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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.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Appellants respectfully petition the Court for a rehearing of its Opinion No. 6129, filed on January 14, 2026 (the "Opinion"), based upon the following points overlooked or misapprehended by the Court.

I. The Opinion Does Not Define the Statutory Language and Overlooks Relevant Facts and Arguments as to the Meaning of that Statutory Language.

The Opinion finds the language of Section 58-5-10 of the South Carolina Code "plain and unambiguous," but does not explain what the plain and unambiguous meaning of that language is. The Opinion then finds that Respondents "merely provide an allocation method and billing function rather than the services themselves." However, the Opinion provides no analysis or explanation as to what constitutes "the services" and how that purportedly differs from "an allocation method and billing function." The Opinion also provides no analysis of whether providing an allocation method and billing function falls with the plain, unambiguous statutory language defining a utility. The Opinion also does not consider that Respondents were also

purchasing the water and sewerage from the area-wide utility and using pipes owned by Respondents to transport the water and sewerage to and from tenants.

The Opinion later considers Appellants' argument that Respondents were supplying and furnishing water and sewerage and rejects that argument on the basis that "mere 'ownership of the pipes that water and sewerage pass through, without the ability to control the flow of service' does not constitute ownership of the water and sewerage." The Opinion does not explain why "ownership of the water or sewerage" would be necessary to "supply" or "furnish" water or sewerage under Section 58-5-10. There is nothing in the statutory language of Section 58-5-10 stating, or even implying, that ownership of water or sewerage is necessary to "supply" or "furnish" water or sewerage. The Opinion also does not consider Appellants' arguments that ownership of water or sewerage is not necessary for one to supply or furnish water or sewerage. (Reply Br. 3–5) Similarly, the Opinion fails to address how any entity could be a public utility if the purchase and taking possession of water in pipes an entity owns is not sufficient to cause an entity to own that water and be a public utility. That exception to the definition of a public utility would swallow the rule, and many entities would not be a public utility. Any entity could then legally avoid regulation as a public utility by explaining that it merely purchases water from someone else, flows the water through its pipes, does not actually own the water, and thus is not a public utility.

II. Contrary to the South Carolina Law of Statutory Construction, the Opinion Assumes the Statute is Plain and Unambiguous and Does Not Analyze Whether there is Ambiguity.

In footnote three, the Opinion indicates the Court did not undertake any analysis of whether the language of Section 58-5-10 is ambiguous and arrived at its holdings based on the assumption that the statutory language is plain and unambiguous because neither party "actually argued the

statute is ambiguous." This assumption and lack of analysis of ambiguity is contrary to South Carolina law.

The parties both assert that the statutory language is plain and unambiguous but present conflicting versions of that plain and unambiguous meaning. In other words, the parties present an issue of statutory construction for the Court to resolve. Engaging in the exercise of statutory construction to determine and apply the meaning of the statutory language, the Court must determine whether the statutory language is plain and unambiguous or is susceptible to more than one meaning and ambiguous. *See, e.g.*, *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) ("If the statute is ambiguous, however, courts must construe the terms of the statute."); *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009) ("[I]nterpretation of a statute is a question of law for the Court."); *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 346–52, 549 S.E.2d 243, 246–50 (2001) (considering parties' arguments that the statute was unambiguous, concluding the statute was ambiguous, and then considering the parties' arguments as to how that ambiguous language should be interpreted); *Hopper v. Terry Hunt Const.*, 373 S.C. 475, 481, 646 S.E.2d 162, 165 (Ct. App. 2007) ("If the language in the statute is plain and unambiguous, there is no need to resort to the rules of statutory interpretation. . . . Therefore, we must first determine if the language used in section 42-1-415 is ambiguous."). Appellants arguing that the statutory language is plain and unambiguous does not bar Appellants from arguing that were the Court to conclude that the statutory language is ambiguous, the Court should select the meaning advanced by Appellants as the intended meaning. *See Kennedy*, 345 S.C. at 346–52, 549 S.E.2d at 246–50. Appellants are entitled to advance such alternative arguments. The Court should first decide whether the language is plain and unambiguous and then if the Court concludes the language is ambiguous, address Appellants'

alternative argument as to why any ambiguity in the statute results in the meaning Appellants' advance. The fact that both parties advance arguments as to the statute being plain and unambiguous cannot eliminate the Court's obligation to determine whether the statutory language is plain and unambiguous.

III. Even if Ownership of the Water and Sewerage Was Relevant Under the Statutory Language, Respondents Owned the Water and Sewerage.

Even if ownership of the water or sewerage was relevant to the application of Section 58-5-10, Appellants owned the water and sewerage on Respondent's side of the connection with the area-wide utility. The Opinion states that "ownership of the pipes" is not alone sufficient to establish "ownership of the water or sewerage" flowing through those pipes. But the Opinion overlooks that Respondents were doing more than just passing water through their pipes. (Reply Br. 2–3) At the meter between the area-wide utility and Respondents' pipes, Respondents were purchasing the water from the area-wide utility. In other words, Respondents purchased and took possession of the water.

The Opinion's holding on ownership of the water is contrary to and would render absurd results in basic property law. If a person pays for the purchase of a liquid and then takes possession of the liquid in a receptable owned by the purchaser, the purchaser owns and possesses that liquid. For example, if a person fills up a swimming pool with water purchased from a utility, the water in the swimming pool belongs to that person. Certainly, if a neighbor pumped the water from the swimming pool, the neighbor would have stolen the person's property. To hold otherwise would render liquids incapable of ownership.

Also, if the Opinion were correct that Respondents did not own the water flowing through their pipes, it begs the question of who owned it. The area-wide utility could no longer own it because that utility received payment from Respondents in exchange for the water and transported

the water out of that utility's pipes and into pipes owned by Respondents. The tenants could not yet have owned it because the tenants had not yet paid anything for it, because the tenants did not yet possess it, and because the water to be used by tenants in various apartments all remained commingled. If a particular tenant was away for a week, that tenant may never turn on the faucet to take possession of some of the water in the pipes.

IV. The Opinion's Effort to Distinguish *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 442, 418 S.E.2d 546 (1992), Misapprehends the Holding in *Anchor Point*.

Appellants contend the *Anchor Point* decision controls and establishes that Respondents functioned as a public utility. The Opinion rejects that argument and attempts to distinguish the *Anchor Point* decision solely on two grounds. First, the Opinion concludes that "*Anchor Point* did not involve a mere submetering or allocation arrangement because the homeowners' association in that case owned and operated that sewer plant system." However, the Supreme Court's analysis of whether the entity at issue in *Anchor Shoals* was a public utility contains no consideration of whether the entity owned sufficient sewer system components to be a public utility or whether the entity engaged in submetering or allocation. Rather, consistent with Appellants' argument, the analysis turned entirely on whether the entity met the statutory requirements of furnishing or supplying water or sewerage for compensation to a portion of the public.

Second, the Opinion relies on the Commission's attempt to distinguish *Anchor Point* on the basis that 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." Again, the *Anchor Point* decision's analysis of whether the entity was a public utility did not consider any of those factors and turned entirely on whether the entity met the statutory requirements of furnishing or supplying water or sewerage for compensation to a portion of the public. To allow the factors identified by

the Commission and the Court—monopoly rights, infrastructure, guaranteed rate of return—to be determinative of whether an entity is a public utility would read limitations into the statute that are not present in the plain, unambiguous statutory language. Additionally, those factors do not distinguish the *Anchor Point* decision. There was no finding in *Anchor Point* that the entity at issue there had monopoly rights over any service area, owned any large, capital-intensive utility infrastructure, or sought or obtained any guaranteed rate of return.

V. The Opinion Does Not Consider the Surrounding Statutory Language.

The Opinion overlooks the impact of the surrounding statutory language and the negative-implication rule of statutory construction in determining the meaning of Section 58-5-10. Appellants set forth in their briefing how the broad language of Section 58-5-10 and the limited, narrow exceptions provided therein indicate the General Assembly intended that all suppliers of water or sewerage, other than those specified in the limited exceptions, are public utilities. (Apps.' Br. 23–25) The Opinion contains no consideration of that surrounding statutory language and its impact.

VI. The Opinion Misapprehends the Arguments on the "For Compensation" Component and Mistakenly Attributes to the Commission the Authorship of Language the Court Found Persuasive on the Issue.

The Opinion misapprehends Appellants' arguments on whether Respondents provided water and sewerage "for compensation." First, the Opinion quotes the affidavit of Andrew Gordon, the respective leases, and the letter of the Utility Management and Conservation Association. Yet the discussion of the "for compensation" issue then ends, and the Opinion states no conclusion that Respondents were not providing water and sewerage "for compensation," much less an explanation as to how the quoted items could support a conclusion that Respondents were

not providing water and sewerage "for compensation." Reviewing the quoted items, none of those items could serve as a basis for such a conclusion.

The Opinion then appears to consider Appellants' arguments that Respondents benefited from providing the water and sewerage in this method in the context of whether Respondents "furnish" or "supply" the water and sewerage. This is a misapprehension of the argument. As set forth in Appellants' briefing, the argument that Respondents benefit from providing the water and sewerage is an argument that Respondents provided the water and sewerage "for compensation." (Apps.' Br. 15–17) As explained there, providing water or sewerage "for compensation" requires nothing more than that an entity receive something of value, *i.e.*, benefit from, providing the water or sewerage. (Apps.' Br. 15)

The Opinion then finds persuasive on this issue quoted language analyzing whether Respondents benefit from providing the water and sewerage and describes the quoted language as having "cogently explained" the relevant analysis, but mistakenly identifies the author of the quoted language as the Commission when the quoted language is from Appellants' brief. The Opinion states: "As the Commission cogently explained:" and then provides a lengthy block quote. The block quoted language does not appear anywhere in the Commission's orders and is not from the Commission. The quoted language is from Appellants' brief. (Apps.' Br. 16–17) Appellants' argument that the Opinion finds "cogent" and persuasive on the issue is an explanation of how Respondents profited from providing water and sewerage in this manner. In other words, while the authorship is mistaken, the Court plainly agrees with Appellants that Respondents were providing the water and sewerage "for compensation."

VII. The Opinion Misapprehends and Overlooks Appellants' Arguments on the Commission Deviating from Prior Orders.

The Opinion's holding that the Commission's decision was not arbitrary or capricious and did not deviate from prior orders without a reasoned basis rests entirely on a block quote from the district court's dismissal order. However, the quoted language provides no support for the Opinion's holding; provides no explanation as to how the Commission did not make one determination of what constitutes a public utility under Section 58-5-10 and then later arrived at a different determination without a reasoned basis. Rather, the quoted language merely evidences that the Commission at one point held that entities operating in the way Respondents operated were public utilities and later arrived at a contrary holding. Additionally, the quoted language does not address and the Opinion does not address Appellants' arguments that the Commission's decision in this case deviates from the later Order 214 issued by the Commission. (Apps.' Br. 29–31)

VII. The Opinion Does Not Identify and the Commission's Factual Findings Are Not Supported by Substantial Evidence.

The Opinion holds that "substantial evidence supports the Commission's factual findings," but the Opinion does not identify any such substantial evidence. As set forth in Appellants' brief, numerous factual findings by the Commission lack any supporting evidence, much less substantial evidence, and are contrary to the applicable law.

CONCLUSION

For the reasons set forth herein, Appellants respectfully request rehearing in this case.

Respectfully submitted,

s/Elliotte Quinn
F. Elliotte Quinn IV
Rachel Igdal
The Steinberg Law Firm, LLC

3955 Faber Place Dr., Ste. 300
North Charleston, SC 29405
(843) 720-2800

ATTORNEYS FOR APPELLANTS

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CERTIFICATE OF SERVICE

The undersigned certifies on January 29, 2026, he caused a copy of the foregoing Petition for Rehearing to be served on all parties of record by e-mail as follows:

Kevin Hall
Bryant Caldwell
Womble Bond Dickinson (US) LLP
1221 Main Street, Ste. 1600
Columbia, SC 29000
(803) 454-7710
Kevin.hall@wbd-us.com
Bryant.caldwell@wbd-us.com

s/Elliotte Quinn

F. Elliotte Quinn IV
The Steinberg Law Firm, LLC
3955 Faber Place Dr., Ste. 300
North Charleston, SC 29405
(843) 720-2800