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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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, Petitioners,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

CERTIFICATION OF COUNSEL

Counsel for Petitioners hereby certifies that a Petition for Rehearing was made and was finally ruled on by the Court of Appeals on February 18, 2026.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in holding that Section 58-5-10 of the South Carolina Code defining regulated water and sewer utilities does not apply to Respondents who provided water and sewer using an allocation formula and charged fees in addition to the allocated amounts?

STATEMENT OF THE CASE

Petitioners 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 Petitioners 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 [Petitioners'] failure to exhaust the available administrative remedies."

On February 22, 2022, Petitioners 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 Petitioners. 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. On May 26, 2023, Petitioners 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, Petitioners 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. Petitioners 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. The federal court action is stayed awaiting the resolution of this action.

In the Commission proceeding, on October 12, 2023, Petitioners moved for reconsideration of Order 736. On January 18, 2024, in Order 2024-78, the Commission denied Petitioners' Motion for Reconsideration. On February 12, 2024, Petitioners filed the Notice of Appeal. On January 14, 2026, the Court of Appeals affirmed. *Zito v. Strata Audubon, LLC*, Op. No. 6129, 2026 WL 111157 (Ct. App. Jan. 14, 2026). Petitioners filed a petition for rehearing, and the Court of Appeals denied the petition on February 18, 2026, but substituted the original opinion for a revised opinion reaching the same result but correcting an error in the original opinion where the Court of Appeals quoted from and agreed with language in Petitioners' brief but erroneously attributed the language to the Commission and claimed it supported the Court of Appeals affirming. *Zito v. Strata Audubon, LLC*, Op. No. 6129, 2026 WL 457278 (Ct. App. Feb. 18, 2026). This petition follows.

STATEMENT OF FACTS

This action arises from apartment complex owners—Respondents—who supplied water and sewerage to tenants including Petitioners at a rate different from what the owners paid to the area-wide utility, without measuring the actual usage of any apartment, and using an allocation

formula to divide the total usage and allocate it to the tenants. Respondents included in the allocation formula and thereby charged the tenants for the usage 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.

Petitioners contend that conduct made Respondents a public utility subject to regulation of rates by the Commission. Petitioners assert the plain, unambiguous language of South Carolina's public utility law in Title 58 of the South Carolina Code and prior decisions applying Title 58 make Respondents a public utility. Respondents never sought Commission approval of the rates charged, and Petitioners assert that therefore, Respondents charged an unlawful rate.

I. Water and Sewerage Background.

Water and sewerage can be provided to apartment 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 usage 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").

[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).

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 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" method, the tenants pay what they would pay if they had contracts with and direct connections to the area-wide utility. This pass-through method is a method the Commission decided does not make 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 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. Petitioners contend that difference is critical and causes Respondents to be a regulated public utility.

The third, controversial method and the method 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.

South Carolina defines several business enterprises 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. Title 58 defines a public utility subject to Commission regulation in providing water and sewerage 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.

Petitioners 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. (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 tenants provided that water and sewerage would be provided and billed for using an allocation formula rate. For the Audubon Park Apartments, the lease provided 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 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) The leases also provided that the usage in the common areas 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. (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) The Commission has not 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)

Petitioners presented the testimony of a statistician expert, Dr. William Huber, and a public utility regulation expert and former commissioner on a state public utility commission, Ashley

Brown. Reviewing the measured usage at each building at the Audubon Park Apartments property, the statistician expert found 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 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 costs to tenants, the public utility expert testified that using an allocation formula is not passing through costs. (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 testified 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, the public utility expert testified that "[u]nder a sale for resale arrangement, as carried out by [Respondents] . . . , [Respondents] undoubtedly take possession of the water." (R. p. 165, lines 14–17.) The expert explained that Respondents must be taking possession because Respondents obtained the water on a volumetric basis and then allocated the charges on a formulaic basis while diverting a portion of the water for common area usage. (R. p. 165, line 14–p. 166, line 16.)

The public utility expert testified as to how the use of an allocation formula is inconsistent with public policy and the "fundamental principles" underlying public utility regulations. (R. p. 166, line 17–p. 168, line 1) Providing a summary of laws across jurisdictions, he testified as to the wide variation in treatment of allocation formula billing across jurisdictions, 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.) Finally, 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 expert testified that public utility commissions have numerous regulatory options available for situations "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 Petitioners' claims. 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)

ARGUMENT

I. The Court of Appeals erred in holding that Section 58-5-10 of the South Carolina Code defining regulated water and sewer utilities does not apply to Respondents who provided water and sewer using an allocation formula and charged fees in addition to the allocated amounts.

A. The Court of Appeals' Decision and the Commission's Order 736 Are Erroneous and Must be Reversed Because They are Contrary to the Plain, Unambiguous Language of Section 58-5-10(4) of the South Carolina Code of Laws.

The Court of Appeals found the language of Section 58-5-10 "plain and unambiguous," but did not explain the plain and unambiguous meaning. The Court of Appeals then found Respondents "merely provide an allocation method and billing function rather than the services themselves." However, the Court of Appeals did not provide any analysis as to what constitutes "the services" and how that purportedly differs from "an allocation method and billing function." The Court of Appeals also did not provide any analysis of whether providing an allocation method and billing function falls with the plain, unambiguous statutory language defining a utility. The Court of Appeals also did 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 Court of Appeals later considered Petitioners' argument that Respondents were supplying and furnishing water and sewerage and rejected 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 Court of Appeals did 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 is necessary to "supply" or "furnish." Similarly, the Court of Appeals failed 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. The Court of Appeals' exception to the definition of a public utility would swallow the rule. Any entity could then legally avoid regulation as a public utility by showing that it merely purchases water from someone, flows the water through its pipes, and purportedly does not actually own the water, and thus is not a public utility.

Contrary to the Court of Appeals' strained efforts to read an exception into Section 58-5-10, the plain language of Title 58 directly speaks to the issue and provides that Respondents' actions make them public utilities. 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 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." Section 58-5-10(4) thus

plainly and unambiguously provides that any entity that furnishes or supplies water or sewer for compensation is a public utility regulated by the Commission.

Here, Respondents' conduct satisfied each of the requirements to be a regulated public utility under Section 58-5-10(4).[2] Respondents were supplying water and sewerage to Petitioners. (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 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 Petitioners and other tenants. (R. pp. 216-1506 & 1530) Respondents were taking water from the area-wide utility into pipes owned by Respondents, transporting that water to outlets owned by Respondents, and providing the water to Petitioners and other tenants at those outlets. Similarly, Respondents were accepting wastewater into pipes owned by Respondents and using those pipes to transport the wastewater to the area-wide utility's sewer pipes. Therefore, Respondents were furnishing and supplying water and sewerage to Petitioners and other tenants.

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;

[2] The Court of Appeals did not address the requirement that the water or sewerage be supplied to the public or a portion of the public.

esp., salary or wages." (R. p. 1520) Here, Respondents received money in exchange for providing water and sewerage to Petitioners and other tenants, and therefore, Respondents provided water and sewerage for compensation.

While the Court of Appeals discussed the "for compensation" requirement, the Court of Appeals stated no holding as to what constitutes "for compensation" under Section 58-5-10(4) and stated no holding as to whether Respondents were providing water and sewerage for compensation. The Court of Appeals discussed several items in the record in relation to the "for compensation" issue but never indicated whether that discussion is meant to indicate that Respondents were not providing water and sewerage "for compensation" and if so, how those items could support that conclusion. In the original opinion, the Court of Appeals then appeared to consider Petitioners' 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 Petitioners' briefing, the argument that Respondents benefit from providing the water and sewerage is an argument that Respondents provided the water and sewerage "for compensation." (Pets.' 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. (Pets.' Br. 15)

The Court of Appeals then quoted language it found persuasive on this issue analyzing whether Respondents benefit from providing the water and sewerage, describing the quoted language as having "cogently explained" the relevant analysis, but mistakenly identifying the author of the quoted language as the Commission when the quoted language is actually from Petitioners' brief. The Court of Appeals' original decision stated: "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 Petitioners' brief. (Pets.' Br. 16–17) In other words, while the authorship is mistaken, the Court of Appeals plainly agreed with Petitioner that Respondents were providing the water and sewerage "for compensation." Yet, in response to Petitioners' Petition for Rehearing, the Court of Appeals submitted a revised decision which removed entirely the quoted language and provides no explanation as to how the Court of Appeals could have agreed with Petitioners' reasoning yet now reached the same result with all of the same reasoning minus the misquoted language.

While the foregoing is sufficient to find Respondents provided water and sewerage for compensation, as discussed *infra*, the Commission previously interpreted Section 58-5-10(4) as requiring that the entity providing the water or sewerage receive a benefit and as not being satisfied where an entity merely measures the actual usage and passes through the costs 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 benefits from and profited from providing the water and sewerage to Petitioners and other tenants.

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

The second way in which Respondents benefited 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 usage in the common areas benefited Respondents because they were thus able to take what should be operating expenses and have tenants pay those expenses. The fact that such operating expenses may otherwise be included in the rents does not alter the fact that Respondents obtained a benefit from billing tenants for common area usage, and to the contrary, further proves the point. By not having to include the common areas usage expenses in the rents, Respondents were able to either: (1) keep rents at the market rates but, due to the decreased expenses, obtain an increased profit from rents or (2) lower rents below the market rate to make Respondents' rents more competitive and thereby increase occupancy and earn increased profits. Additionally, by not having to include common area usage 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 to irrigate landscaping at a property and make the property more visually desirable to prospective tenants without incurring expenses from such usage because the tenants were paying for the common area usage. Similarly, Respondents could pressure wash the buildings regularly because the tenants paid for such usage. Finally, Respondents also benefited from the reverse scenario where Respondents avoid non-water and sewerage costs by having tenants pay for common area 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 paid for the water.

The Court of Appeals' and the Commission's interpretations of Section 58-5-10(4) are also contrary to the surrounding statutory language in Section 58-5-10. 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." 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. First, 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 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 indicates the absence of other exceptions. *See Garrison v. Target Corp.*, 435 S.C. 566, 581, 869 S.E.2d 797, 806 (2022); *Hodges v. Rainey*, 341 S.C. 79, 86–87, 533 S.E.2d 578, 582 (2000); Antonin Scalia & Bryan A. Garner, *Reading Law* 107 (2012). 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).

Finally, not only are the Court of Appeals' and the Commission's decisions contrary to the plain statutory language of Section 58-5-10, their applications of that statutory language are also

directly contrary to the 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 held a nonprofit providing 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 "serve[d] a limited portion of the public" it was a public utility. *Id.* The Court then 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 advanced by Respondents and the Court of Appeals here that an entity is not a public utility if it is providing water or sewerage on a nonprofit basis. The Court also did not find any limitation of what constitutes a public utility based on "furnishing" or "supplying" and did not consider whether the entity took possession or had the ability to disconnect service as relevant to the analysis. 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, 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. Accordingly, both as a matter of the plain statutory language and as supported by prior decisions addressing that statutory language, the result is that Respondents' conduct made them a public utility, and the Court of Appeals' decision failed to properly apply the plain, unambiguous statutory language.

B. Even Were Section 58-5-10 Ambiguous, the Commission's Interpretation Would Not be Entitled to Deference and the Statute Would be Properly Construed as Providing that Respondents Acted as a Public Utility.

Even were there some ambiguity in the statutory language—and there would have to be some ambiguity for the Court of Appeals to arrive at its holding because the Commission previously found the plain meaning of the statute was contrary to the Court of Appeals' reading—the Opinion indicates the Court of Appeals did not undertake any analysis of whether 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. Engaging in the exercise of statutory construction to determine and apply the meaning of the statutory language, a court must determine whether the statutory language is plain and unambiguous or is susceptible to more than one

meaning and thus ambiguous. *See S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010); *Hopper v. Terry Hunt Const.*, 383 S.C. 310, 314, 680 S.E.2d 1, 3 (2009); *Kennedy v. S.C. Retirement Sys.*, 345 S.C. 339, 346–52, 549 S.E.2d 243, 246–50 (2001). Petitioners arguing that the statutory language is plain and unambiguous does not bar Petitioners from arguing that were the Court to conclude that the statutory language is ambiguous, the Court should select the meaning advanced by Petitioners as the intended meaning. *See Kennedy*, 345 S.C. at 346–52, 549 S.E.2d at 246–50. The Court of Appeals should have first decided whether the language is plain and unambiguous and then if the court concluded the language is ambiguous, address Petitioners' alternative argument as to why any ambiguity in the statute results in the meaning Petitioners' advance. The Court of Appeals erred in failing to conduct this required analysis.

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). 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. The Commission has previously arrived at the opposite conclusion, finding that entities operating as Respondents did here are public utilities. 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); *Sec. of the Interior v. California*, 464 U.S. 312, 321 n.6 (1984); *Kiawah Devel.*, 411 S.C. at 33, 766 S.E.2d at 717; Alfred C. Aman, Jr. & William T. Mayton, *Administrative Law* 500–01

(2d ed. 2001). 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. For the reasons set forth *supra* in relation to the plain meaning of the statute, were Section 58-5-10(4) ambiguous, the correct construction of the statute would be that it means that any entity that provides water or sewerage to another in exchange for a benefit is a public utility.

C. The Court of Appeals and the Commission Relied on Unsupported and Erroneous Factual Findings.

Petitioners contend that in addition to conflicting with the statutory language and decisions applying that statute, 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. While the Court of Appeals found that "substantial evidence supports the Commission's factual findings," the Opinion does not identify any such substantial evidence. Numerous factual findings made by the Commission and relied on by the Court of Appeals lack any supporting evidence, much less substantial evidence, and are contrary to the applicable law.

i. The Court of Appeals and the Commission Erroneously Found that Respondents Did Not Possess the Water or Sewerage.

The Court of Appeals and the Commission erroneously found 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," 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 Court of Appeals and 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, the Court of Appeals' and the Commission's reasoning yield absurd results. Employing their reasoning, 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 no water utility would be a utility under Section 58-5-10(4). Moreover, whether Respondents take possession of the water or sewerage is immaterial to whether Respondents are regulated utilities under the plain language of Title 58.

ii. The Court of Appeals and the Commission Erroneously Found that Respondents Were Only Passing Through Costs and Operating on a Nonprofit Basis.

Despite all the evidence in the record indicating the opposite is true, the Court of Appeals and the Commission concluded Respondents were only passing through the costs of the water and sewerage and were operating on a not-for-profit basis. 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 Petitioners' request to conduct discovery. Petitioners 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 Shupe v. Settle*, 315 S.C. 510, 516–17, 445 S.E.2d 651, 655 (Ct. App. 1994); *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38–39, 331 S.E.2d 385, 388 (Ct. App. 1985). 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. Finally, even were the services provided on a not-for-profit basis, the *Anchor Point* decision establishes that an entity can be a public utility even when it operates on a nonprofit basis.

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 usage by particular tenants, nor do they even try to make a rough estimate of tenants' actual usage. Additionally, Respondents' furnishing of water and sewerage to tenants cannot be on a "pass-through basis" because Respondents bill tenants for common area usage and bill tenants administrative fees.

CONCLUSION

In conclusion, this appeal includes novel questions of law and a decision of the Court of Appeals in conflict with a prior decision of the Supreme Court, and this appeal is thus especially deserving of a grant of a writ of certiorari. For the reasons set forth herein, Petitioners respectfully request the Court grant the petition, reverse the Court of Appeals, and hold Respondents are a regulated public utility.

Respectfully submitted,

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