BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2022-84-WS - ORDER NO. 2024-78

JANUARY 18, 2024

IN RE: Sarah Zito; Alvaro Sarmiento, Jr.; Mark Shinn; and Daniel Bermudez, Complainants/Petitioners v. Strata Audubon, LLC, and Strata Veridian, LLC, Defendants/Respondents	)))))	ORDER DENYING MOTION FOR RECONSIDERATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (Commission) on the timely Motion of Sarah Zito; Alvaro Sarmiento, Jr.; Mark Shinn; and Daniel Bermudez, Complainants/Petitioners (collectively, Complainants) for Reconsideration of Order No. 2023-736. This Motion arises out of the dismissal of the Complaint brought by the Complainants against Strata Audubon, LLC and Strata Veridian, LLC (jointly, Respondents) wherein the Commission determined that the Respondents are not operating a public utility and are therefore not subject to the Commission's jurisdiction. Petitioners' Motion for Reconsideration of Order No. 2023-736, filed October 12, 2023 (Motion).

The Complainants assert the following grounds for reconsideration:

(1) Order No. 2023-736 is contrary to the plain, unambiguous language of Section 58-5-10(4) of the South Carolina Code. Motion, pp. 1-9, ¶ 1.

(2) Order No. 2023-736 is contrary to Commission precedent. Motion, pp. 9-11, ¶ 2.

(3) Order No. 2023-736 erroneously relies on a finding that Defendants do not bill their tenants directly. Motion, pp. 12, ¶ 3.A.

(4) The Commission erroneously finds that Defendants' water and sewer billing "is designed to recover the actual cost of water and sewer service through an allocation method provided on a not-for-profit basis" and is "pass-through billing." Motion, pp. 12-15, ¶ 3.B.

(5) The Commission erroneously finds that Defendants "did not possess or take possession of the water." Motion, pp. 15-16, ¶ 3.C.

In addition to the above-listed alleged errors of the Commission, the Complainants also request additional discovery, without any further explanation.

For the reasons herein, the Commission denies the Motion to Reconsider and denies the request for additional discovery by the Complainants.

II. APPLICABLE LAW

Pursuant to S.C. Code Ann. § 58-5-330, a party may apply within twenty (20) days of service of the Order to the Commission for a rehearing in respect to any matter determined in the proceeding. The Commission received a timely filed Motion for Reconsideration pursuant to S.C. Code Ann. Regs. 103-825 and S.C. Code Ann. Regs. 103-854. Under S.C. Code Ann. Reg. 103-825(4):

> A Petition for Rehearing or Reconsideration shall set forth clearly and concisely:
> (a) The factual and legal issues forming the basis for the petition;
> (b) The alleged error or errors in the Commission order;
> (c) The statutory provision or other authority upon which the petition is based.

S.C. Code Ann. Reg. 103-825(4) (2012). "The purpose of a petition for rehearing [or reconsideration] is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing [or reconsideration] is not just to have the case tried ... a second time." *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234, 238 (1933); *see also, Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Further, "[t]he purpose of a Petition for Rehearing is not intended as a procedure for rearguing ... [a] case merely because the non-prevailing parties disagree with the original decision." *In re BellSouth BSE, Inc.*, Docket No. 97-361-C, Order No. 98-66 at 1-2. Rather, petitions for rehearing or reconsideration are to allow the Commission to identify and correct specific errors and omissions in its orders. Nor can a party raise issues in a motion to reconsider that could have been presented prior to the decision on the merits or that are raised for the first time in a petition for rehearing. *See Kiawah Prop. Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E. 2d 481, 482 (Ct. App. 1990); *Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995); *McGee v. Bruce Hosp. Sys.*, 321 S.C. 340, 468 S.E.2d 633 (1996).

> [T]he party challenging a PSC order must establish that (1) the PSC decision is not supported by substantial evidence and (2) the decision is clearly erroneous in light of the substantial evidence in the record. *Patton*, 280 S.C. at 291, 312 S.E.2d at 259; *Greyhound Lines, Inc. v. South Carolina Pub. Serv. Comm'n*, 274 S.C. 161, 262 S.E.2d 18 (1980).

Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). A Petition for Rehearing or Reconsideration shall set forth clearly and concisely the factual and legal issues forming the basis for the petition, the alleged error or

errors in the Commission Order, and the statutory provision or other authority upon which the petition is based.

III. DISCUSSION AND FINDINGS OF FACT

Based on record, the Commission makes the following findings:

1. Order No. 2023-736 is consistent with the plain language of S.C. Code Ann. section 58-5-10(4).

2. The Commission did not err in its decision and findings of fact in Order No. 2023-736 by considering the following factors:

a. The consideration of directly billing tenants;

b. Determination that the tenants were billed using an allocation method on a not-for-profit basis; and

c. Determination that the Defendants did not possess or take possession of the water.

3. Order No. 2023-736 is consistent with Commission precedent.

4. The Complainants fail to demonstrate that the Commission's decision and Order is unsupported by the evidence or embodies arbitrary or capricious action as a matter of law.

IV. EVIDENCE AND DISCUSSION FOR FINDINGS OF FACT

The Complainants assert that the Commission erred by ruling "contrary to the plain, unambiguous language of Section 58-5-10(4) of the South Carolina Code." Motion, pp 1-9, ¶ 1. For the reason stated below, the Commission concludes the Complainants have failed to show that the Commission erred in its determination.

A. Findings of Facts 1-2(a-c):

1. Consistency With Plain Language of S.C. Code section 58-5-10(4)

The Complainants contend that the Commission erred in Order No. 2023-736 by ignoring the plain language of the statute by adding an exception to the statutory definition of a public utility. The Complainants assert the Commission evaluated the characteristics that indicate whether an entity is engaged as a "public utility," rather than finding the Defendants were a "public utility" under the definition in provided in S.C. Code Ann. section 58-5-10(4). "The construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason." *Hall v. United Rentals, Inc.*, 371 S.C. 69, 81, 636 S.E.2d 876, 883 (Ct. App. 2006) *quoting Risinger v. Knight Textiles,* 353 S.C. 69, 72, 577 S.E.2d 222, 224 (Ct.App.2002) (*quoting Vulcan Materials Co. v. Greenville County Bd. of Zoning Appeals,* 342 S.C. 480, 496, 536 S.E.2d 892, 900 (Ct.App.2000)).

The Commission made its decision by applying the literal meaning of the terms of the statute. The Commission evaluated the qualities of entities that constitute "furnishing" and "supplying" water and sewer, which is consistent with the plain language of the statute. Section 58-5-10(4) reads, in part:

> The term "public utility" includes every corporation and person delivering natural gas distributed or transported by pipe, and every corporation and person furnishing or supplying in any manner heat (other than by means of electricity), water, sewerage collection, sewerage disposal, and street railway service, or any of them, to the public, or any portion thereof, for compensation. . . .

S.C. Code Ann. section 58-5-10(4) (2015). The plain language of the statute, clearly dictates that a "public utility" must "furnish" or "supply" a public service in order to be

considered a "public utility." It is the obligation and duty of the Commission to judicially and consistently apply state and federal statutes and regulations in the matters before it. The most consistent way to apply legal standards is by establishing and evaluating characteristics for consideration of satisfaction of the standard.

The Complainants disagree with the Commission's conclusion that an entity engaged in submetering is not a utility. The Complainants assert that there is no basis in the law, or in the record, for the Commission to read an exception into Section 58-5-10(4). The Complainants further allege that such an exception is not present in, and not supported by, the statutory text. The Commission does not read an exception into the statutory definition of a "public utility," but rather applies a consistent and objective evaluation to determine if an entity is a "public utility." In considering whether an entity is a "public utility," the Commission found and concluded that, in the context of water, sewer, or both, the Defendants:

(1) do not have water or sewer submetering infrastructure in either apartment building at issue;

(2) contracted with a third-party to perform billing services and neither directly billed tenants nor contracted directly with a utility provider for service to tenants;

(3) recovered the actual costs of water and sewer services to its tenants through an allocation formula method on a not-for-profit basis;

(4) do not have any monopoly rights over a service area;

(5) do not own any large, capital-intensive utility infrastructure;

(6) do not seek or obtain an authorized[1] rate of return on the pass-through billing;

(7) never take possession of the water; and

(8) lack the ability to disconnect the water or sewer service to an individual tenant for non-payment.

Order No. 2023-736, pp. 9-10; Motion, pp. 2-3.

The Commission, in evaluating the above-listed characteristics of Defendants, is applying the standard dictated by S.C. Code Ann. section 58-5-10(4) clearly and consistently. The Complainants' Motion alleges that the Commission committed error in Order No. 2023-736 for the use of standardized criteria to determine whether an entity is a "public utility." The Commission notes that the Complainants attempt to demonstrate error in Order No. 2023-736 for the use of standardized criteria to determine if an entity is a "public utility." However, the Complainants cite authority using standardized criteria to discredit the use of standardized criteria by the Commission:

> Hempling, Regulating Public Utility Performance 14–15 ("[A public utility's franchise relationship] has seven distinct dimensions: . . . 7. Just and reasonable rates: The utility's right to charge rates set by the regulator, designed to provide a reasonable opportunity to earn a fair return on equity investment."); Phillips, The Regulation of Public Utilities 110 ("[P]ublic utilities have four rights that are largely the result of their special status. First, **public utilities have the right to collect a reasonable price for their services.** Regulatory authorities may not force such a business to operate at a loss.").

Motion, p. 5 (emphasis added). Moreover, not only have the Complainants illustrated that there are standard criteria which ought to be considered characteristic of a "public utility,"

[1] Order No. 2023-736 referenced the language asserted by the Defendants (a "guaranteed rate of return") Affidavit of Andrew Gordon, p. 2, ¶7. The Commission notes that a regulated utility would seek an *authorized* rate of return, rather than a *guaranteed* rate of return.

but Complainants also quote a standard specifically absent from the present case. The authority presented by the Complainants is distinguishable from the present case. Defendants have not sought "to collect a reasonable price for their services" but rather seek only to remain revenue neutral for service being provided by another entity. This is accomplished by recouping from the tenants only the cost of service charged to the Defendants by the service provider.

The Complainants rely on *Anchor Point, Inc. v. Shoals Sewer Co.*, 308 S.C. 422, 418 S.E 2d 546 (1992), which is distinguishable from the matter at hand. In *Anchor Point, Inc.*, the homeowners' association owned and operated the sewer plant system. In that case, the Court considered whether, under S.C. Code Ann. section 58-5-10(4), a nonprofit organization created to provide sewerage to condominiums was a public utility subject to Commission regulation. *Id.*, 308 S.C. at 424–25, 418 S.E.2d at 547–48. The South Carolina Supreme Court held that, "an entity was a public utility despite providing sewerage on a not-for-profit basis." *Id.*, 308 S.C. 422, 426, 418 S.E.2d 546, 548 (1992). In the instant case, the Respondents do not own or operate the water or sewer system.

Anchor Point, Inc. is a factually different scenario. There, it was not a mere submetering arrangement; rather, the entity in question owned and operated the sewer plant system. *Id.*, 308 S.C. at 424, 428. As the Commission found here, pointedly differentiating this case from *Anchor Point*, "Defendants [] do not own any large, capital-intensive utility infrastructure." Order No. 2023-736.

2. Reliance on Findings

The Complainants argue that the Commission erred in making irrelevant and unsupported findings. Motion, p. 11, section III. For the reasons stated in the previous

section of this Order, and as discussed below, the criteria established by the Commission are relevant to the determination of whether an entity is engaged as a "public utility" under the definition in S.C. Code Ann. section 58-5-10(4).

a. Consideration of Direct Billing to Tenants

In making a determination as to whether the Respondents are engaged as a "public utility" under South Carolina law, the Commission not only looked at the billing arrangement between the Complainants and Respondent, but also considered factors such as: whether the Respondents have sewer submetering infrastructure; whether Respondents recover actual costs on an allocation, not-for-profit basis; whether Respondents have monopoly rights over any service area, have capital intensive utility infrastructure, or seek a rate of return on the pass-through billing of water and sewer services; and whether Respondents ever take possession of the water or have the ability to disconnect water or sewer service to a resident for nonpayment. In issuing Order No. 2023-736, the Commission evaluated the parties' filings and the evidence of record and determined that Respondents are not engaged as a "public utility" under section 58-5-10(4).

The Complainants argue that the consideration of the billing arrangement between a submeterer and its tenants is not relevant to the determination of whether the submeterer is a "public utility." The Commission, as described in Order No. 2023-736 and herein, considers a number of criteria when determining whether an entity is a "public utility." The Commission may place differing significance upon a single criterion based upon the record. As part of its determination, the Commission may find certain criteria to be more informative in the determination of whether an entity is a "public utility." An entity that has not invested in the staff or infrastructure to bill tenants for water is less likely to be

engaged as a "public utility." Alternatively, an entity that has significant staffing and infrastructure to facilitate in the collection, tabulation, and issuance of bills is more likely to be engaged as a "public utility." Examining whether an entity conducts its own billing or contracts with third parties is relevant to whether the subject entity is engaged in a function of providing public utility service. While perhaps not dispositive when considered in isolation, it is not irrelevant as a matter of fact or law. The totality of the evidence, as applied to S.C. Code Ann. Section 58-5-10(4), demonstrates that Defendants are not a "public utility" under the laws of the State.

b. Determination That Tenants Were Billed on an Allocation, Not-for-Profit Basis

The Complainants alleged that, "[T]here 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." Motion p. 12, (Emphasis added). The Complainants cite to the same undisputed evidence of record that the Commission accepted and relied upon in its finding. While the Complainants' request for additional discovery will be addressed in a later section of this Order, it is worth noting that Complainants request additional discovery to determine whether the Respondents' water and sewer billing operated on a pass-through basis. This argument fails as a matter of fact.

Additionally, Complainants raise an argument in their Motion that billing water usage for the common area and for the mutual benefit of tenants is evidence that Defendants are operating as a public utility. As discussed in Order No. 2023-736, the allocation of water used for the common grounds of the tenants' dwelling for mutual benefit of the tenants does not invalidate a pass-through arrangement, whether allocated to the tenants

via a water and wastewater assessment, through incorporation into the rental rate directly, or any other lawful mechanism. Order No. 2023-736, p. 16.

c. Determination that Defendants Did Not Possess or Take Possession of the Water

The Complainants assert that the Commission did not make a clear finding, based on fact, which proves that the Defendants did not have possession of the water. *See* Motion p. 15. The Complainants state, "[e]mploying the Commission's reasoning on possession, one is left struggling to conceive of how any entity could be a water or sewerage utility." Petition, pp. 15-16.

In Order No. 2023-736, the Commission found:

> While the water did move through pipes owned by Respondent into the rented dwellings of the tenants, it cannot be said that Defendants assert exclusive domain over the water or sewer supplies. Defendants undisputedly did not have the ability to control the flow of water or sewer service in a tenant-specific capacity and therefore could not exercise control of the commodities.

Order No. 2023-736 p. 17. Simply put, as the Respondents do not have a method to control the flow of water to the specific recipient – whether for failure to pay for a service or other reasons – the Respondent does not have control or possession of the commodity. The language originally employed by the Commission is argued by the Complainants as an "inconceivable" result. The Commission holds that if the entity does not have a method to control the flow of water to the specific recipient – whether for failure to pay for a service or other reasons – then the entity does not have control or possession of the commodity.

B. Finding of Fact 3:

The Complainants have alleged that the Commission did not follow prior Commission precedent, citing to a single and specific Order: Order No. 1999-307, which found that a submeterer is a regulated utility. However, Order No. 1999-307 was vacated by the Commission in Order No. 2003-214. "Since submeterers of water and wastewater do not meet the definition of a "public utility" under our statutes, this Commission does hereby deny and dismiss the Rules to Show Cause issued by us. Further, and following this conclusion, we hereby vacate Order No. 1999-307. . ." Order No. 2003-214. Thereafter, the Commission has consistently interpreted the term "public utility" not to include submeterers. *See, In re Rule to Show Cause on Submeterers*, Docket No. 2001-485-WS, Order No. 2003-214 (2003); *In re Seahorse*, Docket No. 2008-192-WS, Order No. 2008-725; In re Quail Pointe Apartments, Docket No. 2007-228-G, Order No. 2008-853. Activities which measure the commodity and provide billing functions do not make a submeterer a public utility.

Moreover, Complainants fail to acknowledge the prior Commission decisions enumerated by Order No. 2023-736. "The Commission has considered the same arguments set forth by the Complainants in Docket No. 2001-485-WS, Order No. 2003-214; Docket No. 2008-192-WS, Order No. 2008-725; and Docket No. 2007-228-G, Order No. 2008-853." Order No. 2023-736. The Commission correctly found that the Respondents are not operating a public utility which is supported by the record. The Complainants did not meet their burden to show the Commission's decision in Order No. 2023-736 is not supported by substantial evidence or that the decision is clearly erroneous in light of the substantial evidence in the record.

C. Finding of Fact 4:

The Complainants do not show that the Commission erred in its decision by failing to base it on the evidence of record, or that there was a lack of evidence to support the Commission's decision. The findings of the Commission

> will only be set aside *if unsupported by substantial evidence. Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Substantial evidence is not a mere scintilla of evidence but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.

Anchor Point, Inc. v. Shoals Sewer Co., 308 S.C. 422, 425, 418 S.E.2d 546, 547–48 (1992) (emphasis added).

The allegations in the Complaint, and the evidence of record, clearly support the ruling by the Commission finding the Defendants are not a public utility. The Complainants rely upon the "Utility and Services Addendum" and Lease entered into with the Defendants. The Utility and Service Agreement clearly states that water and sewer "bills will be billed by the service provider to us and then allocated to you based on the following formula" using a third-party billing company called Conservice. Exhibit A to Complaint, filed February 22, 2022, ¶¶ 1.a. and 1.b. There are no allegations by Complainants that the Defendants owned or operated the service provider or any of the infrastructure. Consistent with the Commission's prior decisions the Defendants, through a third-party billing company, "merely measure the amount of flow of water or wastewater and provide billing functions." Order No. 2003-214. ("[S]ubmeterers of water and wastewater services do not meet the statutory definition of a 'public utility,' and should not therefore be regulated by this Commission as jurisdictional utilities, in that such submeterers do not actually 'furnish

or supply' the commodity, but merely measure the amount of flow of water or wastewater and provide billing functions." Order No. 2003-214, p. 10; "These activities of measuring the commodity and providing billing functions do not make submeterers 'public utilities' for purposes of regulation by this Commission." Order No. 2003-214, p. 10. For these reasons, the Complainants' Motion is denied.

D. Request for Additional Discovery:

In a single, unexplained line in its Motion for Reconsideration, the Complainants request additional discovery. Without any basis stated by the Complainants for a reasoning for how additional discovery would bear upon the disposition of the case by the Commission, the Commission denies the request for additional discovery.

The Complainants fail to identify any material facts that have not yet been discovered that could somehow support their claims. It is duty of the Complainants as the party requesting additional discovery to demonstrate the likelihood that further discovery will uncover additional relevant evidence. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). There is no demonstration by the Complainants that a likelihood exists showing further discovery will uncover additional relevant evidence and that the party is not merely engaged in a 'fishing expedition.' *Baughman v. AT&T Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 544 (1991). The record (i.e., the Complainants' pleadings) show that the parties conducted discovery and used this discovery to support their position. The Complainants do not identify any material facts in their Motion that have not yet been discovered that could somehow resuscitate their claims.

Additionally, a party cannot introduce new arguments not raised in the underlying case. "It is settled that '[a]n issue may not be raised for the first time in a motion to

reconsider.'" *Repko v. Cnty. of Georgetown*, 424 S.C. 494, 502, 818 S.E.2d 743, 748 (2018) citing *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009). The Complainants had ample opportunity to conduct discovery and did not file a motion to compel. For these reasons, the request is denied.

V. CONCLUSIONS OF LAW

Based upon the discussion set forth herein, and the record of the instant proceeding, the Commission makes the following Conclusions of Law:

1. The Commission did not err in the findings of fact nor conclusions of law made in Order No. 2023-736.

2. For the reasons set forth in Order No. 2023-736, the Complaint is properly dismissed and the Motion to Reconsider is denied.

3. No additional discovery has been justified by any party nor is necessary in this proceeding.

VI. ORDERING PROVISIONS

IT IS THEREFORE ORDERED:

1. The Motion for Reconsideration filed by the Complainants is denied.

2. The request for additional discovery made by the Complainants is denied.

3. This Order shall remain in force and effect until further action of the Commission.

BY ORDER OF THE COMMISSION:

Delton W. Powers, Jr., Vice Chairman
Public Service Commission of
South Carolina