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S.C. SUPREME COURT

THE 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 REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

Preliminary Statement in Reply

Daufuskie Island Utility Company, Inc. ("DIUC" or "Appellant") initiated the underlying Request for Approval of a Rate Increase in 2015. The application requested new rates based upon data from a 2014 test year. Since 2014, there have been two presidential elections, a global pandemic, and tremendous changes in the world economy; the realities of operating a business in 2022 are very different than they were in 2014. That means now, seven years later as we near the end of 2022, despite two successful appeals, what DIUC is fighting for is not some windfall or even a new rate based upon the current realities of operating the utility in 2022. DIUC is not asking this Court to analyze the tremendous differences between DIUC's costs of operation in 2014 and the current costs of DIUC's operation and it is not asking for rates in excess of those in its 2015 application based on 2014 expenses. DIUC merely seeks this Court's correction of the Commission's errors in Order 2022-79, which denied DIUC's right to collect a reparations surcharge[1] rate that properly addresses the circumstance resulting from the seven-year battle DIUC has fought to achieve the revenue that the ORS and the POAs finally agreed to in the 2021 Settlement Agreement.[2]

Appellant's Brief explains the history of this proceeding, the two previous appeals, and the events of discovery and trial before the Commission originally, after the first reversal/remand from this Court, and after the second reversal/remand from this Court. (App. Brief __) Certain issues

[1] Order 2022-79 denied DIUC's request for two one-time surcharges. (Order; Ex B, DIUC Brief re Reparations; App Brief at 5 (itemizing the one-time surcharges requested))

[2] Despite opposing DIUC's requested annual combined water/sewer system revenues of $2,267,722 throughout two full hearings and two appeals, both Respondents entered into the March 2021 Settlement Agreement agreeing to annual revenues of $2,267,714. (Order 2021-132, Ex.1)

related to those facts bear clarification in response to the Respondents' briefs.

In 2015, just before the Commission hearing on DIUC's application, ORS and the POAs concocted a "settlement agreement" and then convinced the Commission to accept it in totem without a single deviation, even though that agreement (and the Commission order adopting it) left DIUC with rates that would not cover DIUC's financing debts or even DIUC's lawfully due taxes. On appeal, this Court reversed the Commission's adoption of the settlement agreement and remanded the case for a de novo rehearing. See DIUC v. S.C. Office of Reg. Staff, 420 S.C. 305, 803 S.E.2d 280 (2017) ("DIUC I"). The case returned to the Commission for rehearing.

On remand ORS argued for (and the Commission's rehearing order adopted) a wholesale rejection of every single rate case expense invoice provided by DIUC's manager, Guastella Associates, LLC, despite the fact that ORS and the Commission had previously approved and awarded $75,000 for Guastella's services in the first rate order. DIUC appealed and this Court reversed, finding "[t]he 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." 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"). Not surprisingly, the ORS Brief in this appeal downplays the significance that this Court attributed to ORS's retaliatory actions. (ORS Brief at 6) In DIUC II this Court specifically ruled:

> … 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 460-61, 832 S.E.2d at 573-74 (emphasis in original). The Court also took the opportunity to explain why the statutes establishing ORS must be heeded by the agency:

> [These statutes] require ORS to act in a fair and unbiased manner to protect the public interest, provide public utilities a fair rate application proceeding, and make appropriate and reliable recommendations to the commission. When ORS fails to meet this responsibility, it necessarily affects the decision-making of the commission. In this case, ORS made recommendations to the commission which the commission accepted. The commission's decision cannot be separated from the higher standard of scrutiny ORS now concedes it applied on remand from its unsuccessful first trip to this Court.

DIUC II, 427 S.C. at 461, 832 S.E.2d at 573-74. Characterizing ORS's action on remand as "misconduct," the opinion in DIUC II clearly and specifically articulated this Court's serious concern with the ORS application of a new, heightened standard to the rate case expense invoices on remand after it lost the first appeal. Id. at 461, 573.

Despite these clear admonitions from the Court, ***during the second remand ORS did the same thing again***. On remand ORS continued to demand for a second time that it was authorized to apply a heightened standard, despite the Court's ruling in DIUC II. In pursuit of its plan ORS served more discovery on DIUC. DIUC objected to the ORS's attempt to require DIUC to submit to a higher level of proof than what was applied in the original proceeding and cited this Court's decision in DIUC II:

> DIUC objects to [the discovery] because it is unduly burdensome and because in direct contradiction of a ruling of the South Carolina Supreme Court, 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. *See DIUC v. S.C. Office Reg. Staff*, 427 S.C. 458, 462-3, 832 S.E.2d 572, 574 (2019)*, reh'g denied* (Sept. 27, 2019).

(DIUC Resp. to ORS Mtn Compel, Ex. B)

The ORS Brief in this appeal characterizes what occurred during the second remand as a proper exercise of the powers of ORS, stating that ORS was "obligated" to conduct additional discovery "to maintain a consistent, measurable and objective review." (ORS Brief at 7) The problem is that ORS continued to demand the higher level of proof specifically rejected by this

Court – as if the Court had never ruled.

Even after the reprimand of this Court in DIUC II, ORS continued to cite to its statutory power while failing to exercise that power fairly and in accordance with the Orders of this Court. ORS made a discovery demand for information that was determined by this Court to be retaliatory and greater than what was previously required. DIUC timely objected but ORS now claims in its Brief here that those objections were somehow trickery and for "strategic reasons," further demonstrating the agency does not comprehend this Court's reprimand or why it was improper for it to continue to insist DIUC meet the higher standard of proof ORS adopted in retaliation for its loss in the first appeal. (ORS Brief at 9)

Seeking Commission cooperation in its discovery demands, ORS filed a motion to compel. (ORS Mtn Compel) In response, the Commission stayed all testimony and hearing dates while DIUC attempted to defend itself against ORS's demands for even more discovery based upon the higher standard of proof already rejected by this Court. (Order) DIUC explained to the Commission that to comply with this Court's ruling in DIUC II, ORS should be applying the standard that allowed approval of the same invoices in the original proceeding, not the heightened standard clearly and unequivocally rejected by this Court in DIUC II. (DIUC Resp. to ORS Mtn Compel and Tr. of Proceedings, October 8, 2020)

After months, the Commission ultimately agreed with everything ORS continued to demand and required DIUC to comply with the discovery propounded by ORS. (Order 2020-759) Per the Order, DIUC was forced to submit even more documentation than what was required in the first hearing. This Commission decision was in direct contradiction to this Court's ruling in DIUC II. Then, shortly before the new date set by the Commission for a third hearing (that date having been rescheduled to accommodate ORS's discovery demands and motion to compel

application of the higher standard rejected by this Court in DIUC II), the parties engaged in settlement negotiations that resulted in a settlement between DIUC, ORS, and the POAs.

Pursuant to the settlement, DIUC would be permitted annual revenues of $2,267,714. (Order 2021-132, Ex. 1) However, the settlement does not include rates based upon the disputed plant in utility; ORS and the POAs continued to oppose that issue so it was preserved for the next rate case. (Id.) What the POAs and ORS actually agreed to include are rate case expenses and additional legal fees related to this proceeding.[3] In other words, the revenue increase ORS and the POAs agreed to in the 2021 Settlement Agreement is just a portion of the expenses DIUC has occurred in its pursuit and appeals in this proceeding, which is now in its third appeal.[4]

On the second remand DIUC also requested to implement a reparations surcharge rate.[5] (DIUC Suppl., Brief re Remand) As part of the settlement, all parties agreed and the Commission approved a procedure whereby after the Commission's decision regarding the proposed settlement agreement, the parties would brief the surcharge rate issue to the Commission and the underlying proceeding would remain open for any appeal of the Commission's decision on the reparations surcharge rates. (Order 2021-132, Settlement Agreement at pp. 2-4)

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[3] This included the previously rejected $542,978 for Guastella Associates' rate case expenses incurred by DIUC through September 30, 2017, plus $95,430 for rate case legal expenses incurred during the rate case. (Order 2018-68)

[4] In its original application DIUC included $191,200 for rate case expenses, even though the actual rate case expenses were pushing $380,000 at the time of the first hearing. Mr. John Guastella, President of Guastella Associates, LLC, DIUC's manager, testified that in its 2012 rate case, DIUC requested $181,200, but the actual expenses amounted to $370,000. *See* Hearing Transcript at 181. DIUC absorbed this difference. Following DIUC's appeal of the Commission's first order in this case, the Supreme Court's reversal, and a second fully litigated rate case DIUC's actual rate case expenses soared to nearly $800,000 plus $60,000 for bonds. *See* Rehearing Tr. at 76, lines 8-12 (Guastella testifying "the cost of actual rate case expenses as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services totals $794,201.17, plus the $60,781.56 DIUC incurred for the bonds and an associated letter of credit."). (See DIUC Suppl. Brief, 4-1-2020 at 7)

[5] See Appellants Brief at 5 (itemizing the one-time surcharges requested).

After the parties briefed the issue, the Commission denied DIUC's request for the reparations surcharge rate via Order 2022-79. This appeal, then, focuses on the single issue the parties' settlement agreement preserved for Commission then appellate review – the reparations surcharge rate. The question at hand is whether Commission Order 2022-79 improperly denied DIUC's request for a reparations surcharge rate designed to address DIUC's shortfall in revenues and rate of return in order to properly address the seven-year battle DIUC has fought to achieve the revenue that ORS and the POAs finally agreed to in the 2021 Settlement Agreement.

DIUC merely seeks this Court's correction of the Commission's errors in Order 2022-79 which denied DIUC's right to collect a reparations surcharge rate which would remedy the Commission's failure in Order 2018-68 to award sufficient rates (ie, to remedy the shortfall of the insufficient 88.5% increase of Order 2018-68 that was rejected by this Court in DIUC II).

On August 22, 2022, DIUC filed its initial brief outlining the deficiencies in Commission Order 2022-79. Respondents have now filed briefs to which DIUC now replies.

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. NOTHING IN RESPONDENTS' BRIEFS JUSTIFIES A RULING CONTRARY TO THE RELIEF REQUESTED BY APPELLANT.

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

The briefs of both Respondents devote significant discussion to the flawed assertion that the reparations surcharge rate sought by DIUC is retroactive ratemaking, yet neither brief adequately refutes DIUC's position.

With regard to the legal support cited by DIUC, both ORS and the POAs correctly state that this Court has in other cases addressed the issue of retroactivity. That is accurate. For

example, Porter v. SCPSC, 328 S.C. 222, 493 S.E.2d 92 (1997), is often cited as recognition that retroactive ratemaking is disfavored because it is preferable that "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 here, because the surcharge rate DIUC seeks will not retroactively impose on any customer charges for the usage of water or sewer services by any other customer. Therefore, although Respondents cite Porter v. SCPSC, 328 S.C. 222, 493 S.E.2d 92 (1997), they do not sufficiently counter DIUC's reliance upon the same case: "for the primary principle underlying the prohibition of retroactive ratemaking 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 rate payors to pay for past dues." (App.Brief at 27; citing Order 202-79 at 7; citing Porter v. SCPSC.)

DIUC does not disagree with the general premise cited by Respondents that "ratemaking is a prospective process, not a retroactive one." However, as fully explained in Appellant's Brief, and supplemented herein, the relief requested by DIUC is not retroactive ratemaking because the reparations rate DIUC seeks will not impose on any customer charges for the usage of water or sewer services by any other customer. 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.")

Additionally, 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 ORS Brief also quotes S.C. Code Ann. § 58-5-290, which provides "[T]he 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 has herein provided." (ORS Brief at 21). The ORS Brief focuses on rates "thereafter observed and enforced" (ie, the timing of the rate). DIUC does not seek a retroactive rate. The important portion of the statute is that it is the Commission's sole duty to "fix a *reasonable rate*" for utilities. This, of course, is exactly the point that DIUC makes. Rates must be reasonable and the requested surcharge reparations rate is, given all the circumstances of the seven-year case, a reasonable rate.

Contrary to Order 2022-79, the denial of the surcharges DIUC requests ignores all the evidence in the record that the extraordinary length of this proceeding and the myriad of egregious errors that have delayed a proper rate order will unconstitutionally harm DIUC if not corrected by the requested reparations surcharge rate.

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

Both Respondents' Briefs ask this Court to ignore the clear intent of the decisions in DIUC I and DIUC II, which reversed both Order 2015-846 and Order 2018-68, respectively. In DIUC I, this Court ruled:

> DIUC's arguments under Regulation 103-846 and Rules of Evidence 401, 402, and 403 are practically identical. Because the Settlement Agreement was entered into by only ORS and the POAs, DIUC rightly asserts the agreement did not resolve any

> of the issues before the Commission. Additionally, DIUC notes the Settlement Agreement contains no evidence related to the rate adjustments at issue, and is therefore irrelevant and immaterial. Furthermore, DIUC argues the Settlement Agreement was unfairly prejudicial in that it bolstered ORS's proposals and attempted to usurp the Commission's fact-finding power to determine the appropriate rates.
>
> We agree the Settlement Agreement was not relevant evidence as defined in Rule 401, and was therefore inadmissible at the hearing. S.C. Code Ann. Regs. 103-846; SCRE 401. The Settlement Agreement contained no factual evidence or stipulations related to DIUC's revenue increase requests. Moreover, the Settlement Agreement did not resolve any issues before the Commission because DIUC, the applicant seeking rate increases, was not party to the agreement. At most, the Settlement Agreement indicated to the Commission that were it to adopt ORS's recommended adjustments, the POAs would not appeal. However, a party's agreed reaction to a speculative future order of the Commission is irrelevant to the pivotal issue at the hearing—the necessity and reasonableness of DIUC's requested revenue increases. Therefore, the Commission erred in admitting and considering the Settlement Agreement.
>
> ***
>
> 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.
>
> ***
>
> For the foregoing reasons, we conclude the Commission erred in admitting into evidence and adopting the Settlement Agreement between ORS and the POAs. Therefore, we reverse and remand to the Commission for a de novo hearing.

DIUC I, 420 S.C. at 315-20, 803 S.E.2d at 285-98.

Two years later almost to the day, this Court reversed the Commission a second time in DIUC II. The Court ruled:

> The commission's wholesale rejection of every Guastella invoice appears retaliatory because the commission approved and awarded $75,000 for Guastella's services after the initial hearing.
>
> ***
>
> 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's rate application will now go before the commission for a third hearing. In our initial reversal and remand, we explained certain points of law applicable to the merits of DIUC's claims. Daufuskie Island Util. Co., 420 S.C. at 316-20, 803 S.E.2d at 286-88. 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. Rather, we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the "objective and measurable framework" the law provides. Utils. Servs., 392 S.C. at 113, 708 S.E.2d at 765.

DIUC II, 427 S.C. at 462-464, 832 S.E.2d 574-575 (emphasis in original). ORS has improperly concentrated only on this language regarding the objective and measurable framework in an attempt to justify subjecting DIUC to the same retaliatory demands wholly rejected by this Court in DIUC II.

Respondents also argue that despite having been reversed by this Court, Commission Orders 2015-846 and 2018-68 remain valid orders and they were not impacted by this Court's rulings in the respective appeals. Accordingly, they argue the surcharge rate DIUC seeks cannot be made because it would violate Commission Order 2015-846 and Order 2018-68 – the very orders this Court reversed for egregious reasons. The Respondents want this Court to rule that even when the Court finds two commission orders reversible and remands the matters for a de novo hearing, the Court really does not mean that those reversed orders are unlawful. The ORS Brief actually says, "the filed rate doctrine bars collateral attacks on previously determined rates. This Court did not rule the rates in DIUC I or DIUC II to be unlawful." (ORS Brief 22) The ORS Brief goes even further by asserting that this Court must use special language or the Court's clear intent will not be recognized by ORS:

> **The reversal of a Commission order also does not, in and of itself, render Commission established rates unlawful, absent a specific indication otherwise. In other words, *if* the Court does not declare that rates are unlawful, the rates are necessarily lawful.** This Court made no finding in DIUC I or DIUC II that the rates ordered in Commission Order No. 2015-846 or Order No. 2018-68 were unlawful.

(ORS Brief 23) (italics in original; bold emphasis added)

Joining in the ORS refusal to accept this Court's rulings in DIUC I and DIUC II, the POA brief asserts: "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.**" (POA Brief 14) (emphasis in original)

The Respondents are repeating the error of law made by the Commission in Order 2022-79. As discussed in Appellant's Brief at Section B, pages 29 through 31, Order 2022-79 ignored the intent of this Court in DIUC I and DIUC II when it concluded the rates of Commission Order No. 2015-846 and Order No. 2018-68 remain in force and therefore "lawful" such that they bar any revision. This is totally illogical – if this Court reversed and remanded both orders for de novo hearings and in doing so rejected and admonished the Commission, those reversed Commission orders cannot be a bar to any subsequent change, whether through rehearing or other adjustment within the same ongoing rate proceeding. As Appellant's Brief explains, in Hamm v. Cent. States Health & Life Co. of Omaha this Court summarized the parties' assertions then explained when Commission rate orders are "unlawful", 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.**

(Appellant Brief 29) (quoting Hamm v. Cent. States Health & Life Co. of Omaha, 299 S.C. 500, 504, 386 S.E.2d 250, 253 (1989) (emphasis added)).

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. at 315, 803 S.E.2d 280 at 286. 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. at 463, 832 S.E.2d at 574. 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 remand on the grounds that those reversed orders are lawful, proper, and cannot be disturbed without implicating the prohibition on retroactive ratemaking.

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. Commission Order 2022-79 should be reversed.

In its Brief, ORS clearly concedes that Hamm v. Cent. States Health & Life Co. of Omaha, 299 SC 500, 386 SE2d 250 (1985), stands for the proposition that ***when rates are found to be "unlawful," "a refund in [t]hat instance would not be considered retroactive ratemaking***." (ORS Brief 23 n.47) (quoting Hamm at 505, 253) (emphasis added). Attempting to circumvent this precedent, ORS goes on to argue that there is a distinction between this Court's ruling in the Hamm case and its rulings in DIUC I and DIUC II because there is a distinction between an unlawful Commission order on rates and an unlawful rate. (See ORS Brief at 24 alleging DIUC position on this Court's rulings in DIUC I and DIUC II "seeks to make inseparable two distinct components: Commission Orders and lawful rates.")

The argument is circular and illogical and it manufactures a distinction without any difference. Respondents are actually arguing that Hamm is inapplicable because there exists some heretofore never noted "distinction between an erroneous Order and unlawful rates." (ORS Brief 24) ORS is arguing that Commission Orders 2015-846 and 2018-68 remain valid and cannot be changed because this Court did not say "the rates are unlawful" when it reversed the orders. (Id.) That makes no sense. The rates of the reversed commission orders would necessarily be replaced by proceedings on remand. So, in March 2021, after the second reversal and remand when the parties all settled and agreed to leave unresolved the current issue of the reparations surcharge rate, ORS specifically agreed to that issue being addressed and a potential change to the rates. (Order 2021-132, Order Approving Settlement Agreement and Further Procedure) (approving the parties' agreement to keep the rate proceeding open for an appeal on the remaining rate issue – the reparation surcharge rate) Now, however, ORS asserts it agreed to the procedure for addressing the reparations surcharge rate but that it does not have to acknowledge the result of that procedure.

Even assuming there is some difference between the rate provided by a commission order and the order itself, as ORS seems to assert, the Settlement Agreement and Order 2021-132 both specifically addressed the issue of rates ***and*** the potential appeal of forthcoming decision on the reparations surcharge rate. Order 2021-132 clearly stated:

> 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.

(Order 2021-132 at6) The Settlement Agreement and Order approving it make clear that although the parties agreed on several issues, the underlying proceeding remains unresolved and DIUC continues to pursue the surcharge rate issue along with any necessary further appeals.

Likewise, despite acknowledging the ruling in Hamm, the POA Brief goes on for several pages attempting to support the idea that the decisions of this Court in DIUC I and DIUC II did not find any rate to be unlawful. (POA Brief 16 stating "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")

The actual ruling sought by Respondents must be analyzed for what it is. Respondents actually seek an order of this Court that states when, as here, this Court reverses two commission orders finding the first order's adjustments unsupported by evidence and the second order tainted by ORS misconduct, the reversed orders nonetheless remain enforceable and cannot be challenged. This is totally contrary to the purpose of remand and Respondents are certainly cannot write into law new requirements for this Court.

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

The Commission committed legal error and made an arbitrary determination that the requested reparation surcharges are not constitutionally necessary. Before the Commission and in Appellant's Brief, DIUC has amply explained 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." (Appellant Brief 34-36, Reparations Submission at 21-23, and DIUC Mtn Reconsider at 13-18) Neither of Respondents' Briefs effectively address DIUC's support for its position.

In its Commission filings and Brief to this Court, DIUC frankly acknowledges that "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." (Appellant Brief 34) Then, Appellant's Brief also thoroughly discusses cases that support DIUC's request and the reasoning behind it, including R.R. Comm'n of Texas v. High Plains Nat. Gas Co., 628 S.W.2d 753 (Tex. 1981); State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina, 312 N.C. 59, 320 S.E.2d 679 (1984); and Appeal of Granite State Elec. Co., 120 N.H. 536, 539, 421 A.2d 121 (1980).

Of particular note is the case of Appeal of Granite State Elec. Co., 120 N.H. 536, 539, 421 A.2d 121, 122–23 (1980), wherein the court held:

> [t]he 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.

(as cited in Appellant Brief at 35) As explained by the court in Granite State, an order is not final until all appeals have been exhausted and the proceeding ended. Equity and fairness are supported by application of Granite State:

> 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.

(Appellant Brief 35-36) (citing Appeal of Granite State Elec. Co., 120 N.H. at 539-40, 421 A.2d at 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)).

As DIUC explained to the Commission and as DIUC has presented in its briefing on appeal,

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 on remand as the parties are not bound by the previous record. See DIUC I, 420 S.C. at 316 n.8, 803 S.E.2d at 286 n.8 ("…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.")

It is entirely consistent with South Carolina law that this Court would -and should- specifically find that making a prevailing party whole following a successful appeal is not retroactive ratemaking. Such a rule ensures compliance with constitutional requirements.

The ORS response to this portion of the Appellant's Brief does not provide adequate support for a ruling against Appellant. What ORS suggests is that because DIUC did not appeal Commission Order No. 2021-132, which approved the Settlement Agreement, "DIUC cannot dispute that it has been charging its customers, lawful, just, and reasonable, and final rates since March 1, 2021." (ORS Brief 20) ORS completely ignores the fact that the parties all agreed in the settlement approved by Order 2021-132 that DIUC could and would continue to pursue its request for reparations surcharge rate, even through appeal. Also, the relief requested is to address the period prior to March 1, 2021. (See Order 2022-79; Ex B, DIUC Brief re Reparations; App Brief at 5 (itemizing the one-time surcharges requested))

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 Approval Order 2021-132 included the following provisions to explain that even after entry of a settlement order, the rate application proceeding would remain open while the parties addressed the remaining rate issue of DIUC's request to implement a reparations surcharge rate. In approving the settlement, 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) Despite this language, Order 2022-79 found, and ORS argues, the Court to find that the entire rate proceeding and the final rate was settled so that DIUC should have actually appealed Order 2021-1332 if it wanted to seek the reparations surcharge rate. ORS wants this Court to rule that DIUC should have appealed the Order Approving Settlement and Further Procedure in order to be able to pursue the "further procedure" all parties agreed to and that the Commission approved in that Order.

This is the same error that the Commission made in Order 2022-79 denying DIUC the right to collect the surcharge rates. The Commission ruled, finding "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 very order whereby the Commission approved a consent procedure for DIUC to litigate the reparations surcharge rate.

In other words, the Commission ruled that it approved a settlement agreement and that agreement's negotiated reparations briefing procedure but then after allowing an entire year's worth of expense, legal briefing, drafting of proposed orders, and multiple hearings regarding reparations the Commission finally mentioned that it never really intended to grant the relief because DIUC did not appeal the settlement order that approved the procedure to seek that relief. This Court cannot endorse that ruling. Commission Order 2022-79 should be reversed.

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 seven-year proceeding. Combined, the refund of $232,542 for the credit/refund made in its January 2018 billing 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 together total almost $900,000 before any interest is applied. DIUC's total annual revenue allowed under is newest rates is $2,267,714. The amount at issue -- the requested surcharge rate-- is nearly half of one year's revenue per the negotiated Settlement Agreement. That is certainly financially and constitutionally significant.

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.").

Again relying on its illogical application of the Settlement Agreement and Order 2021-132 Approving Settlement Agreement and Further Procedure, the ORS Brief asserts DIUC is not entitled to relief through the briefing procedure established by the settlement and Order to address the remaining rate issue of the reparations surcharge rate because DIUC did not appeal that order. ORS then doubles back to its previous argument that this "Court's Opinion and Commission Orders, Orders on Rehearing, and the Order on Second Rehearing make no … findings" that the reversed Commission Orders were "unlawful". (ORS Brief 34) ORS also faults DIUC for not submitting evidence on constitutional grounds and loss; but, it was ORS that sought and obtained a ruling of the Commission striking the Affidavit on that subject that DIUC submitted. 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 Ex. B, Remediation and Reparation Schedule. (Cite) Of course, just because ORS was successful in limiting the post-settlement briefing that does not mean that if this Court reverses Order 2022-79 that the Commission cannot take evidence on that issue. To be clear, DIUC did not waive any rights to present evidence after a decision on the legal issue. (Order 2021-

132, Ex. 1 Settlement Agreement stating "The Parties, all of them and each of them, specifically reserve their rights, positions, arguments, and previous testimony related to these issues. This Settlement Agreement shall not be construed as a waiver … as to these issues.")

Order 2022-79 and the Respondents' position cannot be adopted by this Court. To do so, would adopt a rule that when ORS and intervenors are able to convince the Public Service Commission to enter wholly inadequate rate orders thereby forcing a utility to either accept those orders or expend significant resources and time in appealing, when the matter is finally concluded, as in this case, after two reversals by this Court, the utility has absolutely no recourse for the losses it sustained while it awaited an actual, final rate order.

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.

Both Respondents wish to ignore the fact that their initial "settlement agreement" with subsequent appeal then ORS's improper application on remand of a heightened standard for rate case expenses extended this proceeding for years. DIUC did not cause that. Instead, particularly with regard to an assertion that DIUC cannot pursue the remedies on appeal here, they instead want to focus on other matters like the Commission's erroneous ruling that notwithstanding DIUC did not have financial resources to obtain a bond under S.C. CODE § 58-5-240, somehow DIUC should have accomplished the impossible. 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 Respondents and the Commission's Order on appeal, DIUC

somehow waived its right to now pursue the rate component that all parties and the Commission agreed DIUC could pursue. (See Order 2021-132, Order Approving Settlement Agreement and Further Procedure) That position is unsupported and erroneous.

The Commission erroneously concluded that DIUC is barred from relying on its inability to afford a bond under S.C. CODE § 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." (Appellant's Brief 43) In response to Guastella's Affidavit, 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 to collect rates on appeal. 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's position.

It is also essential to note that in In re Blue Granite Water Co., this Court considered the language of Section 58-5-240 which permits an appealing utility to "put the rates requested in its schedule [(i.e., its original application to the PSC for ratemaking)] into effect under bond only during the appeal and until final disposition of the case" or "*there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested*...." 434 S.C. 180, 202, 862 S.E.2d 887, 898–99 (2021) (quoting S.C. CODE § 58-5-240(D)) (emphasis in original). Obviously a bond is not the exclusive remedy available to a utility with regard to appeals and rates. In this case, DIUC seeks the alternate remedy of a reparations surcharge rate. There is no reason to read S.C. CODE § 58-5-240(D) to limit DIUC's remedy, particularly given that it could not afford a bond.

CONCLUSION

Nothing presented by Respondents' Briefs justifies a ruling contrary to the relief requested by the Appellant. 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.

Respectfully submitted,

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October 11, 2022
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S.C. SUPREME COURT

CERTIFICATE OF COMPLIANCE

By signing below, I hereby certify that this Brief complies with Rule 211(b), SCACR.

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