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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2024-000208

PSC Docket No. 2022-84-WSH

Sarah Zito, Alvaro Sarmiento, Jr., Mark Shinn, and Daniel Bermudez — Appellants,

v.

Strata Audubon, LLC, and Strata Veridian, LLC, — Respondents.

BRIEF OF RESPONDENTS

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June 28, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES

1. This appeal concerns a complaint by four tenants alleging that Respondents inclusion of pass-through charges for water and sewer service in monthly rental payments constitutes the unlawful provision of public utility service. Recognizing that Respondents did not have any characteristics of a utility, the Public Service Commission dismissed Tenants' Complaint for lack of subject matter jurisdiction. Did the Public Service Commission err in finding that the Respondents are not Public Utilities?

COUNTER-STATEMENT OF THE CASE

This brief is submitted on behalf of Respondents, Strata Audubon, LLC, and Strata Veridian, LLC, in response to the Appellants' brief appealing the decision of the Public Service Commission of South Carolina ("PSC" or "Commission") dismissing the Appellants' Complaint. Appellants alleged that the Respondents are acting as unauthorized public utilities under South Carolina law by employing an allocation billing method—agreed to by the parties—because the properties at issue do not have individual utility meters for each apartment (submeters) to charge for water and sewer services. The Commission correctly dismissed the Complaint and the motion for reconsideration, concluding that the Respondents' billing method does not transform a landlord into the statutory definition of a public utility.

Appellants are a group of former tenants of two properties owned by Respondents: The Grove Apartments and the Audubon Park Apartments (collectively, "the properties"). The properties were constructed in 1998 (Grove Park Apartments) and 1991 (Audubon Park Apartments). Water and sewerage services at the properties are measured by a master meter. There is no individual water or sewer submetering service in either of the buildings, and it is undisputed that "there are no meters on [Respondents'] properties determining the actual water and sewerage usage" of Appellants and other tenants. (Order 736 at p. 11).

Given the absence of individual submetering infrastructure at the buildings, Appellants agreed with Respondents, per the lease agreement terms, that Appellants would be responsible for paying for water and sewer services pursuant to an allocation method. The allocation method, also known as a ratio utility billing system ("RUBS"), requires Respondents to allocate water and sewer costs to their tenants in their two multi-family properties based in one case on the number of persons living in the unit, or in the other based on a combination of the number of persons living in each unit

and square footage of the units. The complaint acknowledges that the applicable formula is stated in a specific addendum to the Tenants' rental agreements.

At no point did Respondents contract directly with any utility providers, nor did Respondents ever bill their tenants directly. Instead, Respondents contracted with Conservice, a third-party billing company agreed upon by tenants in their lease, to provide billing services for water and sewerage. Conservice sought to recover the actual costs of water and sewer services to tenants at the properties through an allocation method on a not-for-profit, pass-through basis. Respondents do not have a monopoly over any service area; do not own any large, capital-intensive utility infrastructure; and did not seek a guaranteed rate of return. Furthermore, Respondents do not take possession of the water or sewerage, and they do not have the ability to disconnect or shut off water to a tenant for failure to pay.

Initially, Appellants filed a complaint in federal district court, which the court dismissed it for failure to exhaust administrative remedies.[1] Appellants then filed a complaint with the Public Service Commission of South Carolina. The Commission dismissed Appellants' Complaint for lack of subject matter jurisdiction after determining Respondents were not public utilities per the statutory definition in S.C. Code Ann. § 58-5-10.

THE PUBLIC SERVICE COMMISSION'S FINDINGS OF FACT

The following is a brief discussion of each of the six Findings of Fact made by the Commission, and the explanation provided by the Commission for each Finding. These Findings of

[1] This decision was remanded for further consideration, and subsequently Appellants' filed an Amended Complaint alleging breach of contract related to the accuracy of the allocation method. *Zito v. Strata Equity Group, Inc.*, 2023 WL 8712054 (4th Cir. No.: 2:20-cv-3808-BHH (D.S.C.). Respondents' motion to dismiss the Amended Complaint is currently pending in federal court.

Fact are particularly important to this appeal because of the deferential standard of review that this Court must afford to the Public Service Commission and apply to these findings.

1.) "Defendants do not have water or sewer submetering infrastructure in either apartment building at issue in this proceeding."

Order No. 2023-736 at p. 9.

The Commission stated that "[t]his assertion of no submetering infrastructure is undisputed by the Complainants in their Complaint…."

2.) "Defendants contracted with a third-party billing provider, Conservice, to provide the billing functions for water and sewer service to resident units, and did not bill tenants directly, nor did the Defendants contract directly with any utility providers for service to resident units."

Order No. 2023-736 at pp. 9-10.

The Commission stated: "[t]he Commission notes that there is no allegation that the Defendants have contracted for service to specific residential units. It is not in dispute that Conservice has been providing billing services on behalf of the Defendants in this case. Since there is no dispute, the Commission may accept the fact as asserted." Order 736 at 12.

3.) "Defendants contracted with Conservice to recover the actual cost of water and sewer services to its tenants to an allocation formula method on a not-for-profit basis."

Order No. 2023-736 at p. 10.

The Commission stated that there are three aspects to this Finding of Fact. First, "it is undisputed that Conservice was contracted to perform billing services." *Id*. at p. 12 Second, "[t]he fact that the rates are based on an allocation formula is not in dispute and may be accepted as fact by the Commission." *Id*. at p. 13. The third aspect with regard to this finding of fact was Complainant's allegation "that the tenants' actual utility usage and pro rata billed amount are different." *Id*. at p. 14. In that regard, the Commission stated that "Defendants were clear in describing the nature of the

aggregate billing amount." *Id*. at p. 15. The Commission further stated that "[b]y its very nature, a formula method for sub-metered allocation of costs is going to be approximate on a specific-tenant basis. The only way to reflect actual usage, and bill, accordingly, is to have all tenants individually metered. Such a method would require significant infrastructure installation and would have material detrimental financial impact for Defendants and, also, ratepaying tenants." *Id*.

4.) "Defendants do not have any monopoly rights over any service area; do not own any large, capital intensive utility infrastructure; and do not seek or obtain any guaranteed rate of return on the pass-through billing of water and sewer services."

Order No. 2023-736 at p. 10.

The Commission stated: "The complainants do not dispute that Defendants do not own significant utility infrastructure and do not seek a rate of return on the investment in the same." *Id*. at 16.

5.) "The water and sewer services are provided to properties by local utilities and the Defendants never take possession of the water and lack the ability to disconnect the water or sewer service to an individual tenant for nonpayment."

Order No. 2023-736 at p. 10.

The Commission first stated that "[i]t is uncontested that the Defendants provided service for local water and wastewater utility." *Id*. at pp. 16-17. Furthermore, "[i]t is uncontested that the Defendants do not have the ability to turn off water or sewer service to the individual tenants, and the Commission finds that the Defendants do not have the ability to control water or service individual Defendants." *Id*. at p. 17.

And while the Commission acknowledged that "[t]here is a difference in positions between the parties regarding whether the Defendants 'possess' the water or not…. Defendants undisputedly did not have the ability to control the flow of water or sewer service in a tenant-specific capacity and therefore cannot exercise control of the commodities. The Commission finds therefore that

Defendant did not possess or take possession of the water or sewerage." *Id*.

> 6.) "Defendants did not operate any public utility that is subject to the jurisdictional authority of the Commission."[2]

Order No. 2023-736 at p. 10.

The Commission quoted the following from Order No. 2003-214, "[s]ubmeterer's water and wastewater services do not meet the statutory definition of a 'public utility'…. [and] that such submeterers do not actually 'furnish or supply' the commodity but merely measure the amount of flow of water or wastewater and provide billing functions. At p. 10, ¶ 2." *Id*. at 18. As such, the Commission stated: "Here the Defendants are engaged in a relatively common practice of submetering water and wastewater services to their tenants. Consistent with prior Commissioner Orders, this activity is not determinative of operation of a public utility." *Id*.

STANDARD OF REVIEW

The standard of review is deferential to the Commission, and the Commission should only be overruled for clear error, abuse of discretion, or because the ruling is arbitrary and capricious.

When reviewing a decision from the Commission, this Court should defer to the agency's judgment. "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. Pub. Serv. Comm'n*, 388 S.C. 486, 490, 697 S.E.2d 587, 590 (2010). Accordingly, "the party challenging a PSC order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Duke Power Co. v. Pub. Serv. Comm'n of S.C.*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (citing *Porter v. South*

[2] The Defendants acknowledge that finding of Fact Number 6 may more appropriately be characterized as a Conclusion of Law. Nevertheless, the Defendants will proceed with setting out the Commission's rationale for this Finding of Fact.

Carolina Public Service Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998). "[The] Court may not substitute its judgment for the Commission's on questions about which there is room for a difference of intelligent opinion." *Duke Power Co.*, at 558, 541 S.E.2 at 252 (2001).

For questions of fact, a court may only reverse or modify the agency's findings when it is "clearly erroneous in view of the reliable, probative, and substantial evidence on the record as a whole" or "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(e)–(f) (Supp. 2020). "A decision by the [PSC] is arbitrary if it is without a rational basis, is based not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Daufuskie Island Util. Co. v. S.C. Office of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019) (internal alteration and quotation marks omitted) (citation omitted).

Substantial evidence is evidence that, considering the record as whole, "from which reasonable minds could reach the same conclusion that the ALJ reached". *Hill v. S.C. Dep't of Health & Envtl. Control*, 389 S.C. 1, 9, 698 S.E.2d 612, 617 (2010). However, the possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding. *Id.*; *Porter v. S.C. PSC*, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998).

For questions of law, such as when an agency is interpreting and applying its own enabling statute, the court may only reverse or modify the agency's interpretation if (1) the interpretation is contrary to the plain language of the statute or (2) if the statute is ambiguous and there are compelling reasons why the agency's interpretation is improper. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014). Even then, "[t]he construction given to a statute by those charged with the duty of exercising it is always entitled to the most

respectful consideration and ought not to be overruled without cogent reasons.'" *Id.*, 411 S.C. 16, 33, 766 S.E.2d 707, 718 (2014) (quoting *Brown v. Bi–Lo, Inc.,* 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003)).

ARGUMENTS AND AUTHORITIES

I. The Respondents Are Not Public Utilities Because They Did Not Furnish or Supply Water and Sewerage to Appellants.

The Commission has previously ruled that that landlords who use submetering of water and sewer services are not public utilities as defined in S.C. Code Ann. Section 58-5-10 (2105) See Order No. 2003-214, p.10 ¶¶ 2. As the Commission in the instant case stated: "The Commission has previously addressed whether submetering of water and sewer services by a landlord subjects a landlord to the Commission's jurisdiction as a 'public utility.' Submeters of water and sewer services do not meet the statutory definition of a 'public utility' as defined in S.C. Cod. Ann. Section 58-5-10 (2015). Order No. 2003-214, p. 10, ¶¶ 2-4." Order No. 2023-716, p. 7. The Commission in this case also stated: "Through submetering, the landlord is capturing its monthly costs for water and sewer service. It is well-established by the Commission that submetering does not constitute furnishing or supplying the commodity to the tenant…. The landlord is not a public utility because it does not take possession of the water [or sewerage] but only passes through the utility costs to the tenant. Id." Order No. 2023-716, p. 8.

Nevertheless, on appeal, Appellants contend the Commission erred in dismissing the Complaint because, as Appellants allege, Respondents furnished and supplied water and sewer to Appellants for compensation. (Ap. Br. at 13). However, as explained below, this argument is nonsensical.

Under South Carolina law, the Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State." SC Code Ann § 58-5-210. As it applies to this case, South Carolina law defines a public utility as "every corporation and person furnishing or supplying in any manner…water…to the public, or any portion thereof, for compensation." S.C. Code Ann. § 58-5-10.

A. Statute Is Not Ambiguous

"Where the statute's language is plain and unambiguous, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000).

"The construction given to a statute by those charged with the duty of executing it"—such as the Public Service Commission executing laws regarding public utilities—"is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." *Read Phosphate Co. v. S.C. Tax Comm'n*, 169 S.C. 314, 168 S.E. 722, 728 (1933).

The Commission held that "merely providing metering services and a billing function is not sufficient activity to be considered a "public utility" as defined in S.C. Code Ann. section 58-5-10(4)." (Order 736 at 19). The Commission is correct. There is simply no evidence to support any notion that Respondents furnished or supplied water and sewer to Appellants. Though their brief is somewhat unclear, Appellants appear to base their argument on the fact that Respondents own the pipes through which the water and sewerage traveled. (Ap. Br. at 15.) In Appellants' view, this ownership of the pipes transforms landlords into public utilities.

However, Appellants cite no South Carolina law or case to support their argument. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the appellant fails to provide argument or supporting authority). Rather, Appellants cite

dictionary definitions of furnish and supply in an attempt to show that the Respondents met the statutory definition of a public utility.

First, Appellants rely on the definition of: "supply' as "v. (supplies, supplying, supplied) [with obj.] make (something needed or wanted) available to someone; provide." (Ap. Br. at 14-15). Second, Appellants rely on the definition of: "furnish" as "v. . . . (furnish someone with) supply someone with (something); give (something) to someone." (Ap. Br. at 15).

While it is undisputed that the Defendants provided service from a local water and wastewater utility, the Defendant did not actually provide the water and sewerage. That was provided by the local utility. Notwithstanding, Appellants rely on these definitions to assert that the Respondents furnished and supplied water and sewerage services by doing nothing more than making the water and sewage services available.

Here, it is undisputed that the Respondents do not have the ability to turn off water or sewer nor do they have the ability to control water or sewer service to individual tenants. (Order 736 at 17). While it is true that "Respondents provided pipes between the area-wide utility connection and fixtures in the apartment" (Ap. Br. At 15), ownership of the pipes that water and sewerage pass through, without the ability to control the flow of service, is no more possession of the water and sewerage than the SCDOT claiming possession of the cars that travel along its roads.

Accordingly, the unambiguous meaning of the statute supports the Commission's conclusion that the Respondents neither furnished nor supplied water and sewerage service to Appellants. (Order 736 at 19-20). As a result, the Court should affirm the Commission's order dismissing the complaint.

B. If Statute Is Ambiguous

Furthermore, assuming the Court determines the statute is ambiguous, the Commission's interpretation of "furnish or supply" is entitled to deference, is clearly not arbitrary or capricious and

should be affirmed. *See Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32-33, 766 S.E.2d 707, 717 (2014) (court should "give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference").

As a threshold matter, an unbroken line of South Carolina caselaw upholds the deference doctrine, which provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations, "unless there is a compelling reason to differ." *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486; *see also, e.g., Barton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 404 S.C. 395, 415, 745 S.E.2d 110, 121 (2013) (stating that an agency's interpretation "will not be overruled absent compelling reasons"); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) (same); *Buist v. Huggins*, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (same); *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. at 515, 560 S.E.2d at 414 (same); *Glover by Cauthen v. Suitt Constr. Co.*, 318 S.C. 465, 469, 458 S.E.2d 535, 537 (1995) (same); *Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 222 (1976) (stating that an agency's interpretation will not be overruled "without cogent reasons"); *Hadden v. S.C. Tax Comm'n*, 183 S.C. 38, 48, 190 S.E. 249, 253 (1937) (stating that an agency's interpretation "will not be overruled without cogent reasons").

An agency interpretation is afforded deference "unless it is 'arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 35, 766 S.E.2d at 718 (internal quotation marks omitted) (citation omitted). An agency interpretation "is arbitrary if it is without a rational basis, is not based upon any course of reasoning or exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Daufuskie Island Utility Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019).

Here, Appellants have failed to provide any reason, much less a compelling one, for this

Court to overrule the Commission. Similarly, the Commission has consistently interpreted the term "public utility" not to include submeterers. *In re Rule to Show Cause on Submeterers*, Docket No. 2001-485-WS, Order No. 2003-214 (2003); *In re Seahorse*, Docket No. 2008-192-WS, Order No. 2008-725; *In re Quail Pointe Apartments*, Docket No. 2007-228-G, Order No. 2008-853. Specifically, the activities of "measuring the commodity and providing billing functions" do not make submeterers "public utilities." *Id.* Because Respondents do not utilize submetering infrastructure, they are similarly measuring the commodity and providing billing functions through an allocation formula implemented by a third-party billing company, which the Tenants call "the allocation version of submetering." (Complaint, ¶ 46).

An agency interpretation "is arbitrary if it is without a rational basis, is not based upon any course of reasoning or exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Daufuskie Island Utility Co., Inc. v. S.C. Off. of Regul. Staff*, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019). The Commission reached its decision after carefully considering past precedent where it held public utilities do not include landlords utilizing submetering. *In re Rule to Show Cause on Submeterers,* Docket No. 2001-485-WS, Order No. 2003-214 (2003); *In re Seahorse*, Docket No. 2008-192-WS, Order No. 2008-725; *In re Quail Pointe Apartments*, Docket No. 2007-228-G, Order No. 2008-853). In light of the deferential standard of review and the careful consideration of affidavits, standards, and state laws, the Commission's decision is not arbitrary and capricious and should be affirmed.

The plain language of "furnish or supply" leads to two possible outcomes: (1) the language unambiguously leads to a conclusion the Respondents did not "furnish or supply" water to Appellants, or (2) the language is ambiguous, and the Commission's interpretation of the language should be afforded deference. *See Kiawah*, at 16, 766 S.E.2d at 718 (court should "give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of

deference"). In either event, when viewed through the stringent standard of review applicable here, the Commission's ruling should stand.

II. The Respondents Are Not Public Utilities Because They Did Not Receive Compensation in Exchange for Furnishing or Supplying Water and Sewerage to Appellants.

As a threshold matter, to be considered a public utility, S.C. Code Ann. § 58-5-10 also requires Respondents to "furnish or supply" water and sewerage services "for compensation." Since the Commission was correct in finding Respondents did not provide any services for compensation, the Commission's decision should be upheld.

On appeal, Appellants contend the Commission erred in dismissing the Complaint because they allege that Respondents provided water and sewer to Appellants for compensation. (Ap. Br. at 15). Specifically, Appellants allege that Respondents obtained a benefit because Appellants were charged a service fee. (Ap. Br. at 16). No matter how Appellants couch this argument, it is contrary to the plain language of the statute and not based on the actions of Respondents.

The definition of compensation that Appellants cite suffers from fatal, circular reasoning. Specifically, the definition states that compensation is "[r]emuneration and other benefits received in return for services rendered." (Ap. Br. at 15-16) (emphasis added). Therefore, for something to be compensation, it must first be provided in return for services rendered; as stated above, Appellants have been unsuccessful in showing that Respondents ever rendered any utility services in the first place.

As the Utility Management & Conservation Association ("UMCA") explained in their Letter of Protest:

> A utility allocation method, also known as Ratio Utility Billing Systems ("RUBS"), is an alternative method of tenant billing of utilities, in contrast to sub-metering (a method used to measure actual utility usage), as a means of recovering the utility expense billed by a utility provider to a landlord for usage consumed by the tenants. RUBS is a common practice used by property owners nationwide that divides the

> utility expense proportionally between the tenants based on a mutually agreed-upon formula… Due to the nature of utilities and outdated building infrastructure, **RUBS is the most cost-efficient utility allocation mechanism for many buildings that lack a preexisting sub-meter infrastructure.** In such buildings, the addition of sub-meters is often cost-prohibitive, or simply infeasible. **The use of RUBS does not provide a means for a landlord to profit from its utility billing to tenants**, but simply a means of reimbursement of utility costs borne by tenants, yet assessed against landlords.

(UMCA Letter of Protest filed in this docket on May 4, 2022.) (emphasis added). Since the properties at issue do not have water or sewer submeter infrastructure, the best alternative available to Respondents to pass-through the costs of providing the essential services of water and sewer to its tenants is the allocation formula used and described in the lease agreements between the parties. (Compl. ¶¶ 15-17, 33-34). Similar to submetering, the Respondents, through a third-party billing company, "merely measure the amount of flow of water or wastewater and provide billing functions." Order No. 2003-214.

Appellants acknowledge, as they must, that Respondents did not control the billing, but instead hired a third-party billing company to handle the water and sewer billing function. (Ap. Br. at 16 acknowledging the service fee reflected on the "billing documents produced by the entity that performed the billing for Respondents."). Likewise, it is undisputed that "[t]he Strata entities contracted with the third-party billing company, Conservice, to recover the actual costs of water and sewer services to its tenants through an allocation formula method on a not-for-profit basis." (Aff. of Andrew Gordon, p. 1, ¶ 6.). Accordingly, the Commission did not err in determining Respondents were only passing through to the tenants the costs of providing water and sewer service on a not for profit basis. (Order 736 at 15). This finding of fact is entitled to substantial deference.

Despite the Commission's interpretation of the statute, Appellants argue that the Commission erred because *Anchor Point, Inc. v. Shoals Sewer Co.*, "held that an entity was a public utility despite

providing sewerage on a not-for-profit basis." 308 S.C. 422, 426, 418 S.E.2d 546, 548 (1992). In truth, *Anchor Point* is readily distinguishable.

In *Anchor Point*, the Court determined that Shoals Sewer was a public utility because it was a homeowners' association that had not filed an application to exempt it from utility status pursuant to the regulations. 26 S.C. Code Ann. Reg. 103-502.2 (1991). Critically, in relying on *Anchor Point*, Appellants left out the most important fact applicable to this case, that Shoals Sewer ***owned*** and ***operated*** the sewer plant system. *Anchor Point*, 308 S.C. at 424, 428. Unlike Shoals Sewer, Respondents do not own or operate the water or sewer system at issue.

In sum, administrative agencies are generally considered the subject matter experts in their relevant field. Given the deferential standard, the Commission—the body appointed by the legislature to oversee public utility service in South Carolina—reached the decision "a reasonable mind would accept" to support its conclusion that Respondents did not furnish or supply utility services for profit. *Hill* at 9, 698 S.E.2d at 617 (2010) (stating that substantial evidence is evidence that, considering the record as a whole, a reasonable mind would accept to support an agency decision, and stating that he possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports the agency's findings); *Palmetto All., Inc. v. S.C. Pub. Serv. Com.*, 282 S.C. 430, 319 S.E.2d 695 (1984) (stating that a court should not set aside a judgment upon which reasonable persons might defer). As a result, the Commission's decision should be affirmed.

Alternatively, if the Court views the Commission's decision that Respondents did not furnish or supply water to Appellants as a question of fact, the Commission's decision is supported by substantial evidence. *See Bursey v. S.C. Dep't of Health & Env't Control*, 369 S.C. 176, 184-85, 631 S.E.2d 899, 904 (2006), *overruled on other grounds, Allison v. W.L. Gore & Assocs.*, 394 S.C. 185,

714 S.E.2d 547 (2011) (holding that interpreting the meaning of a term in a statute was a question of law, but whether a company's activities fit the definition of the term was a question of fact).

In much the same way as the record reflects that the Commission's decision was not arbitrary or capricious, it also reflects that the decision was supported by substantial evidence. The Commission carefully reviewed the evidence and affidavits from both parties and, upon doing so, decided that Respondents are not a public utility. Specifically, the Commission's Order analyzes the billing arrangement between Appellants and Respondents; the infrastructure at the properties; whether Respondents recover actual costs on an allocation, not-for-profit basis; and whether Respondents seek a guaranteed rate of return on the pass-through billing of water and sewer services. (Order 736 at 9). Because the Commission's Order is supported by substantial evidence, there is no clear error or abuse of discretion on its behalf, and the Court should affirm the Commission's decision to dismiss the Complaint.

III. The Commission's Determination That Respondents are Not a Public Utility is Supported by Agency Precedent

The Commission's decision below simply followed a long line of its prior cases. Its decision to adhere to its own precedents on questions of law is entitled to deference.

On appeal, Appellants continue to insist—incorrectly—that the Commission's precedent is that a submeterer *is* a regulated utility based on Order No. 1999-307. (Ap. Br. at 23). However, the Order relied on by Appellants was later **vacated** by Order No. 2003-214, with detailed reasoning and explanation. In Order No. 2003-214, the Commission looked to the Landlord-Tenant Act and found contrasting authority to disconnect water service between landlords and public utilities. Landlords, on the one hand, are not permitted to disconnect water service for non-payment, while public utilities, on the other hand, are permitted to disconnect water service for non-payment. Therefore, if the Commission were to decide to regulate a Landlord as a public

utility, the Landlord would be permitted to disconnect a tenant's service for non-payment, running afoul of the Landlord-Tenant Act.

In any event, the Commission has consistently interpreted the term "public utility" *not* to include submeterers. *In re Rule to Show Cause on Submeterers*, Docket No. 2001-485-WS, Order No. 2003-214 (2003); *In re Seahorse*, Docket No. 2008-192-WS, Order No. 2008-725; *In re Quail Pointe Apartments*, Docket No. 2007-228-G, Order No. 2008-853. Specifically, the Commission's precedent is that the activities of "measuring the commodity and providing billing functions" do not make submeterers "public utilities." *Id.*

The Commission has also found the following factors persuasive in determining the public utility status of a submeterer:

- Billing on a not-for-profit, pass-through basis (Order Nos. 2003-214; 2008-853)
- Lacking the characteristics of a public utility (monopoly service area; owning large, capital-intensive utility infrastructure; guaranteed rate of return) (Order No. 2008-853)
- Ability to turn off water supply to individuals for failure to pay charges (Order No. 2008-725)
- The provision of "essential services" and available remedies under the South Carolina Landlord and Tenant Act (Order No. 2008-853)

Similar to the above submetering cases, Respondents here bill tenants on a not-for-profit, pass-through basis, using a third-party billing company. Because Respondents' apartment buildings do not have submetering infrastructure installed, they are merely measuring the commodity and providing billing functions through an allocation formula implemented by a third-party billing company, which the Tenants call "the allocation version of submetering." (Complaint,

¶ 46). There is no evidence supporting the argument that Respondents are profiting from the allocation formula used under the terms of the lease agreement to recover costs of water and sewer services. Further, Respondents do not have any other characteristic of a public utility: they have no monopoly over any service area, they do not own any large, capital-intensive utility infrastructure, and they do not seek a guaranteed rate of return from the allocation formula used to recover the cost of water and sewer services. And Respondents never do not have the ability to turn off water supply to individuals for failure to pay.

Additionally, Appellants rely on Order No. 2008-725, to argue that Respondents are utilities because the allocation method does not measure the *actual* usage of each tenant. (Ap. Br. at 31); however, the circumstances in Order 725 are materially different than the circumstances here. Notably, the defendants in Order 725 possessed the submetering infrastructure to provide service to residents on an individually metered basis. (Order No. 2008-725). Here, it is undisputed the Respondents do not have the infrastructure to do so. Appellants cherry pick one line from Order 725 to support their argument, when in fact, the order only supports the general premise that submeterers who pass through costs, and do not have the ability to turn off water, are not public utilities. *Id*.

Importantly, Order 725 established that whether an entity has the ability to turn off water supply to customers for non-payment is indicative of whether that entity takes "possession" of the water or wastewater for the purpose of determining public utility status. *Id*. As reflected in the record, Respondents do not have this ability. *Id*.

Without submeters installed in each unit, there is no way to measure the actual usage of each tenant. This is precisely the reason why the RUBS method was invented—to be used where there is no existing, or functioning submeterers and the cost to install, repair or replace, are prohibitive.

However, RUBS is still a method to "measure" the usage of each tenant, albeit imprecise, to recover the cost of providing water or sewer services. Appellants attempts to distinguish RUBS from submetering simply fails; they can cite to no prior Commission orders to support their position. Instead, the Commission's prior orders clearly show that RUBS is a version of submetering used where actual submetering infrastructure does not exist or does not function properly.

Further, the arguments and evidence presented by the Appellants do not go to whether a RUBS, in and of itself, subjects a landlord to public utility status. Instead, the Appellants' repeated complaints and proffered evidence surround the application of the RUBS method used by the Landlords to pass through the cost of certain services. For example, Appellants allege that the Landlords had a duty to confirm the number of persons residing in each unit to ensure the RUBS method was being implemented correctly. (Memorandum in Opposition, at 8). Just because the services complained of happen to be "water and sewer" services does not give the Commission jurisdiction.

In sum, the Commission's holding that Respondents are not public utilities fits squarely within Commission precedent on the same question; therefore, the Commission's decision should be affirmed.

IV. The Commission's Order is Supported by Substantial Evidence in the Record.

On appeal, Appellants ignore the facts in the record that support the Commission's conclusions of law in attempting to claim the Commission erred. (Ap. Br. at 32). For example, Appellants argue that "Section 58-5-10(4) contains no language whereby whether a utility bills customers itself or contracts with a third-party to bill customers is a requirement for an entity to be a regulated utility." (Ap. Br. at 32). Even in making this argument, Appellants attempt to ignore the

existence of factual evidence in support of the Commission's findings. Not only is this factual finding supported by the Affidavit of Andrew Gordon, but it is also relevant to the Commission's prior precedent in determining whether a landlord is engaged in activity that is regulated as a public utility. (Orders 2003-214, 2008-853); (Affidavit of Andrew Gordon, ¶ 5). Furthermore, it is painfully obvious that a characteristic of a utility is the ability to bill customers directly.

Next, Appellants argue that the Commission erred in holding that Respondents passed through the costs of providing water and sewer on a not for profit basis. (Ap. Br. 32.). Specifically, Appellants contend "there is no evidence in the record that the water and sewerage were provided at cost and on a not-for-profit bases ***other than*** the conclusory assertion of Andrew Gordon in his affidavit." (Ap. Br. at 32-33) (emphasis added). In making this argument, Appellants acknowledge the existence of factual evidence in support of the Commission's findings. Once again, this fact is supported by the Affidavit of Andrew Gordon. (Affidavit of Andrew Gordon, ¶ 6). And Appellants have submitted no evidence that the Respondents profited or attempted to profit from the water and sewerage provided by the local utility. Appellants also ignore the vast amount of discovery that was produced, which Appellants relied on to unpersuasively support their arguments in their Motion for an Order. Further, there are no claims in the Complaint that Respondents sought a profit through the billing of water and sewer services. Consistent with the Commission's prior precedent on submetering, the Respondents, through a third-party billing company, "merely measure the amount of flow of water or wastewater and provide billing functions." (Order No. 2003-214). The Commission's findings and conclusions are supported by substantial evidence.[3]

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[3] Recognizing their arguments' fate, Appellants' attempt to revive their claims by incorrectly stating that "[t]he Commission declined Appellants' request to conduct discovery. (Ap. Br. 33). First vast discovery has been produced. Second, in Appellants' Motion for Order of Relief on the Written Record, Appellants' expert "was able to use the water and sewer bills from the supplier utilities to Defendants and Defendants' records of the allocation formula charges to

Finally, Appellants curiously argue that the Commission erred in finding that Respondents "do not possess or take possession of the water or sewerage." (Ap. Br. at 35). However, Appellants cite no South Carolina law or case to support their argument. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 515 (1994) (stating an issue is abandoned where the appellant fails to provide argument or supporting authority). Rather, the Commission's precedent has established that whether an entity has the ability to turn off water supply to customers for non-payment is indicative of whether that entity takes "possession" of the water or wastewater for the purpose of determining public utility status. (Order 2008-725). By ignoring the Commission's prior orders on this and other issues, Tenants unsuccessfully asked the Commission to overturn their prior precedent interpreting the statutory definition of a public utility. Here, as stated previously, the record reflects that Respondents did not have the ability to turn off the water supply and did not take possession of the water or wastewater. (Order 736 at 17); (Affidavit of Andrew Gordon, ¶ 8). As such, the Commission's finding is supported by substantial evidence and Appellants' argument fails as result.

CONCLUSION

Appellants simply have no legal argument, and no Commission orders or South Carolina law that supports reversing the Commission's decision. Nor do Appellants have any evidence to support their position that the RUBS method, an off-shoot of submetering, for passing through water and sewer costs is regulated by the Commission. Rather, the Tenants appear to suggest that use of an actual submeter is the preferred method over RUBS (which Respondents do not dispute) but

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tenants each month" to support Tenants' opposition to the use of the allocation method. (Tenants Mot. for Order at 7). Tenants' own pleadings show that the Parties have conducted discovery and Tenants have used this discovery to support their position. Finally, Appellants have failed to identify any material facts that have not yet been discovered that could somehow resuscitate their defective claims. Accordingly, Tenants' argument for additional discovery fails as a matter of law, and the this Court should reject it. *See, e.g., Fields*, 354 S.C. at 69, 580 S.E.2d at 439 (stating that the party requesting additional discovery must demonstrate the likelihood that further discovery will uncover additional relevant evidence).

Appellants are effectively asking the Commission to require Landlords to install submeters where there is no preexisting infrastructure, a request that the Commission is without authority to grant. As stated by UMCA, RUBS is a common practice that provides an equitable method for a landlord to recover its utility expense and has even been found to reduce consumption and contribute towards water conservation.

For the foregoing reasons, the decision of the Commission to dismiss the Appellants' complaint and deny their motion for reconsideration should be affirmed. The Commission's interpretation of the statutory definitions is in line with the plain meaning of South Carolina law, and its findings of fact are supported by substantial evidence and consistent with established precedent.

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Jun 28 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2024-000208
PSC Docket No. 2022-84-WSH

Sarah Zito, Alvaro Sarmiento, Jr., Mark Shinn, and Daniel Bermudez, Appellants,

v.

Strata Audubon, LLC, and Strata Veridian, LLC, Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that on June 28, 2024, he caused a copy of the foregoing Brief of Respondents to be served on all parties of record by email as follows:

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