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Jun 18 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

No. 2025-UP-113 (S.C. Ct. App. Filed April 2, 2025)
Case No. 2018-CP-10-02764

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated..Petitioner Class,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks..Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner Class certifies that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on May 20, 2025.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err by finding the Petitioner Class obtained a "benefit," for purposes of S.C. Code Ann. § 6-1-300(6), because the BFC it paid reserved capacity even though MPW's experts testified capacity reservation has nothing to do with BFC and recommended MPW change its BFC policies to remove all references to capacity reservation?

2. Did the Court of Appeals err by finding the excessive BFC paid by the Petitioner Class does not confer a general public benefit in violation of S.C. Code Ann. § 6-1-300(6) despite the expert testimony revealing how the excessive BFC inequitably subsidize other ratepayers' share of covering MPW's fixed costs?

3. Did the Court of Appeals err by finding there are no genuine issue of material fact that MPW's BFC policies are unreasonable despite facts in the record showing how MPW's BFC policy hinges on flawed and unprecedented capacity reservation concepts, MPW inequitably requires ratepayers forfeit REU assets it previously paid for to be charged a fair BFC in line with actual use, MPW knew for years that Petitioner Class was being massively overcharged BFC and subsidizing other ratepayers yet failed to notify them, MPW increased BFC rates compounding these known inequities, and at all times relevant MPW could have easily right-sized the Petitioner Class's REU count and charged the Petitioner Class a fair BFC in line with historical use data?

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI IN THIS CASE

What, if any, legal constraints govern local government-run water and sewer utility ratemaking? This case offers an opportunity for the Supreme Court to clarify the law on this important issue impacting the daily lives (and wallets) of millions of South Carolina residents and businesses. The unjust and unreasonable overcharges in this case demonstrate why such clarification is necessary.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("MPW"), a local government-run water and sewer utility, has for years knowingly forced a subset of its commercial ratepayers to pay excessive monthly base charges (what MPW calls Basic Facility Charges, or "BFC") accordingly to an unprecedented and conceptually flawed "capacity reservation" rationale that its own experts and counsel have called improper and inequitable. These excessive charges compel the Petitioner Class to subsidize all other ratepayers' share of covering MPW's fixed costs.

From the outset, the Petitioner Class has maintained local government water and sewer rates, including the BFC, are "service or user fees" under S.C. Code Ann. § 6-1-300(6)[1] and S.C. Code Ann. § 6-1-330(B).[2] As such, the BFC must provide an individualized benefit to the payor, must be calculated according to the cost of actually providing service to the payor, and cannot provide a generalized benefit to the public like a tax. *Burns v. Greenville Cnty. Council*, 433 S.C. 583, 861 S.E.2d 31 (2021) (interpreting and applying S.C. Code Ann. § 6-1-300(6) and S.C. Code Ann. § 6-1-330(B) and confirming the legal distinction between a "fee" and a "tax").

MPW disputes the BFC are "service or user fees." Instead, MPW claims its charges are governed only by a "reasonable" standard found in the near century old S.C. Code Ann. § 5-31-670.[3] Granting MPW's motion for summary judgment a month before trial, the circuit court agreed with MPW and found S.C. Code Ann. § 6-1-300(6), S.C. Code Ann. § 6-1-330(B), and this Court's holding in *Burns v. Greenville Cnty. Council* do not apply to MPW. As such, the circuit

[1] Before it was amended in June 2022, S.C. Code Ann. § 6-1-300(6) provided: "Service or user fee" means a charge required to be paid in return for a particular government service or program made available to the payer that benefits the payer in some manner different from the members of the general public not paying the fee. "Service or user fee" also includes "uniform service charges."

[2] S.C. Code Ann. § 6-1-330(B) provides, in relevant part: "The revenue derived from a service or user fee imposed to finance the provision of public services must be used to pay costs related to the provision of the service or program for which the fee was paid."

[3] Section 5-31-670 provides: "Any city or town or special service district may, after acquiring a waterworks or sewer system, furnish water to persons for *reasonable* compensation and charge a minimum and *reasonable* sewerage charge for maintenance or construction of such sewerage system within such city or town or special service district."

court granted extraordinary deference to the local politicians who run MPW and set its rates, concluding the court had no basis to second guess the reasonableness of MPW's policies.

Whether the circuit court applied the correct legal test was front and center in the Petitioner Class's appeal of the order granting summary judgment. Affirming the circuit court's order, the Court of Appeals failed to definitively acknowledge whether BFC are "service or user fees." The Municipal Association of South Carolina filed a lengthy *amicus curiae* brief encouraging the Court of Appeals to avoid ruling on this issue.

The circuit court's order and the Court of Appeals' opinion conflict with controlling Supreme Court precedent. **In *Azar v. City of Columbia*, 414 S.C. 307, 310 778 S.E.2d 315, 317 (2015), this Court held the City of Columbia's water and sewer rates are "service or user fees" governed by S.C. Code Ann. § 6-1-300(6) and S.C. Code Ann. § 6-1-330(B).** The Court of Appeals' hesitancy to rule on this critical legal issue was unwarranted and, respectfully, it undermines the analysis in its *per curiam* unpublished opinion.

By granting this Petition for Writ of Certiorari, this Court can reinforce its holding in *Azar* and confirm local government-run water and sewer utilities, who enjoy monopolies and no independent ratemaking regulatory oversight, must adopt rates that are not just "reasonable," but provide a specific benefit to payors and reflect the amount necessary to pay the costs associated with their service. Absent such clarification, MPW and other local government-run water and sewer utilities will be free to charge whatever rates they please, no mater how unjust and discriminatory, without any meaningful judicial oversight to the detriment of millions of captive ratepayers throughout the state.

STATEMENT OF THE CASE

MPW is a local government-run utility providing water and sewer service to residential and commercial ratepayers. MPW enjoys a monopoly in its service area, which primarily consists of the corporate limits of the Town of Mount Pleasant and other areas east of the Cooper River.

As a public entity, MPW's rates are neither reviewed nor approved by any independent oversight body like the Public Service Commission. Only private utilities' rates are subject to review and approval by the Public Service Commission. Instead, MPW's rates are set by elected commissioners and *ex officio* members of Town Council with no third-party review or oversight.

Petitioner Snee Farm Lakes Homeowner's Association Inc.[4] and a certified class of five hundred and twenty-six commercial customers ("Petitioner Class")[5] challenge MPW's methodology for calculating and assessing its base charge, which MPW calls Basic Facility Charges ("BFC").[6] Base charges are a flat, monthly fee charged by utilities to achieve cash flow stability.[7] The Petitioner Class does not dispute the legitimacy of base charges *per se*, which are a

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[4] Petitioner is a non-profit homeowners' association that owns, manages, and maintains the common elements articulated in its restrictive covenants. (R. pp. 220-294).

[5] On June 14, 2019, the circuit court issued an order certifying the class. The Class is defined as "[a]ll current and former MPW commercial customers who paid excessive BFC in excess of $100, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to December 31, 2019 being less than that customer's assigned REU." (R. pp. 2-14).

[6] MPW customers have two distinct charges on their monthly bills – a volumetric charge and the BFC. (R. pp. 549-550). The volumetric charge is a function of the prior month's actual use based on a meter reading. (R. pp. 303-305). The BFC is calculated according to the number of Residential Equivalent Units (REU) assigned to the account. (R. pp. 303-304).

[7] Respondent's expert William Zieburtz explained the purpose of a base charge as follows:

> Q. What is a true base charge?
>
> A. A true base charge is a reference to a fixed fee that captures some of the costs of utility operation typically including a portion of administrative costs and often including a portion of capital costs and sometimes other types of costs and charges that amount on a monthly basis regardless of use and including cases where there is no use at all.
>
> Q. So this is essentially the same concept that Mount Pleasant Waterworks has with respect to its BFC, it's just a base charge?
>
> A. Yes.

(R. p. 993, lines 10-22).

standard, accepted practice. Rather, the challenge is over MPW's unprecedented and inequitable BFC policies, which have led to the Petitioner Class being significantly overcharged for years and for no valid reason.

Most water and sewer utilities around South Carolina and the rest of the nation calculate base charges according to a customer's meter or pipe size, but MPW uniquely calculates its BFC based on pre-service use assumptions known by MPW to be woefully oversized and inaccurate. (R. p. 1006, lines 3-10).

MPW calculates each ratepayer's monthly BFC based on the number of Residential Equivalent Units ("REU") assigned to each customer's account. REU are a unit of measure equal to 300 gallons of water per day or 9,000 gallons per month. (R. pp. 509-514). A ratepayer's REU assignment occurs *prior to* service and any actual use data. The REU assignment derives from complex engineering assumptions, provided to ratepayers by MPW and aimed at forecasting water and wastewater demand. (R. pp. 358-366).

The ratepayer pays MPW sizable impact fees based on the number of REU assigned by MPW. MPW defines "impact fees" as follows:

> Impact fees are charges assessed against new development to recover part of the capital costs of expanding the water and wastewater infrastructure to serve them. Considered as a capital-recovery charge, impact fees allow recovery of the capital costs of developing the new service directly from the customers who will benefit from the service. proportionate share of each customer's infrastructure demands on the system.

(R. pp. 307-308). As MPW's rate consultant put it, "the impact fees are what a customer pays to 'reserve' their rights to capacity in the system." (R. pp. 432-434).

Once a customer purchases its REU by paying impact fees, MPW recognizes these REU as assets corresponding to purchased capacity in the system. Clay Duffie, MPW's longtime

General Manager, testified, "the capacity, . . . is assigned to the property, so it is an asset that is assigned to the property." (R. p. 617, lines 20-22). A commercial customer who changes its use and requires more capacity can pay additional impact fees to increase its capacity reservation. (R. pp. 509-514).

As previously mentioned, MPW calculates a ratepayer's monthly BFC based on the number of REU assigned to its account from the impact fee stage. Unfortunately for commercial ratepayers like the Petitioner Class, *MPW never periodically reviews and updates these REU assignments, for BFC purposes, to ensure the monthly BFC charged and paid are consistent with actual use data, as opposed to the pre-service assumptions and estimates (upon which the REU were originally assigned)*. This practice, called administrative "right-sizing," is a common feature for the minority of utilities who calculate their base rates on REU as opposed to meter or pipe size, which do not lend themselves to significant variation. (R. pp. 446-508). The Petitioner Class's expert testified that the minority of utilities who use REU to calculate base charges periodically administratively "right size" a customer's REU count consistent with historical usage without placing this responsibility on ratepayers. (R. p. 1005, lines 20-25). After all, utilities like MPW have the resources and expertise to efficiently right-size accounts system-wide, as this is a straightforward, data-driven analysis.

Rather than handling the right sizing itself, MPW clandestinely foists this burden on each customer via obscure Policies 5.3.2 and 5.3.3, which allow customers to request an REU reduction. However, these policies place the customer between the horns of a dilemma. If a customer elects to reduce its number of assigned REU, to bring BFCs more in line with actual usage and demand, *the customer must abandon REU previously purchased via impact fees* – a capacity asset, according to MPW. Should a customer subsequently wish to increase the number of REU, to change or expand its use for instance, it must repay the impact fees it previously purchased and was forced to abandon earlier in order to be charged a fair BFC. (R. pp. 509-514).

The overcharges at issue in this case exist because the Petitioner Class have, for years, consistently used significantly less water and wastewater than their assigned REU and, therefore, pay excessive BFC. In other words, they are paying BFC based on outdated and inaccurate use assumptions and estimates – not actual use based on use data. MPW has always possessed the Petitioner Class's historical use data, but it failed to administratively right-size these accounts and continued to charge BFC based on use assumptions MPW knew were outdated and inaccurate.

In Petitioner's case, MPW assigned 148 REU to its account when it established service in 1982. However, MPW's records reveal Petitioner's average monthly demand, conservatively drawn from its highest quarter of usage, is only 76 REU. Since Petitioner's BFC is calculated according to 148 REU, Petitioner has been overcharged almost double based on outdated and inaccurate use assumptions. (R. pp. 195-197). Had Petitioner been charged BFC based on 76 REU, it would have saved thousands of dollars each month, going back years. Each member of the Petitioner Class has a similar story to tell.

MPW has known about these BFC overcharges for over a decade. In 2014, MPW hired Raftelis Financial Consultants, Inc., the nation's leading utility rate consultant, to determine "updated water and wastewater [REUs] for utility planning and rate making purposes." (R. pp. 319-320). George Raftelis, a nationally renowned authority on utility rates, explained this project to MPW's Chief Financial Officer Mark Coffin as follows:

> **MPW has determined that certain commercial customers have been assigned an <u>incorrect number of REUs</u>**, which is a[n] equivalent measure of demand used to quantify utility customer loadings and identify future capacity necessary to accommodate new customer demands.
> …
> **These inconsistencies present complexities an[d] <u>potential customer inequities</u>**

> in estimating user charge revenues and defining the current and future levels of service for calculating impact fees.

(R. pp. 319-320) (emphasis added).

The resulting study confirmed Mr. Raftelis' determination that MPW had assigned the Petitioner Class an "incorrect number of REUs." Specifically, CDM Smith's analysis revealed over the past seven years a staggering 40% of all REU assigned to commercial ratepayers went consistently unused – yet MPW still charged BFC based on these unused REU. (R. p. 346, lines 5-24; R. p. 347, lines 6-10). Specifically, "approximately 700 commercial customers used less than their allocated REUs in 2013 and approximately 90 customers used more than their allocated REUs in 2013." (R. pp. 323-324). The Petitioner Class find themselves in the former group.

Armed with this information, MPW *only* contacted the latter, smaller number of commercial ratepayers who had been *exceeding* their allocated REU and paying less than their usage should have required (the winners). (R. p. 350; R. p. 352). MPW reached out to these "undersized" customers to recommend they purchase additional impact fees to bring their REU count more in line with actual use. (R. p. 618, lines 12-17). MPW chose not to inform the larger number of commercial customers, including the Petitioner Class, they were paying to cover significantly more of MPW's fixed costs than their actual use demand (the losers).

However, in 2014, a commercial customer who was changing its use from a restaurant to a spa discovered that although it had been using only four REU for years, MPW had been charging BFC based on fifteen REU. (R. p. 353). Understandably upset at this overcharge never being corrected, the customer demanded a refund of the overpayment. (R. p. 353). MPW *agreed* and refunded the excess BFCs collected over the previous decade. (R. p. 353). The Petitioner Class simply seeks similar refunds for the excessive BFC they have paid over the years.

Eventually, MPW finally audited all commercial accounts for the purpose of identifying commercial customers using *less than their assigned REU,* concluding "[a] recent audit of commercial accounts revealed that a portion of customers had more REUs assigned to their account than they were using in their highest quarter of the year." (R. p. 368); (R. p. 372); (R. p. 421); (R. p. 422). **MPW's own internal audits identified several hundred commercial ratepayers, *i.e.* the Petitioner Class, who had been paying excessive BFCs for years.**

After completing the audit, MPW finally notified ratepayers, including the Petitioner Class, who had been overcharged BFC. MPW's letter to Petitioner states, "[o]ur records show that your assigned REUs exceed the gallons you are using. You are currently paying Basic Facility Charges for each REU assigned to your account." It goes on to state that "[y]our average monthly consumption for your highest quarter is 697,383 gallons," which equates to 76 REU – far less than the 148 REU assigned to Petitioner's account since 1982. The letter then explains the bottom-line impact to Petitioner as follows: "[y]ou are currently paying $3,418.80 per month in Basic Facility Charges. Lowering your REUs to the average month of your highest quarter would lower your monthly Basic Facility Charges to $1,755.60 per month." The letter concludes with the following "guidance," which reveals the prejudicial dilemma MPW's policies impose on its captive ratepayers.

> MPW's Policy 5.3.3 - Impact Fee Management can be found on our website. It explains in detail the management of Impact Fees and REUs.
>
> If you reduced the number of REUs or if the REUs have lapsed you may adjust active REUs once per year to a number that does not exceed the REUs originally assigned to the property. To add any reduced or lapsed REUs back to the property, impact fees or back BFCs must be paid at MPW's current rate in accordance with Policy 5.3.2 (whichever is less).

(R. pp. 354-357).

Petitioner refused to abandon the REU capacity assets it paid for at the impact fee stage and brought this class action, seeking a declaratory judgment on the legality of MPW's BFC practices and refunds of excessive BFCs paid.

While the aforementioned 2018 audit and notification campaign was underway, MPW contemporaneously reviewed its BFC policies and practices. The ensuing internal discussions undermine the very practices the Petitioner Class challenges in this litigation.

In an e-mail to MPW General Manager Clay Duffie about proposed revisions to the REU adjustment policies, MPW's counsel questioned: "Did we not conclude that because the customer would have already paid impact fees on the original number of REUs that a capacity reservation fee or back payment for REUs **was not equitable**?" (R. pp. 528-539) (emphasis added). Despite these well-founded concerns, *MPW's inequitable policies were never changed*.

<u>MPW has long justified its BFC methodology by suggesting payment based on the originally assigned REU was to "reserve capacity" in the system. However, MPW's own witnesses and experts, in private, unequivocally rejected the capacity reservation concept for the same reasons the Petitioner Class has advanced in this case.</u>

George Raftelis testified at his deposition that it was improper and inaccurate to use the phrase "capacity reservation fee" in connection with BFC. (R. p. 546, lines 8-10; R. p. 547, lines 9-11) ("To me, the term 'capacity reservation fee' is not a relevant term in what we're talking about when we're dealing with BFCs."). Incredibly, he agreed that the final two sentences of Policy 7.2, governing BFC, should be struck. (R. p. 548, lines 8-17). These sentences read as follows:

> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. <u>**To ensure the purchased capacity remains available, all BFCs must be paid**</u>.

(Emphasis added). However, just as MPW's counsel's concerns were ignored, Raftelis' recommendations were similarly brushed aside by MPW. These two sentences remain in Policy 7.2 today even though MPW's expert said they should be struck.

The Petitioner Class's claims in this case echo the concerns expressed by MPW's own rate consultant and counsel. If BFC are not a "capacity reservation fee," according to MPW's own experts, and it is improper and inequitable to require ratepayers forfeit and repay impact fees to adjust their REU based on actual demand needs, *then there is no reason for MPW not to have periodically right-sized accounts for the purposes of BFC rates*. It would have been simple for MPW to do so, as it possessed all the records from its audit as well as the technology to adjust REU for BFC purposes. Such periodic administrative right-sizing would also help MPW make better planning decisions because it would have a more accurate sense of actual demand across the utility as a whole.

Less than a month before the trial on May 10, 2021, the Honorable R. Markley Dennis, Jr. granted MPW's motion for summary judgment.[8] (R. pp. 24-44). His order concludes MPW's rates are governed only by the "reasonable" standard found in the almost century old S.C. Code Ann. § 5-31-670.[9] Singularly focusing on this vague standard, Judge Dennis gave extraordinary deference to MPW and treated Petitioner Class's challenge as nothing more than a political disagreement immune from judicial review.

At the summary judgment hearing, Judge Dennis was troubled by the prospect of second guessing the ratemaking decisions of the local politicians who run MPW – even though entities like MPW are not overseen or regulated by an independent body like the Public Service Commission. The following excerpt from the summary judgment hearing is instructive:

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[8] The Petitioner Class's memorandum in opposition to MPW's motion for summary judgment was well-supported by twenty-six (26) exhibits, including documents and testimony from MPW's and Plaintiff's witnesses and expert witnesses. (R. pp. 193-6110).

[9] The order granting summary judgment also found the Petitioner Class's claims to be barred by the statute of limitations, voluntary payment doctrine, and failure to mitigate damages. Petitioner Class appealed these rulings, but the Court of Appeals did not reach them, ruling "[b]ecause we affirm the circuit court's grant of summary judgment, we decline to address Snee Farm's remaining arguments as to MPW's affirmative defenses." (Opinion at p. 14, n.5).

> And, Mr. Appel, I don't argue with one thing you have said. I agree with all of that, they could have done a lot of things, but they didn't. And the problem that I see you have, from my standpoint is, that's what the legislature said. Now, they can be unelected. You can run for that, just as you ran. You know, you can run for the body and say, Look, we need to change this, this is totally wrong. Let's vote on this.
>
> But the Court doesn't come in and say, No, no, folks, you elected persons, you can't do that. You need to find a better system, because this isn't fair to certain people here.
>
> I hear you. I just – my question is, How do I have the authority to tell an elected board this is what you – you have to use a different method. That's my – that's my concern.

(R. p. 965, line 19 – p. 966, line 9).

Judge Dennis' extraordinary deference to MPW, respectfully, reflects a total abdication of judicial review. Municipal utility ratemaking is *not* purely a political question. Local government-run utilities cannot charge whatever they want, over the objections of their own rate professionals and counsel, so long as a majority of local politicians agree. On the contrary, this Court has unequivocally ruled that local water and sewer rates are "service or user fees" subject to the nexus requirements of S.C. Code Ann. § 6-1-300(6) and S.C. Code Ann. § 6-1-330(B). *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). Unfortunately, Judge Dennis' order failed to adhere to this precedent and subject MPW's BFC policies to this level of legal scrutiny.

The Petitioner Class respectfully submits judicial review of government-run utility rates must be anchored to actual use data – not pre-service inception assumptions known by the utility to be massively overstated. S.C. Code Ann. § 6-1-300(6) and S.C. Code Ann. § 6-1-330(B) require rates (1) provide a specific benefit to payors and (2) correlate to the amount necessary to pay the costs associated with their service. Had Judge Dennis analyzed the Petitioner Class's claims through the prism of the correct legal standard, there were more than enough genuine issues of material fact presented by the Petitioner Class to preclude granting summary judgment. Viewing the facts in the record in a light most favorable to the Petitioner Class, genuine issues of material fact exist as to whether MPW's practices comply with S.C. Code Ann. § 6-1-300(6), S.C. Code Ann. § 6-1-330(B), and this Court's holding in *Burns v. Greenville Cnty. Council*.

The Petitioner Class appealed Judge Dennis' order granting summary judgment and his order denying the motion for reconsideration to the Court of Appeals. The Court of Appeals affirmed Judge Dennis' rulings via a *per curiam* unpublished opinion filed on April 2, 2025.

The Court of Appeals' opinion waffled on whether S.C. Code Ann. § 6-1-300(6) and *Burns v. Greenville Cnty. Council* control. The Court of Appeals then concluded summary judgment was properly granted in MPW's favor. In so doing, the Court of Appeals made three distinct findings plagued by material error, namely, (1) the Petitioner Class received an individualized benefit in the form of capacity reservation, (2) the BFC paid by the Petitioner Class did not confer a generalized benefit on the public, and (3) MPW's BFC practices were reasonable.

The Petitioner Class filed a petition for rehearing, addressing each of the three aforementioned rulings, claiming the Court of Appeals overlooked and misapprehended the applicable law and failed to view the facts in the record in a light most favorable to the Petitioner Class. The Court of Appeals denied the Petitioner Class's petition by order dated May 20, 2025. This timely Petition follows.

APPLICABLE LEGAL STANDARD

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP. *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002). Pursuant to Rule 56(c), SCRCP, summary judgment may only be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463, 892 S.E.2d 297, 301

(2023) (clarifying "that the 'mere scintilla' standard does not apply under Rule 56(c)[, SCRCP,]" and that "the proper standard is the 'genuine issue of material fact' standard set forth in the text of the Rule"). "If triable issues exist, those issues must go to a jury." *Mulherin-Howell v. Cobb*, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005).

Summary judgment is not appropriate when further inquiry into the facts of the case is desirable to clarify the application of the law. *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 487 S.E.2d 187, 191 (1997). Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts. *Id.* In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party. *Manning v. Quinn*, 294 S.C. 383, 385, 365 S.E.2d 24, 25 (1988).

ARGUMENT

I. The Court of Appeals erred by finding the Petitioner Class reaped a benefit by paying BFC to reserve capacity because MPW's own experts admitted capacity reservation has nothing to do with BFC.

The Court of Appeals' holding that the Petitioner Class obtained a "benefit," under S.C. Code Ann. § 6-1-300(6) rests on the sole, shaky premise that BFC are properly calculated and assessed to reserve capacity. The Court of Appeals held as follows: "Viewing the evidence in the light most favorable to Snee Farm, we find there is no other reasonable inference to be drawn from Snee Farm's unwillingness to release its reserved capacity in the system in exchange for a corresponding reduction in its BFC except that Snee Farm received a benefit from maintaining its reserved capacity through its assigned REUs." (Opinion at p.11).

Capacity reservation, however, is an irrelevant concept for BFC purposes according to MPW's own expert testimony. Viewing this testiomony in a light most favorable to the Petitioner Class, there no support in the record for the Court of Appeals' holding that BFC payments to reserve capacity conferred a "benefit" on the Petitioner Class. Moreover, the Court of Appeals committed an error of circular reasoning by treating the Petitioner Class's refusal to forfeit purchased REU assets as an acknowledgment that paying REU to reserve capacity confers a benefit. The Petitioner Class maintains, and MPW's own experts agree, customers should not be required to forfeit capacity assets under a flawed capacity reservation theory. At absolute bare minimum, a genuine issue of material fact exists as to whether capacity reservation confers "benefit."

The following testimony and facts preclude the granting of summary judgment on the "benefit" question:

- George Raftelis, founder of Raftelis Financial Consultants, Inc., testified it was error to use the phrase "capacity reservation fee" in connection with BFC. [10] (R. p. 546, lines 8-10; R. p. 547, lines 9-11) ("To me, the term 'capacity reservation fee' is not a relevant term in what we're talking about when we're dealing with BFCs.").

- In an e-mail with MPW staff, Joe Crea with Raftelis Financial Consultants, Inc. agreed. (R. pp. 432-434) ("impact fees are what a customer pays to 'reserve' their rights to capacity in the system.").

- The Petitioner Class *already* reserved capacity, an "asset" according to MPW's General Manager,[11] and secured the benefit of capacity when it purchased its REU through the

[10] MPW Cost Recovery Policy 7.2 defines BFC as follows:

> *Water and Wastewater Basic Facility Charges will recover an amount equal to or greater than the sum of the annual Renewal and Replacement (R&R) debt service expense, a portion of the capital expenditures for the system, a portion of operation and maintenance costs, and a portion of general administrative costs.*
>
> The Commission incurs fixed costs for providing services to its customers including, but not limited to, Renewal and Replacement (R&R) debt service, capital costs, operating and maintenance costs, and general administrative costs.
>
> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid.

(R. pp. 303-304) (emphasis in original).

[11] Clay Duffie, MPW's longtime General Manager, testified at his deposition as follows: "Well, the capacity, . . . is assigned to the property, so it is an asset that is assigned to the property." (R. p. 617, lines 20-22).

payment of impact fees. These impact fees were used by MPW to construct and supply the capacity used by the Petitioner Class. There is no requirement to rent capacity – it is purchased through impact fees – and MPW's own experts agree.

- MPW's expert William Zieburtz explained the purpose of a base charge as follows:

  > Q. What is a true base charge?
  >
  > A. A true base charge is a reference to a fixed fee that captures some of the costs of utility operation typically including a portion of administrative costs and often including a portion of capital costs and sometimes other types of costs and charges that amount on a monthly basis regardless of use and including cases where there is no use at all.
  >
  > Q. So this is essentially the same concept that Mount Pleasant Waterworks has with respect to its BFC, it's just a base charge?
  >
  > A. Yes.

  (R. p. 993, lines 10-22). Zieburtz's testimony is silent on capacity reservation being a proper function of a base charge.

- Zieburtz further testified that in his over thirty years in the utility industry, *he never heard of a utility that conflates capacity and base charge concepts, requiring surrender of the former for adjustments to the latter*. (R. p. 995, lines 13-20).

  This makes sense because payment of impact fees is what reserves a payor's capacity in the system.[12] BFC, properly understood, merely help MPW recover certain fixed costs borne by the utility – not facilitate customers' reservation of capacity.

- Troubled by MPW's conflation of impact fee and BFC concepts, particularly on the question of capacity reservation, Raftelis recommended the final two sentences of MPW Policy 7.2, governing BFC, be deleted. (R. p. 548, lines 8-17). **The sentences recommended for deletion are the very sentences the Court of Appeals relied on to support its holding that the Petitioner Class obtained a "benefit" by paying BFC to reserve capacity**. The sentences are as follows:

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[12] MPW Cost Recovery Policy 8.1 defines "impact fees" as follows:

Impact fees are charges assessed against new development to recover part of the capital costs of expanding the water and wastewater infrastructure to serve them. Considered as a capital-recovery charge, impact fees allow recovery of the capital costs of developing the new service directly from the customers who will benefit from the service. proportionate share of each customer's infrastructure demands on the system.

(R. pp. 307-308).

> The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid.

(R. p. 548, lines 8-17).

MPW ignored **Raftelis' recommendations**. These two sentences remain in Policy 7.2 to this day. These facts are a damning indictment of the excessive BFC charged in this case and directly undermine the Court of Appeals' holding that capacity reservation confers a "benefit" for purposes of S.C. Code Ann. § 6-1-300(6).

- In an e-mail from MPW's attorney to General Manager Clay Duffie about proposed revisions to the REU adjustment policies, the attorney rightly questioned: "Did we not conclude that because the customer would have already paid impact fees on the original number of REUs that a capacity reservation fee or back payment for REUs **was not equitable**?" (R. pp. 528-539) (emphasis added). Despite the attorney's well-founded concerns, MPW has never extricated capacity reservation concepts from its BFC policies, resulting in massive overcharges to the Petitioner Class.

These facts clearly demonstrate MPW's own experts admit capacity reservation and BFC have nothing to do with one another. The experts agree BFC can be properly based on a variety of different metrics, but *capacity reservation is not one of them*.[13]

The Court of Appeals' holding that MPW complied with S.C. Code Ann. § 6-1-300(6) stands on a single, false premise – that capacity reservation has any legitimate connection to BFC. The Petitioner Class agrees with MPW's experts that no connection exists. Therefore, the Petitioner Class hardly reaps any "benefit" by reserving capacity it already purchased and owns. MPW's requirement that customers forfeit previously purchased REU for the privilege of being charged a BFC in line with actual use and in compliance with S.C. Code Ann. § 6-1-300(6) violates the law and basic notions of justice and fair play.[14] The Court of Appeals erred by suggesting such

[13] According to the Petitioner Class's expert Bryan Mantz, MPW's base charge practices deviate from most utilities who calculate base charges according to meter or pipe size – not pre-service inception use assumptions based on REU. (R. p. 1006, lines 3-10) (observing that MPW's BFC practices are not discussed in the American Water Association M1 Manual and other industry authorities).

[14] The public is entitled to presume a municipality is charging a reasonable rate as required by law. 12 McQuillin Mun. Corp. § 35:56 (3d ed.) ("A customer is entitled to assume that a municipal utility is charging it for service at the most favorable rate available. The city is under a legal duty to disclose to the customer the availability of a more favorable rate."); *c.f. S.C. Nat'l Bank v. Florence Sporting Goods*, 241 S.C. 110, 115-16, 127 S.E.2d 199, 202 (1962)

a forfeiture comes at "no cost" and the Petitioner Class's refusal to abandon REU it paid for amounts to acknowledgment of a benefit.

The Court of Appeals erred by ruling on the "benefit" issue in MPW's favor on a motion for summary judgment and failing to view the facts in a light most favorable to the Petitioner Class.

II. **The Court of Appeals erred by finding the excessive BFC paid by the Petitioner Class do not confer a general benefit on the public because these excessive charges subsidize other ratepayers.**

The Court of Appeals held "this case doesn't involve a question whether the general public benefits [from the excessive BFC paid by Snee Farm and the class] because the general public is not using this service." (Opinion at p. 12). This ignores facts in the record demonstrating how the excessive BFC paid by the Petitioner Class subsidize other ratepayers (both commercial and residential) by artificially keeping *their rates and share of covering MPW's fixed costs lower*. When viewing the facts in a light most favorable to the Petitioner Class, the Court of Appeals should have acknowledged, at the very least, a genuine issue of material fact exists as to whether the Petitioner Class is, in fact, subsidizing other ratepayers.

In *Burns v. Greenville Cnty. Council*, this Court struck down Greenville County's road maintenance fee, finding the fees conferred a generalized benefit on the public in violation of S.C. Code Ann. § 6-1-300(6). 433 S.C. 583, 587-588, 861 S.E.2d 31, 33 (2021). The excessive BFC paid by the Petitioner Class similarly subsidize other ratepayers and confer a general benefit on the public. This is borne out by facts in the record, which the Court of Appeals failed to view in a light most favorable to the Petitioner Class.

("[P]ublic officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged.").

MPW Cost Recovery Policy 7.2 confirms BFC are used to recover certain fixed administrative and overhead costs borne by the utility. (R. pp. 303-304). The Petitioner Class does not challenge the need for MPW to recover these fixed costs in part through its BFC. The Petitioner Class does, however, challenge *how the BFC are calculated and spread amongst the entire rate base*.

The Petitioner Class's expert Bryan Mantz testified the excessive BFC present a "subsidization issue." (R. p. 762, line 13 – p. 763, line 8). He went on to testify that the policy of the American Water Association is to "avoid subsidization." (R. p. 687, lines 9-19). In his report, Mr. Mantz observed in painstaking detail how the excessive BFC paid by the Petitioner Class subsidize other ratepayers by keeping their rates artificially low at the expense of the Petitioner Class. (R. pp. 552-568). Had the Petitioner Class been charged a fair BFC – based on actual use and not linked to the flawed capacity reservation concept – the charges would be more fairly and equitably distributed amongst all ratepayers, thereby eliminating the subsidy concern. MPW's failure to periodically right-size customers' REU, for BFC purposes, perpetuates a generalizable benefit to the public in the form of a rate subsidy in violation of S.C. Code Ann. § 6-1-300(6) and *Burns v. Greenville Cnty. Council*.

At bare minimum, genuine issues of material fact exist as to whether the excessive BFC alleged by the Petitioner Class confer a subsidy on other ratepayers in violation of S.C. Code Ann. § 6-1-300(6) and *Burns v. Greenville Cnty. Council*. The Court of Appeals erred by ruling on the subsidy issue in MPW's favor on a motion for summary judgment and failing to view the facts in a light most favorable to the Petitioner Class.

III. **The Court of Appeals erred by finding there are no genuine issues of material fact supporting the Petitioner Class's claim that MPW's BFC practices are unreasonable.**

The Court of Appeals held the Petitioner Class "failed to supply evidence to demonstrate a genuine issue of material fact as to whether MPW charged unreasonable rates." (Opinion at p. 13). The Court of Appeals relied on the wrong test for evaluating reasonableness in the context of government-run utility rates. It also ignored overwhelming evidence supporting the Petitioner Class's claim that MPW's BFC practices are unreasonable. These facts should have been viewed in a light most favorable to the Petitioner Class, but they were not.

The facts in the record going to the unreasonableness of MPW's practices are, among other things, (1) MPW's flawed introduction of capacity reservation concepts in its BFC policies, (2) the significant magnitude of excessive BFC charged and how they subsidize other ratepayers, (3) MPW's departure from national and local base charge best practices, (4) MPW's failure to periodically right-size REU assignments based on historic usage and (5) MPW's shifting the burden to right-size on ratepayers coupled with the requirement that ratepayers forfeit valuable REU assets in order to be charged a fair BFC consistent with actual use. Viewing the facts in a light most favorable to the Petitioner Class, the Court should have found genuine issues of material fact exist as to whether MPW's BFC practices are reasonable.

South Carolina case law offers limited guidance on what "reasonable" means in the context of government-run utility rates. The lack of case law development makes sense because the General Assembly and the Supreme Court view local government water and sewer rates as "service or user fees" subject to the individualized benefit nexus test to the nexus requirements of S.C. Code Ann. § 6-1-300(6) and S.C. Code Ann. § 6-1-330(B). *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315 (2015). Assuming, the "reasonableness" standard under S.C. Code Ann. § 5-31-670 applies exclusively or in addition these requirements, the Court of Appeals and Judge Dennis nonetheless erred in limiting the reasonableness inquiry to service quality only.

The Court of Appeals cites to *H.A. Sack Company, Inc. v. Forest Beach Pub. Serv. District*, 272 S.C. 235, 238, 250 S.E.2d 340, 341 (1978) for the proposition that reasonableness is evaluated according to the quality of service received. However, *H.A. Sack Company, Inc.* did not involve a challenge to the quality of the service received. The phrase "service received" should be viewed broadly to encompass how rates are calculated. The Petitioner Class is not required to allege some suspension in service or brown water from the tap to claim MPW's BFC practices are unreasonable. Otherwise, MPW could charge completely arbitrary and made-up rates so long as the water is clean. This surely cannot be the law in South Carolina. If that were the case, MPW and other government-run utilities could charge captive customers whatever they wanted with absolutely no judicial recourse.

The correct test for evaluating "reasonableness" in the context of local government ratemaking is well articulated in 94 C.J.S. Waters § 730 ("As a general rule, a municipality authorized by law to fix the rates to be charged for service from a water system operated by it is not free to exact whatever rates it may see fit, but must fix reasonable rates, **or rates reasonably proportionate to the value of the service rendered, or bearing some relationship to the present or future cost of providing service**" (Emphasis added). The Petitioner Class maintains it is unreasonable to pay BFC based on flawed capacity reservation concepts discredited by MPW's own experts and utterly divorced from any actual use, especially when doing so unfairly subsidizes other ratepayers and where MPW could have easily corrected this issue by right-sizing without requiring customers forfeit previously purchased REU assets and risk expensive future back charges.

Once the reasonableness test is properly framed, the following evidence in the record, viewed in a light most favorable to the Petitioner Class, should have readily precluded a grant of summary judgment in MPW's favor.

As discussed above, MPW's BFC policies rest on capacity reservation concepts that have no place in a discussion of base charges according to MPW's own experts. MPW's failure to heed its own experts and eliminate capacity reservation from Policy 7.2 is patently unreasonable. So too is MPW's requirement that the Petitioner Class forfeit REU just for the privilege of being charged a reasonable BFC – a practice deemed "inequitable" by MPW itself.

Aside from capacity reservation, MPW has long known about the tremendous amount of unused, phantom REU in its system that it was nonetheless charging BFC on. Not only did MPW refuse to periodically right-size these accounts in the fact of such systemic inequities, but it actually *increased BFC rates multiple times*, thereby exacerbating known rate imbalances and the subsidy the Petitioner Class confer on other ratepayers.

In 2014, MPW hired Raftelis and CDM Smith to review its REU and BFC practices. These experts confirmed "certain commercial customers have been assigned an incorrect number of REUs" and "[t]hese inconsistencies present complexities an[d] potential customer inequities in estimating user charge revenues and defining the current and future levels of service for calculating impact fees." (R. pp. 319-320). The consultants went on to admit that "approximately 4,400 REUs that are allocated to commercial accounts . . . are 'unused'" and "[i]t is assumed that the number of unused REUs is consistent over the past seven years." (R. p. 323-324). Stated another way, almost half of the capacity MPW charges customers is unused and therefore not related to the provision of *any* service or individualized benefit to ratepayers. (R. p. 346, lines 5-24; R. p. 347, lines 6-10; R. pp. 323-324). These "unused" REU are the very basis of the excessive BFC charges at issue in this case.

Rather than notify the oversized customers identified in 2014 after this analysis was completed, MPW *only* contacted a much smaller group of commercial ratepayers who had been *exceeding* their allocated REU and paying less than their usage should have required (the winners). (R. p. 350; R. p. 352). MPW reached out to these "undersized" customers to recommend they purchase additional impact fees to bring their REU count more in line with actual use. (R. p. 618, lines 12-17). During this time, MPW chose not to inform the larger number of commercial customers, i.e. the Petitioner Class, they were paying to cover significantly more of MPW fixed costs than their actual use should reasonably and equitably allow.

MPW did not notify the Petitioner Class until 2018.[15] Even after they were belatedly notified, of course, MPW still required the Petitioner Class forfeit previously purchased REU to be charged an accurate BFC and risk expensive future back charges if service needs increased. This practice, inextricably tied to the flawed notion of capacity reservation, is the essence of unreasonableness and at the heart of the practices challenged by the Petitioner Class in this case.

Armed with actual knowledge of these incorrect and inequitable REU assignments, MPW not only failed to correct the imbalance, but also increased the weight of that burden by *significantly* increasing BFC rates in 2015. Specifically, in fiscal year 2015 MPW raised the BFC rates for water ($3.33/ REU to $6.00/REU, an 80.2% increase) and wastewater ($8.97/REU to $12.00/REU, a 33.8% increase), all the while leaving volumetric rates untouched. Fiscal year 2016 saw another substantial BFC rate increase, this time $6.00/REU to $8.00/REU for water (a

[15] The class period spans from January 1, 2014 (or any later date of service inception) to December 31, 2019. To the extent Snee Farm and the class were notified, this occurred in 2018 meaning MPW knowingly charged excessive rates throughout 2014, 2015, 2016, and 2017 without providing any notice to ratepayers. This is unreasonable.

33.3% increase) and $12.00/REU to $14.00/REU for wastewater (a 16.7% increase), with volumetric charges, again, remaining constant. (R. p. 437).

The Petitioner Class's expert Brian Mantz testified that a REU system has the potential to be fair,[16] but only where "the REUs are periodically right-sized" by the utility.[17] (R. p. 1017, line 2). He further testified it would be "very easy" for MPW to administratively right-size its rates, as do other utilities around the country. (R. p. 1011, line 17-25; R. p. 1013, lines 3-6). Instead, MPW uniquely and unreasonably places the burden of right-sizing on ratepayers, requiring them to forfeit REU previously purchased, while other utilities handle the right-sizing themselves. (R. p. 1005, lines 20-25). All the while, other ratepayers enjoyed a tremendous subsidy at Snee Farm's and the class's expense.

Mr. Zieburtz, MPW's expert, acknowledged that the magnitude of the incorrect REU assignments is relevant to whether inequity and unreasonableness exists in the rate structure. (R. p. 994, lines 5-9). Once more, he admitted in his thirty-plus years in the utility industry, **he has never heard of a utility that similarly conflates capacity and base charge concepts**, requiring surrender of the former for adjustments to the latter. (R. p. 995, lines 13-20) (emphasis added). If that is not evidence of unreasonableness – nothing would suffice. This further supports the Petitioner Class's claim that MPW's BFC policies are unreasonable.

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[16] Mr. Mantz acknowledged base charges calculated, in other utilities, according to water meter or pipe sizes (as opposed to REU) are reasonable. This, however, does not support the conclusion, especially on an appeal from a grant of summary judgment, that MPW's unique REU-based BFC methodologies are reasonable. Mr. Mantz's testimony is clear that he believes MPW's policies of charging BFC for capacity reservation and requiring customers to forfeit previously purchased REU to reduce BFC charges are unreasonable. These facts should have been viewed in a light most favorable to the Petitioner Class but were not by either the Court of Appeals or the circuit court.

[17] The Court of Appeals mischaracterizes Mr. Mantz's testimony that a base charge calculated on the basis of assigned REU (as opposed to size of meter, etc.) can be reasonable to support the proposition that MPW's unique practices *are reasonable*. Mr. Mantz's testimony is clear that he believes MPW's practices to be unreasonable due to, among other things, the utility's failure to periodically right size as other utilities with REU based systems do.

There is overwhelming evidence in the record that MPW's BFC practices are unreasonable – especially when these facts are viewed in a light most favorable to the Petitioner Class. For these reasons, the Court's finding that the Petitioner Class failed to advance evidence of unreasonableness to survive summary judgment should be reversed.

CONCLUSION

Given the foregoing, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

McCULLOUGH ▪ KHAN ▪ APPEL

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June 18, 2025

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

No. 2025-UP-113 (S.C. Ct. App. Filed April 2, 2025)
Case No. 2018-CP-10-02764

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated...Petitioner Class,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks..Respondent.

PROOF OF SERVICE

I certify that Petitioners' Petition for Writ of Certiorari was served upon The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks, via e-mail to counsel of record listed below on June 18, 2025.

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RECEIVED
Jun 18 2025
SC Court of Appeals

June 18, 2025

VIA US MAIL AND EMAIL
Supreme Court of South Carolina
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Re: Snee Farm Lakes Homeowner's Association v. The Commission of Public Works for the Town of Mount Pleasant.
No. 2025-UP-113 (S.C. Ct. App. Filed April 2, 2025)
Case No. 2018-CP-10-02764

Dear Ms. Howard:

I hope you are well. Enclosed for filing in the above-mentioned matter, please find the Petitioners' Petition for Writ of Certiorari and Proof of Service.

The filing fee will be mailed to the Court today. If you have any questions, please do not hesitate to contact me.

Sincerely yours,

MCCULLOUGH ▪ KHAN ▪ APPEL

Elizabeth Lademan

Elizabeth Lademan,
Paralegal

/eml
Enclosures