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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

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 RESPONDENTS HAIG POINT CLUB AND COMMUNITY ASSOCIATION, INC., MELROSE PROPERTY OWNER'S ASSOCIATION, INC., AND BLOODY POINT PROPERTY OWNER'S ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

RESTATEMENT OF ISSUES ON APPEAL

1. Whether the Commission's decision to deny Appellant's Request for Reparations was error.

STATEMENT OF THE CASE

1. On June 9, 2015, DIUC filed an application seeking approval of a new schedule of rates and charges for water and sewer service provided to DIUC's customers within its authorized service area ("Proposed Rates").

2. On December 8, 2015, the Commission issued Order No. 2015-846 ruling on DIUC's Application. Commission Order 2015-846 approved rates ("Initially Approved Rates") allowing DIUC to earn additional annual revenue of $462,798.

3. DIUC filed a Petition for Reconsideration and/or Rehearing of Order No. 2015846. On February 25, 2016, the Commission issued Order No. 2016-50 denying DIUC's Petition for Reconsideration and/or Rehearing.

4. On March 22, 2016, DIUC filed and served its Notice of Appeal seeking review of Commission Orders 2015-846 and 2016-50 the ("Orders").

6. On January 20, 2016, DIUC filed a Petition for Bond Approval in which it notified the Commission that, under S.C. Code Ann. § 58-5-240(D), DIUC intended to put its Proposed Rates into effect under surety bond during the pendency of an appeal.

7. On March 1, 2016, the Commission issued Order No. 2016-156 approving the surety bond proposed by DIUC, effective July 1, 2016, for a period of one year. On June 30, 2017, the Commission issued Order No. 2017-402(A) extending DIUC's surety bond for an additional six months.

8. On July 1, 2016, and pursuant to S.C. Code Ann. § 58-5-240(D), the Company began collecting its Proposed Rates under bond.

9. On July 26, 2017, this Court reversed the Orders, and remanded the case to the Commission for a *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) ("*DIUC I*").

10. On December 6th and 7th of 2017, the Commission conducted a *de novo* Rehearing of DIUC's Application.

11. On January 31, 2018, and following the Rehearing, the Commission issued Order No. 2018-68. On February 20, 2018, DIUC filed a Petition for Reconsideration and/or Rehearing of Order No. 2018-68. On May 16, 2018, the

Commission issued Order No. 2018-346 denying DIUC's Petition for Reconsideration and/or Rehearing.

12. On June 13, 2018, DIUC filed and served its Notice of Appeal seeking review of Order No. 2018-68 and Order No. 2018-346 (the "Orders on Rehearing").

13. The Orders on Rehearing approved rates ("Subsequently Approved Rates") allowing DIUC to earn additional annual revenue of $950,166. Per S.C. Code Ann. § 58-5-240(D), Order No. 2018-68 required DIUC to refund to its customers the difference between the revenue collected by DIUC under the Proposed Rates and the revenue approved by the Orders on Rehearing resulting in the Subsequently Approved Rates.

13. Following the Rehearing, DIUC did not exercise its rights under S.C. Code Ann. § 58-5-240(D) to request that the Commission allow its Proposed Rates to go into effect under "bond or other arrangements" during its appeal of the Orders on Rehearing, but instead implemented the Subsequently Approved Rates effective January 1, 2018.

14. On July 24, 2019, this Court reversed the Orders on Rehearing, and again remanded the case to the Commission for another *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019) ("*DIUC II*").

15. On February 25, 2021, the Commission held a virtual hearing, during which the parties submitted a Settlement Agreement, and the Commission made certain Settlement Testimony a part of the record.

16. On March 30, 2021, the Commission issued Order No. 2021-132 ("Order on Second Rehearing") adopting the Settlement Agreement executed by the Parties and approving rates effective March 1, 2021 ("Current Rates").

17. Subsequent to the issuance of the Order on Second Hearing, and as referenced in the Settlement Agreement (attached as Exhibit 1 to the Order on Second Rehearing), and the Order on Second Rehearing, DIUC made its Request for Reparations ("Request") to the Commission:

> 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.

Order on Second Rehearing, Exhibit 1, paragraph 8.

18. As set out in the Order on Second Rehearing, the parties proceeded to "brief the matter [the Request] to the Commission for its determination in this case." Order on Second Rehearing, p. 5.

19. On May 17, 2021, DIUC filed its "Submission in Support of Request for Reparations" ("Appellant's Commission Brief").

20. On June 17, 2021, ORS and the POAs filed their Briefs in opposition to DIUC's Request.

21. On July 2, 2021, DIUC filed a Reply ("Appellant's Commission Reply Brief").

22. On July 26, 2021, the Commission issued Order No. 2021-501 striking certain portions of the Affidavit of John Guastella filed by DIUC along with its Submission.

23. On August 25, 2021, the Commission issued Order No. 2021-581 directing the parties to submit proposed orders and directing the Commission Staff to set the matter for oral argument.

24. On September 22, 2021, DIUC, ORS, and the POAs submitted Proposed Orders.

25. On November 30, 2021, the Commission held oral argument.

26. On January 27, 2022, the Commission issued its Order Denying Request of Daufuskie Island Utility Company, Incorporated to Impose Reparations Surcharges on Customers ("Order Denying Request"), Order No. 2022-79.

27. On February 15, 2022, DIUC filed a Petition for Reconsideration of the Order Denying Request.

28. On April 11, 2022, the Commission issued Order No. 2022-242 denying DIUC's Petition for Reconsideration.

29. On April 13, 2022, DIUC filed a Notice of Appeal with this Court.

STATEMENT OF FACTS

1. DIUC customers never paid, and DIUC never collected, the Initially Approved Rates set by the Orders.

2. On July 1, 2016, and pursuant to S.C. Code Ann. § 58-5-240(D), the Company began collecting its Proposed Rates under bond.

3. Following the Orders on Rehearing, DIUC refunded customers the difference between the Proposed Rates and the Subsequently Approved Rates, plus interest.

4. From April 1, 2016 until March 21, 2021, customers paid the Subsequently Approved rates approved in the Orders on Rehearing. Likewise, DIUC collected the Subsequently Approved Rates from July 1, 2016 until March 21, 2021. DIUC bills and collects for services in arrears, so it collected for service provided in the second quarter of 2016 (commencing on April 1, 2016) beginning on July 1, 2016.

5. On June 9, 2016, twelve months after filing its original Application, DIUC was permitted to file another rate case pursuant to S.C. Code Ann. § 58-9-240(F): ("After the date the schedule is filed with the Commission and provided to the Office of Regulatory Staff, no further rate change request under this section may be filed until 12 months have elapsed from the date of the filing of the schedule . . . ."

6. Despite having the clear statutory authority to file a new rate case at any point forward from June 9, 2016, DIUC did not do so until June 24, 2022, when it filed an application with the Commission seeking a rate increase.

STANDARD OF REVIEW

As set out in S.C. Code Ann. § 1-23-380(a)(5):

> [t]he court may not substitute its judgment for the judgment of the agency [the Commission] as to the weight of the evidence on questions on fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision 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.

ARGUMENTS

There is one issue considered and ruled upon by the Commission in the Order Denying Request that is dispositive and properly before this Court *for review*: "whether DIUC may charge its customers reparations in the form of surcharges resulting from what DIUC described as "confiscatory" rates." (Order Denying Request, p. 2) This is not an appeal of a rate case decision. All of the other 'issues" DIUC argues in its Brief were not addressed by the Commission in any record below, and are therefore not properly before this Court. As a result, this Court would be addressing those issues in the first instance, and not as an appellate court.

Moreover, the Request is an improper collateral attack on Commission Orders (the Orders, the Orders on Rehearing, and the Order on Second Rehearing) that are final and contain lawful, final rates. Similarly, DIUC's Request is an attempt to avoid the specific statutory provision- S.C. Code Ann. § 58-5-290 – that allows the Commission to correct "improper" rates. DIUC has not and cannot address S.C. Code Ann. § 58-5-290, because that statute empowers the Commission only to adjust "improper rates" *prospectively*.

DIUC cites no specific statutory provision that authorizes the Commission to grant DIUC's Request to adjust the Subsequently Approved Rates that were previously in place, even though this Court has made clear that the Commission "simply does not have any implied power to award refunds in the nature of reparations for past rates or charges;

such power must be expressly conferred by statute." *SCE&G v. SCPSC*, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980) ('SCE&G").

Lacking any specific statutory authority for its Request, and in the face of ample applicable statutory authority and opinions issued by this Court explicitly prohibiting the relief sought by the Request, DIUC turns to one case- *Hamm v. Central States*, 299 S.C. 500, 386 S.E.2d 250 (1989) ("*Central States*") - to argue that the Subsequent Rates DIUC seeks to adjust retroactively were deemed "unlawful" by this Court.

But DIUC can't cite any language of this Court in *DIUC I* or *DIUC II* to support that proposition, and ignores the language of this Court in *DIUC I* and *DIUC II* making clear just the opposite: that this Court made no "determination on the merits" whatsoever in either case. More practically, DIUC can't overcome the most obvious and indisputable facts demonstrating that the *Central States* rationale (unlawful rates may be adjusted retroactively) cannot apply here: **on remand following *DIUC I* and *DIUC II*, the Commission conducted all "determinations on the merits," by holding two *de novo* hearings and considering new evidence from the parties.**

Armed with no applicable statutory or case law, and unable to overcome the numerous specific provisions of South Carolina prohibiting the relief sought in its Request, DIUC resorts to 1) improper collateral attacks on previous Commission Orders and the lawful rates contained in those Orders; and 2) trying to present "evidence" which was not in any record at the Commission and raise claims that were not considered by the Commission; 3) citing cases from other jurisdictions that cannot apply to the specific statutory framework established by the General Assembly in Title 58; and 4) mischaracterizing numerous undisputed facts.

A. DIUC requests that the Commission implement the Current Rates retroactively.

The Request seeks to have the Current Rates apply going backwards:

> 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.

Order on Second Rehearing, Exhibit 1, paragraph 8. As argued by DIUC, granting the Request would be "the mechanism with which to properly restore the utility to the financial position it would be in if the existing rates [the Current Rates] had been billed instead of the January 1, 2018 rates providing an 88.5% increase [the Subsequently Approved Rates]." (Appellant's Commission Brief, p. 25).

The question before the Commission, then, and before this Court on review, is whether granting the Request is allowed under South Carolina law, or illegal "retroactive ratemaking." As is absolutely clear, the Request constitutes illegal "retroactive ratemaking."

B. Ratemaking in South Carolina is Prospective, and Retroactive Ratemaking is Prohibited.

As this Court has observed, S.C. Code Ann. § 58-5-240 requires a water and wastewater utility like DIUC to "have rates filed and approved by the Commission prior to implementation of such rates . . . ." *Hamm v. Public Service Commission of South*

Carolina, 310 S.C. 13, 19, 425 S.E.2d 28, 31, (1992). In deciding whether to grant a rate increase, the Commission must determine "whether a utility's rate base or expenses have increased, such that additional revenues are required." *Utility Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 115, 708 S.E.2d 755, 765 (2011) ("*Utility Services*"). Crucially, a Commission determination that "additional revenues are required" by a utility is based on a demonstration that "rate base or expenses" have increased.

The Commission conducted three separate hearings and created three separate records (consistent with this Court's mandate in *DIUC I* and *DIUC II* to hold *de novo* hearings on remand and consider new evidence from the parties) to consider DIUC's rate proposals, resulting in the Orders, the Orders on Rehearing, and the Order on Second Rehearing. None of those Orders are on appeal to this Court in this case. DIUC appealed the Order Denying Request.

All parties agree that the Current Rates approved by the Order on Second Rehearing are at the very least prospective, meaning that the Current Rates apply from March 21, 2021 *going forward*. *See* Second Order on Rehearing, Exhibit 1, at Paragraph 2: ("These rates and charges become effective upon Order of the PSC accepting this Settlement Agreement and may be first billed by DIUC to its customers in the first bill issued by DIUC thereafter.")

The prospective nature of the Current Rates follows the principle that rates approved by the Commission following a utility rate case conducted pursuant to S.C. Code Ann. § 58-5-240 are prospective. As this Court has recognized, ratemaking by the Commission is a prospective rather than a retroactive process. *Porter v. SCPSC*, 328 S.C.

222, 493 S.E.2d 92 (1997) ("*Porter*"), *quoting SCE&G*. "Retroactive rate-making is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for past use." *Id., citing Popowsky v. Pa. Pub. Ulil. Comm'n*, 164 Pa.Comwlth. 338, 642 A.2d 648 (1994) (*Popowsky I*).

As further explained in *Popowsky I*:

> Because of the prospective nature of rates, a rule against retroactive ratemaking has developed. The rule against retroactive ratemaking prohibits a public utility commission from setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits. Krieger, The Ghost of Regulation Past: Current Applications of the Rule Against Retroactive Ratemaking in Public Utility Proceedings, 1991 Univ.Ill.L.Rev. 983, 984. The policy reasons behind this rule are that if retroactive ratemaking is allowed, it makes the "test year" method of ratemaking meaningless and the general principle that those customers who use power should pay for its production rather than requiring future ratepayers to pay for past use.

C. DIUC's Request Clearly Seeks Retroactive Relief

Putting aside briefly the question of whether DIUC's Request constitutes *illegal* "retroactive ratemaking" (it does), there is no question that DIUC asked the Commission to impose a surcharge that would change the rates previously paid by DIUC customers, in connection with service DIUC provided in the past. As a result, the Request seeks retroactive relief, because it would apply a rate going backwards (retroactively), instead of going forward (prospectively).

As argued by DIUC, granting the Request would be "the mechanism with which to properly restore the utility to the financial position it would be in if the existing rates [the Current Rates] had been billed instead of the January 1, 2018 rates providing an 88.5% increase [the Subsequently Approved Rates]." (Appellant's Commission Brief, p.

25). In other words, DIUC's Request seeks to have the Current Rates replace the Subsequently Approved Rates.

Moreover, it is absolutely clear that DIUC's Request is designed to allow DIUC to "recoup [what it characterizes as] past losses":

- "shortfall in revenues and return on investment . . . ." (Appellant's Brief, p. 5);
- "insufficient and confiscatory nature of the rates included in Orders 2015-846 and 2018-68." (Appellant's Brief, p. 13);
- "the income DIUC has lost." (Appellant's Brief, p. 26);
- "DIUC is entitled to recover the lost revenues it should have been able to collect." (Appellant's Brief, p. 26);
- "the revenue shortfall due to inadequate rates" (Appellant's Brief, p. 28);
- "making a prevailing party whole following a successful appeal." (Appellant's Brief, p. 34).

D. The Commission Committed No Error in Concluding that the Subsequently Approved Rates Were "lawful" rates, and therefore "final rates," and that Adjusting the Subsequently Approved Rates Would Constitute Illegal Retroactive Ratemaking

The Commission concluded that the Subsequently Approved Rates "were 'lawfully established' rates and 'final rates' that cannot be adjusted retroactively." (Order Denying Request, p. 9). The Commission's decision is consistent with the long-standing prohibition in South Carolina against adjusting "lawful rates" retroactively, as articulated by this Court in *SCE&G*, "The crux of this issue is the firm principle that rate-making is prospective rather than retroactive. The Commission has no more authority to require a refund of monies collected under a lawful rate *than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would*

thus pay the difference to the utility." *SCE&G,* 275 S.C. 491, 272 S.E.2d 795. (Emphasis added).

As the Commission recognized, and as argued by the POAs below (POAs' Commission Brief, p. 8), this Court's reversal of a Commission Order is not a conclusion that the *rates* approved in that order are "unlawful"- **unless this Court says so.** Accordingly, and unlike in *Central States* (relied upon by DIUC in Appellant's Brief, pp. 29-30), this Court reached no such conclusion in *DIUC I* or *DIUC II.* Consequently, the Subsequently Approved Rates were "lawfully established," the "lawful rates," "final," and in effect until replaced by the Current Rates.

DIUC is correct that this Court held in *Central States* that when *rates* are "found to be unlawful" a refund is not considered to be retroactive ratemaking. *Central States*, 299 S.C. 500, 504, 386 S.E.2d 250, 253. As cited in bold by DIUC, *Central States* makes clear that: "**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.**" (Appellant's Brief, p. 30). And this Court made that exact determination in *Central States*: "[t]his Court reversed the portion of the Commissioner's order which allowed a rate increase as to medical intensity on the basis that such increase and *remanded the case to the circuit court with instructions to remand the case to the Commissioner for a determination of the appropriate rate to be charged.*" *Central States*, 299 S.C. 251-252, 386 S.E. 2d 502. (Emphasis added). In *directing* the circuit court (this was back when the circuit court was still part of the appellate process) to *direct* the Insurance Commissioner to calculate an appropriate rate, this Court addressed the merits of the appeal.

But this Court did not find the Initially Approved Rates to be "unlawful" in *DIUC I*, or find the Subsequently Approved Rates to be "unlawful" in *DIUC II*. DIUC misreads *Central States* by improperly conflating the "reversal" of a Commission order and remand for de novo hearings (what took place in *DIUC I* and *DIUC* II) with a merits determination by this Court that rates approved by the Commission are "unlawful" and a direction that lawful rates be calculated and applied on remand (*Central States*). DIUC argues that "[w]hen the underlying rate orders are (as they are here) found to be unlawful, they cannot be used to bar proper and equitable result." (Appellant's Brief, p. 29). In doing so, DIUC ignores the plain, fundamental, and legally dispositive difference between *DIUC I* and *DIUC II* on the one hand, and *Central States* on the other: in *DIUC I* and *DIUC* II this Court made no determinations on the merits whatsoever (with respect to rates or anything else), while in *Central States* this Court determined the rates at issue to be "unlawful." As such, the rule in *SCE&G* applies squarely to this case to prohibit retroactive adjustment of "lawful rates." The "proper and equitable result," following these remands, therefore, were the de novo hearings ordered by this Court and conducted by the Commission.

Unlike in *Central States*, this Court made no determination in *DIUC I* or *DIUC II* on the merits directing the Commission to take *any* action based on the existing record. Neither *DIUC I* nor *DIUC II* made any "determination on the merits" that the Commission could implement on remand. Instead of directing the Commission to implement particular determinations of this Court on the merits (akin to what this Court ordered the Insurance Commissioner to implement in *Central States*), this Court explicitly and unambiguously twice ordered the Commission to conduct *de novo* hearings

on remand, making clear that the "determination on the merits" would be conducted by the Commission following those hearings. "Therefore, we reverse and remand to the Commission for a de novo hearing." *DIUC I*, 420 S.C. 305, 320, 803 S.E.2d 280, 288. "We remand to the Commission for a new hearing." *DIUC II*, 427 S.C. 458, 464, 832 S.E.2d 572, 575. *DIUC II* clarified that *neither* opinion addressed the merits of *either* case: "In this reversal and remand, *we do not address the merits at all.* In reversing the commission twice, *we do not intend to make any suggestion of our views of the merits.*" *Id.* (Emphasis added).

Put another way, because this Court made no determination on the merits of the Orders and Orders on Rehearing it reviewed on appeal, the remands to the Commission following *DIUC I* and *DIUC II* did not establish any of the law in this case, regarding rates or anything else. *See Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000) (when the appellate court makes no determination on the merits of the action, remand does not establish the law of the case). This Court ordered the Commission to create the law in this case on remand by explicitly ordering the Commission to conduct *de novo* hearings, and the Commission followed this Court's directives. By contrast, in *Central States*, this Court's decision established "the law of the case," and directed that those determinations be implemented on remand.

Accordingly, neither *DIUC I* nor *DIUC II* made any determination that the Initially Approved Rates or the Subsequently 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. As a result, the

Subsequently Approved Rates" were "lawful rates" until the Current Rates went in effect following the Order on Second Rehearing.

Absent a determination by this Court that the Subsequently Approved Rates were "unlawful," and a similar direction or determination that the Proposed Rates (or some other rates) were the "lawful rates," the Commission simply has no authority to make a rate adjustment going backward, and doing so would be illegal retroactive ratemaking. S.C. Code Ann. § *58-5-240(D)*; *58-5-290*; *Porter; SCE&G; Central States. Central States* simply does not support DIUC's Request, because DIUC's claim that the Subsequently Approved Rates were "illegal" is baseless in light of this Court's rulings in *DIUC I* and *DIUC II*, and the subsequent de novo hearings conducted by the Commission on remand. S.C. Code Ann. § 58-5-290, *Porter*, and *SCE&G* foreclose any potential retroactive relief sought by the Request, and the rationale in *Central States* does not exist here.

As such, despite the plain, clear, and unambiguous language of *DIUC I* and *DIUC II*, (and the fact that two *de novo* evidentiary hearings took place following remand to the Commission), DIUC still argues that this Court did rule on the merits in *DIUC I* and *DIUC II.* (Appellant's Brief, p. 30). DIUC further argues, based on its flawed reading of *Central States*, that because in its view the Orders and Orders on First Rehearing were "unlawful" rate orders, that the Subsequently Approved Rates may be adjusted retroactively. (Appellant's Brief, pp. 29-31). But *Central States* by its plain language applies *only* when this Court has 1) considered the merits of the appeal (which took place in neither *DIUC I* nor *DIUC II*); 2) determined that rates were "unlawful," (which did not happen in either *DIUC I* or *DIUC II*); and 3) remanded the case with a

direction to implement its decision on the existing record (which also did not take place following *DIUC I* or *DIUC II*).

DIUC then continues to conflate the "reversal" of a Commission order with a determination that rates approved by the Commission are "unlawful." More particularly, DIUC argues (without citation to any authority whatsoever) that "[i]f all issues are reversed by this Court, then surely the underlying Order containing those issues cannot be considered still binding and 'lawful' so as to preclude the changes in that Order pursuant to the Court's ruling such changes are necessary." (Appellant Brief, p. 31). This Court ordered that the Commission conduct *de novo* hearings and create new evidentiary records in order to effect any "changes". And the Commission did exactly that.

DIUC further argues that *DIUC II* did not find "the rates of Order 2018-68 [Orders on Rehearing] were lawful and properly established." (Appellant's Brief, p. 31). As the Commission concluded, the Subsequently Approved Rates were "lawful and properly established" because this Court did not determine these rates to be "unlawful."

Similarly, DIUC argues that "[t]here 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." (Appellant Brief, p. 31). On the contrary, the indisputable "support" for the Commission's conclusion is the clear language of *DIUC I* and *DIUC* II, the de novo hearings conducted by the Commission in the Rehearing and the Second Rehearing, and the statutory and case law cited repeatedly herein and by the Commission.

Again, the point is that this Court made no "determination on the merits" whatsoever, with respect to rates or anything else, but remanded the cases to the Commission for those determinations. DIUC cannot demonstrate that *DIUC II* concluded that the Subsequently Approved Rates were "unlawful" because 1) there is no such language in *DIUC II* making such a conclusion; 2) this Court unambiguously ruled that it was making no "determination on the merits"; and 3) the Commission made the "determinations on the merits" by conducting *de novo* hearings on remand as ordered by this Court.

Similarly, DIUC's attempts to distinguish *SCE&G* (Appellant's Brief, p. 24) fail simply because the Subsequently Approved Rates, like the rates addressed in *SCE&G*, were "lawfully approved." The rule in *SCE&G* (that the Commission has no authority to award refunds by adjusting a *lawfully approved* rate) applies with equal force here (the Commission has no authority to change "lawfully approved" rates and grant reparations based thereon). Likewise, *Central States* is inapplicable because this Court made no determination that the Subsequently Approved Rates were "unlawful".

In fact, outside of the *Central States* scenario, the rates approved by the Commission are "lawful rates" until adjusted by the Commission on remand. As discussed below, prospective application of rates following a remand and a "*de novo*" hearing is further necessary because those rates will be the products of a different record.

Because this Court made no determination that the Initially Approved Rates or the Subsequently Approved Rates were "unlawful," the Subsequently Approved Rates were "lawfully established," the "lawful rates," "final," and in effect until replaced by the Current Rates. Similarly, the Orders and Orders on Rehearing are "final orders"

regarding rates, and particularly regarding any challenge of the Subsequently Approved Rates. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2015) (stating that the filed rate doctrine prohibits collateral attacks on previously determined rates).

DIUC's Request seeks what the General Assembly has determined and this Court has ruled is unavailable to it. DIUC asked the Commission to 1) determine that the Subsequently Approved Rates, which were "previously fixed and approved" by the Commission, were unreasonably low and 2) require DIUC's customers to "pay the difference" plus interest to DIUC. This Court's decisions in *DIUC I* and *DIUC II* did not conclude that the Subsequently Approved Rates were "unlawful", so those rates cannot now be adjusted.

E. The Commission Properly Applied S.C. Code Ann. § 58-5-240(D) in denying the Request

DIUC asks this Court to "specifically rule that making a prevailing party whole via reparations surcharge rates following a successful appeal is not retroactive ratemaking." (Appellant's Brief, p. 34). Such a ruling would conflict with established South Carolina law specifying just the opposite. As the Commission ruled (Order Denying Request, pp. 20-24), the General Assembly's enactment of S.C. Code Ann. § 58-5-240(D) demonstrates that "relief" is illegal retroactive ratemaking. A "prevailing party" that does not avail itself of the bonding process set out in S.C. Code Ann. § 58-5-240(D) to "protect" its proposed rates on appeal cannot seek to adjust "lawfully approved" rates retroactively. DIUC is asking this Court to issue a ruling that directly conflicts with that statute.

The Commission quotes part of S.C. Code Ann. § 58-5-240(D) in the Order Denying Request (p. 21), " . . [i]f the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case...." By contrast, if a utility does not "avail itself of the specific protections established by the General Assembly" (Order Denying Request, p. 23) by bonding its proposed rates, there is no legal mechanism to adjust rates previously approved by the Commission. As set out below, DIUC's claims that it could not afford a bond following the Orders on Rehearing were not considered by the Commission and are not properly before this Court.

If the Commission could correct rates going backward even in the absence of a determination by this Court that rates were "unlawful," then the bonding provisions of S.C. Code Ann. § 58-5-240(D) would be unnecessary. *See Denene v. City of Charleston*, 352 S.C. 208, 212, 574 S.E. 2d 196, 198 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something."). Obviously S.C. Code Ann. § 58-5-240(D) "accomplish[ed] something," because DIUC knew that it had to bond its Proposed Rates following the Orders.

In addition, DIUC's nonspecific and unsupported suggestions (Appellant's Brief, p. 41-44) that S.C. Code Ann. § 58-5-240(D) might not be the "only way a utility may be protected when it faces an appeal of a rate order" are foreclosed by this Court's determination that the Commission cannot use its general or implied powers to award the relief DIUC seeks. The Commission only possesses that authority given to it by the General Assembly. *South Carolina Cable TV Assoc. v. PSC,* 313 S.E. 48, 437 S.E.2d 38

(1993). More particularly, the Commission "simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute." *SCE&G*, 275 S.C. 487, 490, 272 S.E.2d 793, 795. Consequently, any power the Commission possesses to grant "reparations for past rates or charges" must be expressly set out in a particular statute, and cannot be implied from the Commission's general powers to regulate utilities like DIUC. Likewise, that power cannot be implied from case law issued in other jurisdictions.

F. The Commission Committed No Error in Concluding that Briefing the Issue of Reparations Did Not Make the Current Rates (or any Rates) Provisional

The Commission concluded that "agreeing to allow the parties to brief and argue whether or not reparations as requested by DIUC are legally appropriate does not give the Commission the authority to make rates provisional and subject to revision going back." (Order Denying Request, p. 9). DIUC argues (citing no applicable authority) that "making a prevailing party whole following a successful appeal is not retroactive ratemaking because, among other things, the underlying matter remains open and pending; rates having been appealed and rejected by an appellate court are not final." (Appellant Brief's p. 34). As set forth above, S.C. Code Ann. § 58-5-240(D) makes clear that "making a prevailing party whole" as requested by DIUC is illegal retroactive ratemaking.

Similarly, DIUC argues (citing no applicable authority) that the briefing procedure ordered by the Commission in the Order on Second Rehearing somehow makes the Current Rates temporary: "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 same into Order 2021-

132, it can hardly be said to be a 'final order' as to the issue of reparations surcharge rates." (Appellant's Brief, p. 33). In fact, the Order on Second Rehearing was a final order by operation of law, and at least the POAs, the ORS, and the Commission never understood "briefing and appeal" to encompass making the Current Rates (or any rates) provisional or temporary.

Again, none of the "lawful rates" discussed in this case (the Initially Approved Rates, Subsequently Approved Rates, and Current Rates) were "rejected by an appellate court," and as a result all such rates are "final"- meaning not subject to adjustment retroactively. *S.C. Code Ann. § 58-5-240(D); S.C. Code Ann. § 58-5-290*; *Porter; SCE&G.* More particularly, the Current Rates are "final," because the Order on Second Rehearing is a final order. The Order Denying Request correctly concluded (based on all the law already presented above) that "[t]he Commission cannot adjust 'lawfully approved' rates retroactively. The Current Rates are 'lawful' rates, and therefore 'final rates,' and cannot be adjusted retroactively since the Current Rates were never appealed." (Order Denying Request at p. 7). Rather than a surprise or a "gotcha" moment for DIUC, the Commission merely applied the longstanding rule prohibiting the Commission from adjusting "lawful rates" (to include unappealed rates) retroactively. *SCE&G.*

No party challenged the Second Order on Rehearing within the time allowed for appeal. *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 734 S.E.2d 778 (2013) ("*Shirley's Iron Works*") (an unappealed ruling is the law of the case). As *Shirley's Iron Works* explains, "[t]he doctrine of the law of the case applies to an order which "finally determines a substantial right . . . ." 403 S.C. 560, 572, 734 S.E.2d 778, 785. There is no question that the Order on Second Hearing "finally determined a substantial right," i.e.

the Current Rates. The Order on Second Rehearing is a final order because, among other reasons, S.C. Code Ann. § 58-5-340 provides that every "decision of the commission may be reviewed by the Supreme Court or court of appeals as provided by statute and the South Carolina Appellate Court Rules upon questions of both law and fact." The limited proceedings that took place subsequently were for a specific purpose that was completely separate from the rate determination on the merits.

Similarly, the Commission committed no error in concluding that its decision to allow DIUC to *argue* for reparations did not allow DIUC to challenge the lawful and final rates in the Order on Second Rehearing (Order Denying Request, pp. 8-9). Contrary to DIUC's argument (Appellant's Brief p. 32), the proceedings that took place before the Commission following the issuance of the Second Order on Rehearing were not an "open proceeding" insofar as that term means "allowing a party to challenge previously established rates." As argued above, the Commission does not possess the power to do what DIUC claims the Commission erred in not doing.

Nor did the Commission conclude or suggest that the Current Rates were not "final." The Order on Second Rehearing clearly states that "the Parties can *brief the matter* [DIUC's Request] to the Commission for its further determination in this case." Order on Second Rehearing, p. 5. (emphasis added). Consistent with the Order on Second Rehearing's directive to the parties to *brief* the matter, via Order No. 2021-501 issued July 26, 2021, the Commission struck certain portions of the Affidavit of John F. Guastella filed by DIUC because that affidavit was an "attempt to introduce other evidence into the case, including opinion evidence of the effect of the Commission's decisions on DIUC's rate of return on equity." Order No. 2021-501, Finding of Fact No.

3, p. 4. Accordingly, DIUC further knew that legal issues were being *briefed*, as opposed to evidence being presented.

The claim that the Order on Second Remand did not allow briefing or an appeal (Appellant's Brief, p. 34) demonstrates that irony is truly dead. DIUC provided a Brief, a Reply Brief, and a Proposed Order to the Commission, and participated in an oral argument before the Commission. And then DIUC appealed the Order Denying Request to this Court. The "further procedure" established by the Commission could not have been more clear. And in fact that is the "further procedure" undertaken by the parties and the Commission (and now this Court).

G. The Commission Committed No Error in Concluding that Matters Decided in the Orders, the Orders on Rehearing, and the Order on Second Rehearing Were Not Properly Before the Commission

The Order Denying Request correctly concluded (based on all the law already presented above) that "[t]he Commission cannot adjust 'lawfully approved' rates retroactively. The Current Rates are 'lawful' rates, and therefore 'final rates,' and cannot be adjusted retroactively since the Current Rates were never appealed." (Order Denying Request at p. 7).

Similarly, the Order Denying Request (pp. 24-26) correctly concluded that various claims regarding the Subsequently Approved Rates (including DIUC's "constitutional claims" were not properly before the Commission in a brief. Again, the Commission has no power to adjust "lawful rates" retroactively.

Likewise, as cited above, DIUC's attempts to change lawful rates retroactively are prohibited based on the "filed rate doctrine." Each of DIUC's arguments sought to challenge the Subsequently Approved Rates. DIUC's attempts to challenge the

Subsequently Approved Rates constituted an improper collateral attack on final orders of the Commission containing "lawfully approved" rates: the Orders, and the Orders on Rehearing. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2015) (stating that the filed rate doctrine prohibits collateral attacks on previously determined rates). South Carolina law is clear in a variety of ways that the Commission has no authority to grant the Request. DIUC's citation to various cases from other jurisdictions address the standards to be applied by utility commissions and other bodies in *rate proceedings*, and are additionally inapplicable here.

Moreover, DIUC's allegation that the Subsequently Approved Rates are "insufficient rates" (Order Denying Request, p. 24) conflicts with the specific statutory remedy the General Assembly has created in the event a utility claims that rates are "noncompensatory" or "inadequate." S.C. Code Ann. § 58-5-290 expressly allows the Commission to correct "improper rates," but only *prospectively*:

> SECTION 58-5-290. Correction by Commission of improper rates and the like.
>
> Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to *be thereafter observed* and enforced and shall fix them by order as herein provided.
>
> (Emphasis added).

The plain, clear, and unambiguous language of S.C. Code Ann. § 58-5-290 gives the Commission the authority to determine, after a hearing, that a previously "lawfully established" rate is "unlawful," and then adjust that rate *going forward*. This Court has confirmed that S.C. Code Ann. Section 58-5-290 grants the Commission in a water and wastewater rate case the authority only to "*prospectively* correct or reduce a previously-approved charge." *Porter*, 328 S.C. 222, 235, 493 S.E.2d 92, 99 (emphasis added);

In the event that DIUC had sought relief pursuant to S.C. Code Ann. § 58-5-290 (and it did not), and the Commission conducted the hearing required by that statute (which did not take place) then the Commission would be empowered to grant relief only going forward.

H. The Commission Committed No Error in Refusing to Consider Various Claims Made by DIUC

Despite the Commission's direction to DIUC to "brief" the issue of reparations, DIUC included a host of claims that were not considered by the Commission and are therefore not before this Court for review. In fact, DIUC invited the Commission look through previous records "for any findings the Commission may wish to make." (Appellant's Commission Reply Brief, p. 16).

For example, DIUC spends several pages (Appellant's Brief pp. 40-45) arguing that "[t]he record establishes that DIUC did not have financial resources to obtain a bond under S.C. Code § 58-5-240(D) to collect its proposed rates pending the second appeal." (Appellant's Brief, p. 40). The record establishes no such thing, because the Commission never considered that issue nor ruled upon it. And the Commission certainly made no such finding in the Order Denying Request that is before this Court for review.

But more fundamentally, DIUC never *asked* the Commission to put its Proposed Rates into effect following the Orders on Rehearing, either under bond or via an alternative financial mechanism set out in S.C. Code Ann. § 58-5-240(D) ("or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested"). Accordingly, the Commission never considered any such request or ruled on one. As a result, that issue and a host of others are not properly before this Court for review. *Townsend v. City of Dillon,* 326 S.C. 244, 486 S.E.2d 95 (1997) (an issue not ruled upon by trial court is not preserved for appeal).

More particularly, DIUC's arguments during the Rehearing about its inability to afford a bond (Appellant's Brief pp. 43-44) were not made for purposes of the application of S.C. Code Ann. § 58-5-240(D) following the issuance of the Orders on Rehearing, but in order to seek to expedite the Rehearing. The Commission accommodated DIUC on its request. *See* Order No. 2018-68 at p. 27 ("[t]he determination of rate base for this case is largely driven by the Applicant's need for an *expedited evaluation of its case on remand* . . . . " (Emphasis added). *See also* Order No. 2017-61-H ("since an early hearing date has been granted as the Company has requested . . . "). However, the Commission made no finding at any time that DIUC could not afford a bond, in Order No. 2018-68 or otherwise.

Inexplicably, DIUC makes inflammatory arguments (and immaterial to the issue before this Court) that are disproved by the plain language of Commission Orders. For example, DIUC's argument that "counsel for the POAs argued 'vigorously' against the need for a decision before December 31, 2017 . . ." (Appellant's Brief, p. 44) is plainly and demonstrably false. As set out in Order 2017-61-H, "counsel for the Intervenors [the

POAs] argues vigorously *against the principles espoused in the affidavit . . .*" (Emphasis added). As the Commission recognized in the Order Denying Request, submitting "evidence" via affidavit is improper.

In any event, not only would DIUC's Request result in illegal retroactive ratemaking by adjusting "lawful" rates going back, its arguments are foreclosed by the clear language of S.C. Code Ann. § 58-5-240(D) and the specific process for challenging "improper rates" in S.C. Code Ann. § 58-5-290 that is prospective in nature. Additionally, DIUC's claims are improper collateral attacks on lawfully approved rates and final orders of the Commission, and barred because the Commission did not consider and rule on them.

I. The Commission Committed No Error in Rejecting DIUC's Arguments With Respect to "Delay" and "Lost Revenue"

The Order Denying Request (pp. 17-20) demonstrated the flaws in DIUC's Request with respect to "lost revenue" and the amount of time these proceedings consumed. As set out above, even if those claims were accurate (they are not) and had been considered by the Commission (they were not), the Commission does not have the authority to apply "lawful rates" (the Current Rates) going backward. Similarly, those claims are barred as improper collateral attacks on the Subsequently Approved Rates and the Orders on Rehearing. And those claims were not considered by the Commission and therefore not properly before this Court.

However, DIUC's claims are wrong on their face, based on undisputed procedural facts and remedies available to DIUC. As a result, DIUC has certainly not been "punished" or otherwise treated unfairly. Neither the Commission nor this Court ruled, prior to the Order on Second Rehearing, that DIUC was entitled to a 108.9% rate

increase. Similarly, the Commission never ruled that the "original application sought just and reasonable rates" (as DIUC argued to the Commission in Appellant's Commission Brief, p. 11-12), or concluded that the Proposed Rates were "just and reasonable."

Likewise, this Court did not direct the Commission to enter an order that would have implemented the Proposed Rates (or any other rates). The Subsequently Approved Rates were "lawfully established," and remained in effect lawfully until the Commission approved the Current Rates. As a matter of law, there simply are no "lost revenues" that DIUC "should have been able to collect," because DIUC cannot show its entitlement to any other rates than those ordered by the Commission.

More practically, any comparison of the revenue produced by the Proposed Rates and the Current Rates could not support the Request. DIUC conflates "revenues" with "rates," (Appellant's Commission Brief at pgs. 11, 12, 17, 24, 25), overlooking that the Current Rates are "lawful rates" approved by the Commission, while the Proposed Rates have never been "lawfully established" by the Commission. There was no valid basis for the Commission to compare 1) the speculative revenues that might be produced by Proposed Rates that were never "lawfully established" with 2) revenues produced by the "lawfully established" Current Rates. Any similarity between the revenues hypothetically produced by the Proposed Rates, and those that would be produced by the Current Rates cannot change that 1) the Proposed Rates were never "lawfully established;" 2) the Subsequently Approved Rates were "lawfully established," and 3) the Current Rates were "lawfully established" prospectively as of March 1, 2021.

And, as the Order Denying Request concluded (pp. 13-17), any such revenue comparison is further invalid because the Current Rates are the product of different

assets and expenses (including expenses that changed over time) than what DIUC used to calculate its Proposed Rates. The expenses and assets for which DIUC initially sought approval in its Application (the basis for the Proposed Rates) are different than those approved by the Commission in the Order on Second Rehearing (the basis for the Current Rates):

	Application	Order on Second Rehearing
Total O&M Expenses	$866,936	$1,005,801
Net Operating Expenses	$1,649,127	$1,827,517
Net Operating Income	$618,595	$ 440,197
Rate Base	$7,085,475	$5,900,924
Rate of Return	8.73%	7.46%

Order Denying Request, p. 14. The Order on Second Rehearing approved a rate base ($5,900,924) that was substantially less than the $7,085,475 sought by DIUC in its Application. The reason these inputs changed is because two additional *de novo* hearings took place, where additional evidence was presented.

Furthermore, the Commission could not establish rates based solely on a comparison of revenues (going backward or otherwise) because doing so is completely the opposite of a proper ratemaking process that requires a demonstration of assets and expenses as a necessary *precursor* to the calculation of appropriate rates and the revenues they would produce. As cited above, the Commission must determine "whether a utility's rate base or expenses have increased, such that additional revenues are required." *Utility Services*, 392 S.C. 96, 115, 708 S.E.2d 755, 765. Similarly, a request to correct rates pursuant to S.C. Code Ann. §58-5-290 would require a hearing and a record before the Commission.

In addition, DIUC's claim for lost revenues that it should have been able to collect does not accurately describe what took place over the course of this Docket. For example, although *DIUC I* did not "direct" the Commission to enter an order making adjustments to the existing record, on remand the Orders on Rehearing gave DIUC the benefit of those assets and expenses (the Elevated Tank Site, Property Taxes, and Bad Debt Expense) that were included in *DIUC I's* "guidance to the Commission."

In the Order on Rehearing, "the water tank, pipes, and other utility equipment located on the Elevated Tank Site" were added to DIUC's rate base and included in the calculation of the Subsequently Approved Rates. Order. No. 2018-68, p. 21. Likewise, in the wake of *DIUC I's* "guidance" regarding Property Taxes, the Commission approved "property taxes of $526,848 amortized over eight (8) years for an annual amortization of property taxes of $65,856," and 2015 property taxes of $188,092. Order No. 2018-68, p. 30. DIUC agreed with these adjustments, and these amounts were included in the calculation of the Subsequently Approved Rates. Finally, the Commission approved a "total bad debts expense" of $198,690 (Order 2018-68, p. 41), even though the DIUC I "guidance" referenced to the bad debts expense sought in DIUC's application as $105,667, and that ORS originally "calculated DIUC's bad debt at $108,349 . . . . The "bad debts expense" of $198,690 was included in the calculation of the Subsequently Approved Rates.

Because DIUC put its Proposed Rates into effect under bond during its appeal of the Orders, and the Orders on Rehearing included the Elevated Storage Tank in rate base and approved Property Tax expenses and Bad Debts Expense as advocated by DIUC, **DIUC received the benefit of those assets and expenses in the Subsequently**

Approved Rates charged beginning April 1, 2016. These assets and expenses were included in the calculation of the Subsequently Approved Rates in effect from April 1, 2016 until March 1, 2021 (the effective date of the Current Rates). Significantly, (and contrary to its numerous and unsupported claims), DIUC collected all "revenues that it should have been able to collect" with respect to those assets and expenses.

Because DIUC implemented a bond following the issuance of the Orders, its representations regarding its financial condition are plainly incorrect and misleading. For example, DIUC argues that "in this case the initial order rate order [Order No. 2015-846] 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." (Appellant's Brief, p. 41). DIUC never collected the Initially Approved Rates, but instead collected the Proposed Rates (a 108.9% revenue increase) and then the Subsequently Approved Rates (an 88.9% increase) from April 1, 2016 to March 1, 2021. Additionally, as the Commission observed (Order Denying Request, pp. 14-17), DIUC sought and recovered substantially more in rate case expenses in the Orders on Rehearing and the Order on Second Rehearing.

Finally, DIUC overlooks a particular statutory provision- S.C. Code Ann. § 58-5-240(F) - that allows DIUC to initiate a new rate case every 12 months. DIUC's arguments regarding "cost data that is 8 years old" (Appellant's Brief, p. 26) are at best curious, given that it enjoys the statutory ability to file a rate case periodically. In fact, DIUC is currently seeking to raise its rates before the Commission. (Application of DIUC dated June 24, 2022).

J. The General Principles that Support the Prohibition Against Retroactive Ratemaking Apply in this Case

As set forth above, the Request would result in illegal retroactive ratemaking specifically because DIUC seeks to adjust "lawful rates" retroactively. However, the prospect that a current DIUC ratepayer could be responsible for additional charges applicable to a rate for service provided in the past (the effect of granting the Request) underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina. *Porter*, 328 S.C. 222, 231 493 S.E.2d 92, 97 ("Retroactive rate-making is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for its past use.").

If the Commission granted the Request, DIUC customers would pay a "rate" for services (over and above what those customers have already paid for those services) that was based in part on expenses that DIUC had not even incurred as of the "date of service" (from April 1, 2016 to March 1, 2021). DIUC argues (Appellant's Brief, p. 28), that because "[o]nly the customers who actually received water and wastewater services from October 1, 2017 until March 1, 2021, at the lower confiscatory rates will be billed for the difference" that principle does not apply.

DIUC misunderstands the policy concern embodied in the statutory prohibitions on retroactive ratemaking. DIUC has no right to charge <u>any</u> rates to a person who does not "actually receive[] water and wastewater service" during a particular time period. However, a current customer of DIUC who was also a customer during the time period covered by the Request would pay not only for 1) the "production" of water and wastewater service (by paying the Current Rates effective March 1, 2021 for services received on and after that date), but also 2) her "past use" (paying the Current Rates effective April 1, 2016)

for "the services that specific customer consumed" (Appellant's Brief, p. 28) in the past. Therefore, the rationale for prohibiting retroactive ratemaking therefore plainly exists here.

CONCLUSION

Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association respectfully request the Court affirm the Order Denying Request because it is not affected by any error of law.

The POAs respectfully request this Court affirm the Order Denying Request, pursuant to SCACR 220(c), based upon any ground or grounds appearing in the Record on Appeal.

Respectfully submitted,

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