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S.C. SUPREME COURT

59THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2014-346-WS
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., and
Bloody Point Property Owner's Association, ... Respondents.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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November 29, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ADMINISTRATIVE ORDERS

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Whether the Company can lawfully collect from its customers a reparations rate increase surcharge prospectively even though it is not tied to any prospective action but corresponds solely to past service rendered when the Company failed to place the associated revenue increase under bond and this Court has ruled that retroactive ratemaking is unlawful.

STATEMENT OF THE CASE AND FACTS

This is an appeal of Public Service Commission of South Carolina ("Commission") Order Nos. 2022-79 and 2022-242, which were issued on January 27, 2022, and April 11, 2022, respectively, in Docket No. 2014-346-WS.[1] (R. pp. 0191, 0225).

Daufuskie Island Utility Company, Inc. ("DIUC" or "Appellant"), a water and sewer company regulated by the Commission, filed an Application on June 9, 2015, requesting a 108.9% revenue increase for water and sewer service to be collected by increasing the rates paid by its water and sewer customers. (R. p. 1281). The revenue increase equaled $1,182,301 in additional revenue, consisting of water revenue increases of $590,454 and sewer revenue increases of $591,847. (R. pp. 1287, 1305).

The South Carolina Office of Regulatory Staff ("ORS") is automatically a party to all matters before the Commission pursuant to S.C. Code Ann. § 58-4-10(B). Petitions to Intervene were granted to Haig Point Club and Community Association, Inc. ("HPCCA"); Melrose Property Owner's Association, Inc. ("MPOA"); Bloody Point Property Owner's Association ("BPPOA");

[1] This is the third appeal to the Court of Commission Orders in the underlying docket. DIUC originally appealed Commission Order Nos. 2015-846 and 2016-50. (R. p. 1063). On Appeal, the Supreme Court reversed and remanded the case to the Commission for a *de novo* rehearing. Daufuskie Island Util. Co., Inc. v. S.C. Office of Reg. Staff, 420 S.C. Off. Of Reg. Staff, 420 S.C. 305, 803 S.E.2d 280 (2017). In its second appeal, DIUC appealed Commission Order Nos. 2018-68 and 2018-346, and the Court again reversed and remanded the case to the Commission for a second rehearing. Daufuskie Island Util. Co., Inc. v. S.C. Off. of Regul. Staff, 427 S.C. 458, 832 S.E.2d 572 (2019).

and Beach Field Properties, LLC ("Beach Field").[2] HPCCA, MPOA, BPPOA are collectively referred to as the Property Owners Associations ("POAs").

Pursuant to its statutory duties ORS initiated settlement discussions with the parties[3] and shared revenue, operating margin, and return on equity ("ROE") amounts resulting from its recommended adjustments. On October 27, 2015, ORS and POAs filed what was titled a "Settlement Agreement" with the Commission and served it on the parties. (R. pp. 0028-0029). At the outset of the merits hearing on October 28, 2015, the Commission received the Settlement Agreement into evidence and proceeded to hear testimony from the witnesses and to receive exhibits into the record. (R. p. 0004, n. 2). On December 8, 2015, the Commission issued Order No. 2015-846, which granted DIUC an additional $462,798 in operating revenues. (R. p. 0031). On December 21, 2015, DIUC filed a Petition for Reconsideration and/or Rehearing, which was denied by the Commission in Order No. 2016-50. (R. p. 0037). On March 22, 2016, DIUC served its Notice of appeal of Order No. 2015-846 and Order No. 2016-50 ("2016 Appeal"). (R. p. 1063). The Office of Clerk of the Supreme Court assigned the matter Appellate Case No. 2016-000652.

The Supreme Court heard oral arguments on the 2016 Appeal on December 14, 2016, and on July 26, 2017, issued its Opinion. Daufuskie Island Util. Co., Inc. v. S.C. Office of Reg. Staff, 420 S.C. 305, 803 S.E.2d 280 (2017) (referred to herein as "DIUC I"). The Court reversed Commission Order No. 2015-846 and remanded the matter for a *de novo* hearing. Id. The Court found the Commission erred in admitting into evidence and adopting the Settlement Agreement

[2] By letter dated July 12, 2016, to this Court, Beach Field stated that it does not have a position regarding the issues on appeal and does not intend to participate as a party Respondent. On November 23, 2016, this Court granted Beach Field's request and removed it from being a named party in this matter.

[3] See S.C. Code Ann. § 58-4-50, "(A) It is the duty and responsibility of the regulatory staff to...9) to serve as a facilitator or otherwise act directly or indirectly to resolve disputes and issues involving matters within the jurisdiction of the commission....")

between ORS and the POAs; however, the Court made no finding that the rates resulting from Commission Order No. 2015-846 were unlawful. See DIUC I. Moreover, while the Court reversed and remanded the matter for a *de novo* hearing as to all issues, it also offered guidance on three allegations of error: DIUC's Plant in Service as it relates to the elevated tank site, DIUC's entitlement to recovery of certain property tax expenses, and DIUC's recovery of certain bad debt expenses.[4] DIUC I, 420 S.C. at 316-320, 803 S.E. 2d at 286-288. The Court held:

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

DIUC I, 420 S.C. at 316, 803 S.E.2d at 286.

The Court also stated that rate cases are heavily dependent upon factors that are subject to change during the pendency of an appeal, that a party's economic realities may change, and the Commission may consider additional evidence on remand. Id. Of note, the Court declined to provide specific guidance to the Commission on the other issues that DIUC appealed, including the Commission's decision to disallow recovery of $699,361 from DIUC's rate base.

On August 24, 2017, following remand from the Court, the Commission Hearing Officer, issued Order No. 2017-52-H asking the parties for proposed dates for the pre-filing of testimony and/or hearing dates. (R. p. 0064). On October 4, 2017, DIUC filed Applicant's Proposal for

[4] While DIUC also appealed Commission Order Nos. 2015-846 and 2016-50, as they pertained to management fees, rate case expenses, and other plant in service, the Court declined to provide specific guidance on these matters.

Procedure Following Remand and Expedited Hearing. (R. p. 0263). According to DIUC's proposal, there were limited issues for the Commission to consider on Rehearing. (Id.).

On October 10, 2017, the Commission Hearing Officer issued Commission Order No. 2017-59-H, which summarized the position of DIUC by stating,

> [c]ounsel for [DIUC] opined that the Commission should consider the record presented in the original hearing, and accept new testimony solely on issues referred to by the Supreme Court, namely property taxes, plant in service, bad debts, management fees, and rate case expenses. Said counsel also stated the belief that the Supreme Court opinion did not allow for any discovery in this case.[5]

(R. pp. 0065-0066). Additionally, that Order stated, "DIUC's counsel stated a preference for the pre-filing of testimony, hearing, and issuance of an Order in this case before the end of 2017...." (R. p. 0066). However, the Commission Hearing Officer declined to set an expedited procedural schedule, concluding that DIUC failed to justify why such an expedited proceeding was necessary, and ordered that the rehearing begin on January 30, 2018. (Id.). On October 16, 2017, DIUC filed with the Commission a Motion to Reconsider Directive 2017-59-H and Directive 2017-60-H in an effort to ensure that the case was "resolved prior to December 31, 2017," and set a path forward to determine the need for additional discovery. (R. p. 0269).

On October 23, 2017, the Commission Hearing Officer, in an effort to accommodate DIUC, issued Order No. 2017-61-H.[6] (R. pp. 0087-0088). Pursuant to that Order and based upon DIUC's

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[5] Shortly after the Commission issued Order No. 2017-59-H, ORS sent an e-mail to the Hearing Officer, which was placed on the Commission's Docket Management System, clarifying one point in his Order in which he characterized ORS's position. According to the e-mail,

> ORS does not read the Supreme Court Order in the same narrow manner presented by counsel for DIUC. ORS believes that the Supreme Court remanded this case to the Commission 'for a new hearing as to all issues.' However, ORS does not intend to argue issues on which the Supreme Court gave guidance. Regarding the utilization of discovery, any discovery required by ORS will depend upon the filings to be made by DIUC. (R. p. 1388).

[6] The Commission has a statutory right to a six-month period from the beginning of a rate proceeding to the date the final order must be filed. S.C. Code Ann. § 58-5-240. This case was remanded for a *de novo* hearing. As a result, the Commission had the latitude to extend the procedural schedule by additional time but instead conducted an expedited procedure in an effort to accommodate DIUC.

preference for a hearing before the end of 2017, the Commission modified the remaining pre-filing testimony due dates and the hearing date. (Id.). During the *de novo* proceeding, ORS conducted discovery related to additional evidence that DIUC introduced at the rehearing, and the parties pre-filed rehearing testimony of their witnesses. (R. pp. 0079, n. 3, 0085). The Commission subsequently convened a *de novo* rehearing on December 6, 2017. (R. p. 0100).

On December 20, 2017, the Commission issued a substantive ruling on the rehearing through a Commission Directive and stated that an Order was to follow. (R. pp. 0073-0074). On January 31, 2018, the Commission issued Order No. 2018-68, which detailed all adjustments and rate matters to be adopted by DIUC and allowed DIUC the opportunity to earn approximately $950,166 in additional revenues.[7] (R. p. 0120). On February 20, 2018, DIUC filed a Petition for Reconsideration and/or Rehearing of Commission Order No. 2018-68. (R. p. 0283). On May 16, 2018, the Commission issued Order No. 2018-346, denying DIUC's Petition for Reconsideration and/or Rehearing. (R. p. 0128).

On June 13, 2018, DIUC served its Notice of Appeal of Order Nos. 2018-68 and 2018-346. (R. p. 1123). The Office of the Clerk of the Supreme Court assigned the second appeal (the "Second Appeal") Appellate Case No. 2018-001107. The Second Appeal was briefed, and the parties presented oral arguments on April 18, 2019. On July 24, 2019, the Court issued its Opinion reversing the Commission's Order and remanding the matter for a "third hearing." DIUC v. S.C. Office Reg. Staff, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019), reh'g denied (Sept. 27, 2019) (referred to herein as "DIUC II"). The Court found the Commission's denial for DIUC's rate case expenses it previously permitted was arbitrary because DIUC's evidence was subjected to a

[7] This amounts to nearly $500,000 more than the Commission awarded DIUC the opportunity to earn in Order No. 2015-846.

retaliatory, higher standard of scrutiny on remand. See DIUC II. In DIUC II, the Court specifically did not rule on the merits but said,

> [i]n 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.

DIUC II, 427 S.C. at 465, 832 S.E.2d at 575 (citing Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 113, 708 S.E.2d 755, 765 (2011)). This matter was remitted to the Commission on September 27, 2019, after the Court denied the Respondents' Petitions for Rehearing.

On November 15, 2019, DIUC's counsel filed a letter with the Commission advising the Company did not intend to introduce any additional evidence in this matter as "the record is fully developed and another hearing for further testimony or evidence is not necessary." (R. p. 1390). Counsel for ORS filed a responsive letter with the Commission on December 6, 2019, stating that "provided DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings."[8] (R. p. 1391).

On May 20, 2020, the Commission issued Order No. 2020-382, which, pursuant to the Court's Opinion, stated that the Commission would hold a third hearing to consider the limited issues of rate case expenses, plant in service, and reparations. (R. p. 0142). On June 9, 2020, the

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[8] On April 1, 2020, counsel for ORS filed a letter stating,

> Based upon representations made by counsel for DIUC, ORS does not plan to submit any additional evidence in this case and has not conducted any new discovery or audits of any of the Company's expenses. ORS respectfully requests that the Commission issue an Order in this case awarding DIUC rates and revenues that include rate case expenses in an amount that includes the amount awarded by the Commission in its last Order plus the $75,000.00 that the South Carolina Supreme Court interpreted as having been taken away from the Company after the Commission's initial Order in this matter.

(R. pp. 0320-0321).

Commission issued Order No. 2020-48H, which set forth procedural dates, including testimony deadlines, for all parties. (R. p. 0143). On June 16, 2020, and contrary to the position advanced in its November 15, 2019 letter, DIUC pre-filed testimony in which the witness adopted all of his previously filed testimony and an additional 22 pages of questions and answers and seven exhibits.[9] Because the Parties eventually settled all issues except the legal issue before this Court, this pre-filed testimony was never entered into the record; however, DIUC's filing obligated ORS to conduct additional discovery to maintain a consistent, measurable, and objective review.[10] ORS issued DIUC discovery that it consistently issues to utilities and that enables ORS to carry out its responsibilities in an objective and measurable framework. The discovery issued by ORS to DIUC in response to DIUC's testimony consisted of the following, "[p]lease provide all documents that support Rate Case Expenses of $269,356 as identified in the Second Rehearing Direct Testimony of John F. Guastella [...] including, but not limited to, the calculation, reconciliation and vendor invoices," and "...[p]lease provide all documentation to demonstrate the invoices that are included in the amount of $269,356 have been paid by DIUC." (R. p. 0415).[11] Notwithstanding this limited and common rate case discovery inquiry that was necessary to objectively evaluate costs DIUC

[9] The testimony filed by DIUC on June 16, 2020, attempted to introduce new facts into the record despite DIUC's November 15, 2019, stated intention that DIUC did not plan to introduce any additional evidence. See DIUC Letter filed on November 15, 2019, stating, "[b]ecause there have already been two hearings in this case, the record is fully developed and another hearing for further testimony or evidence is not necessary." In its June 16, 2022, testimony, DIUC requested recovery of $269,356 in rate case expenses.

[10] The Commission found that,

> ORS offered to cease discovery to the extent DIUC stopped the submission of new evidence into the record. However, because DIUC introduced new facts to the Commission, and ORS had an obligation to investigate the new facts and utilize an objective and measurable framework to make a recommendation to this Commission, ORS issued additional discovery requests.

(R. pp. 0202-0203).

[11] ORS acted in a consistent manner. The question ORS asked in the second remand is substantively similar to discovery ORS asked in the original proceeding. On July 17, 2015, ORS issued discovery asking DIUC to provide rate case expenses incurred, the date paid, payee, amount paid, and a description of services provided. During the first remand hearing, on October 24, 2017, ORS asked that DIUC provide detailed invoices and other documentation to support all rate case expenses for which the Company is seeking recovery.

would request to be passed along to ratepayers, DIUC objected to this limited discovery. (R. pp. 0400-0401).[12] On July 14, 2020, ORS filed a Motion for Clarification and To Hold Remaining Procedural Due Dates in Abeyance Pending Commission Order to determine whether the Commission would prefer "to have ORS continue its investigatory review or cease to conduct any further review of DIUC and thereby allow the Commission to rely upon the record as it currently [stood]." (R. p. 0401). On July 22, 2020, the Commission issued Order No. 2020-496, which granted ORS's Motion for Clarification and requested that ORS continue its investigatory review of the matter of the rate case invoices. (R. p. 0145). However, DIUC continued to deny ORS access to information.[13] (R. pp. 0426-0427). On August 17, 2020, ORS filed a Motion to Compel Production of Documents by DIUC. (R. p. 0426). On October 8, 2020, the Commission heard oral argument on ORS's Motion to Compel and, on that same day, issued Order No. 2020-700 granting ORS's Motion to Compel. (R. p. 0147). Of note, counsel for DIUC admitted that DIUC withheld discoverable matter conceding that DIUC could in fact provide the requested reconciliation to ORS but did not want to because of possible strategic reasons (Order No. 2020-759) (R. p. 0151), while also making the contradictory remark that "[t]he supposition that there has been some sort of incomplete response or that DIUC intentionally withheld information is

[12] It should also be noted that in its response DIUC asserted for the first time that certain invoices had been paid.

[13] DIUC did not cooperate with ORS's discovery requests despite the fact that S.C. Code Ann. § 58-4-50 directs ORS to inspect, audit, and examine public utilities and make appropriate recommendations to the Commission regarding matters within the jurisdiction of the Commission when in the public interest and S.C. Code of Regulations §§ 103-517 and 103-719 declare that in addition to having access to the utility's records, the utility must also be fully cooperative. S.C. Code Ann. § 58-4-50; S.C. Code Regs. §§ 103-517, 719. Additionally, Commission Order No. 2009-154 requires DIUC to provide books and records to ORS upon request; and according to a filing made by Mr. John Guastella, on behalf of Guastella Associates, if ORS requests books DIUC would provide them "to ORS either the same day or the next business day of its request." (R. pp. 0427-0429). Mr. Guastella also committed that "[i]n the event of any investigation by the PSC or ORS with respect to rate cases or any other matter for which ORS requests access to the books and records, we will make a full set of requested records available at a location in South Carolina that is acceptable to ORS." Id.

totally ridiculous." (R. p. 0462). Notably, Order No. 2020-759 was not appealed by DIUC and stands as fact in this proceeding.

On January 7, 2021, counsel for DIUC wrote to the Commission and requested that the matter be set for hearing at the Commission's convenience in late February or early March. (R. p. 1392). The Commission once again accommodated DIUC's request as to timing and set the hearing date for March 2, 2021. (R. p. 0156). Subsequently, on February 11, 2021, counsel for DIUC informed the Commission that the Parties were engaged in good faith settlement negotiations. (R. p. 1393).

On February 18, 2021, the Parties filed with the Commission a Settlement Agreement that resolved all issues remaining in this proceeding with the exception of one legal issue: DIUC's request for a retroactive reparations surcharge rate increase (the "Retroactive Surcharge"). (R. pp. 1397, 1400). The Settlement Agreement allows for DIUC to charge rates intended to generate $2,267,714 of annual revenue. (R. p. 1398). In order to stay within the revenue confines of DIUC's Second Revised Notice to its customers, DIUC voluntarily agreed to forego in this proceeding its request to recover $699,361 in Utility Plant.[14] (R. p. 1399). Additionally, all Parties agreed that the Settlement Agreement proposes rates that are just and reasonable.[15] (R. p. 1398). Regarding the remaining legal issue of whether DIUC is entitled to recover the Retroactive Surcharge, the Settlement Agreement states:

> DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%,[16] 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

[14] (R. p. 1399).

[15] "[The] Settlement Agreement results in rates for water and wastewater service that are just and reasonable and will allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application." (R. p. 1398).

[16] Despite the rates resultant from Commission Order No. 2015-846, because DIUC utilized the remedy offered by the General Assembly in S.C. Code Ann. Section 58-5-240, the lowest amount DIUC has ever charged its customers was 88.5% of its total increase sought—and it has never charged its customers only 43% of its total increase sought.

> 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. ORS asserts that because DIUC chose not to put its requested (applied for) rates into effect under bond pending resolution of the second appeal, it cannot collect revenues from its customers going forward which it claims to have lost as a result of its decision to not post a bond while the current appeal was pending. Moreover, ORS also asserts that DIUC is prohibited from charging its customers any interest on any alleged lost revenues because rate-making is a prospective rather than a retroactive process. It is ORS's position that retroactive ratemaking is prohibited based on the principle that customers who use service provided by a utility should pay for its production rather than requiring future customers to pay for past use....

(R. pp. 1399-1400).

DIUC's request for a Retroactive Surcharge corresponds to 1) collecting the full amount it requested in its Original Application from the time period beginning on October 1, 2017, through March 1, 2021, with interest at the allowed 9.31% equity return; and 2) collecting reimbursement of the credit/refund made to the customers with the January 1, 2018, billing with interest at the allowed 9.31% equity return. (DIUC Reparations Initial Appeal Brief, p. 5). The first surcharge requested corresponds specifically to services rendered from October 1, 2017, to March 1, 2021, and the second surcharge related to the refund corresponds to service rendered from April 1, 2016, to January 1, 2018. (R. p. 0533). In large part, the length of this proceeding underpins DIUC's request for a Retroactive Surcharge. However, because DIUC was able to update expenses as they were incurred with each succeeding remand, it had the ability to recover expenses incurred in addition to those originally included in its 2014 test year.[17] Moreover, as shown in Table 1 through

[17] [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

Table 5 of ORS's Proposed Order on DIUC's request for reparations, (R. p. 0672), which consolidate and illustrate much of this proceeding's timing, many of the delays in this proceeding were precipitated by DIUC, while the Commission and ORS often worked with DIUC to accommodate DIUC's schedule.[18]

In accordance with the agreed-upon procedure, the parties briefed the legal issue of retroactive reparations to the Commission, and the Commission heard oral arguments on November 30, 2021.[19] (R. p. 0187). The sole issue for Commission consideration was whether DIUC may charge its customers reparations in the form of surcharges resulting from what DIUC described as "confiscatory" rates. (R. pp. 0192, 1400-1401). On January 27, 2022, the Commission issued Order No. 2022-79 denying DIUC's request to impose a Retroactive Surcharge on its customers. (R. p. 0191). DIUC petitioned the Commission to reconsider Order No. 2022-79 and on April 11, 2022, the Commission issued Order No. 2022-242 denying DIUC's petition for reconsideration. (R. pp. 0757, 0225).

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presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

DIUC I, 420 S.C. at 316 n. 8, 803 S.E.2d at 286 n. 8.

[18] (R. p. 0672). Notably, this table does not include the three extensions DIUC sought and received to file its brief in this appeal. ORS did not object to DIUC's multiple requests, but it did raise "serious concern that DIUC may include the days of extensions of time in what DIUC believes the final bill should be for its customers." Third Request for Extension of Time Filed by DIUC with this Court on August 1, 2022.

[19] DIUC attached to its legal brief an affidavit of one of its witnesses, which caused some contention regarding DIUC's ability to introduce certain questions of fact into the legal determination of whether it could charge a Retroactive Surcharge. On July 26, 2021, the Commission issued Order No. 2021-501 that held, "[t]he Parties agreed and the Commission approved the method of adjudicating the question of reparations and surcharges, and this was by filing briefs with the Commission." (R. p. 0187). Accordingly, the factual matters that DIUC attempted to introduce through its written legal brief were found to exceed the parameters of evidence properly before the Commission and were struck. Id. DIUC did not appeal this Order and cannot properly assert that any issue aside from legal issue detailed in the briefs is properly before this Court.

STANDARD OF REVIEW

The issue that DIUC appealed to this Court is solely a legal issue. There are no factual disputes before this Court. South Carolina Code Ann. §§ 1-23-310 et seq. govern judicial review of a Commission Order. According to S.C. Code Ann. § 1-23-380,

> [t]he court may not substitute its judgment for the judgment of the agency 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.

"The Commission is considered the expert designated by the legislature to make policy determinations regarding utility rates." S.C. Energy Users Comm. v. S.C. Elec. & Gas, 410 S.C. 348, 353, 764 S.E.2d 913, 915 (2014) (citing S.C. Energy Users Comm. v. Pub. Serv. Comm'n of S.C., 388 S.C. 486, 490, 697 S.E.2d 587, 590 (2010)). "Thus, [b]ecause the Commission's findings are presumptively correct, the party challenging the Commission's order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." Id.

ARGUMENT

This proceeding opened in 2014, and the docket has not yet been closed. This has been a lengthy matter; however, any assertion that ORS created an untenably drawn-out proceeding and that DIUC was prejudiced as a result is simply untrue. As mentioned above, this Court allowed

DIUC to present additional evidence on remand.[20] Accordingly, with each new hearing before the Commission, DIUC has been afforded the opportunity to present additional evidence and seek recovery of new expenses incurred. This process enabled DIUC to mitigate the impact a lengthy proceeding may otherwise have had by allowing it to recover new expenses with each proceeding. As a result, DIUC has not been punished by the length of this proceeding but has received accommodation utilities were not previously afforded. This fact also dispels DIUC's allegation that it would be punished if this Court denies its requested Retroactive Surcharge to which it is not now, nor has it ever been, entitled. Moreover, as indicated above, DIUC withheld discoverable material from the state regulator, which unnecessarily prolonged this matter.

ORS also denies DIUC's assertion that, by issuing discovery to DIUC during the remand proceedings, ORS somehow applied a retaliatory standard.[21] ORS consistently issues discovery requests similar to those it asked DIUC during the second remand, and that discovery is substantively similar to discovery issued by ORS in the initial proceeding as well as the proceeding on first remand.[22] These requests are basic, standard, and necessary to ensure ORS evaluates rate case expenses in an objective and measurable manner – had ORS not asked it, it would have violated this Court's mandate set forth in DIUC II.[23] DIUC's citation to Mr. Rhoden's pre-filed testimony in support of its misleading and factually inaccurate argument that ORS applied a retaliatory standard also is irrelevant.[24] Mr. Rhoden's pre-filed testimony was not entered into the

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[20] DIUC I, n. 8, at 286, 316.

[21] See DIUC Reparations Initial Appeal Brief, p. 17.

[22] See n. 11 supra. Moreover, ORS only asked any additional discovery at all because DIUC sought to introduce additional evidence. See n. 9 supra.

[23]The Court required that ORS evaluate the evidence and carry out its important responsibilities consistently, within the "objective and measurable framework" the law provides. DIUC II, at 465, 575 (citing Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff. 392 S.C. at 113, 708 S.E.2d at 765 (2011)).

[24] See n. 11 supra

record of the proceeding and was not relied upon by the Commission in forming its decision or its order. Therefore, that pre-filed testimony should not be considered by this Court as it evaluates Commission Order No. 2022-79. Even if the Court were to consider Mr. Rhoden's testimony, it does not support DIUC's argument a retaliatory standard was applied.

DIUC's assertion regarding retaliation is nothing more than a red herring meant to distract the Court from the legal argument at hand. DIUC voluntarily entered into a Settlement Agreement and is now charging rates that it expressly agreed were "just and reasonable," which is the only rate to which DIUC is entitled. Instead, the sole issue before the Court is the legal argument of whether DIUC may charge its customers not for prospective production, but future rates for past use, the request of which the Commission properly denied in Order Nos. 2022-79 and 2022-242.[25]

Moreover, DIUC utilized the statutory tools at its disposal during the first appeal and obtained a bond, which allowed DIUC to charge its customers the full amount of the revenue requirement it requested during the pendency of the first appeal. DIUC never charged only the 43% increase originally approved by the Commission but instead charged 100% of the increase it originally requested. As a result, once this Court reversed the Commission in DIUC I, the 43% revenue increase approved in Commission Order No. 2015-846, and to which DIUC may have otherwise been subject during the first appeal, became a fiction.

Finally, the issue presented to this Court is the legal issue of whether a utility may seek and collect a retroactive rate increase surcharge on its customers that corresponds solely to past use and has no bearing on the utility's future production. Not only is the requested Retroactive Surcharge illegal under the regulatory construct created by the General Assembly and enforced by

[25] Retroactive ratemaking 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 ratepayers to pay for past use." Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997). (R. pp. 0192, 1400-1401).

this Court but DIUC's calculation of the surcharge is also illogically tied to utility plant, for which DIUC is not seeking recovery or rate case expenses that were not incurred until after the second remand.[26]

For the reasons summarized above and discussed in detail below, the Commission properly and appropriately applied the law to the record of facts and issued a well-reasoned Order supported by the substantial evidence in the whole record. Commission Order Nos. 2022-79 and 2022-242, which deny DIUC's ability to recover from its customers a Retroactive Surcharge, comply with the laws of South Carolina and should be affirmed.

I. COMMISSION ORDER NO. 2022-79 PROPERLY DENIED DIUC'S REQUEST TO IMPLEMENT A RETROACTIVE REPARATIONS SURCHARGE AND SHOULD BE UPHELD.

The question before the Commission was whether granting the Company's request is allowable under South Carolina law or whether it is illegal retroactive ratemaking.[27] Retroactive ratemaking is prohibited in South Carolina 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 ratepayers to pay for past use." Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997). The longstanding prohibition against retroactive ratemaking is based on the widely held norm that ratemaking is a prospective – rather than retroactive – process. See 73B C.J.S. Public Utilities § 141 ("[T]he setting of utility rates is a legislative function, even if carried out by administrative agency; therefore, utility rates, like any other legislation, generally can have only prospective application…."). Accordingly,

> [u]nder the rule against retroactive ratemaking, when a commission engages in ratemaking, it can look to the future only. Specifically, the rule requires that when

[26] October 1, 2017, through March 1, 2021, is the time period that forms the basis for DIUC's calculated Retroactive Surcharge. DIUC Reparations Initial Appeal Brief, p. 5.

[27] (R. p. 0196).

> determining each of the terms of the revenue requirement formula, when calculating the amount of revenue to be collected under proposed rates, or when allocating rates between classes or within a class, the commission cannot adjust for past losses or gains to either the utility, consumers, or particular classes of consumers.

Stefan H. Krieger, The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings, p. 997 (1991). As a result, "[e]ven if the court reverses a rate order on appeal, the court remands the case to the commission to fix rates for the future." Id. (emphasis added).[28] Similarly, this Court has specifically held that ratemaking is a prospective rather than a retroactive process. Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997); S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n of S.C., 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980); Parker v. S.C. Pub. Serv. Comm'n, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), overruled on other grounds by DIUC II ("Ratemaking is a prospective process, not a retroactive one. Any rate increases must be applied prospectively."). This Court has only recognized a single exception—which is not implicated in the facts before the Court presently. Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997) ("There is an exception to [the prohibition against retroactive ratemaking], however, for expenses deemed 'extraordinary.' An extraordinary expense is one that is unanticipated and non-recurring.").[29]

A. The Relief Sought by DIUC Requires the Application of Illegal Retroactive Ratemaking.

In the underlying proceeding, DIUC sought to charge its customers a reparation surcharge that corresponds to "water and sewer services from October 1, 2017 until March 1, 2021," and for

[28] While some courts have allowed retroactive ratemaking, this Court has not with only limited exception. See The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings, Stefan H. Krieger, Maurice A. Deane School of Law at Hofstra University, pp. 997-1007 (1991).

[29] Notwithstanding the fact that DIUC's requested Retroactive Surcharge is not "extraordinary," DIUC failed to raise the argument that this surcharge is "extraordinary" before the Commission and cannot now properly raise it.

interest corresponding to services rendered beginning April 1, 2016 to January 1, 2018.[30] Accordingly, the Retroactive Surcharge is not based on future production or prospective usage and instead DIUC seeks to require its customers to pay for past use of water and sewer service. Because awarding rates that provide for the future collection of any claim of past lost revenues or interest constitutes impermissible retroactive ratemaking,[31] the Commission appropriately rejected DIUC's request finding that it constitutes illegal retroactive ratemaking.[32] (R. p. 0196). In this appeal, DIUC mistakenly claims it is entitled to its requested relief and that the retroactive application of rates has not been addressed by South Carolina courts.[33] Instead, DIUC relies upon case-law from other jurisdictions, which of course have no authority over the Commission or this Court. Contrary to DIUC's assertions, this Court has addressed retroactive ratemaking and specifically held that ratemaking is a prospective rather than a retroactive process.[34] The law of

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[30] DIUC Initial Brief, p. 5; (R. p. 0533).

[31] See Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 493 S.E.2d 92 (1997).

[32] (R. p. 0196).

[33] See DIUC Reparations Initial Appeal Brief, p. 34.

[34] Argument I, supra. See also Hamm v. Cent. States Health and Life Company of Omaha. In Hamm, the South Carolina Supreme Court reasoned that, where certain insurance rates were found unlawful, the authority of an Insurance Commissioner granted under S.C. Code § 38-3-110(1) (Supp. 1987), "to make refunds of monies collected under an unlawful rate [was] a reasonably necessary implication arising from the authority of the Commissioner to regulate rates." 299 S.C. 500, 504, 386 S.E.2d 250, 253 (1989). In Parker v. S.C. Pub. Serv. Comm'n, 280 S.C. 310, 313 S.E.2d 290 (1984) ("Parker I"), the Supreme Court concluded the Commission erred by including an injuries and damages reserve account in approving an electric utility's rate base. In a second appeal, the Supreme Court reversed the Commission's order on remand because it allowed the electric utility to retain funds to which it was not entitled. Parker v. S.C. Pub. Serv. Comm'n, 285 S.C. 231, 328 S.E.2d 909 (1985) ("Parker II"). Both cases are distinguishable from the facts currently before the Court. Hamm involved insurance rates, not the statutes the General Assembly has enacted for setting rates for water and wastewater utilities. In addition, in the context of electric utilities, a statute is in place which allows for reparation orders under certain limited circumstances. See S.C. Code Ann. § 58-27-960. One limitation on the authority granted under S.C. Code Ann. § 58-27-960 is "no order for the payment of reparation upon the ground of unreasonableness must be made by the commission in any instance wherein the rate or charge in question has been authorized by law." Id. No statute similar to § 58-27-960 exists for water and wastewater utilities. Further, a refund situation is inherently different than what is sought by DIUC because only utilities are granted to the ability to effect rates under bond. Parties other than utilities do not have the ability to prevent rates they believe are unlawfully high from going into effect. Finally, in the second appeal of this matter where DIUC did not place rates into effect under bond, the Court, unlike in Hamm and Parker I and II, specifically stated it was not addressing "the merits at all" and did "not intend to make any suggestion of our views of the merits." DIUC II, 427 S.C. at 464, 832 S.E.2d at 575.

South Carolina thus positively confirms that DIUC's requested Retroactive Surcharge constitutes impermissible retroactive ratemaking.

DIUC cites a North Carolina Supreme Court Opinion in support of the position that the Commission has the ability to grant DIUC's Retroactive Surcharge.[35] In that case, however, the ability to order refunds hinged on the North Carolina Utility Commission's statutory authority, and the North Carolina Supreme Court's opinion that those abilities extended to itself, to order refunds from the Duke Power Company ("Duke") to Duke's Customers for over-collections.[36] In comparison, South Carolina law provides that only the Commission is authorized to engage in ratemaking and to set rates.[37] Moreover, the North Carolina Supreme Court found that refunds relating to overcollections by the utility were warranted on the basis ratepayers had been charged "unlawfully high rates" and that to require otherwise would allow "utilities to retain the proceeds of rates that were illegally charged."[38] Thus, there are substantive distinguishing factors between

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[35] Unlike the South Carolina General Assembly, the North Carolina General Assembly has created a statutory means by which the Commission can order refunds. See N.C.G.S.A. § 62-130, ("[i]n all cases where the Commission requires or orders a public utility to refund moneys to its customers which were advanced by or over collected from its customers, the Commission shall require or order the utility to add to said refund an amount of interest at such rate as the Commission may determine to be just and reasonable; provided, however, that such rate of interest applicable to said refund shall not exceed ten percent (10%) per annum.").

[36] Duke concedes that G.S. §§ 62–130(e), 132 and 136 grant specific authority to the Commission to order refunds. However, Duke argues that G.S. § 62–94 which sets out the extent of appellate review prevents this Court from ordering refunds because it does not specifically grant such authority. G.S. § 62–94(b) gives the reviewing court the power to affirm, reverse, remand, or modify the order of the Commission if the substantial rights of the appellants have been prejudiced. This Court has often ordered refunds in the past, ... and we hold that G.S. § 62–94(b) gives this Court ample basis for ordering refunds to ratepayers who have been charged unlawfully high rates. To hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged. It defies common sense to believe that the Legislature intended such a result. We, therefore, hold that this Court is authorized to order refunds when the Commission has made an error of law in its rate making procedures.

State ex rel. Utilities Comm'n v. Conservation Council of N. Carolina, 312 N.C. 59, 68, 320 S.E.2d 679, 685, 686 (1984) (internal citations omitted).

[37] See S.C. Code Ann. § 58-5-210. See also Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n, 272 S.C. 81, 86, 248 S.E.2d 924, 926 (1978) ("The duty to fix a reasonable rate for a service performed by a public utility rests solely with the Commission, and neither [the] Court nor the circuit court can assume this responsibility.").

[38] See supra, n. 36.

the present situation and the North Carolina case cited by DIUC that prevent that court's reasoning from being dispositive in this proceeding.

DIUC also cites cases out of Texas and New Hampshire for the proposition that its Retroactive Surcharge is not retroactive ratemaking.[39] However, unlike the Texas case cited by DIUC, neither the Commission, nor the Court, have made any finding of fact that any of DIUC's expenses were lost as a result of an improper Order, and there is no finding that any lost costs exist in this case. Also, unlike the case presented in New Hampshire,[40] DIUC has directly acknowledged in the Settlement Agreement that the rates now being charged are lawful, just, and reasonable, and allow it the opportunity to earn a reasonable return on the basis of its 2014 application.[41] Furthermore, no party appealed Commission Order No. 2021-132, which approved the Settlement Agreement and set "just and reasonable" rates,[42] and, as a result, DIUC cannot dispute that it has been charging its customers, lawful, just, and reasonable, and final rates since March 1, 2021.

Finally, DIUC makes the assertion that it has sufficient records to ensure only certain customers will be billed its Retroactive Surcharge if this Court permits it.[43] The factual issue of whether DIUC has sufficient records to charge only a Retroactive Surcharge that corresponds to certain customers' past usage and refund was not before the Commission for determination, and

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[39] DIUC Reparations Initial Appeal Brief, p. 34; R.R. Comm'n of Texas v. High Plains Nat. Gas Co., 628 S.W.2d 753, 754 (Tex. 1981) and Appeal of Granite State Elec. Co., 421 A.2d 121, 122–23 (N.H. 1980).

[40] In Appeal of Granite State Elec. Co., the New Hampshire Supreme Court held,

> the substitution of new rates in accordance with this court's order for those required by the PUC's earlier order does not involve a retroactive application of the law. Until the rate had become final, the rate established by the PUC had not become tantamount to a statute which could not be amended retrospectively.

421 A.2d at 122.

[41] (R. p. 1398).

[42] While this fact does not stand for the proposition that DIUC should have appealed the Order that approved the Settlement Agreement into which DIUC entered, it does contribute to the showing that rates DIUC is now charging are final and to adjust them by adding a surcharge would be improper retroactive ratemaking.

[43] DIUC Reparations Initial Appeal Brief, pp. 27-28.

there is no finding before the Court that DIUC does have sufficient records to ensure these protections. Accordingly, any factual dispute regarding that issue is not properly before this Court. However, regardless of whether DIUC has such records dating back to 2017, DIUC's claim still does not cure South Carolina's prohibition on retroactive ratemaking.

B. The General Assembly Has Not Granted Authority to the Commission to Authorize a Retroactive Rate Increase Surcharge and, as a Result, the Commission Lacks the Authority to Grant the Relief Sought by DIUC.

Absent an express delegation from the General Assembly, the Commission is without authority to increase a previously approved rate for water and wastewater utilities by allowing a utility to retroactively collect revenues. The Commission is statutorily empowered to correct established water and wastewater rates that it finds to be "unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law" but only on a going-forward basis. S.C. Code Ann. § 58-5-290 ("[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 by order as herein provided." (emphasis added)). The Court applied this principal in Porter and held "the Commission has the continuing power to prospectively correct or reduce a previously approved charge." Porter, 328 S.C. at 235, 493 S.E.2d at 99.

Furthermore, neither decision issued by this Court in the previous two appeals in this matter sets rates because "[t]he duty to fix a reasonable rate for a service performed by a public utility rests solely with the Commission, and neither [the] Court nor the circuit court can assume this responsibility." Carolina Water Serv., Inc. v. S.C. Pub. Serv. Comm'n, 272 S.C. 81, 86, 248 S.E.2d 924, 926 (1978). Rather, the only rates established since DIUC filed its rate application were those fixed by the Commission, which rates were not set at their current level until March 30, 2021. DIUC's request to recover the Retroactive Surcharge – in the form of revenue and interest on

revenue it claims to have lost because the current rates were not placed into effect at an earlier date – constitutes a request for retroactive ratemaking in violation of the statutory and common law of this State. Accordingly, both the governing statutes and the precedent set by this Court stand in direct conflict with DIUC's request and prevent any grant of authority to recover the Retroactive Surcharge.

C. The Relief Sought by DIUC is a Prohibited Collateral Attack on the Filed Rates that Resulted from Commission Order Nos. 2015-846 and 2018-68.

DIUC seeks to charge its customers a Retroactive Surcharge corresponding to a time period in which lawful rates were in effect even though the Commission "cannot adjust 'lawfully approved' rates retroactively."[44] DIUC's request amounts to an improper collateral attack on lawfully approved rates, and its assertion that this Court rendered the rates ordered by the Commission in Order Nos. 2015-846 and 2018-68 unlawful is unsupported and not based on any facts.

While similar to the prohibition against retroactive ratemaking, "[t]he Filed Rate Doctrine 'stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.'" Temporary Services, Inc. v. American Intern. Group, Inc. 388 S.C. 348, 351, 697 S.E.2d 527, 529 (2019) (citing Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005)). On this basis, rates ordered by the Commission are lawful, unless they are specifically determined to be unlawful, and DIUC cannot collaterally attack previously ordered rates in the absence of a finding that they were unlawful. See Edge v. State

[44]. (R. p. 0197). The requested Retroactive Surcharge corresponds to water and sewer services from October 1, 2017, through March 1, 2021, during which rates charged pursuant to Order Nos. 2015-846 and 2018-68 were in effect. See supra pp. 10-11 & n. 26.

Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005) (holding 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. The filed rate doctrine, therefore, dictates that DIUC may not collaterally attack the rates ordered by the Commission in Order Nos. 2015-846 and 2018-68 in this or other proceedings, and the Commission is without statutory authority to order involuntary changes to rates collected under duly approved tariffs. Doing so constitutes both a violation of the filed rate doctrine and retroactive ratemaking. See Edge v. State Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005) (holding the filed rate doctrine bars collateral attacks on previously determined rates).

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[45] or Order No. 2018-68 were unlawful. In fact, in DIUC II, this Court held, "[i]n this reversal and remand, [the Court does] not address the merits at all.... 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."[46]

The Court's findings in DIUC I and DIUC II are contrasted with the Court's findings in Hamm v. Cent. States Health & Life Co. of Omaha in which the Court determined retroactive ratemaking was not implicated because rates approved by the Insurance Commission were found

[45] While the Court did provide guidance on certain issues in this Order, as shown below, even this does not render the rates ordered "unlawful."

[46] Daufuskie Island Utility Company, Inc., 427 S.C. at 464, 832 S.E.2d at 575 (citation omitted).

to be "unlawful."[47] The distinction between the two prior DIUC appeals and the Hamm case thus required the Commission to conclude that the rates resultant from Order Nos. 2015-846 and 2018-68 were not unlawful (and were therefore lawful). Ignoring this established law, DIUC mischaracterizes the Commission's Order[48] and seeks to make inseparable two distinct components: Commission Orders and lawful rates. However, this Court recognized the distinction between an erroneous Order and unlawful rates in previous cases when it made clear (as in Hamm) that the rates at issue were unlawful. This Court made no such finding in DIUC I or DIUC II. As a result, the rates put into effect were lawful and cannot be collaterally attacked, and the Commission properly denied DIUC's request to impose a Retroactive Surcharge.[49] Moreover, the rates DIUC is charging are final, just, and reasonable and cannot now be amended and doing otherwise would constitute a violation of both the filed rate doctrine and prohibition against retroactive ratemaking.[50]

Also unavailing is DIUC's assertion that, because the Court allowed additional evidence to be presented on remand, it should be entitled to charge its customers a Retroactive Surcharge.[51] The law of South Carolina only allows a single exception to retroactive ratemaking – where there are "extraordinary" expenses that are "unanticipated and non-recurring." Porter v. S.C. Pub. Serv.

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[47] Hamm v. Cent. States Health & Life Co. of Omaha, 299 S.C. 500, 505, 386 S.E.2d 250, 253 (1989) (holding that because the rates were found "unlawful," "a refund in [that] instance would not be considered retroactive ratemaking.").

[48] DIUC's Initial Appeal Brief consistently mis-characterizes the Commission Order No. 2022-79 as flawed because it concluded that this Court "did not reject Order No. 2015-845 [sic] in DIUC I or DIUC II." DIUC Reparations Initial Appeal Brief, p. 31. Commission Order No. 2022-79 makes no such representation.

[49] On March 30, 2021, the Commission issued Order No. 2021-132, which set "rates for water and wastewater service that are just and reasonable and will allow [DIUC] the opportunity to earn a reasonable return on the basis of its 2014 rate application." No Party appealed Commission Order No. 2021-132. Accordingly, just, reasonable, and final rates are in effect, which rates DIUC has been charging its customers since March 1, 2021. Therefore, the Commission cannot now retroactively change those rates. (See Porter v. S.C. Pub. Serv. Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997) (holding ratemaking is a prospective rather than a retroactive process.)

[50] See Argument I.A & I.C, supra; (R. pp. 0167, 1398).

[51] DIUC Reparations Initial Appeal Brief, p. 36.

Comm'n, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997). DIUC failed argue that its requested Retroactive Surcharge is extraordinary and cannot raise that argument for the first time on appeal. Regardless, the single exception to the prohibition against retroactive ratemaking established by this Court does not apply to DIUC's requested Retroactive Surcharge.

Moreover, while the Court did permit DIUC to present additional evidence on remand, the rates in DIUC I and DIUC II were not found to be unlawful and cannot now be collaterally attacked. To the extent the Commission is required to evaluate the "current economic realities"[52] at issue for DIUC, paragraph five (5) of the Settlement Agreement dispositively affirmed that the current rates DIUC is charging are just and reasonable and will "allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application."[53] By DIUC's own admission, the current economic realities do not require the Retroactive Surcharge that DIUC requests.

Finally, DIUC's request to recover the difference between the rates originally sought and the subsequently approved rates plus interest for the period before the issuance of Order No. 2022-79 is an unlawful collateral attack on the rates set forth in Order No. 2018-68 and violates S.C. Code Ann. § 58-5-240(D)). DIUC did not challenge the portion of Order No. 2018-68 requiring DIUC to provide the refunds and interest required pursuant to S.C. Code Ann. § 58-5-240(D) and that portion of Order No. 2018-68 became the law of the case and is not subject to collateral attack in this appeal. Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) ("An unappealed ruling, right or wrong, is the law of the case.").

[52] DIUC I, 420 S.C. at 286 n.8, 803 S.E.2d at 316 (R. pp. 0167, 1398).

[53] (R. p. 1398).

II. DIUC is Prohibited from Collecting its Alleged Lost Revenues Because DIUC Did Not Put Its Requested Rates into Effect Under Bond Pending Resolution of the Second Appeal.

The Commission is statutorily obligated to set "just and reasonable" rates, which are in turn collected by utilities from their customers,[54] and the General Assembly has given regulated utilities statutory rights and remedies when those rights allegedly are offended. South Carolina Code Ann. § 58-5-240(D) states in part,

> ...[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....

Further, "[a] 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, as provided pursuant to this section...." S.C. Code Ann. § 58-5-340.

South Carolina Code Ann. §§ 58-5-210, -240(D), and -340 collectively create a substantive right for DIUC (the right to charge just and reasonable rates and the right to appeal a Commission Order if the utility determines that rates ordered were not just and reasonable) and provide a remedy for the alleged infringement of that right (the right to obtain a bond and charge its customers rates not otherwise ordered by the Commission during the pendency of the appeal). DIUC initially availed itself of the statutory protections provided in S.C. Code Ann. § 58-5-240(D) and received the commensurate benefit by charging its customers the full request of rates sought during the pendency of the first appeal,[55] but did not do so during the second appeal. Because DIUC did not put its requested rates into effect under bond pending resolution of the second appeal, it has forgone those revenues and now is prohibited from collecting these allegedly lost revenues

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[54] See S.C. Code Ann. § 58-5-210.

[55] (R. pp. 0059-0063).

from its customers. See Dockins v. Ingles Markets, Inc., 306 S.C. 496, 498, 413 S.E.2d 18, 19 (1992) ("When a statute creates a substantive right and provides a remedy for infringement of that right, the plaintiff is limited to that statutory remedy." (citing Campbell v. Bi–Lo, 301 S.C. 448, 392 S.E.2d 477 (Ct.App.1990)) (emphasis added). DIUC is limited to the remedies available under the law, and the law does not permit a Retroactive Surcharge to take the place of the lawful and available remedy established by the General Assembly.

Notwithstanding the legal prohibitions against DIUC's attempt to recover the Retroactive Surcharge from its customers, there is also sound policy to prohibit DIUC from retroactively recovering these monies. The General Assembly set forth a specific mechanism in S.C. Code Ann. § 58-5-240(D), which would have allowed DIUC to recover the revenue it would have realized from its requested rates. This statutory mechanism is well-reasoned and creates specific checks and balances for both utilities and their customers. For instance, if the utility avails itself of the protections afforded by S.C. Code Ann. § 58-5-240(D) and the appellate court reverses the Commission, then during the pendency of the appeal the utility will have collected from its customers the rates it originally sought (as was the case in the first DIUC appeal). However, if on appeal the Commission is affirmed, then the utility must return to its customers the unreasonably charged rates, with interest. It is through this mechanism that the General Assembly prudently balanced the interests of utilities and their customers. If the Court were to grant DIUC's request to retroactively collect reparations in this case, DIUC would be able to circumvent this specific remedy and collect rates outside of the authorized statutory parameters. Such action would signal that utilities need not follow the bond statute, but still may be able recover additional money from

their customers if successful in challenging the Commission's decision on appeal.[56] Therefore, granting DIUC's unlawful request would upset the careful balance enacted by the General Assembly, remove the risk from utilities in utilizing S.C. Code Ann. § 58-5-240(D), and instead place the risk directly on the utilities' customers.

DIUC argues that it had no choice in the matter regarding whether to obtain a bond. However, the issue before this Court is the legal question of whether DIUC can charge its customers the Retroactive Surcharge, which issue the parties agreed would be briefed and presented to the Commission.[57] DIUC did not appeal the portion of Commission Order No. 2022-79 that stated only a legal issue stood before the Commission. Because the parties agreed that the sole issue was the legal question of whether DIUC could recover its Retroactive Surcharge DIUC did not present to the Commission for consideration the factual question of whether it had the financial resources to obtain a bond. Therefore, that factual question is not properly before this Court. Moreover, the record contains no finding that DIUC lacked financial resources to obtain a bond.[58] Any claims that DIUC could not afford a bond are nothing more than bald assertions that were not contested before the Commission, have not been found to be true, and are not now properly before this Court.

Assuming *arguendo* DIUC's assertions that it lacked financial resources to obtain a bond were true, S.C. Code Ann. § 58-5-240 is unequivocal. The statute contains no exception based on whether a utility has the financial resources to obtain a bond or for a utility that does not avail itself

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[56] It should also be noted that the surcharge DIUC seeks to impose may exceed $44,000 for certain commercial customers and $3,500 for residential customers. (R. p. 1414).

[57] The sole issue for Commission consideration was whether DIUC may charge its customers reparations in the form of surcharges resulting from what DIUC described as "confiscatory" rates. (R. pp. 0192, 1400-1401).

[58] Simply because DIUC has made this assertion previously does not make it a finding of the Commission.

of the specific protections established by the General Assembly. Because DIUC did not avail itself of the statutory remedy, the law is clear that DIUC is now prohibited from recovering its Retroactive Surcharge.

To the extent DIUC seeks equitable relief in this matter in the form of restitution, unjust enrichment, or similar concepts, such "relief is generally available only where there is no adequate remedy at law. An adequate legal remedy may be provided by statute." Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). This rule applies in the context of ratemaking. See id. In Santee Cooper, the Commission set a rate schedule of $8.00 per month. Id. at 181, 379 S.E.2d at 120. The Consumer Advocate appealed to the circuit court and requested the court place the $8.00 rate into effect under bond. Id. at 181, 379 S.E.2d at 120-21. The circuit court granted the motion and required the utility to file a bond undertaking to secure a refund with 14% interest if any was ordered at the conclusion of the case. Id. at 181, 379 S.E.2d at 121. This Court reversed, concluding the applicable bond statute did not authorize the requirement of a bond at the request of a party other than the utility and that the Administrative Procedure Act did not authorize the bond either. Id. at 182-84, 379 S.E.2d at 121-22. The Consumer Advocate also argued the circuit court had inherent equitable power to place rates into effect under bond. Id. at 185, 379 S.E.2d at 122-23. This Court held the circuit court lacked equitable authority because an adequate statutory remedy existed, reasoning "the court's equitable powers must yield in the face of an unambiguously worded statute." Id. at 185, 379 S.E.2d at 123. The same reasoning applies here. DIUC had an unambiguous statutory remedy in S.C. Code Ann. § 58-5-240(D); therefore, the Commission did not have authority to grant the relief DIUC seeks.

It should also be noted that the Commission and this Court have recognized an administrative remedy that has been employed to protect a utility's potential revenue and that

required minimal outlay of financial resources on the part of the utility. In Commission Docket No. 2019-290-WS, Blue Granite Water Company ("Blue Granite") conditionally petitioned the Commission for an accounting order to defer recovery of the difference between the rates approved by the Commission and the rates that Blue Granite would have otherwise put into effect under bond, in addition to the costs of providing certain notices and carrying charges on the deferred costs. According to Blue Granite and as cited by this Court,

> *There are two possible remedies to avoid an unconstitutional taking.* The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. *An alternative remedy is to grant the instant deferral request.*

In re Blue Granite Water Company, 434 S.C. 180, 203, 862 S.E.2d 887, 899 (2021). The Commission granted Blue Granite's request, and this Court determined that Blue Granite's complaint regarding the Commission's treatment of its requested bond was moot because Blue Granite received the remedy it sought. Id. at 204, 899. That case is distinguishable from the one presently before the Court because the issues in that appeal did not relate to whether such an alternative administrative remedy was appropriate or lawful; however, it highlights the contrast that in the underlying proceeding, DIUC did not even attempt to avail itself of an administrative remedy – one which did not require a third party to approve and issue a bond or similar form of protection.

It is undisputed that DIUC failed to avail itself of the statutory remedy and did not even attempt to obtain an administrative remedy. Accordingly, DIUC is now prohibited from recovering its requested Retroactive Surcharge.

III. DIUC is Now Charging Just, Reasonable, and Final Rates.

DIUC asks this Court to rule that, because the underlying proceeding remained open following the establishment of final, just, and reasonable rates in order to consider the requested

Retroactive Surcharge, DIUC is entitled to further increase customers' rates. Although the Commission appropriately held the proceeding open for DIUC to brief this issue and seek the Retroactive Surcharge, as contemplated in the Settlement Agreement,[59] the law does not allow the Commission to make provisional rates. Rather, the law dictates that, once final rates are set, the Commission cannot revise those rates further.[60] Upon issuing Order No. 2021-132, which resulted in just and reasonable rates, the Commission kept the proceeding open for the sole purpose of allowing the parties to brief and argue the Retroactive Surcharge issue but in doing so, the Commission could legally take no action to enable DIUC to further increase its customers' rates through a Retroactive Surcharge.

Additionally, all Parties agreed that Commission Order No. 2021-132 set rates that were just and reasonable – and DIUC subsequently put those rates into effect.[61] Once the period to appeal Order No. 2021-132 lapsed, the rates put into effect in that Order became final. Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 734 S.E.2d 778 (2013) (an unappealed ruling is the law of the case). See also S.C. Code Ann. § 58-5-290 (making clear that current rates can only be adjusted prospectively and not retroactively).[62]

Despite the fact that DIUC agreed the rates it is currently charging are just and reasonable, it now seeks this Court to order additional charges to be implemented. In the Settlement Agreement, DIUC made no assertion that it was settling to rates that were less than or were not

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[59] (R. pp. 1399-1401).

[60] (R. p. 0199). See also Settlement Agreement, paragraph 8 in which ORS and the POA asserted from the beginning that while DIUC was entitled to seek its Retroactive Surcharge, it constituted retroactive ratemaking and it was not entitled to recover its Retroactive Surcharge. (R. pp. 1399-1401).

[61] Settlement Agreement, paragraphs 2 and 5. (R. p. 1398).

[62] See paragraph B, supra. See also SCE&G v. PSC, 275 S.C. 487, 491, 272 S.E.2d 793, 795 (1980) ("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.").

"just and reasonable."[63] Rather, DIUC definitively agreed to rates that it characterized as just and reasonable, but now seeks permission to charge rates that are just and reasonable 'plus.' No party disputes the fact that the proceeding remained open to give DIUC the ability to brief the issue of its requested Retroactive Surcharge. However, that ability cannot be conflated with a sense that the Commission may circumvent the law, and that DIUC is entitled to recover the Retroactive Surcharge – which, by definition, would constitute just and reasonable 'plus.'

IV. Commission Order No. 2022-79 Does Not Violate DIUC's Constitutional Protections and the Law Prohibits the Relief DIUC Seeks.

DIUC also argues that the length of this proceeding and the costs it expended on appeals entitles it to recoup lost revenues that it "should have been able to collect."[64] As discussed previously, many of the delays in this proceeding were precipitated by DIUC, while the Commission and ORS often worked to accommodate DIUC's requested and preferred schedule.[65] Moreover, there has been no finding that any expense DIUC is now recovering is an expense that "should" have been recovered previously.[66] Those facts notwithstanding, DIUC had the ability throughout this proceeding to introduce new evidence to cover ongoing expenses and thereby was afforded the benefit of seeking recovery of expenses that were incurred subsequent to its 2014 test year.

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[63] According to S.C. Code Ann. § 58-5-210, the Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed...."

[64] DIUC Reparations Initial Appeal Brief, p. 26.

[65] Supra, pp. 5, 9, n. 18.

[66] (R. pp. 0217-0219). In fact the finding was to the contrary, while there are certain rate case expenses now recoverable that could have been recovered previously, they were only deemed recoverable once DIUC produced adequate justification and records made possible by Commission Order No. 2020-759, which granted ORS's Motion to Compel. Therefore, these expenses were not previously just and reasonable and should not have been recovered prior to the appropriate data and records being produced.

As determined by the Commission,[67] the facts of this case also demonstrate that DIUC is not suffering unconstitutional confiscation. DIUC is bound by its acknowledgement that the Settlement Agreement "results in rates for water and wastewater service that are just and reasonable and [would] allow the Company the opportunity to earn a reasonable return on the basis of its 2014 rate application."[68] As a matter of law, it therefore cannot be argued that the settled-upon rates are in any way confiscatory, unjust, unreasonable, or will result in an unreasonable return to DIUC.

Even so, DIUC argues that to be constitutionally appropriate, the ultimate result of the rates permitted DIUC must be "[a] return to the equity owner [that is] commensurate with returns on investments in other enterprises having corresponding risks."[69] However, DIUC failed to present any evidence into the record before the Commission that demonstrates or proves that the rates ordered by the Commission were not commensurate with returns on investments in other enterprises having corresponding risks.

Additionally, DIUC points to no finding of fact indicating that it was entitled to property of which it was later deprived and fails to show that it had a property interest taken by Commission Order. The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V.[70] However,

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[67] Order 2022-79 specifically addressed DIUC's constitutional claim; DIUC makes an unsubstantiated assertion that the Commission did not address DIUC's Constitutional claim. (R. pp. 0214-0220); DIUC Reparations Initial Appeal Brief, p. 40.

[68] Settlement Agreement, paragraph 5. (R. p. 1398).

[69] S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 281 (1978). See DIUC Reparations Initial Appeal Brief, pp. 37-40.

[70] The Fifth Amendment right to protection against takings is implicit in the Due Process Clause of the Fourteenth Amendment to the United States Constitution and applicable to the states. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897).

these protections arise only where a property right exists. As explained by the North Carolina Supreme Court:

> Invocation of constitutional protection against takings without just compensation or without due process requires a property interest on the part of the person seeking such protection. Where there is no property interest, there is no entitlement to constitutional protection. To have a property interest that is subject to procedural due process protection, the individual *must be entitled* to a benefit created and defined by a source independent of the Constitution, such as state law.[71]

DIUC failed to produce the evidence required to show a constitutional taking occurred. In the context of setting rates for a regulated utility, a property right does not arise unless and until there is a finding the cost sought to be included in the rates is just and reasonable. See Dunes West Golf Club v. Mount Pleasant, 401 S.C. 280, 306, 737 S.E.2d 601, 615 (2013) ("Before determining whether a taking has occurred, a court must first determine, what precisely, is the property at issue."). DIUC did not, and cannot, show it had an entitlement to recover certain rate case expenses or the $699,361 in rate base, the recovery of which it voluntarily has foregone in this case. DIUC also failed to indicate precisely the property at issue it alleges to have been unconstitutionally taken. Because DIUC had no entitlement to recover its rate case expenses or certain rate base from its customers, no unconstitutional taking occurred. Accordingly, there is no evidentiary foundation needed to support a finding that an unconstitutional taking has occurred.

There also has been no finding by the Court or Commission that the previously approved rates in this proceeding were unlawful or constitutionally deficient. The Court's Opinion and Commission Orders, Orders on Rehearing, and the Order on Second Rehearing make no such

[71] State of North Carolina ex rel. Utils. Comm'n v. Carolina Utility Customers Ass'n, 446 S.E.2d 332, 344 (N.C. 1994) (emphasis added).

findings, and the Court made no such determinations.[72] For the aforementioned reasons, the Court should not award the Retroactive Surcharge to DIUC based on DIUC's allegation that the rates it currently charges are, or the previously approved rates were, constitutionally insufficient.[73]

A. DIUC's Requested Retroactive Surcharge is Not Tied to an Expense to Which DIUC is Entitled and is Illogically Tied to Expenses that 1) Do Not Exist in The Underlying Proceeding or 2) were Not Incurred Until After the Period Used by DIUC to Calculate Its Retroactive Surcharge.

DIUC cites Bluefield and asserts that the Company is entitled to "a fair return upon the value of that which it employs for the public convenience."[74] According to DIUC, the Retroactive Surcharge was calculated based upon both the revenue figure it originally applied for and the revenue figure on which it settled.[75] But this argument is illogical, and DIUC must tie the calculation of its Retroactive Surcharge to a specific revenue figure that is comprised of specific and identified expenses. Accordingly, the Retroactive Surcharge must actually be based on either 1) the revenue figure for which DIUC originally applied or 2) the revenue figure on which DIUC settled. These total revenue figures vary slightly but are comprised of very different expenses.[76] Specifically, the revenue figure for which DIUC originally applied includes expenses that DIUC

[72] In its Opinion No. 27729, the Court provided "guidance" to the Commission regarding specific issues, and in its Opinion No. 27905, the Court specifically "[did] not address the merits at all." See also discussion on filed rate doctrine. Infra, section I.C.

[73] Neither the Commission nor this Court ruled, prior to the Order on Second Remand, that DIUC was entitled to a 108.9% rate increase. Specifically, this Court did not direct the Commission to enter an order that would have resulted in that rate increase, and neither the Commission nor the Court approved any such rates prior to the Order on Second Rehearing.

[74] DIUC Reparations Initial Appeal Brief, p. 38 (citing Bluefield, 262 U.S. at 690). See also Duquesne Light Co. v. Barasch, 488 U.S. 299, 308(1989) ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.")

[75] (R. p. 0614). Accordingly, the facts are not clear as to which expenses DIUC is actually tying its requested Retroactive Surcharge. The revenue figure DIUC originally applied included $699,361 in plant that DIUC voluntarily agreed not to seek in the Settlement Agreement; whereas the Settlement Agreement included certain rate case expense that DIUC had not even incurred when it calculated its originally applied for revenue.

[76] The originally-applied-for revenue was $2,267,722, the settled-upon revenue is $2,267,714, and the total revenue ordered by the Commission in Order No. 2018-68 was $2,023,743. (R. p. 0117).

explicitly agreed not to pursue in this case. In contrast, the revenue figure on which DIUC ultimately settled includes expenses that were not incurred during the period to which the Retroactive Surcharge corresponds.

If DIUC means to tie the calculation of its Retroactive Surcharge to the revenue for which it originally sought recovery, it has illogically tied the calculation of the Retroactive Surcharge to an expense the recovery of which DIUC voluntarily agreed to forego. In this proceeding DIUC specifically agreed not to seek the value of certain property that comprised the original revenue figure and that it claims to be used for public service in this proceeding. According to the Settlement Agreement, DIUC agreed to "delay seeking recovery of the corresponding $699,361 until its next rate filing, and the Parties agree to reserve their positions as to the $699,361 reduction to Utility Plant in Service for consideration in DIUC's next rate case."[77] Because DIUC agreed not to seek the expenses associated with this investment in this proceeding, it follows that DIUC cannot tie the calculation of its Retroactive Surcharge to these expenses. While DIUC also asserted that it "essentially had no choice but to delay" seeking recovery on its plant items, DIUC voluntarily entered into the Settlement Agreement.[78] Moreover, DIUC previously only offered affirming remarks regarding the Settlement Agreement.[79]

If, however, DIUC means to tie the calculation of its Retroactive Surcharge to the revenue on which it ultimately settled, it is illogically tied to expenses that were incurred after the beginning date that corresponds to the Retroactive Surcharge. As detailed above, DIUC specifically agreed

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[77] (R. p. 0177).

[78] DIUC Reparations Initial Appeal Brief, p. 40. It should also be noted that DIUC filed a Revised Notice of Filing and presumable had the opportunity to update the revenue increase it was requesting. (R. pp. 1195-1199). This Revised Notice of Filing also included an update date by which parties could Petition to Intervene. (R. p. 1199).

[79] "DIUC appreciates the other parties' efforts and cooperation in working together to negotiate the Settlement Agreement." (R. p. 0926, ll. 6-7).

to forego recovery of any expenses tied to the alleged $699,361 in Plant In Service in this case. The remainder of the revenue collected pursuant to the Settlement Agreement, which nearly matches the revenue DIUC originally noticed, is comprised almost entirely of updated rate case expenses.[80] Certain of these rate case expenses were not incurred by DIUC, or provided for the Parties' review, until the third proceeding; much of the remaining rate case expenses were not shown to be just and reasonably recoverable until this Commission ordered DIUC to provide documents it withheld. Thus, certain of these expenses did not even exist and could not have been recovered until the third proceeding, well after the October 1, 2017, date to which DIUC asserts the calculation of its Retroactive Surcharge should correspond and begin.[81] Moreover, because of DIUC's refusal to comply with its discovery obligations, the remaining rate case expenses that were recovered pursuant to the Settlement Agreement should not have been recovered until this third proceeding.[82] Accordingly, DIUC cannot properly tie the calculation of its Retroactive Surcharge to the revenue on which DIUC ultimately settled.

While DIUC failed to tie its proposed Retroactive Surcharge to any particular asset or expense and the Commission could only speculate as to the revenue on which the Retroactive Surcharge is based, the surcharge must be based either 1) on plant that DIUC agreed not to seek in this proceeding or 2) on rate case expenses that were not available for recovery until the third proceeding before the Commission. Either option indicates that DIUC's assertion that it is entitled to this Retroactive Surcharge is an illogical fallacy that cannot support DIUC's request for relief.

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[80] See Commission Order No. 2021-132, Order Exhibit 1, paragraph 7, "[t]he inclusion of $542,978 for Guastella Associates' rate case expenses along with the additional legal rate case expenses, related minor, and fall-out adjustments generates $2,267,714 of annual revenue...." (R. p. 0177).

[81] See id. See also supra, pp. 10-11.

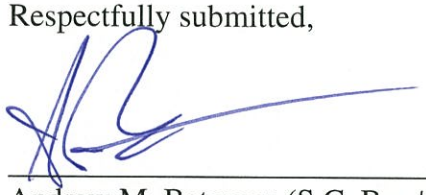
[82] Id. Moreover, DIUC previously unsuccessfully advocated for the inclusion of $699,631 in plant-in service assets to its rate base, which DIUC voluntarily agreed not to seek in this proceeding. As such, to date, DIUC has never been entitled have those assets included as part of its rates.

Accordingly, DIUC has no entitlement to its Retroactive Surcharge and even if DIUC presented facts sufficient to tie this Retroactive Surcharge to specific expenses, DIUC would still not be entitled to the recourse it seeks.

CONCLUSION

The Commission's Orders are supported by the law and regulatory construct as enacted by the South Carolina General Assembly and interpreted by this Court. This Court has specifically held that ratemaking is a prospective rather than retroactive process. Accordingly, ORS respectfully requests that this Court affirm Commission Order Nos. 2022-79 and 2022-242.

Respectfully submitted,



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November 29, 2022

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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

Public Service Commission Docket No. 2014-346-WS

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., and
Bloody Point Property Owner's Association, Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent South Carolina Office of Regulatory Staff complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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