of the Commission, as set forth in Order 2021-132. Because the Order on Rehearing, Order 2018-68, only allowed an 88.5% increase, DIUC gave certain credits/refunds to specific customers in their January 1, 2018, billing. DIUC now seeks to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective. (Order 2021-132, Settlement Agreement at pp. 2-4) Assuming the surcharges become effective on January 1, 2023, the refund amount sought is $232,542, plus interest, bringing the total to $362,912 (see DIUC's proposed order on reparations; also see DIUC Reparations Submission) The revenue shortfall sought due to inadequate rates in effect from October 1, 2017 until March 1, 2021, for DIUC's combined water and wastewater billings for that period is $668,641, plus interest, bringing the total to 965,951. (Id.)

That means the actual customers that received the benefit of the 2018 refunds will be notified of the change. Only the customers who actually received water and sewer services from October 1, 2017, until March 1, 2021, at the lower rates will be billed for the difference. Each customer's billing will be calculated based upon the services that specific customer consumed, thereby remedying each customer's prior windfall. (See Prefiled Second Rehearing Testimony of John F. Guastella with Exhibits at Exhibit JFG-RR3)

The correction requested by DIUC via the surcharges would not operate as a retroactive rate. The customers who consumed the services will simply address the shortfall for their lower payment for services.

B. DIUC I and DIUC II rendered Order 2015-846 and Order 2018-68 invalid and unlawful. Subsequent requests on remand are not improper collateral attacks on the Orders.

Order 2022-79 also misapplied the concept of retroactivity in rates when it concluded DIUC's request seeks to improperly adjust "lawfully approved" rates retroactively. (Order at 7) The Commission determined:

> The Initially Approved Rates [of Order 2015-846, which was reversed by this Court] and the Subsequently Approved Rates [of Order 2018-68 on Rehearing, which was reversed by this Court] were "lawfully established" rates and "final rates" and cannot be adjusted retroactively. The South Carolina Supreme Court has spoken specifically about circumstances similar to the present case. In *SCE&G v. PSC,* 275 S.C. 487,272 S.E. 2d 793 (1980), the Court noted that when a rate is lawful, the Commission has no authority to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility. This is precisely the relief and result sought by DIUC in the present case, which is prohibited.

(Order 2022-79 at 9) The problem with the conclusion is that the "lawful rates" at issue in SCE&G v. PSC, 275 S.C. 487,272 S.E. 2d 793 (1980), were from orders very different than those here. In DIUC I and DIUC II this Court reversed and remanded the underlying orders of the Commission; the Commission orders asserted as a bar to DIUC were rejected and reversed by this Court. When the underlying rate orders are (as they are here) found to be unlawful, they cannot be used to bar proper and equitable result. Addressing SCE&G and the very distinction at issue here, in Hamm v. Cent. States Health & Life Co. of Omaha this Court summarized the parties' assertions then explained when Commission rate orders are "unlawful" then those orders do not bar additional action to remedy circumstances created by the unlawful or improper orders:

> Central States advances SCE&G to support its position stating that "[t]he Commission simply does not have any implied power to award refunds in the nature

> of reparations for past rates or charges; such powers must be expressly conferred by statute." SCE&G, 275 S.C. 487 at 490, 272 S.E.2d 793 at 795 (1980). SCE&G is easily distinguished from the present case. In SCE&G, we held that the PSC had no authority to direct refunds pursuant to past-approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in SCE&G, would have permitted them to engage in retroactive ratemaking. **Under the present facts, the rates approved by the Commissioner were found to be *unlawful.* As such, a refund in this instance would not be considered retroactive ratemaking.**

Hamm v. Cent. States Health & Life Co. of Omaha, 299 S.C. 500, 504, 386 S.E.2d 250, 253 (1989) (emphasis added).

The Commission's refusal to acknowledge the actual, stated impact of this Court's rulings in both previous appeals, DIUC I and DIUC II is a clear error of law. The Commission found it could not offer any relief to DIUC because it was somehow bound by its own previous "lawful" orders, despite the reversal of both orders. The Order states:

> Further, neither *DIUC I* nor *DIUC II* made any determination that the Initially Approved Rates were unlawful or not lawfully established. Nor did either opinion make any determination that directed the Commission to implement the Proposed Rates (or the Current Rates). Neither opinion directed the Commission to calculate or implement any particular rates. **The Supreme Court opinions did not rule on the merits of the case, but called for *de novo* hearings before the Commission.**

(Order at 10 (emphasis added) That is simply not true.

In DIUC I this Court rejected the first rate order, Commission Order 2015-846 because it improperly adopted every single adjustment from a "Settlement Agreement" that did not even include DIUC and merely "indicated to the Commission that were it to adopt ORS's recommended adjustments, the POAs would not appeal. […]" DIUC I, 420 S.C. 305, 315, 803 S.E.2d 280, 286 (2017) ("DIUC I"). This Court did address the merits of the underlying Commission Order when it ruled "the Settlement Agreement contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission." Id. Then, continuing its critique

of the underlying Commission Order, this Court provided an entire discussion in its opinion under the heading "Commission Findings on the Merits" and also stated

> … the Settlement Agreement contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission. Therefore, we hold the Commission erred in approving and adopting the Settlement Agreement and DIUC is entitled to a new hearing in which the parties may present any additional evidence. While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal.

Id. Clearly, the Commission erred as a matter of law in concluding that this Court did not reject Order 2015-845 in DIUC I; the Order specifically stated, among other things, "we are reversing and remanding for a new hearing as to all issues." If all issues are reversed by this Court, then surely the underlying Order containing all those issues cannot be considered still binding and "lawful" so as to preclude the changes in that Order pursuant to this Court's ruling such changes are necessary.

Relying on DIUC II to preclude relief for DIUC was also clearly in error. One cannot read this Court's decision in DIUC II and reasonably conclude this Court found the rates of Order 2018-68 were lawful and properly established. (See Order 2022-79 at 10 (stating "neither DIUC I nor DIUC II made any determination that the Initially Approved Rates were unlawful or not lawfully established."). There is no support for the Commission's conclusion that because neither DIUC I nor DIUC II "directed the Commission to implement [specific rates]" and "Neither opinion directed the Commission to calculate or implement any particular rates," therefore this Court did not reject the underlying rate orders as unlawful. In fact, in DIUC II, the Court concluded the Commission "employed a retaliatory standard of scrutiny" to reject $542,000 of DIUC's rate case expenses. DIUC II, 427 S.C. 458, 462-463, 832 S.E.2d 572, 574 (2019). This Court surely did not intend its decision in DIUC II to mean that the underlying Order 2018-68,

tainted by retaliatory and unprofessional conduct, should be considered lawful. This Court plainly did not intend that tainted order to be the basis for refusing any relief to DIUC on the grounds that those reversed orders are lawful, proper, and cannot be disturbed without implicating the prohibition on retroactive ratemaking.

Because Order 2022-79 denied any relief based on these legal errors, the Order should be reversed.

Order 2022-79 also erroneously based its denial of DIUC's request for reparations relief upon the legally incorrect and arbitrary concept that Commission Docket 2014-346 is not still open and pending, despite the fact that Commission Order 2021-132 Approving Settlement Agreement and Further Procedure states the contrary. (See Order 2022-132 (stating "The Parties agree that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary."))

The Commission also erred in ruling that DIUC was somehow required to appeal the Order Approving Settlement Agreement. In fact, In Order 2022-79, the Commission concludes that Order 2021-132 Approving Settlement was not appealed so even though DIUC and the parties agreed to further proceedings on the requested reparations surcharge rates, DIUC should have appealed its own settlement agreement. (Order 2022-79 at 6 and 7)

Order 2022-79 specifically incorporated and approved the 2021 Settlement Agreement that provided:

> the Parties can brief the matter [of DIUC's request for reparations] to the Commission for its further determination in this case.
>
> [* * *]
>
> The Parties agree that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final

> order(s) on remand, if necessary. The Parties reserve their right to appeal the Commission's decision regarding this issue.
>
> [* * *]
>
> After Commission approval of this Settlement Agreement and the issuance of an Order permitting implementation of the 2021 Rates, the Parties shall proceed to present their respective positions to the Commission regarding the DIUC request for reparations.

(Order 2021-132 at 4-9) Then, pursuant to the briefing procedure regarding the outstanding issue of reparations, as ordered and approved in the Settlement Approval Order 2021-132, the parties briefed the issue of reparations. If the parties negotiated to preserve the reparations issue for briefing and potential appeal and then the Commission approved the negotiated procedure for briefing and any potential appeal by incorporating the same into Order 2021-132, it can hardly be said to be a "final order" as to the issue of reparations surcharge rates. The plain language of the Order leaves the issue open and the Docket open.

The lack of logic and legal error in the Commission's reasoning and its conclusions is further laid bare by Order 2022-79's subsequent conclusion that, "The Commission order approving the new rates and charges [ie, Order 2021-132 Approving Settlement Agreement] was not appealed, therefore, the rates are lawful, and implementing new rates retroactively would constitute illegal retroactive ratemaking." (Order at 10) In this sort of "gotcha" punchline, the Commission has actually ruled that DIUC should have appealed the order whereby the Commission approved DIUC's request to seek reparations surcharge rates so that DIUC would be entitled to seek reparations as approved by the Order. In the Settlement Agreement the parties agreed "that this proceeding, Docket No. 2014-346-WS, will remain open until the issue [of reparations] is fully adjudicated, including any appeals and final order(s) on remand, if necessary. The Parties reserve their right to appeal the Commission's decision regarding this issue." (Settlement Agreement at 5) Despite having approved the Settlement Agreement, the Commission

later rules the Order Approving Settlement Agreement was final and did not really keep the proceeding open or allow the briefing or reservations of positions or potential appeals, even though the Order specifically provided for all these things.

It is also difficult to imagine that the Commission approved the Settlement Agreement and its negotiated reparations briefing procedure then allowed an entire year's worth of expense, legal briefing, proposed order, and multiple hearings regarding reparations when the Commission never really intended to grant the relief because DIUC did not appeal its Settlement Order. Of course, if Order 2021-132 did preclude later reparations relief then the Commission erred in approving it or erred in rejecting the procedure. Even the name of the Order, "Order Approving Settlement Agreement **and Further Procedure**" renders the Commission error unsupportable and arbitrary. (See generally Order 2022-79, emphasis added) The Order should be reversed.

C. This Court should specifically rule that making a prevailing party whole via reparations surcharge rates following a successful appeal is not retroactive ratemaking.

DIUC asserts that making a prevailing party whole following a successful appeal is not retroactive ratemaking because, among other reasons, the underlying matter remains open and pending; rates having been appealed and rejected by an appellate court are not final. (See Reparations Submission at 21-23 and DIUC Mtn Reconsider at 13-18) Although South Carolina courts have not yet addressed this specific issue, other courts have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking. For example, in R.R. Comm'n of Texas v. High Plains Nat. Gas Co., 628 S.W.2d 753, 754 (Tex. 1981), the Supreme Court of Texas found that "allowing the utility to recover the incremental expenses lost as a result of the improperly mandated ninety percent PGA clause is not retroactive rate relief but restitution of a lost operating cost" that the utility would have been recovering but for the erroneous order reversed on appeal.

The Supreme Court of North Carolina has also ruled in support of refunds after an appeal (this time for a ratepayer, though the same reasoning applies here). The Court reasoned that ruling against refunds would deny adequate relief appellants who appeal from erroneous orders of the Commission. See State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina, 312 N.C. 59, 68, 320 S.E.2d 679, 686 (1984). Addressing the issue of retroactive ratemaking, the North Carolina Supreme Court focused on the distinction that there can be no retroactive ratemaking until a rate is final. The Court explained, "If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been 'lawfully established' until the appellate courts have made a final ruling on the matter." Id. at 67, 685. Therefore, a restitution or reparations payment like the one sought here by DIUC cannot by definition be retroactive ratemaking because the rates are not finally established until the appellate process is complete. It should also be noted that ORS and the Intervenors have both agreed "that this proceeding, Docket No. 20l4-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand, if necessary." Order 2021-132, Order Approving Settlement Agreement and Further Procedure, at pp. 4-6 with Settlement Agreement.

The Supreme Court of New Hampshire has also ruled that the implementation of new rates following appeal does not involve a retroactive application of the law or retroactive ratemaking. In Appeal of Granite State Elec. Co., 120 N.H. 536, 539, 421 A.2d 121, 122–23 (1980), the Court held that "the substitution of new rates in accordance with this court's order for those required by the PUC's earlier order does not involve a retroactive application of the law. Until the rate had become final, the rate established by the PUC had not become tantamount to a statute which could not be amended retrospectively." Likewise, here, there has yet to be a *final* rate such that the

concept of retroactive ratemaking would be implicated. Notably, the Court also ruled that the concepts of restitution and unjust enrichment support refunds when a rate decision is altered on appeal:

> In this context, the terms "restitution" and "unjust enrichment" are modern designations for the older doctrine of quasi-contracts, and the action, for "unjust enrichment," therefore, lies in a promise implied by law, that one will restore to the person entitled thereto that which in equity and good conscience belongs to him. A refund order is consistent with general principles of restitution requiring the return of property after a judicial determination that it was improperly acquired.

Id. at 539-40, 123 (citing 17 C.J.S. Contracts s 6 (1963); Bloomgarden v. Coyer, 479 F.2d 201, 211 (D.C.Cir.1973); and Cecio Bros., Inc. v. Town of Greenwich, 156 Conn. 561, 244 A.2d 404 (1968). Again, as with the previously cited cases, further and varied support exists for the requested relief, which is not, as ORS asserts, improper retroactive ratemaking.

The conclusion that DIUC's requested relief does not implicate retroactive ratemaking is further supported by this Court's ruling in DIUC I wherein the Court announced:

> Furthermore, we take this opportunity to overturn Parker v. South Carolina Public Service Commission, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

DIUC I, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017). As DIUC argued to the Commission, this Court requires the Commission on remand to apply a procedure that is based on the premise that the rate order appealed is not final; additional evidence can be provided as the parties are not bound by the previous record. It is entirely consistent with South Carolina law that this Court would –and should-- specifically rule that making a prevailing party whole following a successful

appeal is not retroactive ratemaking. Such a rule also ensures compliance with constitutional requirements.

D. The Commission committed legal error and made an arbitrary determination that the requested reparations surcharge rates are not constitutionally necessary.

The Commission refused to consider the constitutional impacts of the loss DIUC has sustained during this six-year proceeding. Combined, the refund of $232,542 for the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal and the revenue shortfall sought due to inadequate rates in effect from October 1, 2017, until March 1, 2021 for DIUC's combined water and wastewater billings of $668,641 total together almost $900,000 before any interest is applied. Notably, DIUC's total annual revenue allowed under is newest rates is $2,267,714. The amount at issue is significant – nearly half of one year's required revenue per the negotiated Settlement Agreement.

The reason the Commission should have considered these amounts and their constitutional impact is grounded in the well-established principle that a utility like DIUC has a constitutional right to collect rates that meet minimum constitutional standards of a reasonable return on investment. See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 107 at n.8, 708 S.E.2d 755, 761 (2011) (citing Bluefield Waterworks & Improvement Co. v. Public Service Comm'n of W. Va., 262 U.S. 679, 690, 43 S. Ct. 675 (1923) (explaining that where the rates allowed for a public utility company "are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service…their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment."). Complying with this constitutional due process requirement is mandatory and the reasoning is

sound – when a utility invests in equipment and real property for use in providing service, the utility is allowed to charge rates sufficient to allow it to operate and maintain that plant in service. "The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the value of the property used at the time that it is being used for the public service, and rates not sufficient to yield that return are confiscatory." Bd. of Pub. Util. Comm'rs v. New York Tel. Co., 271 U.S. 23, 31, 46 S. Ct. 363, 366 (1926) (citing Willcox v. Consolidated Gas Co., 212 U. S. 19, 29 S. Ct. 192 (1909) and Bluefield Waterworks, 262 U. S. 679, 43 S. Ct. 675. Rates are confiscatory if they do not address the cost of property of the utility and all sums required to meet operating expenses. Bluefield Waterworks, 262 U.S. at 691, 43 S. Ct. at 678.

Applying the principle here, DIUC's insufficient rates since Order 2015-846's increase of only 43%, which was mitigated but not corrected by Order 2018-68's 88.5% increase, have not provided DIUC its constitutionally guaranteed just compensation for its property used and its operating expenses, given the duration of this rate proceeding. Again, "what the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience." Bluefield, 262 U.S. at 690, 43 S. Ct. at 678; see also Duquesne Light Co. v. Barasch, 488 U.S. 299, 308, 109 S. Ct. 609, 616 (1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.").

In the years following Bluefield, up until the Supreme Court's 1944 decision in Federal Power Com'n. v. Hope Nat. Gas Co., 320 U.S. 591, 64 S. Ct. 281 (1944), "the courts engaged in a detailed review of each of the three major components used in determining a utility's maximum rates: (1) its rate base; (2) the allowed rate of return; and (3) operating expenses" to determine if rates were confiscatory. See James M. Van Nostrand, Constitutional Limitations on the Ability

of States to Rehabilitate Their Failed Electric Utility Restructuring Plans, 31 Seattle U. L. Rev. 593, 596 (2008). In Hope, however, the Supreme Court articulated a much more flexible approach aimed at evaluating the actual impact of rates upon a utility. The Court explained that "when the Commission's order is challenged in the courts, the question is whether that order viewed in its entirety" meets constitutional muster. Hope Nat. Gas Co., 320 U.S. at 602, 64 S. Ct. at 287–88 (internal quotations omitted).

While the Court also acknowledged that commissions will make adjustments to an application for rate relief, those adjustments *must* be "pragmatic adjustments." Id. Therefore, when reviewing a rate order's impact by looking at the order in its entirety to determine whether the rate order is "just and reasonable," the focus of a reviewing court is to be upon "the result reached not the method employed" to achieve the result. Hope Nat. Gas Co., 320 U.S. at 602, 64 S. Ct. at 287 (holding "the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling"); see also Duquesne Light Co., 488 U.S. at 310, 109 S. Ct. at 617 ("Today we reaffirm these teachings of Hope Natural Gas: "[I]t is not theory but the impact of the rate order which counts.").

This Court has also endorsed a pragmatic and practical approach to reviewing a rate's overall impact upon a utility. For example, in S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978) this Court quoted Hope Nat. Gas Co.:

> From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on debt and dividends on the stock…. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978).

In its Order Denying DIUC's Request for Reparations, the Commission committed an error of law when it refused to analyze the impact of this extended case upon DIUC.[8] Instead, the Order merely pivots by addressing only the constitutional requirements for rate of return on plant items. (See Order 2022-79 at 28-29) The Order then concludes the constitutional requirements need not be considered because DIUC agreed to delay seeking recovery related to the disputed $699,361 of plant items until its next rate case. The interesting thing to note about the Commission's conclusion is that DIUC essentially had no choice but to delay an answer on its plant items because rate case expenses had so increased that there would not be room to include the proper revenue based on those plant items and to stay within the 108.9% increase noticed to the customers. (Id.) The Commission erroneously failed to address DIUC's actual claim. Accordingly, Commission Order 2022-79 should be reversed.

E. The record establishes that DIUC did not have financial resources to obtain a bond under S.C. Code § 58-5-240 to collect its proposed rates pending the second appeal. Inability to obtain such a bond does not foreclose DIUC from receiving the reparations sought.

Commission Order 2022-79 erroneously concluded that despite the significant evidence in the record establishing DIUC did not have financial resources to obtain a bond under S.C. Code § 58-5-240, somehow DIUC should have accomplished the impossible and collected its proposed rates pending the second appeal. Contrary to Order 2022-79, inability to obtain such a bond due to the financial impact of appealing a drastically insufficient rate order does not foreclose DIUC from receiving the reparations surcharge rates sought.

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[8] If a utility regulatory commission fails to grant rate relief in an amount adequate to provide a utility with an opportunity to earn a reasonable return, or denies recovery on a specific utility investment [then the utility's claim is a constitutional claim based on the Takings Clause].") See, e.g., Van Nostrand, 31 Seattle U. L. Rev. at 595.

In error, the Commission held in Order 2022-79 that the General Assembly passed S.C. Code § 58-5-240 to provide utilities a "substantive right and a remedy for infringement of that right." Order 2022-79. In so ruling, the Commission endorsed the ORS assertion that Section 58-5-240 is the only method by which DIUC can be protected from the damaging impact of an initial rate order so low that it does not provide income sufficient to support a bond; therefore, according to ORS and the Commission, the utility has no recourse even when such an order is reversed and remanded. For example, in this case the initial rate order allowed a 43% increase and then after remand that amount was more than doubled to 88%. The initial order nearly bankrupted DIUC as rate case expenses ballooned; DIUC had no money --through no fault of its own-- to pay for an appeal bond. Surely, punishing a utility under these facts was not the intent of the statute.

Even without this circular reasoning far beyond any reasonable legislative intent, Order 2022-79 should also be reversed for its legal conclusion that S.C. Code § 58-5-240 is the "sole statutory remedy" available to DIUC in this instance. (Order 2022-79 at 20)

"When interpreting a statute or regulation, courts look to "the plain, ordinary meaning of the words, … without resort to subtle or forced construction to limit or expand [its] operation." Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control, 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App. 2002). "The true guide to statutory construction is not the phraseology of an isolated section of provision, but the language of the statute as a whole considered in light of the manifest purpose." Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005).

There is nothing in the plain language of Section 58-5-240 that suggests it is the only way a utility may be protected when it faces appeal of a rate order. Depending on the circumstances,

the statute could function to protect both utilities and ratepayers. The statute does not say, nor does a practical reading reveal, any legislative intent for concluding that if a utility does not (or cannot) avail itself of a bond then the utility is barred from seeking some other form of relief, particularly in a situation like this one where the utility has universally prevailed on appeal but exhausted its available funds doing so.

Additionally, statutes must be construed to give practical meaning to the legislature's intent and to avoid an absurd result. Kiriakides v. United Artists Communications, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). This Court has also specifically explained this essential principle of statutory interpretation and the necessary avoidance of an absurd result:

> However plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intent…. If possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.

Stackhouse v. Rowland, 86 S.C. 419, 68 S.E. 561 (1910). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). As herein stated in multiple ways, the result endorsed by ORS and the Commission creates, at least in this application, an absurd result that is inconsistent with demonstrated legislative intent and public policy ensuring fairness for and protection of South Carolina business like DIUC.

The Commission's reliance on S.C. Code § 58-5-240 to bar any relief to DIUC also erroneously assumes that the legislature intended this bond procedure to be the only and the exclusive means by which a utility might be protected from a wholly insufficient and ultimately

reversed rate order. S.C. Code § 58-5-240(D) states that if a utility is pursuing an appeal then "the utility may put the rates requested in its schedule into effect under bond only during the appeal." The statute provides a utility may use a bond; it does not say anywhere that this is the exclusive remedy available. Section 58-5-240 does not state or suggest that it limits, or that the legislature intended it to limit, any other means that might help make whole a utility after it prevails on appeal. Further, DIUC's reading of the statute is consistent with the position herein asserted that because the underlying docket remains open until conclusion of all appeals, DIUC is entitled to the requested reparations rate via surcharge because it is fundamentally fair and because it does not implicate any issues of improper retroactivity.

The Commission's conclusions as to S.C. Code § 58-5-240 are contrary to legal principles of statutory interpretation, and they are arbitrary. Accordingly, Section 58-5-240 does not prohibit the relief sought by DIUC in reparations. The Order should be reversed.

The Commission also concluded that DIUC is barred from relying on its inability to afford a bond under S.C. § 58-5-240 because "This Commission has never made a finding of fact in this proceeding that DIUC could not afford a bond." (Order 2022-79 at 23) To the contrary, the Commission specifically recognized that DIUC needed the Commission to decide the remand before the end of 2017 because DIUC submitted the sworn affidavit of John Guastella stating "DIUC is not able to renew its existing bonds or obtain additional bonds for rates charged after December 31, 2017. This fact is demonstrated DIUC's recent efforts and my experience in attempting to secure previous bonds." Commission Hearing Officer Butler then found:

> The Company has now filed the affidavit of John F. Guastella and other materials, which support the difficulties of continuing its appeal bond after the end of 2017, and various financial consequences associated with that effort.
>
> … this Standing Hearing Officer believes that any ruling must be on the side of caution, and that all discovery, pre-filing of testimony, and the hearing should be

> accomplished as soon as possible, so that the Commission may have the opportunity to rule on this remanded matter prior to the end of 2017.

(Order 2017-61-H) DIUC has, in fact, established in this record that DIUC could not obtain another bond. DIUC did not merely "assert" or "claim" that it was impossible to obtain another bond and that it had no choice but to implement whatever rate increase the Commission would allow to be billed on January 1, 2018. DIUC proved it with Mr. Guastella's affidavit and documented evidence, none of which has ever been refuted. Also, as noted in Order 2017-61-H, counsel for the POAs argued "vigorously" against the need for a decision before December 31, 2017; however, "no countervailing affidavits or other evidence" was ever submitted in opposition to DIUC.

In any other case, it is very difficult to anticipate how or why a utility would ever seek an actual finding that it could not afford a bond pursuant S.C. Code § 58-5-240; likewise, it is hard to imagine why the Commission would make such a finding – unless it is to prove that some relief other than that of S.C. Code 58-5-240 is proper. The Commission conclusion is unsupported and circular. If, in fact, as the Commission ruled, there is no right to protection outside of Section 58-5-240 for a utility that cannot afford a bond under Section § 58-5-240, then what use would any utility have for a Commission finding that it could not afford the purported sole protection of a Section 58-5-240 bond?

To be clear – the Commission has agreed with ORS and ruled that ORS can oppose adequate rates for a utility for extended periods of time, nearly six years into DIUC's case, thereby forcing the utility to expend its resources on multiple appeals but when the Supreme Court actually rejects every single position asserted by ORS and the case returns on its second remand, the utility must absorb the loss from its inadequate rates unless the utility was somehow able to pay for appeal bonds pursuant to S.C. Code § 58-5-240(D). Or stated differently, Commission

Order 2022-79 ruled that because ORS and the Intervenors were able to secure an initial rate order via a rejected "Settlement Agreement" that was so oppressive DIUC was forced to spend its resources on appeal costs to reverse it, ORS and the Intervenors may receive the benefit of not having to pay for proper rates during the remaining four plus years it has taken DIUC to fight through a rehearing, a second appeal, and then remand which ORS and the POAs were able to extend through request for additional discovery under standards already rejected by this Court.

CONCLUSION

This Court should reverse or modify Public Service Commission Order 2022-79, because the Order's findings and conclusions were legally erroneous, arbitrary, unsupported by substantial evidence, and prejudiced substantial rights of DIUC. Contrary to the findings and conclusions of Order 2022-79:

1. DIUC may implement a surcharge to collect the 108.9% increase it should have been allowed beginning on October 1, 2017, through March 1, 2021. A surcharge may be added to customer bills to recover the shortfall in revenues and return on investment for that period of time, with interest at the allowed 9.31% equity return.

2. Because the 108.9% increase was not allowed to begin on October 1, 2017, DIUC gave certain credits/refunds to customers in their January 1, 2018, billing. DIUC may implement a one-time surcharge for reimbursement of the credit/refund made to the customers with the January 1, 2018, billing, with interest at the allowed 9.31% equity return.

3. Pursuant to the terms of the Settlement Agreement, DIUC shall submit the calculation of the amount of the surcharges to individual customers for review by ORS. Within 14 days of receipt of the same. ORS shall notify the Commission if there is a dispute as to the amount of the surcharges or their implementation and specify the grounds for the dispute.

The Appellant respectfully requests this Court remand the matter to the Public Service Commission for a third time with instructions to enter an Order granting the relief as set forth in the DIUC Submission in Support of Reparations and in the DIUC Reply Brief in Support of

Request for Reparations, filed with the Commission on May 17, 2021, and July 2, 2021, respectively.

Respectfully submitted,

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