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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.

BRIEF OF APPELLANTS

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ATTORNEYS FOR APPELLANTS

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I. Did the Public Service Commission err in holding, contrary to the plain, unambiguous language of Section 58-5-10(4) of the South Carolina Code of Laws, that Respondents did not operate as a public utility?

II. Were there some ambiguity in Section 58-5-10(4), did the Public Service Commission err in holding Respondents did not operate as a public utility?

III. Was the Public Service Commission's decision arbitrary and capricious in deviating from prior orders without a reasoned basis for the deviation?

IV. Did the Public Service Commission err in making factual findings not supported by substantial evidence and immaterial under Section 58-5-10(4) and prior orders?

STATEMENT OF THE CASE

Appellants initially filed an action in the Berkeley County Court of Common Pleas on September 22, 2020, *Zito v. Strata Equity Grp., Inc.*, 2020-CP-08-2090, against Respondents and others raising the issues asserted in this action. Respondents and the other defendants in that action removed the case to the United States District Court for the District of South Carolina on October 29, 2020, and moved to dismiss the action on the basis Appellants failed to exhaust their administrative remedies, as well as other grounds. On September 10, 2021, the District Court granted the motion and dismissed the action "without prejudice based on [Appellants'] failure to exhaust the available administrative remedies."

On February 22, 2022, Appellants filed this action before the Public Service Commission of South Carolina (the "Commission"). On May 4, 2022, Respondents moved to dismiss certain causes of action asserted by Appellants. On June 21, 2022, in Order 2022-503, the Commission granted the motion to dismiss and dismissed certain claims.

On April 12, 2023, Respondents filed a Request for an Order Finding that No Testimonial Hearing is Required in this Customer Complaint Proceeding and Dismissing the Matter Based on the Written Record Before It. In response, on May 26, 2023, Appellants filed a Motion for Order Granting Complainants Relief Based on the Written Record or in the Alternative, Setting a Schedule and a Hearing and Memorandum in Opposition. On October 2, 2023, in Order 2023-736 ("Order 736"), the Commission dismissed the Complaint.

In the federal court action, following a denial of their motion for reconsideration, Appellants appealed the dismissal to the United States Court of Appeals for the Fourth Circuit on August 15, 2022. On December 18, 2023, the Fourth Circuit issued an unpublished per curiam opinion remanding the federal court action to the District Court for further proceedings.

Appellants filed a First Amended Complaint in the federal court action on March 15, 2024, and on April 12, 2024, Respondents moved to dismiss the First Amended Complaint.

In the Commission proceeding, on October 12, 2023, Appellants moved for reconsideration of Order 736. On January 18, 2024, in Order 2024-78, the Commission denied Appellants' Motion for Reconsideration. On February 12, 2024, Appellants filed the Notice of Appeal.

STATEMENT OF FACTS

This action arises from apartment complex owners—Respondents—who supplied water and sewerage to tenants including Appellants at a rate different from what the owners paid to the area-wide utility for the water and sewerage, without measuring the actual water and sewerage usage of any apartment and instead using an allocation formula to divide the total usage at the apartment complex and allocate it to the tenants. Respondents included in the allocation formula and thereby charged the tenants for the water and sewerage used in the common areas of the properties. Respondents also charged the tenants administrative fees for allocating and billing the water and sewerage in addition to the allocation formula charge.

Appellants contend that conduct made Respondents a public utility subject to regulation of rates by the Commission. Appellants assert that the plain, unambiguous language of South Carolina's public utility law, Title 58 of the South Carolina Code, and the Commission's orders interpreting and applying Title 58 make Respondents a public utility. Respondents never sought Commission approval of the rates charged to their tenants for water and sewerage, and Appellants assert that therefore, Respondents charged an unlawful rate.

I. Water and Sewerage Background.

Water and sewerage services can be provided to apartment complex tenants in multiple ways. *In re Generic Proceeding Related to Sub-Metering of Electric, Water and Wastewater*

Services, Order No. 1999-307 (S.C.P.S.C. May 4, 1999) ("Order 307").[1] One uncontroversial way of providing those services is to have the utility servicing the broader area—the area-wide utility—run its pipes up to and install a meter at each apartment. The tenants then contract directly with the area-wide utility for services. The utility uses that meter to measure the water and sewerage used by each apartment and bills each apartment's tenants accordingly, with the landlord playing no role in providing or billing for the water and sewerage.

A second uncontroversial way of providing water and sewerage is for the area-wide utility to run its pipes to the landlord's property with a meter at the connection point (the "master meter"). *Id.* at 3. The landlord then runs a pipe with a meter (the "submeter") to each apartment, uses the submeter to measure the actual usage of each apartment, and charges the tenant only for that portion of the amount the area-wide utility charged the landlord that is directly attributable to that apartment as determined by the usage measured by the submeter. *See, e.g.*, *id.*; Applicability of the Safe Drinking Water Act to Submetered Properties, 68 Fed. Reg. 74,233-01, 74,233, 2003 WL 22996790 (Dec. 23, 2003); R. p. 160, line 20–p. 162, line 16. In this "secondary meter" or "pass-through" form of providing water and sewerage, the tenants pay the same as what they would pay if they had contracts with and direct connections to the area-wide utility. This pass-through method of providing water and sewerage to tenants is a method the Commission decided does not render an entity a public utility because the entity is just passing through the service and associated charge to the tenant. *In re Seahorse Investment*, Order No. 2008-725, 2008 WL 9903512 (S.C.P.S.C. Oct. 28, 2008) ("Order 725"); *In re Rule to Show Cause on Submeterers*, Order No. 2003-214, 2003

[1] The Commission order cited here and all filings with and orders of the Commission referenced in this brief are publicly available government records available through the Commission's Docket Management System at www.psc.sc.gov and of which the Court can take judicial notice. Rule 201, SCRE (Note); *Davenport v. City of Rock Hill*, 315 S.C. 114, 432 S.E.2d 451 (1993).

WL 23325952 (S.C.P.S.C. April 15, 2003). Respondents contend this pass-through method is how they provide water and sewerage to their tenants but with what they contend is a minor and insignificant difference—Respondents do not have submeters, do not measure tenants' actual usages, and instead use a formula to allocate charges. As set forth *infra*, Appellants contend that difference is critical and causes Respondents to be a regulated public utility.

The third, controversial method of providing water and sewerage to tenants and the method actually used by Respondents is the "allocation formula" or "ratio utility billing system" method. Submetered Properties, 68 Fed. Reg. at 74,233 n.4. In the allocation formula method, the only meter is the master meter at the connection point between the area-wide utility and the landlord property owner. *See id.* There is no metering between the landlord's pipes and each apartment. Instead, the landlord creates a formula by which it allocates to each tenant a portion of the total water and sewerage usage at the property. *Id.* The landlord provides water and sewerage to the tenants and then bills the tenants for that service using the landlord's allocation formula. *Id.*

II. South Carolina Public Utility Law Background.

Like other states, South Carolina defines several business enterprises, ranging from electrical utilities to motor vehicle carriers, as a "Public Utility" and subjects the "rates and service" of any public utility to regulation by the Commission. S.C. Code Ann. §§ 58-3-140 & 58-4-5. In Title 58 of the South Carolina Code—the title governing public utilities and the Commission—an entity that is a public utility subject to Commission regulation in providing water and sewerage is defined as including "every corporation and person furnishing or supplying in any manner . . . water, sewerage collection, sewerage disposal, . . . or any of them, to the public, or any portion thereof, for compensation." S.C. Code Ann. § 58-5-10(4). Title 58 further provides that

the term "public or any portion thereof" used in defining a water or sewer utility includes "any limited portion of the public" even if only "a person." S.C. Code Ann. § 58-5-10(5).

Title 58 provides the Commission is "vested with power and jurisdiction to supervise and regulate the rates and service of every public utility" and "to ascertain and fix such just and reasonable standard, classifications, regulations, practices, and measurements of service to be furnished, imposed, observed, and followed by every public utility." S.C. Code Ann. § 58-5-210. Title 58 requires a utility to file a proposed rate for water or sewerage with and obtain approval from the Commission before the utility can charge customers that rate, and charging customers a rate not approved by the Commission is unlawful. S.C. Code Ann. §§ 58-5-240 & 58-5-370; S.C. Code Ann. Regs. 103-503 & -703. Title 58 also gives the Commission the power to determine that a rate charged by a water or sewer utility is "unjust" or "unreasonable" and order that a different rate be charged from that point forward. S.C. Code Ann. § 58-5-290.

III. Respondents Supplying Water and Sewerage to Tenants Using an Allocation Formula Plus Additional Charges.

Appellants were tenants at two apartment complexes—the "Audubon Park Apartments" in Hanahan and the "Veridian Apartments" in Spartanburg—owned by Respondents. (R. pp. 1535-36 & 1552-56) At those properties, Respondents did not maintain any meter between Respondents' tenants and the respective point of delivery/outflow of water and sewerage to/from the area-wide utility that Respondents obtained the services from. (R. pp. 1536 & 1554) In other words, there were no meters on the properties determining the actual water and sewerage usage of any particular apartment. (R. pp. 1536 & 1554)

The leases entered into with Appellants provided that water and sewerage would be provided to the tenants and billed for using an allocation formula rate. For the Audubon Park Apartments, the lease provided that water and sewerage would be billed by "allocation based on

the number of persons residing in your dwelling unit." (R. pp. 1535-36, 1554, & 1583-84) For the Veridian Apartments, the lease provided that water and sewerage would be billed by "allocation based on a combination of square footage of your dwelling unit and the number of persons residing in your dwelling unit." (R. pp. 1536, 1556, & 1623-24) Additionally, the leases provided that the water and sewerage usage in the common areas of the properties would be allocated to the tenants and that the tenants would be charged new account fees, monthly administrative billing fees, late fees, and final bill fees for utility charges. (R. pp. 1537, 1557, 1584, & 1624)

Respondents did not file any rate for water and sewerage or file their leases with the Commission. (R. pp. 1537 & 1557) Specifically, the Commission has not reviewed or approved the allocation rate, new account fees, monthly administrative billing fees, final bill fees, or inclusion of common area water and sewerage usage in the allocation formula rate used by Respondents. (R. pp. 1537 & 1557)

Appellants retained a statistician expert, Dr. William Huber, and a public utility regulation expert and former commissioner on a state public utility commission, Ashley Brown, who reviewed the available documents[2] and provided opinions in written testimony. Reviewing the measured water and sewer usage at each building at the Audubon Park Apartments property, the statistician expert found that the tenants in different buildings at the Audubon property were paying different rates for water and sewerage, stating he found "substantial variation in these per-occupant costs every month: typically, some occupants pay three times as much for their water and sewer

[2] In addition to documents provided by the parties, over the course of the proceeding Appellants sent subpoenas to Charleston Water System, the area-wide utility providing water and sewerage to the Audubon Park Apartments, and to Conservice, LLC, the third-party entity that calculated, sent, and collected bills for water and sewerage for Respondents. (R. pp. 1658-67)

than other occupants of other buildings." (R. p. 102, lines 11–13) The statistician also found that the allocation formula used by Respondents did not accurately allocate the water and sewerage charges among tenants, and specifically, "did not account for large measured variations among buildings in both water and sewer usage." (R. p. 103, lines 8–11)

The public utility expert testified as to the differences between submetering and allocation formula billing. He explained that unlike submetering which reflects actual usage, an allocation formula rate "reflects subjective, and potentially entirely irrelevant, criteria, such as the number of permanent residents and the square footage of the individual unit." (R. p. 161, line 13–p. 162, line 116) The expert explained that allocation formula billing fails to account for the fact that per capita consumption of water and sewerage is not uniform across tenants, does not provide a price signal to tenants to promote conservation of resources, provides no transparency in billing, and promotes manipulation by apartment complex owners. (R. p. 161, line 13–p. 162, line 116) The expert concluded that "the risks of formulaic pricing are precisely the asymmetric arrangements that regulatory oversight is intended to mitigate and control." (R. p. 162, lines 14-16)

Addressing Respondents' claim that they merely used an alternative method—the allocation formula—to measure water and sewerage, the public utility expert testified that the use of an allocation formula is not measuring the flow of water and sewerage. (R. p. 162, line 17–p. 163, line 2) He testified that "an allocation formula is not a measurement, it is a sale for resale." (R. page 163, lines 1-2)

Addressing Respondents' claim that they merely passed through water and sewerage to tenants, the public utility expert testified that using an allocation formula is not passing through water and sewerage and specifically, Respondents were not merely passing through water and sewerage to tenants. (R. page 163, line 21–p. 165, line 2) The public utility expert testified that

Respondents "were clearly being compensated through the administrative fees paid in addition to the charge for allocated water and sewer and through the tenants having to pay for water and sewer usage in the common areas." (R. p. 165, lines 14-17.) He further testified that the administrative fees and common area 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." (R. p. 165, lines 14-16)

Addressing Respondents' claim that they did not possess the water and sewerage provided to tenants, the 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." (R. p. 165, lines 14–17.) The expert further explained that Respondents must be taking 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 supplied water for common area usage. (R. p. 165, line 14–p. 166, line 16.)

The public utility expert testified at length as to how the use of an allocation formula rate is inconsistent with public policy and the "fundamental principles" underlying public utility regulations and pricing. (R. p. 166, line 17–p. 168, line 1) Providing a summary of laws and regulations across jurisdictions, he testified as to the wide variation in treatment of allocation formula billing across jurisdiction in the United States, testifying that "[s]ome 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." (R. p. 169, line 2–p. 170, line 2.) He also testified that contrary to assertions otherwise, Respondents' use of an allocation formula does not promote conservation of water. (R. p. 170, line 3–p. 171, line 16) Finally, addressing claims by

Respondents and anticipating the Commission's concerns, the public utility expert testified that the Commission finding Respondents acted as a public utility subject to Commission regulation would not result in a flood of apartment complex billing proceedings before the Commission. (R. p. 173, line 1–p. 174, line 3) In addition to the fact that apartment complexes could install submeters and avoid Commission regulation entirely, the public utility expert testified that public utility commissions have numerous regulatory options available "where the expense and broad scope of regulation of large utilities was more than what was needed to protect the consumers." (R. p. 173, lines 19-20)

On October 2, 2023, the Commission entered Order 736 dismissing Appellants' claims. The Commission made six findings of fact in Order 736:

1. [Respondents] do not have water or sewer submetering infrastructure in either apartment building at issue in this proceeding.

2. [Respondents] 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 [Respondents] contract directly with any utility providers for service to resident units.

3. [Respondents] contracted with 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.

4. [Respondents] 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.

5. The water and sewer services are provided to the properties by local utilities and [Respondents] never take possession of the water and lack the ability to disconnect the water or sewer service to an individual tenant for non-payment.

6. [Respondents] are not operating a public utility that is subject to the jurisdictional authority of the Commission.

(R. pp. 25-26) The Commission concluded that "[m]erely providing metering services and a billing function is not sufficient activity to be considered a 'public utility' . . . " and "[s]uch an arrangement does not subject the submeterer to the jurisdiction of the Commission." (R. p. 35) Accordingly, the Commission dismissed the complaint for lack of subject matter jurisdiction. (R. p. 36)

STANDARD OF REVIEW

Questions of statutory interpretation are issues of law to be decided by appellate courts *de novo* without any deference. *See, e.g.*, *Comm'rs of Public Works of the City of Laurens v. City of Fountain Inn*, 428 S.C. 209, 219 n.4, 833 S.E.2d 834, 839 n.4 (2019) ("[T]his case is purely one of statutory interpretation, dependent only on how the undisputed facts apply to the statute. . . . [T]his case thus solely presents a question of law, which we review de novo."); *S.C. Dep't of Social Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018) ("Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." (internal quotations omitted)). Where an administrative agency interprets a statute or regulation "administered by an agency," courts are to engage in a two-step process in reviewing the agency's interpretation. *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control*, 411 S.C. 16, 32, 766 S.E.2d 707, 717 (2014). If "the language of a statute or regulation directly speaks to the issue," then "the court must utilize the clear meaning of the statute or regulation." *Id.* "If the statute or regulation is silent or ambiguous with respect to the specific issue," the court is to proceed to the second step where the court defers to the agency interpretation "unless there is a compelling reason to differ" or the interpretation "is arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 33–35, 766 S.E.2d at 717–18 (internal quotation omitted). An agency decision "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) (internal quotations omitted).

Where an appeal concerns an agency's factual findings, "findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." *Able Commc'ns, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986). Factual determinations made by the Commission are subject to the substantial evidence standard of review, and a party challenging a factual finding of the Commission must show the finding is "clearly erroneous in view of the substantial evidence on the whole record." *Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 539 S.E.2d 148, 151 (2004). An agency decision is supported by substantial evidence where "upon looking at the entire record on appeal, there is evidence from which reasonable minds could reach the same conclusion that the ALC reached." *Engaging & Guarding Laurens Cnty.'s Env't v. S.C. Dep't of Health & Env't Control*, 407 S.C. 334, 342, 755 S.E.2d 444, 448 (2014).

ARGUMENT

I. Order 736 is Erroneous and Must be Reversed Because it is Contrary to the Plain, Unambiguous Language of Section 58-5-10(4) of the South Carolina Code of Laws.

A. The Plain Language of Title 58 Requires Reversal.

The plain language of Title 58 of the South Carolina Code directly speaks to the issue in this proceeding, and therefore, the Court must apply that plain language and hold that Respondents acted as a regulated public utility. If statutory language directly addresses an issue, a court is not to give any deference to an agency interpretation, and "the court must utilize the clear meaning of

the statute." *Kiawah Dev.*, 411 S.C. at 32, 766 S.E.2d at 717. That principle follows from the elementary rule of statutory construction that "[w]here 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 words used 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).

Title 58 provides: "The term 'public utility' includes . . . every corporation and person furnishing or supplying in any manner . . . water, sewerage collection, sewerage disposal, . . . or any portion thereof, for compensation . . . ." S.C. Code Ann. § 58-5-10(4). Therefore, an entity is a public utility regulated by the Commission and required to obtain Commission approval before charging customers a rate if: (1) the entity "furnish[es] or suppl[ies] . . . water, sewerage collection, [or] sewerage disposal . . . to the public, or any portion thereof" and (2) the entity does so "for compensation." The Commission is obligated to apply South Carolina law and does not have the authority to disregard, alter, or deviate from statutory law. Section 58-5-10(4) plainly and unambiguously provides that any entity that furnishes or supplies water or sewer for compensation is a public utility regulated by the Commission.

While there may be potential policy reasons for defining a 'public utility' differently than the definition in Section 58-5-10(4), the General Assembly made the policy decision to define 'public utility' broadly in a manner encompassing Respondents. Where the General Assembly made a policy decision expressed in the plain language of a statute, both as a matter of the legal principles of statutory interpretation and as the result of South Carolina's constitutional separation of powers, administrative agencies and courts must apply the statutory language and cannot use

policy considerations to interpret the statute as having a narrower application than the statutory text provides. *See, e.g.*, S.C. Const. art. I, § 8 (requiring the three branches of government be "forever separate and distinct from each other, and no person or persons exercising the functions of one of said department shall assume or discharge the duties of any other"); *Smith v. Tiffany*, 419 S.C. 548, 565, 799 S.E.2d 479, 488 (2017) ("We construe the statute in a manner to give effect to the policy decision made by the legislature. . . . [T]he policy decision belongs to the legislature, and the legislature has crafted the provisions of the Act as it sees fit. We are a court, not a legislative body. That a court may disagree with a legislative body's policy decisions or believe a perceived 'more fair' outcome exists is of no moment."); *Hampton v. Haley*, 403 S.C. 395, 403–09, 743 S.E.2d 258, 262–65 (2013) (stating that "while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power," and "hold[ing] the [agency] violated the separation of powers by acting beyond its statutory authority and infringing upon the General Assembly's power to make policy determinations"). As succinctly stated by the United States Court of Appeals for the Fourth Circuit, "no amount of policy-talk can overcome plain statutory text." *Julmice v. Garland*, 29 F.4th 206, 210 (4th Cir. 2022).

Here, Respondents' conduct satisfied each of the requirements to be a regulated public utility under Section 58-5-10(4). Respondents were supplying water and sewerage to Appellants. (R. pp. 216-1506 & p. 1530) The statute's use of "furnishing" and "supplying" requires nothing more than that an entity make water or sewerage available to others for their use. For example, the New Oxford American Dictionary defines "supply" as "v. (supplies, supplying, supplied) [with obj.] make (something needed or wanted) available to someone; provide." (R. p. 118). Similarly, the New Oxford American Dictionary defines "furnish" as "v. . . . (furnish someone with) supply

someone with (something); give (something) to someone. (R. p. 116) Respondents provided pipes between the area-wide utility connection and fixtures in the apartments that made water and sewerage available to Appellants and other tenants for their use. (R. pp. 216-1506 & 1530) Respondents were taking water from the area-wide utility into pipes owned by Respondents, transporting that water to faucets, shower heads, and other outlets owned by Respondents, and providing the water to Appellants and the other tenants at those outlets. Similarly, Respondents were accepting wastewater into pipes owned by Respondents and using those pipes to transport the wastewater to sewer pipes owned by area-wide utilities. Therefore, Respondents were furnishing and supplying water and sewerage to Appellants and other tenants.

Appellants and other tenants were a portion of the public. Title 58 provides the term "public, or any portion thereof" includes "any limited portion of the public" even if only "a person." S.C. Code Ann. § 58-5-10(5). Therefore, Appellants were furnishing and supplying water and sewerage to a portion of the public, and the first requirement for an entity to be a regulated public utility is satisfied.

Respondents also were providing water and sewerage "for compensation." Providing water or sewerage "for compensation" requires nothing more than that an entity receive something of value in exchange for providing water or sewerage. Black's Law Dictionary defines "compensation" as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." (R. p. 1520) Here, Respondents received money in exchange for providing water and sewerage to Appellants and other tenants, and therefore, Respondents provided water and sewerage for compensation.

While the foregoing is sufficient to find Respondents provided water and sewerage for compensation, as discussed *infra*, the Commission has previously interpreted Section 58-5-10(4)

as requiring that the entity providing the water or sewerage receive a benefit from providing the water or sewerage and as not being satisfied where an entity merely measures the actual usage of water by a tenant and passes through the costs of that usage to the tenant. Such an interpretation of Section 58-5-10(4) is immaterial here because Respondents did not just measure actual water and sewerage usage by tenants and pass through the costs of that usage to the tenants. Here, Respondents obtained a benefit from and profited from providing the water and sewerage to Appellants and the other tenants.

The first way in which Respondents obtained a benefit from providing water and sewerage to Appellants and the other tenants is the administrative charge billed in addition to the allocation formula charge for water and sewerage. As reflected on the billing documents produced by the entity that performed the billing for Respondents, each month the tenants were charged a $4.87 service fee in addition to the allocation formula charges for water and sewerage. Therefore, the service fee was compensation paid for the furnishing of water and sewerage to the tenants.

The second way in which Respondents obtained a benefit from providing water and sewerage to Appellants and the other tenants is the billing of the tenants for water and sewerage usage in the common areas of the properties. At each property, the total water and sewerage usage at the property billed to the tenants included water and sewerage used at the common areas of the property, including any leasing office, gym, pool, irrigation, etc. (R. pp. 103, lines 12-17, 1537, 1557, 1584, & 1624) Billing tenants for water and sewerage used in the common areas conferred a benefit on Respondents because they were thus able to take what should be an operating expense and have the tenants pay those expenses. The fact that such operating expenses would presumably otherwise be included in the rent charged for apartments at the properties does not alter the fact that Respondents obtained a benefit from billing tenants for common area water and sewerage

usage, and to the contrary, this further proves the point. By not having to include the water and sewerage expenses for the common areas in the rent, Respondents were able to either: (1) keep rents at the prevailing market rates but, due to the decreased expenses for water and sewerage, obtain an increased profit from the rent or (2) lower rents below the prevailing market rate to make Respondents' rents more competitive and thereby increase occupancy and earn increased profits. Additionally, by not having to include water and sewerage in the common areas in operating expenses, Respondents benefited by being able to use excessive amounts of water and sewerage to further their profit interests without any concern for costs. For example, Respondents could use unlimited amounts of water for irrigation to beautify the landscaping at a property and make the property more desirable to prospective tenants without facing any expense from such water usage because the tenants were paying for the common area water usage. Similarly, Respondents could pressure wash the apartment buildings regularly or hose off the sidewalks and parking lots regularly because the tenants paid for such water usage. Finally, Respondents also benefited from the reverse scenario where Respondents were able to avoid non-water and sewerage costs by having tenants pay for common area water and sewerage usage. For example, if faucets, irrigation pipes, pools, or other common area components that use water leaked or were inefficient, Respondents could avoid the expense of repairing a leak or replacing an inefficient component because the tenants were billed for the water.

B. The Commission's Order 736 Does Not Change the Analysis of the Statute's Plain Language and Relied on Factual Findings that Are Immaterial Under the Plain Language of Section 58-5-10(4).

While the plain language of Section 58-5-10(4) thus provides that Respondents using an allocation formula to bill all water and sewerage with administrative fees and common area usage included made them a regulated public utility, Order 736 concluded that does not constitute the

operation of a public utility because "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)." (R. p. 35) Setting aside the factual issue that Respondents were not merely measuring the flow and providing billing functions, the Commission's legal conclusion that an entity engaged in allocation formula billing is not a utility reads an exception into Section 58-5-10(4) that is not present in and not supported by the statutory text. Tasked with applying the plain language of Section 58-5-10(4), the Commission and courts cannot add provisions to the statute. *See S.C. Pub. Int. Found. v. Calhoun Cnty. Council*, 432 S.C. 492, 497, 854 S.E.2d 836, 838 (2021) ("It is not the province of this Court to engraft an additional provision onto a statute which is ostensibly clear on its face."); *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 540, 725 S.E.2d 693, 698 (2012) ("[W]hen a statute is clear on its face, it is improvident to judicially engraft extra requirements to legislation."); Antonin Scalia & Bryan A. Garner, *Reading Law* 94 (2012) ("[An] absent provision cannot be supplied by the courts.").

In finding that Respondents are not regulated public utilities, Order 736 relies on findings that Respondents: (1) contracted with a third-party to perform billing; (2) "recover the actual costs of water and sewer services to its [*sic*] tenants through an allocation formula method on a not-for-profit basis;" (3) "do not have any monopoly rights over a service area;" (4) "do not own any large, capital-intensive utility infrastructure;" (5) "do not seek or obtain a guaranteed rate of return on the pass-through billing;" (6) "never take possession of the water;" and (7) "lack the ability to disconnect the water or sewer service to an individual tenant for non-payment." (R. pp. 25-26). Section 58-5-10(4) does not contain any language stating such limitations on what is a public utility or that could be interpreted as limiting the definition of public utilities in such a manner.

The immaterial nature of many of these factual findings are addressed in detail in Section IV *infra* in relation to the lack of substantial evidence supporting those findings. Of the other factual findings made by the Commission, several engage in circular reasoning, finding that a characteristic that a regulated public utility has solely by virtue of being a regulated public utility and submitting to Commission jurisdiction means an entity that does not have those characteristics is not a regulated public utility. For example, Order 736 relies on a finding that Respondents "do not have any monopoly rights over a service area," but an entity obtains monopoly rights over a service area solely by being a regulated public utility that submits to Commission jurisdiction and receives Commission approval of its tariffs and services. To the extent an entity has monopoly rights over a service territory, those monopoly rights exist solely by virtue of having been conferred on a utility by the Commission pursuant to Title 58 of the South Carolina Code. *See, e.g.*, *New Orleans Gas-light Co. v La. Light & Heat Producing & Mfg. Co.*, 115 U.S. 650, 669 (1885) ("[T]he manufacture of gas, and its distribution for public and private use . . . is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases."); *Atlantic Coast Line R. Co. v. Pub. Serv. Comm'n*, 226 S.C. 136, 140, 84 S.E.2d 132, 134 (1954) ("Public utility corporations accept their franchises from the State subject to the valid exercise of the police power of the State and to their duty to conform to reasonable regulations designed to promote the public safety and convenience."); *S. Ry. Co. v. Pub. Serv. Comm'n*, 195 S.C. 247, —, 10 S.E.2d 769, 775 (1940) ("[I]t is quite true, . . . corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve . . . ." (internal quotations omitted)); *State v. Broad River Power Co.*, 157 S.C. 1, —, 153 S.E. 537, 548 (1929) ("It is the contention of the

petitioners that a franchise is the privilege of doing that 'which does not belong to the citizens of the country generally by common right,' and that such franchises are granted primarily for the public benefit and when accepted constitute a contract, and that the grantee undertakes in consideration for the privilege granted to perform the services authorized. This position, in my opinion, is well supported by authority and cannot be successfully questioned."); Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* 14 (2013) ("For most of the twentieth century, the market structure faced by most retail consumers of electricity, gas, telecommunications and water was a monopoly. The incumbent provider was a vertically integrated company, government-selected, providing prescribed services within a defined territory at approved prices. Supporting this market infrastructure was a legal infrastructure, called a franchise: a 'special privilege,' granted by the state government to the utility to provide defined services subject to defined obligations. . . . [The franchise] typically has seven distinct dimensions: 1. *Exclusive retail franchise*: The utility's right to be the sole provider of a government-prescribed service within a state-defined service territory."); Charles F. Phillips, Jr., *The Regulation of Public Utilities* 110–11 (1988) ("[P]ublic utilities have four rights that are largely the result of their special status. . . . Third, . . . public utilities have the right of *protection* from competition from an enterprise offering the same service in the same service area.").

Similarly, Order 736 relies on a finding that Respondents "do not seek or obtain a guaranteed rate of return on the pass-through billing," but an entity seeks and obtains a guaranteed rate of return solely through being a regulated public utility and submitting to the jurisdiction of the Commission. *See, e.g.*, *Duke Energy Carolinas, LLC v. S.C. Off. of Regul. Staff*, 434 S.C. 392, 404–05, 864 S.E.2d 873, 879–80 (2021) (stating that the Supreme Court "has long followed the governing principles" set forth by the Supreme Court of the United States that public utilities are

entitled to just and reasonable rates of return); *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 312 S.C. 79, 85, 439 S.E.2d 270, 273 (1994) (holding that South Carolina's public utility statutes require the Commission to "determine a fair rate-of-return"); Hempling, *Regulating Public Utility Performance* 14–15 ("[A public utility's franchise relationship] has seven distinct dimensions: . . . 7. *Just and reasonable rates*: The utility's right to charge rates set by the regulator, designed to provide a reasonable opportunity to earn a fair return on equity investment."); Phillips, *The Regulation of Public Utilities* 110 ("[P]ublic utilities have four rights that are largely the result of their special status. First, public utilities have the right to collect a reasonable price for their services. Regulatory authorities may not force such a business to operate at a loss."). The Court should reject this circular reasoning as to whether an entity is a public utility because it has characteristics that it could only have were it already deemed a public utility. The Court should look no further than the plain language of Section 58-5-10(4) and should reject the Commission's factual findings as immaterial under that statutory language.

C. Decisions of the Supreme Court of South Carolina and the Commission Provide that the Plain Language of Section 58-5-10(4) Makes Respondents a Regulated Public Utility.

Consideration of the plain language of Section 58-5-10(4) should result in the conclusion that Respondents' use of an allocation formula with administrative fees and common area usage resulted in them being a regulated public utility. Moreover, not only are the Commission's findings immaterial in relation to the plain language of Section 58-5-10(4)'s definition of a public utility as discussed *supra*, the Commission's reliance on those findings as relevant to whether an entity is a public utility is directly contrary to the South Carolina Supreme Court's application of 58-5-10(4) in *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E.2d 546 (1992). In *Anchor Point*, the Court considered whether, under Section 58-5-10(4), a nonprofit organization

created to provide sewerage to condominiums was a public utility subject to Commission regulation. 308 S.C. at 424–25, 418 S.E.2d at 547–48. The Court first stated that "it should be noted that [South Carolina's] definition of public by including 'any limited portion of the public' is much broader than other states." *Id.* at 426, 418 S.E.2d at 548. The Court concluded that because the nonprofit organization "serve[d] a limited portion of the public" it was a public utility. *Id.* The Court then addressed and rejected the argument that the entity was not a public utility because it was "constructed solely to serve members of a nonprofit organization." *Id.* Therefore, the Court rejected the position adopted by the Commission here that an entity is not a public utility if it is providing water or sewerage on a nonprofit basis. In *Anchor Point*, the Court held that an entity was a public utility despite providing sewerage on a not-for-profit basis.

Additionally, the *Anchor Point* decision indicates the Commission's other findings relied on to conclude Respondents are not a public utility are not proper considerations under Section 58-5-10(4). In *Anchor Point*, the Court did *not* consider whether the nonprofit entity had monopoly rights, owned large, capital-intensive utility infrastructure, sought a guaranteed rate of return, took possession of sewerage, or had the ability to disconnect service. Rather, the *Anchor Point* decision applied the plain language of the statute, finding the nonprofit entity was providing sewerage to a limited portion of the public, and therefore, concluding the entity was a regulated public utility. *Id*. The Court's analysis indicates that once the elements of furnishing or supplying water or sewerage to a portion of the public for compensation are met, an entity is a public utility under Title 58 and there is no further analysis needed or exceptions to apply.

Additionally, examining the language of Section 58-5-10(4) in a prior order considering both secondary meter submetering and the use of an allocation formula rate, the Commission concluded that "[a] literal interpretation of this statute would classify any entity that sells water

and/or provides wastewater services for compensation as a public utility." Order 307 at 3. Relying on the plain language of Section 58-5-10(4), the Commission then explicitly held that a submeterer—regardless of whether a secondary metering submeterer or an entity using an allocation formula rate—is a regulated utility, concluding:

> It appears to this Commission that any entity that sells water or provides wastewater services for compensation is a public utility, including submeterers. We believe that landlords and companies that submeter and bill tenants for water and/or wastewater services are indeed public utilities, and should be certificated by this Commission.

Order 307 at 4. While the Commission later backtracked to a degree as discussed *infra*, the Commission acknowledged in Order 307 that the plain language of Section 58-5-10(4) provides that any entity that sells water or provides wastewater to a portion of the public for compensation is a regulated public utility.

D. Consideration of Surrounding Statutory Language Confirms that Section 58-5-10(4) Makes Respondents a Regulated Public Utility.

The Commission's findings and conclusions are also contrary to the surrounding statutory language in Section 58-5-10(4). After generally and broadly defining a "public utility" as any entity or person who furnishes or supplies natural gas, heat, water, sewerage, or street railway service to a portion of the public for compensation, Section 58-5-10(4) states two exceptions to the broad, general definition of a public utility. First, Section 58-5-10(4) makes an exception for "a corporation or person furnishing, supplying, marketing, and/or selling natural gas at the retail level for use as a fuel in self-propelled vehicles is not a public utility." Second, Section 58-5-10(4) makes an exception for "a corporation or person whose only purpose is the furnishing, supplying, marketing, and/or selling of treated effluent for irrigation purposes." The two exceptions are relevant to whether Respondents are a "public utility" under Section 58-5-10(4) for two reasons.

As an initial matter, the two exceptions indicate the broad scope of Section 58-5-10(4)'s definition of a public utility. By including the exceptions, the General Assembly indicated that absent the exceptions entities providing natural gas at the retail level for use as fuel in self-propelled vehicles and entities providing treated effluent for irrigation would be public utilities.

More importantly, under the recognized negative-implication rule of statutory construction—"*expressio unius est exclusio alterius*" when dressed up in its traditional Latin form—the expression of an exception in a statute implies the lack of other exceptions. *See Garrison v. Target Corp.*, 435 S.C. 566, 581, 869 S.E.2d 797, 806 (2022) ("Subsection (A) [of the statute] begins by stating 'except as provided in subsections (B) and (C),' indicating that the statute applies to all cases not specifically excluded by those subsections."); *Hodges v. Rainey*, 341 S.C. 79, 86–87, 533 S.E.2d 578, 582 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' . . . holds that to express or include one thing implies the exclusion of another, or of the alternative. . . . The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." (internal quotations omitted)); Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012) ("The expression of one thing implies the exclusion of others."). Therefore, with Section 58-5-10(4) excluding retail suppliers of natural gas vehicle fuel and treated effluent for irrigation, the necessary conclusion is that the General Assembly intended that all other suppliers of natural gas, heat, water, sewerage, and street railway service are public utilities pursuant to Section 58-5-10(4).

In conclusion, Section 58-5-10(4) plainly and unambiguously provides that an entity engaged in the conduct Respondents engaged in is a public utility subject to the jurisdiction of the Commission. Order 736 failed to apply that statutory law. Instead, the Commission considered statutorily irrelevant factors as somehow removing Respondents from Section 58-5-10(4)'s

definition of a public utility. The Commission cannot disregard Section 58-5-10(4) and substitute its policy judgment of what should constitute a regulated utility for the policy judgment already made by the General Assembly and codified in Section 58-5-10(4). The Commission's disregard of the statutory language and substitution of its own considerations in place of the statutory language is erroneous and requires reversal.

II. Even Were There Some Ambiguity in Section 58-5-10(4), the Commission's Interpretation is Not Entitled to Deference and Does Not Comport with the Language of Section 58-5-10(4).

As previously discussed, the language of Section 58-5-10(4) plainly and unambiguously provides that all that is required for an entity to be a regulated public utility is for the entity to supply water or wastewater to a portion of the public for compensation, and therefore, Respondents' conduct made them a regulated public utility under Section 58-5-10(4). While that resolves the issue and the Commission did not find any ambiguity in Section 58-5-10(4), even were the Court to find some ambiguity in Section 58-5-10(4), the Commission's interpretation would not be entitled to deference and should be rejected as deviating from the statutory language.

As discussed in the previous section, the Commission previously concluded in Order 307 that Section 58-5-10(4) provides that a regulated public utility is any entity that supplies water or wastewater to a portion of the public for compensation and nothing more is required to be a regulated utility. Therefore, the Commission previously interpreted Section 58-5-10(4) in a manner contrary to the interpretation the Commission relied on here. Where an agency is inconsistent in its interpretation of a statute and has not provided considered reasons for the change of position, the agency interpretation is not entitled to deference. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the [agency's] request for heightened deference to its position is the inconsistency of the positions the [agency] has taken

through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (internal quotations omitted)); *Sec. of the Interior v. California*, 464 U.S. 312, 321 n.6 (1984) ("Under normal circumstances [the agency's] understanding of the meaning of [the statute] would be entitled to deference by the courts. But in construing [the statute] the Agency has walked a path of such tortured vacillation and indecision that no help is to be gained in that quarter."); *Kiawah Devel.*, 411 S.C. at 33, 766 S.E.2d at 717 (stating a court is to give deference "assuming the interpretation is worthy of deference"); Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 500–01 (2d ed. 2001) ("When courts conclude that the agency has been inconsistent and it has not given a considered reason for its change of position, however, they rarely defer. . . . If the inconsistency on the part of the agency appears to be egregious, the court may assign no weight at all to the agency's views."). The Commission has been inconsistent in its interpretation of Section 58-5-10(4), has not provided considered reasons for the inconsistency, and accordingly, its most recent interpretation here is not entitled to deference.

In 1998, the Commission established a docket to consider both secondary metering submetering and allocation formula submetering or "RUBS," the "Generic Proceeding Relating to Sub-Metering of Electric, Water and Wastewater Services," the 1998-624-EWS docket. In that docket the Commission issued Order 307 which first defined submetering as: "Submetering is done when the particular service (water/wastewater or electricity) is metered through a master meter, and the service is then split off into different sub-units, such as apartment or retail outlets in a shopping center." Order 307 recognized two forms of submetering: the secondary metering version and the allocation formula version at issue here where the property owner allocates the water, wastewater, or electricity charges "by means of a calculated formula." Examining the

language in Section 58-5-10(4) defining a "public utility," Order 307 found that "[a] literal interpretation of this statute would classify any entity that sells water and/or provides wastewater services for compensation as a public utility." Order 307 at 3. The Commission then explicitly held that a submeterer—regardless of whether a secondary metering submeterer or an allocation formula submeterer—is a regulated utility. Order 307 at 4. Because the Commission found the record in docket 1998-624-EWS did "not contain enough information to set up specific rules," the Commission ordered "that a rulemaking proceeding be established so that we may determine specific requirements for certifications of submeterers and regulation of them in general."

The Commission then opened a new docket, "Rules and Regulations Dealing with Water and Wastewater Submetering," docket 1999-216-WS, to engage in the rulemaking. Due to difficulties developing regulations, the Commission issued Order No. 2000-436 ("Order 436") which provided the Commission would "hold this matter in abeyance until further notice" and "that the proposed regulations shall be held in abeyance." Order 436 merely held in abeyance the rulemaking proceedings and proposed regulations, and nowhere in Order 436 did the Commission provide any reversal, or even skepticism, of its earlier holding that a submeterer is a public utility subject to Commission regulation.

After several years passed without the promulgation of regulations, Commission Staff filed petitions for rule to show cause orders as to why several submeterers should not be required to obtain certificates from the Commission as regulated utilities. In response, the Commission issued Order No. 2003-214 ("Order 214") dismissing the petitions and holding that if an entity is submetering by merely measuring the flow and passing through the charges—*i.e.*, secondary meter submetering with no markup or other charges—the entity is not a regulated public utility. Order 214 reasoned 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." Order 214 provided no explanation as to how the Commission arrived at a different conclusion from its previous conclusion that submetering was furnishing or supplying water or wastewater that made an entity a regulated public utility. Moreover, Order 214 contains no discussion of whether the Commission changed its former position as to entities that provide water and wastewater using allocation formula billing and generally, contains no consideration whatsoever of allocation formula billing.

Not only is the Commission's interpretation here inconsistent with a former interpretation and not worthy of deference, but the Commission's interpretation does not comport with the statutory language. As discussed previously, Section 58-5-10(4) merely requires that an entity furnish or supply water or wastewater. That language requires nothing more than that an entity make water or sewerage available to others for their use. An apartment property owner using an allocation formula rate generally, and specifically Respondents here, makes water and sewerage available to tenants. The owner provides a series of pipes supplying water to faucets and other outlets in the apartment. When a tenant desires water, the tenant turns on the faucet, and the owner provides water to the tenant. Similarly, an owner provides a series of pipes conveying wastewater from drains in an apartment away from the apartment. When a tenant creates wastewater, the owner accepts it and disposes of it for the tenant.

The Commission's new interpretation in Order 214 and then third interpretation in Order 736 ignore this aspect of submetering or allocation formula rate methods of supplying water and wastewater to tenants. Neither Order 214 nor Order 736 contains an explanation as to how an entity that purchases water and wastewater from an area-wide utility, owns and provides pipes that transport the water and wastewater to and from the area-wide utility to outlets and drains in

apartments, and makes the water and wastewater available whenever a tenant desires could be "merely measur[ing] the amount of flow of water or wastewater and provid[ing] billing functions." Order 214 at 10. Moreover, neither Order 214 nor Order 736 contains an explanation of how measuring the flow and providing billing would be inconsistent with, or even relevant to, an entity being a regulated public utility.

III. Order 736 is Contrary to Commission Precedent, Erroneously and Without Reasoned Decision-Making Deviates from Commission Precedent, and Therefore, is Arbitrary and Capricious.

Order 736 misconstrues and deviates from the Commission's prior orders on submetering and allocation formula rates, does so based on an erroneous reading of the Commission's prior orders and without any reasoned basis for deviating from the prior orders, and therefore, should be reversed as arbitrary and capricious. When an agency order deviates from prior orders without a basis for distinguishing the circumstances, the agency order may be set aside as arbitrary and capricious. *See South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 103 (1st Cir. 2002) ("[P]atently inconsistent applications of agency standards to similar situations are by definition arbitrary."); *Henry Ford Health Sys. v. Shalala*, 223 F.3d 907, 912 (6th Cir. 2000) ("[I]nconsistent application of a regulation is often a hallmark of arbitrary or capricious agency action."); *Contractors Transp. Corp. v. U.S.*, 537 F.2d 1160, 1162 (4th Cir. 1976) (reversing agency decision as arbitrary and capricious and lacking a rational basis where agency reached inconsistent results in similar adjudications with no explanation).

Order 736 conflicts with Commission precedent that where an entity receives a benefit from furnishing water and sewerage, rather than merely measures the actual usage and passes through the costs of the usage, the entity is a regulated utility. As discussed *supra*, the Commission previously concluded in Order 307 that "[a] literal interpretation of this statute would classify any

entity that sells water and/or provides wastewater services for compensation as a public utility." The Commission then explicitly held in Order 307 that a submeterer—regardless of whether a secondary metering submeterer or an allocation formula submeterer—is a regulated utility. Order 736 provides no explanation of any legal basis for the Commission rejecting its prior conclusions in Order 307 and arriving at the apparent new standard for what constitutes a public utility provided in Order 736. Moreover, the Commission has not provided in any order an explanation as to how the conclusion as to what constitutes a utility articulated in Order 307 was incorrect. The Commission correctly concluded in Order 307 that submeterers are public utilities under the plain language of Section 58-5-10(4), and Order 736 holding otherwise is erroneous.

In Order 214, the Commission held that if an entity is submetering by merely measuring the flow and passing through the charges—*i.e.*, secondary meter submetering with no markup or other charges—the entity is not a regulated public utility. Order 214 reasoned 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." Order 736 is contrary to Order 214 and Order 307 because Respondents do not merely measure the flow of water and wastewater and pass through the associated costs. Rather, Respondents neither measure the flow nor pass through the actual costs. Under Order 214 and Order 307, Respondents acted as regulated utilities, and Order 736 is contrary to those orders, provides no basis for deviating from those orders, and therefore, is arbitrary and capricious.

Finally, in Order 725, the Commission found a complex owner was a non-regulated submeterer rather than a regulated utility only because the owner measured the actual water and sewer usage and passed the actual cost directly to the tenant, rather than charging tenants through a method other than actual usage and rather than charging tenants any fees in addition to the usage

charge. The Commission found: "From the description of these activities undertaken by [the owner], it appears that the Company is in fact submetering . . . water and sewer service to the residents of [the park] and not providing these services for compensation." Order 725 at 2. The Commission then ordered:

> As a submeterer and not a regulated utility, [the owner] shall only pass through actual water and sewer service charges from Charleston Water System according to the metered usage of individual tenants of the [park]. No other water or sewer charges are allowed to be billed to these tenants.

Order 725 at 3. Order 725 therefore establishes that a submeterer who charges on a basis other than a tenant's actual measured usage is a regulated utility and a submeterer who charges fees in addition to charges for actual usage or charges for anything more than actual usage is a regulated utility. Here, Respondents did not charge tenants an amount equal to their actual measured usage and charged fees and for common area usage in addition to the tenants' estimated usages. Under Order 725, Respondents acted as regulated utilities, and Order 736 fails to apply the standard articulated in and deviates from Order 725 with no explanation as to how Order 725 is incorrect or can be altered or extended under the governing statutory law.

IV. Order 736 is Based on Factual Findings that Are Not Supported by Substantial Evidence and that Are Immaterial Under Section 58-5-10(4) and Commission Orders.

In addition to conflicting with the governing statutory law and Commission orders applying that statutory law, Order 736 is erroneous because it makes factual findings that are not supported by evidence in the record, much less by substantial evidence, and that are immaterial under the governing statute and Commission orders.

A. Order 736 Erroneously Relies on a Finding that Respondents Do Not Bill Their Tenants Directly.

Order 736 relies on a finding that Respondents do not bill the tenants directly. 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. Moreover, whether an entity bills its customers for water and sewer directly or contracts with a third-party for such billing could never be a relevant consideration in whether an entity is a regulated utility. Were it a relevant consideration, any entity could function as a public utility yet escape regulation by contracting out the billing portion of its business to a third-party. Such an absurd result must be rejected, especially where the statutory language provides no support for such an interpretation. *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.").

B. The Commission Erroneously Found that Respondents' Water and Sewer Billing "Is Designed to Recover the Actual Cost of Water and Sewer Service Through an Allocation Method Provided on a Not-For Profit Basis" and is "Pass-Through Billing."

Despite all the evidence in the record indicating that the opposite is true, Order 736 erroneously found that Respondents were "only passing through to tenants—on an allocation basis—the cost of providing water and sewer service without profit." (R. p. 31) As an initial matter, there is no evidence in the record that the water and sewerage were provided at cost and on a not-for-profit basis other than the conclusory assertion of Andrew Gordon in his affidavit. The Commission declined Appellants' request to conduct discovery. Appellants dispute whether the water and sewerage were provided at cost and on a not-for-profit basis, and a self-serving, conclusory assertion in an affidavit is insufficient to establish such a disputed fact. *See, e.g.*, *Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment."); *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38–39, 331 S.E.2d 385, 388 (Ct. App. 1985) ("Additionally, we observe that Mrs. Germann adduced no competent evidence to prove a purpose of the trust other than that expressed in the trust agreements. Her sole

proof in the record before us is a conclusory statement in the affidavits of her two children that . . . . A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment."). Moreover, the evidence in the record is uncontroverted that Respondents' method of billing does not recover actual costs and is not provided on a not-for profit basis because Respondents bill tenants for common area water and sewer usage and bill tenants administrative fees.

Similarly, Order 736 erroneously finds that Respondents provide water and sewerage on a "pass-through basis." Respondents do not provide water and sewerage on a pass-through basis. Respondents make no effort to measure water or sewer usage by particular tenants nor do they even make an effort to make a rough estimate of particular tenants' actual water or sewer usage. Additionally, Respondents' furnishing of water and sewerage to tenants cannot be on a "pass-through basis" because Respondents bill tenants for common area water and sewer usage and bill tenants administrative fees.

The Commission attempted to bypass these problems in two ways, neither of which complies with the applicable law. First, the Commission concluded the total amount that Respondents bill the tenants at each of the properties equals the total amount Respondents paid for water and sewerage services for each property. There is nothing in the record to support such a finding, and therefore, the finding is erroneous. Additionally, there is no basis in Title 58, judicial decisions applying Title 58, or even in Commission orders, to support such a shift from the amount paid by a particular water or sewer user to a group of water and sewer users. Analyzing the issue in terms of usage of all persons at a property rather than usage by individual users is directly contrary to the Commission's Order 725 which found a water and sewerage provider was not a public utility because it was "pass[ing] through *actual* water and sewer service charges from

Charleston Water System according to the metered *usage of individual tenants* of the [mobile home park]" and provided that "[n]o other water or sewer charges are allowed to be billed to these tenants." Order 725 at 3.

Additionally, shifting the analysis from individual usage to property-wide usage would render absurd results plainly contrary to Title 58. For example, were the Commission's analysis to turn on whether the total amount billed to a group equals the total cost of providing services to that group, an entity could in all respects function as and be a utility yet evade public utility regulation. An entity could incorporate as a nonprofit corporation without shareholders, provide water and sewerage to customers across a territory using an allocation formula, and including all operating expenses including salaries for executives in the total cost of providing those services. The Commission's analysis must be rejected as rendering absurd results and as having already been rejected in *Anchor Point*.

C. The Commission Erroneously Found that Respondents "Did Not Possess or Take Possession of the Water."

Order 736 erroneously finds that Respondents "did not possess or take possession of the water or sewerage," in spite of the lack of evidence in the record to support that finding and in spite of that finding conflicting with South Carolina law. The evidence shows that Respondents possess the water and sewer at the points between the area-wide utility's meter and the outlet or drain in an apartment. The Commission made a conclusory finding that Respondents do not possess the water or sewerage without making any supporting factual findings—other than that Respondents owned the pipes in which the water or sewerage was located which supports a finding of possession—or providing any explanation of how, under South Carolina law, Respondents could not possess the water or sewerage when in pipes between the area-wide utility's meter and the outlet or drain in an apartment. The Commission concluded "it cannot be said that

[Respondents] assert exclusive domain over the water or sewer supplies," but that conclusion is not supported by any factual findings or any legal reasoning. The Commission did not make any finding or identify any evidence as to who—other than Respondents—exercised any domain over the water or sewer supplies. The Commission did not provide any explanation as to how whether one has "exclusive domain" over water or sewer is determinative of or relevant to whether one possesses the water or sewer under South Carolina law. Also, again, the Commission's reasoning yields absurd results. Employing the Commission's reasoning on possession, one is left struggling to conceive of how any entity could be a water or sewerage utility. Water and sewerage utilities, by their very nature, own pipes, and consumers can obtain water from and deposit sewage into those pipes at the consumer's discretion. The fact that a consumer controls when to turn a faucet on and how much water to obtain from the utility is immaterial to whether the utility possesses the water in its pipes or whether the utility is a utility. Were the law otherwise, no utility would possess the water in its pipes, and following the Commission's reasoning, no water utility would be a utility under Section 58-5-10(4). Moreover, to be clear, as with the Commission's other factual findings, whether Respondents take possession of the water or sewerage is immaterial to whether Respondents are regulated utilities under the plain language of Title 58 of the South Carolina Code.

CONCLUSION

For the reasons set forth herein, the Court should reverse.

Respectfully submitted,

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September 5, 2024

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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.

CERTIFICATE OF SERVICE

The undersigned certifies on September 5, 2024, he caused a copy of the foregoing Brief of Appellants to be served on all parties of record by e-mail as follows:

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