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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-WS

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

v.

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

INITIAL REPLY BRIEF OF APPELLANTS

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"Almost any word or phrase may be rendered vague and ambiguous by dissection with a semantic scalpel . . . . [But such an approach] amounts to little more than verbal calisthenics."

Cole v. Richardson, 397 U.S. 238, 240 (1970) (Harlan, J., concurring).

Faced with the plain statutory language of Section 58-5-10(4) and an order from the Commission that disregards that plain statutory language, Respondents primarily resort to "verbal calisthenics," attempting to create and read into Section 58-5-10(4) a nonexistent and nonsensical distinction between furnishing or supplying water and sewerage for compensation on one hand and on the other hand, an entity purchasing water from an area-wide utility at a master meter, transporting that water through pipes it owns and delivering it to end-users, accepting waste water from those end-users into pipes the entity owns, transporting that waste water through the pipes to the area-wide utility for disposal, and charging the end-users—at a rate different from the rate the entity paid to the area-wide utility for the water and sewerage services provided to the entity due to the inclusion of administrative charges and usage in the common areas of the properties—for the water and sewerage services. Respondents' verbal calisthenics are contrary to the plain, ordinary meaning of the language—"furnishing," "supplying," "water," "sewerage collection," "sewerage disposal," and "compensation"—of Section 58-5-10(4). Not only are Respondents' verbal calisthenics contrary to the meaning of the statutory language, Respondents' efforts ignore or misstate relevant facts in the record in their attempt to distinguish themselves from regulated public utilities.

Additionally, Respondents fail to address and thereby concede part of Appellants' argument as to Respondents having been compensated for providing water and sewerage. Respondents also concede the lack of substantial evidence supporting the Commission's purported

findings by relying on conclusory assertions as to the existence of substantial evidence. Finally, Respondents fall back on a fallacious "parade of horribles"—asserting that holding Respondents operated as a public utility subject to Commission regulation would result in purportedly undesirable outcomes—and a fallacious appeal to the purported fairness and virtues of Respondents' allocation formula billing. Neither the purported horribles nor the purported virtues are supported by the record, and moreover, the record establishes that the purported horribles would not occur and the purported virtues do not exist.

I. Respondents' Arguments Rely on a Nonexistent, Nonsensical Distinction that is Contrary to the Plain, Ordinary Meaning of the Statutory Language and Contrary to the Evidence in the Record.

Respondents repeatedly attempt to draw a false distinction between owning a series of pipes, providing end-users with water and sewerage through those pipes, and charging the end-users for the water and sewerage with "actually provid[ing] the water and sewerage." (Resps.' Br. 14.) That purported distinction is contrary to the plain, ordinary meaning of the statutory language and is not supported by the evidence in the record.

Here, Respondents were "furnishing or supplying . . . water, sewerage collection, [and] sewerage disposal" to Appellants and the other tenants. There was a single meter between Respondents and the area-wide utility providing Respondents with water and sewerage. (Compl. ¶16; Ans. ¶16.) Respondents were paying the area-wide utility for water and sewage flow at that meter point. (Compl. ¶¶16, 17, 34, Ex. A at 11, & Ex. B at 11; Ans. ¶16, 17, 26.) On Respondents' side of the respective area-wide utility meters, Respondents owned the water and sewer pipes. (Resps.' Br. 15.) With the area-wide utility's charges to Respondents for water and sewerage occurring at the meter point and Respondents' owning the pipes on their side of the meter point, Respondents owned any water or sewerage flowing through Respondents' pipes. Therefore,

Respondents were purchasing water, taking ownership of the water, transporting it to tenants, and charging tenants for supplying the water. Respondents were also accepting sewage from the tenants into Respondents' pipes—*i.e.*, "sewage collection," charging the tenants for accepting that sewage, transporting the sewage through the pipes to the connection point with the area-wide utility, and paying the area-wide utility for the sewage passing from Respondents' pipes into the area-wide utility's pipes.

Providing pipes through which water and sewerage flows and at the termination of which water is delivered to an end-user and sewage is accepted from an end-user is the quintessential nature of "furnishing" or "supplying" water and sewerage. Furnishing and supplying water and sewerage is a service that at its core involves providing pipes for the transport of the water and sewage. Given that water and sewage are liquids, water and sewerage cannot be furnished or supplied without pipes to transport the liquid.

Moreover, Appellants' public utility expert provided uncontroverted testimony that Respondents possessed the water and sewerage in Respondents' pipes due to the nature of Respondents' acquisition, transport, and resale of the water and sewerage. Appellants' public utility expert testified that "[u]nder a sale for resale arrangement, as carried out by [Respondents] in this case, [Respondents] undoubtedly take possession of the water." (Appellants' Mot., Ex. F at 8:14–17.) The expert further explained that Respondents take possession of the water because Respondents obtained the water on a volumetric basis and then allocated the charges for it on a formulaic basis while also diverting a portion of the water for common area usage. (Appellants' Mot., Ex. F at 8:14–9:16.)

As discussed *supra*, Respondents owned, possessed, transported, and delivered the water and sewerage flowing through their pipes. However, even if Respondents' assertions that they did

not own or possess the water or sewage were correct, that would not change the result that Respondents were "furnishing" and "supplying" water and sewerage to the tenants. There is nothing in Section 58-5-10(4) nor in the plain, ordinary meaning of "furnishing" or "supplying" to indicate that one must own or possess a substance to be engaged in the service of "furnishing" or "supplying" the substance. As discussed previously, the plain, ordinary meaning of "furnish" and "supply" are to make something available to someone else, to provide someone else with something. (Appellants' Mot., Ex. B.) There is nothing in the concept of "furnish" or "supply" indicating that one must possess or own the thing that one provides to someone else. Additionally, one can easily contemplate situations where one can "furnish" or "supply" something to another without ever possessing or owning the thing. For example, a company ("Company A") could contract to provide a specified number of widgets to a second company ("Company B"). Company A could then contract with a separate manufacturer of the widgets to manufacture and deliver the widgets to Company B. Upon completion of the process, Company A would have furnished or supplied the widgets to Company B without ever having owned or possessed the widgets.

Applying the same reasoning to the water and sewerage context exemplifies how Respondents' attempted distinction is not supported by the plain, ordinary meaning of the statutory language, is contrary to the statutory language, and would produce an absurd result. Applying Respondents' reasoning, a water utility could avoid "furnishing" or "supplying" water and avoid being a regulated public utility by acquiring water from a third-party and merely providing the service of transporting the water through its pipes to an end-user. Applying Respondents' reasoning, such a utility could charge the end-user unregulated fees for providing that water to the end-user. In short, were Respondents' reasoning applied, the statutory scheme of public utility regulation for water utilities would be rendered entirely or largely a nullity. Additionally,

Respondents' reasoning would presumably also apply to electricity and natural gas utilities. Those utilities would be able to avoid utility regulation by not owning generation or production facilities and only transporting electricity and natural gas acquired from others to end-users.

Additionally, Respondents' attempted distinction is even more nonsensical when considered in relation to sewerage. Respondents assert that they "did not actually provide the . . . sewerage." (Resps.' Br. 14.) Sewerage is a service whereby one accepts wastewater from another. Anyone who provides a drain and pipe that accepts wastewater from an end-user is providing, and thereby "furnishing" and "supplying," sewerage to that end-user.

"The words in a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. *Gilstrap v. S.C. Budget & Control Bd.*, 310 S.C. 210, 214, 423 S.E.2d 101, 103 (1992). "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). Courts also are to avoid reading statutory language in a manner which would lead to an absurd result or render statutory language meaningless. *See, e.g.*, *Ranucci v. Crain*, 409 S.C. 493, 500, 763 S.E.2d 189, 192–93 (2014) ("This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless."); *State v. Long*, 406 S.C. 511, 515 n.5, 753 S.E.2d 425, 427 n.5 (2014) ("When construing a statute, this Court will reject a meaning when it would lead to a result so plainly absurd that it could not have been possibly intended by the General Assembly or would defeat the plain legislative intention."). Respondents' attempt to draw a distinction between how Respondents provided water and sewerage to Appellants and the other tenants is a resort to a subtle and forced construction to limit the operation of Section 58-5-10(4) and would produce absurd results, and the Court must reject it. The plain, ordinary meaning of the terms

"furnishing" and "supplying" in Section 58-5-10(4) encompass the method Respondents used to provide water and sewerage to Appellants and the other tenants. Accordingly, the Court should apply that plain, ordinary meaning, conclude the record establishes that Respondents were furnishing and supplying water and sewerage, and reverse the Commission's order.

II. Respondents Were Providing Water and Sewerage for Compensation.

Respondents rely on two arguments in support of their position that they did not provide water and sewerage "for compensation." First, Respondents argue that compensation is a benefit received for a service rendered and that Appellants cannot show that Respondents provided any service. As discussed *supra*, Respondents furnished and supplied water and sewerage. Respondents then argue that they were not providing water and sewerage "for compensation" because they "were only passing through to the tenants the costs of providing water and sewer service on a not for profit basis." (Resps.' Br. 18.) In doing so, Respondents fail to address Appellants' argument that Respondents received compensation and were not merely passing through costs by charging tenants for water and sewer usage in the properties' common areas, and accordingly, Respondents concede this issue. Additionally, the remainder of Respondents' argument relies on a misstatement of the record.

Appellants argue that Respondents obtained a benefit—*i.e.*, obtained compensation—from providing water and sewerage to Appellants and the other tenants through billing the tenants for water and sewage usage in the common areas of the properties. (Apps.' Br. 16–17.) Usage in the common areas of the properties was not usage by or attributable to particular tenants, even imprecisely through an allocation formula, and therefore, by charging for such common area usage, Respondents were not charging even an approximation of the actual amounts of water and sewer used by tenants and were not merely passing through the costs of tenants' actual usage.

Respondents fail to address this argument, much less offer any explanation as to how such charges for common area usage could not be compensation for water and sewerage and how Respondents could be merely passing through actual costs when charging for common area usage. Accordingly, Respondents conceded and it is uncontested that Respondents received compensation for the water and sewerage and were not merely passing through actual costs because Respondents were charging for common area usage.

Even were the uncontested common area usage argument not determinative of the issue, Respondents' argument regarding "only passing through to the tenants the costs of providing water and sewer service on a not for profit basis" fails for two reasons. First, that argument and the Commission orders applying that reasoning are contrary to the plain, unambiguous language of Section 58-5-10(4). Respondents and the Commission have not identified any language in Section 58-5-10(4) indicating that where the water and sewer charges are the passed through costs of a tenant's actual water and sewer usage that does not constitute compensation, and Respondents and the Commission have not offered any explanation as to how the term "for compensation" could be understood to exclude the situation where charges are the passed through costs of a tenant's actual usage. The plain, ordinary meaning of "for compensation" is the receipt of a benefit in exchange for providing something, and the plain, ordinary meaning of "for compensation" does not exclude a situation where something is provided to another on a not-for-profit basis or even at a loss. Nowhere in Section 58-5-10(4) is there any language indicating that the term "for compensation" does not apply to a pass through of actual costs on a not-for-profit basis. Accordingly, the Court should apply the plain, ordinary meaning of the statutory language and reject Respondents' and the Commission's not-for-profit, pass through of actual costs exception.

Not only does the plain, ordinary meaning of the statutory language compel that result, as discussed previously, the South Carolina Supreme Court considered and rejected Respondents' and the Commission's not-for-profit, pass through exception in *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992). There, the Court rejected the argument that an entity is not a public utility if providing water and sewerage on a not-for-profit basis. Respondents attempt to distinguish *Anchor Point* on the basis that "Respondents do not own or operate the water or sewer system at issue," but that purported factual distinction is based on a misstatement of the facts. (Resps.' Br. 19.) Respondents own and operate a series of pipes between the respective area-wide utilities' connection points and outlets or drains in apartment units. (Resps.' Br. 15.) Those pipes are a water and sewerage system owned and operated by Respondents. As discussed *supra*, a water or sewerage system exists where there are pipes used to transport water or sewage to or from end-users.

Moreover, to read Respondents' and the Commission's exception into the term "for compensation" would render absurd results. Unlike Respondents, utilities typically have a meter at a particular customer's home or business that measures the customer's actual usage. Applying Respondents' and the Commission's exception to "for compensation," such a utility presumably would not be a regulated utility at any time that the utility was providing water, sewerage, electricity, or natural gas to a customer at a loss. Such an absurd result further indicates that the Court should decline to adopt Respondents' and the Commission's not-for-profit, pass through exception. *See, e.g.*, *Ranucci*, 409 S.C. at 500, 763 S.E.2d at 192–93; *Long*, 406 S.C. at 515 n.5, 753 S.E.2d at 427 n.5.

Even could a not-for-profit, pass through exception be read into Section 58-5-10(4)'s use of the term "for compensation," which it cannot for the reasons previously stated, the record

establishes that Respondents would not fall within such an exception because they were not providing water and sewerage on a not-for-profit, pass through basis. Respondents rely on misstatements of the record in an attempt to fit into such an exception. Respondents assert that "it is undisputed that '[Respondents] . . . recover the actual costs of water and sewer services to its tenants through an allocation formula method on a not-for-profit basis.'" (Resps.' Br. 18.) That is a patently false statement, and Appellants contest whether Respondents provided water and sewerage on a not-for-profit, pass through basis and presented evidence and arguments on that issue. Throughout this proceeding, Appellants asserted and continue to assert that Respondents did not measure and charge for actual usage and obtained a benefit and profited from the charges for water and sewerage. Respondents were not measuring and charging for actual usage because Respondents did not have submeters measuring the usage of individual apartments, did not measure the usage, and instead, used an inaccurate allocation formula to bill for water and sewerage. (Compl. ¶¶12–17 & 30–35, Ex. A at 11–12, Ex B. at 11–12; Ans. ¶¶12–17 & 23–26; Appellants' Mot., Ex. F at 5:14–16.) Respondents obtained a benefit and profited from the charges for water and sewerage because Respondents charged an administrative fee and charged for common areas water and sewer usage. (Compl. ¶¶42–43, Ex. A at 12. & Ex. B at 12; Ans. ¶¶32–33, Appellants' Mot., Ex. A at 8:12–17; Appellants' Mot., Ex. F at 6:21–8:8.) As Appellants' public utility expert testified, the administrative fees and common areas usage charges "are a markup on the water and sewer, and [Respondents] cannot be engaged in a mere pass through where [Respondents] are marking up the water and sewer charges." (Appellants' Mot., Ex. F at 8:9–13.)

The sole support Respondents identify in the record for their assertion that it is "undisputed" that Respondents provided the water and sewerage on a not-for-profit, pass through

basis is paragraph six in Andrew Gordon's affidavit which states, in full: "The 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 ¶6.) That statement is nothing more than a self-serving, conclusory assertion and therefore, is insufficient to establish a fact, much less render a fact "undisputed." *See, e.g.*, *Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994); *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38–39, 331 S.E.2d 385, 388 (Ct. App. 1985).

III. The Commission's Order Lacks Substantial Evidence and Respondents' Fail to Identify Substantial Evidence in the Record and Thereby Concede the Issue.

Respondents discuss the issue of whether there is substantial evidence in the record to support the Commission's findings at two points in their appellate briefing. (Resps.' Br. 20 & 23–24.) The sole item in the record that Respondents identify as purportedly providing substantial evidence in support of the Commission's findings is the affidavit of Andrew Gordon, and specifically paragraphs five and six in that affidavit. Paragraph five in Gordon's affidavit states, in full: "As the owner of the properties, the Strata entities 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 we contract directly with utility providers for service to resident units." (Aff. of Andrew Gordon ¶5.) That paragraph provides evidence in support of the Commission's findings only on the limited facts addressed in that paragraph. Paragraph six in Gordon's affidavit, quoted and discussed *supra* in Section II, is a self-serving, conclusory assertion that cannot serve as substantial evidence.

Other than referencing the two paragraphs in Gordon's affidavit, the remainder of Respondent's arguments as to the existence of substantial evidence supporting the Commission's findings are conclusory assertions that such evidence exists in the record. (Resps.' Br. 20 & 23–

24.) Accordingly, Respondents concede that the record does not contain substantial evidence supporting the Commission's findings, except as to the limited facts addressed in paragraph five of Gordon's affidavit. *See, e.g.*, *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue."); *State v. Jones*, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). The Court should therefore hold that the Commission's order is not supported by substantial evidence both because Respondents concede the issue and because, as Appellants detail, there is not substantial evidence in the record to support the Commission's findings relied on to conclude that Respondents did not act as a regulated public utility.

IV. The Record Establishes that Holding that Respondents Acted as a Regulated Public Utility Would Not Result in Respondents' Parade of Horribles and the Purported Fairness and Virtues of Respondents' Allocation Formula Billing Method do Not Exist.

Stuck with statutory language that does not support their position and the Commission's order that disregards the plain, ordinary meaning of that statutory language and lacks substantial evidence in the record, Respondents conclude by resorting to policy arguments in the form of a fallacious parade of horribles and false and unsupported assertions as to the fairness and virtues of the allocation formula billing method. First, Respondents assert that "Appellants are effectively asking the Commission to require Landlords to install submeters where there is no preexisting infrastructure." (Resps.' Br. 26.) Respondents also imply that the Commission would have to be involved in proceedings regarding landlord provision of water and sewerage to tenants. Were the Court to hold that Respondents acted as a regulated public utility, the result would not be that Respondents or other landlords would have to install submeters at each apartment unit at a

property. Installing submeters at each apartment would be one option for apartment complex owners, but other options would also exist. An apartment complex owner could incorporate into the rent for each apartment an amount to cover water and sewerage and provide those services as part of the rent. In other words, the apartment complex owner could provide water and sewerage to its tenants without any charge specific to the water and sewerage but with the rent increased by an amount intended to cover the anticipated usage of the apartments.

Also, the Commission could engage in rulemaking specific to landlords providing water and sewerage for a charge and establish rules for minimal, streamlined regulatory processes for such landlords. Appellants' public utility expert testified that the Commission would have many options as to how it exercises its jurisdiction over landlords providing water and sewerage for a charge. (Appellants' Mot., Ex. F 16:1–17:3.) The expert detailed a number of potential options for regulatory treatment of such landlords, "including issuing guidelines and making sure they are followed through systematized reporting and auditing requirements that streamline regulatory processes, issuing broadly applicable rules exempting companies from certain regulatory processes, issuing broadly applicable rules exempting companies from certain regulatory requirements if certain conditions are met, [and] issuing boilerplate pricing formulas that, absent special circumstances, would, if followed, be presumed valid." (Appellants' Mot., Ex. F 16:14–18.)

Respondents also tout the purported virtues of the allocation formula billing method as a "common practice," a practice that is "equitable," and a practice that can "reduce consumption and contribute towards water conservation." (Resps.' Br. 26.) The Commission did not make any such findings, the record does not support those assertions, and Appellants submit that the record establishes that those purported virtues are false or in the best case for Respondents, are disputed.

Respondents appear to rely exclusively on the Utility Management & Conservation Association's Letter of Protest in Opposition to Complainants, but that document is merely a letter of protest setting forth the arguments of an intervening party and not evidence in the record. Appellants' public utility expert addressed the argument that the allocation formula billing method is a common practice, testifying: "Some states permit allocation formula billing generally or have not addressed the issue, some states permit allocation formula billing but only subject to certain statutory and regulatory restrictions and limitations, and some states prohibit allocation formula billing." (Appellants' Mot., Ex. F at 12:11–14.)

Appellants' public utility expert also testified in detail as to the inequity of using an allocation formula billing method. The expert testified that when an allocation formula method is used, "[t]o the extent there are variations in the use of water which is an inevitable occurrence, customers using less water will be subsidizing heavy users." (Appellants' Mot., Ex. F at 5:5–7.) The expert testified that an allocation formula is also inequitable because "the use of formulaic rather than volumetric pricing provides the complex owner with not only the incentive to transfer risks onto consumers and enhance its profit through opportunistic formula design rather than performance, but also provides the complex owner with the means to surreptitiously do so." (Appellants' Mot., Ex. F at 5:11–14.)

Finally, Appellants' public utility expert testified as to how the use of an allocation formula does not contribute to water conservation. (Appellants' Mot., Ex. F at 9:17–10:21 & 13:3–14:16.) The expert testified that the use of an allocation formula method is "most decidedly inconsistent" with "the incentive to use resources efficiently and conserve them where possible." (Appellants' Mot., Ex. F at 9:19–21.) He further testified that the subsidies between tenants and for the landlord created by an allocation formula method "distort the price signals in ways that further dilute the

efficiency and conservation incentives." (Appellants' Mot., Ex. F at 10:10–11.) The expert testified that: "Whether an allocation formula could contribute to water conservation depends entirely on the design of the formula. The likelihood of that happening in the absence of meaningful regulatory oversight is virtually non-existent because the primary concern of those who design and implement the formula is meeting their revenue requirements, not the attainment of public policy objectives such as efficient use and conservation of resources." (Appellants' Mot., Ex. F at 13:7–12.) The expert concluded that if Respondents and others advocating the use of an allocation formula method were concerned about conservation of resources, they would assert the "necessity of utility regulatory oversight of the use of an allocation formula." (Appellants' Mot., Ex. F at 13:13–14.)

CONCLUSION

As set forth herein, the plain, ordinary meaning of Section 58-5-10(4) provides that Respondents acted as a regulated public utility. The Commission's order and Respondent's arguments are contrary to the plain, ordinary meaning of Section 58-5-10(4). Moreover, the Commission's order is arbitrary and capricious, lacks a reasoned basis, and is not supported by substantial evidence. Accordingly, the Court should reverse the Commission and hold that Respondents acted as a regulated public utility subject to regulation by the Commission.

Respectfully submitted,

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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 on July 19, 2024, he caused a copy of the foregoing Appellants' Initial Reply Brief to be served on all parties of record by e-mail as follows:

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July 19, 2024

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Appellate Case No.: 2024-000228
PSC Docket No. 2022-84-WS

To Whom it May Concern,

Please find enclosed for filing the Initial Reply Brief of Appellants. Please let us know if there are any questions or concerns.

Regards,

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