THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2013-002492

SCPSC Docket No. 2013-42-S

Sensor Enterprises, Inc. and J-Ray, Inc., ... Appellants,

v.

Palmetto Utilities, Inc. and South Carolina Office of Regulatory Staff, ... Respondents.

INITIAL BRIEF OF RESPONDENT PALMETTO UTILITIES, INC.

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STATEMENT OF ISSUES ON APPEAL

I. **Did the Public Service Commission err in rejecting Appellants' alternative wastewater service rate design where the substantial evidence of record demonstrated that this would improperly allow Appellants to pay a non-uniform rate for the service and where Appellants failed to demonstrate the costs of such alternative and its effect on rates for other customers?**

II. **Did the Public Service Commission err in approving the rate design proposed by Respondents where it fairly distributed the undisputed revenue requirement of Palmetto Utilities, Inc. among its customer classes based upon an objective and measurable framework?**

III. **Did the Public Service Commission err in rejecting Appellants' proposed alternative rate design where Appellants raised the question of whether the strength of their wastewater discharge was the same as that of other customers but failed to demonstrate that this was the case?**

IV. **Did the Public Service Commission err in requiring that Appellants demonstrate the effect of their proposed alternative rate design on other customers where Appellants' bore the burden of demonstrating that their proposal resulted in just and reasonable rates for all customers?**

V. **Did the Public Service Commission err in failing to adopt the number of cars claimed to be served daily by Appellant J-Ray, Inc. for purposes of determining its single family equivalencies where the number proposed by Respondents is supported by substantial evidence of record and the Commission's decision was a proper exercise of judgment and discretion?**

STATEMENT OF THE CASE

On January 28, 2013, Palmetto Utilities, Inc. ("Utility" or "PUI") gave notice to the Public Service Commission of South Carolina ("PSC" or "Commission") of PUI's intent to file an application for an adjustment in its rates and conditions of service in accordance with S.C. Code Ann. § 58-5-240 (A) (Supp. 2012). On March 12, 2013, Utility filed an application with the PSC, pursuant to S.C. Code Ann. § 58-5-240 (Supp. 2012) and 10 S.C. Code Regs. 103-512.4.A (2012) and 103-712.4.A (2012), seeking an increase in its previously approved rate for

sewer service and for the approval of modifications to certain terms and conditions of its service. Appellants Sensor Enterprises, Inc. ("Sensor") and J-Ray, Inc. ("J-Ray") timely filed petitions to intervene as parties of record in the proceeding. The South Carolina Office of Regulatory Staff ("ORS") was automatically made a party of record pursuant to S.C. Code Ann. § 58-4-10 (B) (Supp. 2012).

On July 1, 2013, the Utility and ORS submitted to the Commission a settlement agreement reached between these two parties ("Settlement Agreement"). The PSC held a hearing at its offices in Columbia on August 13, 2013, for the purpose of receiving evidence from the parties. During this hearing, the PSC also provided Utility's customers the opportunity to testify as "public witnesses" and two of them did so. Subsequently, all four parties of record submitted proposed orders for the PSC's consideration.

On September 17, 2013, the PSC issued its Order No. 2013-660, granting Utility's application for rate relief in part as provided for by the terms of the Settlement Agreement. On October 7, 2013, Sensor and J-Ray filed a joint petition for rehearing and/or reconsideration pursuant to S.C. Code Ann. § 58-5-330 (Supp. 2013) and 10 S.C. Code Ann. Regs. 103-825(4)(a) and 103-854 (2012). Utility and ORS filed returns in opposition to this petition on October 11, 2013. On October 23, 2013, the PSC issued its Order No. 2013-771 denying the Appellants' petition. On November 22, 2013, Sensor and J-Ray served their Notice of Appeal to this Court from the Commission's orders.

On March 21, 2014, Sensor and J-Ray filed with the Commission a "Petition for Writ of Supersedeas and/or Equitable Stay" of "Commission Order No. 2013-669" (*sic*) pursuant to Rule 241(c), SCACR. By Notice dated March 24, 2014, Utility was directed to file and serve an

answer to this petition on or before April 25, 2014. Utility filed and served its answer to the petition on April 8, 2014. By its Order No. 2014-403 issued May 1, 2014, the Commission denied Appellants' petition for a writ of supersedeas or an equitable stay.

STATEMENT OF FACTS

Under Utility's previously approved rate schedule, and since 1979, the Commission has approved for PUI a rate design which permits the Utility to distribute its revenue requirement among its customers using an equivalency rating system whereby a flat monthly rate for sewer service is set for residential customers, and commercial customers are charged that monthly rate multiplied by the number of residential equivalents they bear in relation to a residential customer ("Single Family Equivalents" or "SFEs"). [Tr. p.332, ll. 5-16, R.__.] This commercial customer equivalency rating is determined by the amount of capacity a wastewater treatment system is required to have under Department of Health and Environmental Control ("DHEC") Regulation 61-67, Appendix A, in order to treat maximum daily, or "peak," flows from residential customers, and the various categories of other types of customers that a system may serve, expressed in gallons of wastewater per day. [Tr. p. 110, l.22 – p.111, l.8, R. __ ; Tr. p.62, l. 16 – p. 63, l.6.] The design capacity for a residence is 400 gallons per day, and the design capacity for the various categories of commercial customers is expressed in the number of gallons per capacity factor(s) for each type of commercial customer. [Tr. p. 11, l.23 – p. 112, l.9, R. __.] *See* 6 S.C. Code Regs. R.61-67, Appendix A (2012). A commercial customer capacity design factor can consist of a variety of items peculiar to the customer's type of business, including the number of seats in a dentist's office, the square footage of a building, the number of persons working in an office, *etc. See id.* [Order No. 2013-660 at 9. n.5, R. ___.] Most pertinent to the instant case, the capacity factors for a fast-food restaurant consist of the number of cars it serves

through any drive-thru facilities it may operate, and the number of seats it has at the service premises. *See* R. 61-67 Appendix A, subparts FF.1 and FF.3. [Order No. 2013-660 at 9, R. ___.] The number of each commercial customer's capacity design factors is multiplied by the design flow for that factor (expressed in gallons), and the product of that calculation is divided by the single family residential design flow of 400 gallons per day. *Id.*, subpart CC. [Order No. 2013-660 at 9, n.5.] This constitutes the commercial customer's total SFEs. The commercial customer charges are determined by multiplying the approved monthly residential service charge by the number of SFEs. [Order No. 2013-6660 at 9, n.5, R. __; Tr. p.112, ll. 9-15, R__.] Each commercial customer is charged based on a minimum of one (1) SFE, even where the total number of SFEs arising from the aforementioned calculation is less than one. [Order No. 2013-660, at 9, n.5, R. ___; Order No. 2013-660, Ex. 1, p.8, R.___.]

Sensor and J-Ray are customers of Utility operating separate McDonald's restaurants in Utility's authorized service territory. [Order No. 2013-660, p. 2, R. __; Tr. p. 164, l.23 – p. 165, l. 1, R. __; Tr. p. 183, ll. 14-17, R.___.]. On March 5, 2013, Utility sent to all of its commercial customers a letter informing them that Utility had conducted a study of commercial utility accounts for the purpose of determining whether Utility was at that time collecting the correct charge for service based upon the equivalency factors for their commercial customer category under Appendix A to R. 61-67 and of the resulting number of SFEs attributable to that service. This letter also informed the Utility's commercial customers that this information would be used in Utility's upcoming rate relief filing with the Commission. [Tr. p. 128, l.14 – p. 131, l.15, R.___.] Additionally, the letter informed customers whether their monthly charges would be immediately increased or decreased as a result of the study and of the magnitude of any such increases, and requested that the customers contact Utility if they had any questions or comments

about the letter or its contents. [Hrg. Ex. 4, pp.1-2, R. __.] The Appellants acknowledged having received this letter from Utility. [Tr.p. 178, ll.10-14, R. __; Tr. p.191, ll. 1-19, R___.] Appellant Sensor thereafter contacted Utility to inquire about the number of cars served at its drive-thru facility and the number of seats in its fast-food restaurant being used to calculate its equivalency rating. [Tr. p. 146, ll.16-22, R. __; Tr. p. 290, ll. 2-19, R. __; Hrg. Ex. 11, p.4, R. __.] Appellant J-Ray, however, did not respond to Utility's March 5, 2013 letter. [Tr. p. 290, ll. 20-21, R. __.]

As a result of its commercial account study, Utility determined that it had been under-charging Sensor and J-Ray for sewer service under the terms and conditions of Utility's previously approved rate schedule – primarily due to an incorrect count of cars served daily by Appellants' drive-thru facilities. Specifically, Utility determined that it had been charging Sensor for service based upon 11.59 SFEs and J-Ray based upon 24.45 SFEs, but that it should have been charging them based upon 133.8 and 171.4 SFEs, respectively. [Tr. p. ll. 6-24, R. __] Utility informed Appellants that their monthly charges for service would increase to reflect the correct charges, but that Utility would forego its right to back-bill Appellants for service at the correct charge. [Tr. p. 287, l.7 – p. 288, l.24, R. __; Hrg. Ex. 11, pp. 1-4, R___.] ORS reviewed the results of Utility's study in this regard and confirmed that Utility had been undercharging the Appellants for service based upon PUI's previously approved rates, and confirmed the correct number of cars served at the drive-thru facilities and seats within Appellants' fast-food restaurants. [Tr. p. 264, ll.6-15, R.__; Tr. p. 281, ll. 3-16, R. __.] At the previously approved rate of $33 per SFE, Sensor's correct monthly charge was $4,415.40 and J-Ray's correct monthly charge was $5,656.20. [Tr. p. 291, ll. 7-10, ll. 13-16, R. __.] However, Utility had been billing Sensor $382.47 per month and J-Ray $806.85 per month. [Tr.p. 294, ll. 4-7, R. __.]

In addition to its written notices issued to commercial customers, Utility also conducted a series of "Town Hall" meetings for its customers to discuss the bases for the upcoming rate relief filing that Utility had noticed to the Commission and the amount of the proposed increase. [Tr. p. 131, l.3 – p. 133, l.17, R. __; Hrg. Exh. 4, pp. 3-45, R. __.] Representatives of ORS were present at this meeting and available to meet with customers. [Tr. p.132, ll.4-5, R. __.] A representative of Sensor attended one of these Town Hall meetings. [Tr. p.179, ll. 21-24, R.___.]

Subsequent to its correspondence with its commercial customers and Town Hall meetings, Utility filed its application with the Commission for an increase in its monthly residential service charge from $33.00 to $39.00, and a like increase in monthly commercial service charges per SFE. The proposed increase would have generated an additional $1,471,758 in annual revenues for Utility. [Order No. 2013-660 at 2, R. __.] ORS conducted an audit of Utility's books and records, and investigated Utility's compliance with Commission regulations pertaining to sewer utility service. [Tr. p. 230, ll. 1-19, R. __; Tr. p. 254, l 19 – p. 255, l. 2, R. __.] Thereafter, PUI and ORS reached a settlement on all issues in the case, including an agreement that Utility should receive an increase in its monthly residential service to $36.00, and a like increase to the monthly commercial charges per SFE. [Hrg. Ex. 1, R.__.] This increase, along with the accounting adjustments made by ORS and agreed to by Utility, would generate $609,897 in additional revenue for utility if it was approved by the Commission. [Order No. 2013-660 at 3, R. __.] More pertinent to the instant appeal, the Settlement Agreement provided for a modification to PUI's previously approved rate design which would reduce the gallons attributable to cars served by fast-food restaurant drive-thru facilities from 40 gallons, as provided in R. 61-67, Appendix A, Subpart FF.3, to 10 gallons per such car served. [Hrg. Ex.1 at pp. 2-3, para. 4; R. __.] This aspect of the Settlement Agreement reflected Utility's view that,

without some modification, the previously approved rate design in this specific regard would not result in a reasonable rate to fast-food restaurants with drive-thru facilities such as Appellants' [Tr. p. p. 291, l.1 – p.292, l.4, R. __; Tr. p. 312, l.12 – p. 313, l. 7, R. __], and was based upon a formula developed by Utility which took into account both average water consumption by fast-food restaurants and average wastewater discharge at Utility's treatment plant, adjusted by 20% to account for peak wastewater flow. [Order No. 2013-660, pp. 17-18, R. __; Tr. p. 314, l.22 – p. 315, l.24, R. __.] Unlike Appellants' alternative rate design proposal (*see* discussion at pp. 16-19, *infra*), the modification to PUI's previously approved rate design provided for in the Settlement Agreement applied to all fast-food restaurants served by Utility and not just Appellants. [Tr. p. 314, ll. 7-11, R. __; Tr. p. 332, ll. 4-13, R.__ .] The effect of this aspect of the Settlement Agreement was to reduce the number of SFEs attributable to cars served by fast-food restaurants with drive-thru facilities by 75%. [Tr. p. 314, ll. 11-15, R. __.] For Sensor, this meant a reduction in its total SFEs from 133.8 to 41.9 and for J-Ray this meant a reduction in its total number of SFEs from 171.4 to 48.77. [Tr. p. 292, ll. 5-8, ll. 13-15, R.__.] At Utility's previously approved rate of $33.00 per SFE, this would have meant that Sensor would have been required to pay $1,382.70 per month and J-Ray would have been required to pay $1,609.41 per month. [Tr. p. 285, ll. 5-7, ll. 13-15, R. __.]

Appellants did not challenge any of the accounting adjustments made to PUI's proposed allowable test year expenses and revenues as proposed by ORS and reflected in the Settlement Agreement [Tr. p. 243, l.4, R. __], and conceded that Utility was entitled to rate relief. [Tr. p.21, ll. 11-5, R. __; Order No. 2013-660, p.22, n.10, p. 24; R. __, __.] Rather, Appellants proposed that the Commission either adopt an alternative rate design for PUI, or further modify its currently approved rate design beyond the modifications proposed in the Settlement

Agreement. [Order No. 2013-660, p. 10-11, pp. 26-27, R. __, R. __.] As to the former, Appellants proposed that they be charged for service based upon their metered water potable water consumption as measured by the City of Columbia or the Town of Winnsboro. [Id., pp. 10-11, R. __; App. Proposed Order pp. 5-6, R. __.] As to the latter, Appellants proposed that the Commission retain the rate design utilizing the equivalency system based upon Appendix A to R. 61-67 provided for in Utility's previously approved rate schedule, but further modify it to reduce the capacity design flows attributable to cars served by fast-food restaurant drive-thru facilities from forty (40) gallons to two (2) gallons per day, and to reduce the capacity design flows attributable to seats in fast-food restaurants from forty (40) gallons to ten (10) gallons per day. [Order No. 2013-660, pp. 11-12, R.__; App. Proposed Order pp. 5-6, R. __.] Appellants did not, however, provide to the Commission a proposed monthly sewer service rate which would result from utilizing their first proposed alternative rate design. [Order No. 2013-660, p.27, R.. __; Tr. p. 292, l.24 – p. 293, l.4, R. __; Tr. p. 302, ll. 20-23, R.__; App. Proposed Order pp. 5-7, R. __.] Nor did Appellants provide information concerning the availability or cost to Utility of obtaining metered water consumption from the various water utilities which serve Appellants or any of PUI's other sewer customers. [Order No. 2013-660, p. 27, R__.] Appellants were further unable to state what impact their alternative rate design would have on rates to be charged to other customers. [Tr. p. 222, ll. 11-25, R.__.]

Moreover, the effect of the further modifications to the existing rate design proposed by Appellants would have been to reduce their monthly charges below the amounts that Utility had been collecting from Appellants prior to the discovery that Utility had been under-billing Appellants under the previously approved rate schedule. [Order No. 2013-660, p.30, n.13, R.__; Tr. p. 293, ll. 4-16, R. ___; Tr. p. 302, l.25 – p. 303, l.3, R. ___.] Thus, notwithstanding

undisputed increases in Utility's investment and expenses, Appellants' recommended modifications to the previously approved rate design effectively sought for themselves a rate reduction. Even though Appellants had been made aware of the basis for the reduction in gallons attributable to cars served reflected in the Settlement Agreement well before its filing on July 1, 2013, [Tr. p. 9, ll. 9-23, R. __; Tr. p. 25, ll. 7-19, R. __; Tr.p. 270, ll. 1-23. R. ___], and had an opportunity to address in surrebuttal testimony the terms of the Settlement Agreement and evidence presented in support of it by Utility, they did not do so. [Order No. 2013-660, p. 19, R. __.]

The Commission rejected Appellants' proposals for an alternative rate design or for further modifications to the per car and modifications to the per seat equivalency factors for fast-food restaurants, and adopted the monthly residential service rate of $36.00 and the monthly commercial service rate of $36.00 per SFE as provided for in the Settlement Agreement. [Order No. 2013-660, pp. 26-31, R. __.] The effect of this rate and rate design was to allow Utility to earn $609,897 in additional annual revenues and resulted in an operating margin of 17.98%. Order No. 2013-660, p. 22, R. __.] The Commission also denied the petition for rehearing and reconsideration submitted by Sensor and J-Ray and this appeal followed. [Appellants Pet. for Reh., R. ___; Order No. 2013- ; R. __.] The Commission subsequently denied Appellants' petition for a supersedeas or equitable stay which sought an order which would allow Sensor and J-Ray to pay $401.52 and $806.86, respectively (roughly the amount of their bills prior to Utility's commercial customer study), for monthly sewer service during the pendency of this appeal. [Appellants' Pet. for Writ of Supersedeas and/or Equitable Stay, R. __.]

SUMMARY OF ARGUMENT

The sole disputed issue in this appeal is the appropriate rate design for Utility. Sensor and J-Ray did not contest that Utility's capital investments and expenditures had increased since its last rate relief proceeding; that Utility was entitled to rate relief and should be allowed to earn $609,897 in additional revenue; that this amount is generated by the monthly service rate of $36.00 per residential customer and per SFE for commercial customers; or that the resulting operating margin of 17.98% was reasonable. Rather, Appellants sought from the Commission approval of an alternative rate design which would have allowed Appellants to be charged for monthly sewer service based upon their individual potable water consumption without proposing an actual rate which would be imposed upon them or demonstrating the impact of such a rate design on the rates to be imposed on Utility's other customers. Failing that, Appellants proposed further modifications to the previously approved rate design beyond those reflected in the Settlement Agreement, the undisputed effect of which would have been to allow them to pay less for monthly sewer service on a prospective basis than they were being (under) charged for under Utility's previously approved rate. Unsurprisingly, the Commission rejected Appellants' proposals and adopted the modifications to Utility's previously approved rate design proposed by Utility and ORS. This appeal does not (indeed, cannot) involve any "overarching policy question" about the Commission's choice of rate design (Br. of App. at 5). Rather, it simply involves the question of whether the Commission's orders under appeal are consistent with the standards provided by law and enunciated by this Court which, *inter alia*, require that they be lawful, supported by substantial evidence of record, and not result from arbitrary or capricious action by the Commission. Utility submits that the Commission's orders meet these standards and are therefore required to be affirmed.

ARGUMENT

STANDARD OF REVIEW

The legal principles governing the scope of review of orders of the Commission are set out in S.C. Code Ann. § 1-23-380 (Supp. 2013) and embodied in a number of decisions of this Court. The Commission's decisions in ratemaking matters are entitled to deference and will be affirmed if they are supported by substantial evidence. *Utilities Services of S.C., Inc. v. Office of Regulatory Staff*, 392 S.C. 96, 103, 708 S.E.2d 755, 759 (2011) (citing *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010)). This Court has defined substantial evidence as "relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." *Id.* (citing *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998)). Further, substantial evidence is not "evidence viewed blindly from one side, but ... evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Welch Moving & Storage Co.*, 301 S.C. 259, 261, 391 S.E.2d 556, 557 (1990) (quoting *Palmetto Alliance v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). This Court will not substitute its judgment for that of the PSC where there is room for a difference of intelligent opinion. *Id.* (citing *Kiawah Prop. Owners Group v. Public Serv. Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004)). Similarly, this Court may not substitute its judgment for that of the Commission with respect to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(5) (Supp. 2013). However, the Court may reverse or modify the Commission's determination if Appellants' substantial rights have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are affected by error of

law, are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record, are arbitrary or capricious, or are characterized by an abuse of discretion. *See* S.C. Code Ann. § 1–23–380(5) (Supp.2013). Reversal or modification of a PSC decision may be appropriate if an appellant makes a convincing showing that the decision constitutes arbitrary or capricious action as a matter of law, *Chemical Leaman Tank Lines, Inc. v. S.C. Pub. Serv. Comm'n*, 258 S.C. 581, 521-22, 189 S.E.2d 296, 297-98 (1972), or is affected by other error of law. *Utilities Services of S.C., supra.* An arbitrary or capricious decision is one that "is without rational basis, is based only on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules of principles." *See Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 183, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985), cited in part with approval in *Taylor v. Nix*, 307 S.C. 551, 555-6, 416 S.E.2d. 619, 621 (1992). This Court has held that "[r]atemaking is not an exact science, but a legislative function involving many questions of judgment and discretion." *Hamm v. S.C. Pub. Serv. Comm'n,* 294 S.C. 320, 322, 364 S. E. 2d 455, 456, n.1 (1988) (citing *Parker v. S.C. Pub. Serv. Comm'n,* 280 S.C. 310, 312, 313 S. E. 2d 290, 291 (1984)). "In reviewing the decision of the Commission under a statute for which it is charged with the administration, the Commission is 'the 'expert' designated by the legislature to make policy determinations regarding utility **rates**; thus, the role of a court reviewing such decisions is very limited.'" *Friends of Earth v. Public Serv. Comm'n of S.C.*, 387 S.C. 360, 371, 692 S.E.2d 910, 916 (2010) (internal citations omitted) (emphasis in original).

I. THE PUBLIC SERVICE COMMISSION DID NOT ERR IN REJECTING APPELLANTS' ALTERNATIVE RATE DESIGN WHERE THAT WOULD HAVE IMPROPERLY ALLOWED THEM TO PAY A NON-UNIFORM RATE AND WHERE APPELLANTS FAILED TO DEMONSTRATE THE COSTS OF SUCH ALTERNATIVE AND ITS EFFECTS ON OTHER CUSTOMERS.

Appellants begin their first argument to this Court by contending that "the fairest sewer rate would be based upon metered water usage." Br. of App. at 6. According to Appellants, "an alternative rate design that would fairly account for the actual amount of wastewater discharged .... based upon metered water usage" would be appropriate and should have been adopted by the Commission. *Id.* Appellants specifically contend that because (1) "they would be willing to compile their water bills and provide them on a regular basis directly to PUI"; (2) water consumption information is being provided by a municipal utility to another public utility that is an affiliate of PUI's that has a wastewater rate design based upon water consumption; and (3) Section 12 of Utility's rate schedule permits it to review commercial customer water consumption to determine whether actual wastewater flows exceed the capacity design guidelines under Appendix A of R. 61-67, "there is no substantial evidence of record to support the PSC's determination that volume billing is not feasible" and that such determination is "arbitrary and capricious." Br. of App. at 6-8. Utility disagrees.

This Court has held that "the PSC's duty to fix 'just and reasonable' rates includes a duty to 'distribute fairly the revenue requirements of the utility.'" *Utilities Services of S.C.*, 392 S.C. at 113, 708 S.E.2d at 764 (citing *Seabrook Island Prop. Owners Ass'n v. S.C. Pub. Serv. Comm'n*, 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991)). The Commission must determine the "fairness" of the "structure of [a] requested rate increase" (*i.e.*, a rate design) "in the context of an objective and measurable framework." *Id.*, 392 S.C. at 113-114, 708 S.E.2d at 764-765. This Court has heretofore recognized that the use of single family equivalents to set just and

reasonable rates required by statute can be an appropriate means of fairly distributing a utility's revenue requirement among its customers if it is supported by substantial evidence of record. *See Seabrook Island Prop. Owners Ass'n*, 303 S.C. at 499, 401 S.E.2d at 675 (citing S.C. Code Ann. §58-5-290 (1976)). This Court has also held that uniform rates among customer classes are generally preferred and that the burden of establishing the reasonableness of a non-uniform rate lies with the party challenging uniformity. *August Kohn and Co., Inc. v. Public Serv. Comm'n of S.C.*, 218 S.C. 28, 30, 313 S.E.2d 630, 631-632 (1984). Exceptions to this general rule "are not frequent and are generally the product of special facts and circumstances." *Id.*, 218 S.C. at 30-31, 313 S.E.2d at 632.

Before responding to Appellants' contentions enumerated above, Utility would note that the underlying premise of Appellants' argument in this regard is, as it was below, faulty. Appellants assert that "design of a wastewater treatment system and estimating flow from particular customers are completely different purposes.' Br. of App. at 5. Appellants further assert that, because their potable water consumption is less than the capacity design flows for their wastewater discharges, they are being improperly charged for the collection, transportation, treatment and disposal of more wastewater than they can produce. Br. of App. at 6. These assertions fail, however, to recognize that the wastewater capacity design guidelines under Appendix A to R. 61-67 are for **peak, maximum daily flows** which reflect the amount of wastewater that the Utility might expect to receive in its system if **all** customers were to discharge wastewater from every toilet, sink, shower, tub, floor drain, or other plumbing fixture all at one time and are not intended to track potable water consumption. [Order at pp. 18-19, R. __; Tr. p. 123, ll. 10-15, R. __; Tr. p. 289, ll. 19-24, R. __; Tr. p. 298 l.27 – p. 299, l.3, R. __; Tr. p. 347, l.23 – p. 348, l.14; R. __.] Further, these design guidelines are not intended, have not

been asserted by Respondents, and have not been found by the PSC to reflect actual or even average customer wastewater flows. To the contrary, the evidence of record is that these design guidelines have been employed by the Commission for PUI, and at least nine (9) other sewer utilities, as a means of distributing the costs of an entire system among customer classes by reference to the amount of capacity that a utility is required to construct in its system to accommodate the highest potential flow from every class and category of customer. [Tr. p. 268, ll. 8-23, R. __; Tr p. 332, ll. 1-4; Order No. 2013-660 at 19, R. __.] The use of an equivalency system to distribute a utility's revenue requirement is a policy determination that the Commission has made regarding utility rates that is fully within its discretion. *See Friends of the Earth, supra.*[1] As noted by the Commission, any of PUI's customers can make the assertion that their actual discharge of wastewater is less than their consumption of potable water and differences in individual customer premises occupancy levels and usage patterns will always cause some level of subsidization in and between customer classes. [Order at. 19, 28, R. __.][2] This is so simply because the rate design adopted by the Commission is uniform and the distribution of Utility's revenue requirement is made upon the same basis for all customer classes. The capacity construction guidelines found in Appendix A to R. 61-67 are not intended to predict, much less establish, potable water consumption patterns or customer specific daily or

[1] At hearing, witnesses for Utility acknowledged that the adoption of a. rate design is a matter within the Commission's discretion and stated the willingness of Utility to accept an alternative rate design as long as it permitted Utility to recover its revenue requirement. [Tr. p. 305, ll. 4-12, R. __;Tr. p.312, ll. 2-11, R. __;Tr. p. 345, l. 15 – p. 346, l.4, R. __.]

[2] Any customer could also argue that their consumption of potable water is lower than that of other customers such that flat monthly rates should not be used. In fact, one residential customer of Utility, Ms. Camp, made this argument to the Commission. [Order No. 2013-660 at 4-5, 27-28, R. ___.] Again, this does not mean that the Commission's choice of rate structure is unsupported by evidence of record or law, but simply reflects a permissible exercise of the Commission's discretion to make a policy determination in choosing a rate design. This argument does beg the question, left unanswered by Appellants below and in this Court, as to what service rate should be imposed under an alternative rate design. *Compare* Br. of App. at 12 ("Sensor and J-Ray respectfully request that this Court ... remand to the PSC for further determination of the appropriate rate to be charged commercial customers') and Tr. p. 222, ll. 15-25, R. __ (acknowledgment of Appellants' witness that Sensor and J-Ray did not propose a rate to be charged to customers if their positions were adopted by PSC).

average wastewater discharge amounts, and the Commission is not required to adopt a rate structure that rises to this level of exactness. *Hamm, supra.* Appellants' suggestion otherwise – which underlies all of its arguments – should be rejected by the Court without more.

A. The Substantial Evidence of Record Supports the Commission's Determination to Deny Appellants' Request for a Non-Uniform Rate For Themselves.

J-Ray and Sensor assert that because they were willing and able to provide to Utility records concerning their metered water usage, the PSC's determination that a rate design based upon water consumption was not feasible is unsupported by substantial evidence. Br. of App. at 6-8. Appellants' argument in this regard ignores both the evidence of record in, and the law applicable to, this case and must therefore be rejected under the standard of review governing this appeal.

Initially, Appellants' contention that substantial evidence does not exist to support the Commission's determination that "PUI does not have access to water billing records or the right to meter [municipal water] flow" (Br. of App. at 6-7) collapses of its own weight when viewed in light of their subsequent assertion that the Commission erred in not recognizing that Appellants can supply their own water consumption records. If any evidence had been adduced which demonstrated that Utility did have access to its customers' municipal water billing data or municipal water facilities, it would have been unnecessary for Appellants' to offer their own billing records for purposes of calculating their bills under their proposed alternative rate design.

Furthermore, the record below clearly demonstrates that the Commission had before it uncontradicted evidence that Utility did not have access to municipal water consumption records or facilities. [Tr. p. 316, ll.3-9, R.__; Tr. p. 324, ll. 10-12, R.__; Tr. 348, ll. 16-22, R.__.] Similarly, the evidence of record reflects testimony pertaining to several other issues attendant to

Utility billing for sewer service based upon municipal water consumption records – including potential billing disputes between customers and municipal water providers, billing delays, and lack of Commission jurisdiction over municipalities -- which further informed the Commission regarding the infeasibility of Appellants' alternative rate design [Tr. p. 348, l.22 – p. 349, l. 15, R. __.] Appellants wholly failed to address, much less refute, this testimony. [Order No. 2013-660 at 19, R. __.]

Finally, and as noted by the Commission, the fact that J-Ray and Sensor are willing to provide their metered water consumption does not establish a basis upon which an individual rate for Appellants should be set. [Order No. 2013-660 at 27, n.11, R.___.] To the contrary, any customer could provide its water consumption records to Utility and therefore Appellants' willingness to do so is not evidence of "special facts and circumstances" required by *August Kohn and Co., Inc.* warranting a rate specific to J-Ray and Sensor. As noted by this Court in *August Kohn*:

> "[t]he difficulties attendant upon making approximately accurate allocations and fixing fair or satisfactory zone or other differing rates are manifest, and **are not to be undertaken unless there are such differences in circumstances and conditions** between different parts of the territory served as to justify departure from uniform rates."
>
> In essence, the appellant in this case seeks a segregation and allocation of the plant expansion and modification fee in accordance with the proportion of expected improvements which Wrenwood subdivision would receive as part of the Carolina Water Services area. This is the premise which underlies the appellant's complaint that the record discloses no evidence of direct or anticipated benefit to Wrenwood.

Id., 281 S.C. at 30, 313 S.E.2d at 631 (internal citation omitted) (emphasis supplied). Below, Appellants sought to have segregated the costs associated with treatment of their actual amount of wastewater flow measured by reference to their potable water consumption and the setting of a rate for themselves on that basis. [Tr. p. 170, ll. 14-24, R. __; Tr. p.185, ll. 7-14, R. __;Tr. p.

202, ll. 6-9, R. __;Tr. p. 217, l.21 - p. 218, l.6, R. __; App. Prop. Order at 5, R. __.][3] This is effectively the same proposal made by the customer in *August Kohn and Co., Inc.* that was rejected by this Court – *i.e.*, that it only be billed based upon the extent of its use of the utility's facilities and not based on a distribution of the utility's costs of operation for all facilities among all customers. *Id.*[4] Adopting a rate design specifically for Appellants, without having any evidence upon which to determine the charge to be imposed on Appellants or other customers, can hardly be said to constitute the "objective and measurable framework" needed for fairly distributing Utility's revenue requirement as provided for in *Utilities Services of S.C., supra.* To the contrary, Appellants' alternative rate design proposal is necessarily subjective and immeasurable as it was focused only upon Appellants' desire to either limit or avoid for themselves the impact of admittedly necessary rate relief.

Accordingly, the fact that Sensor and J-Ray were willing to provide Utility with their personal water consumption data does not establish the existence of a special fact or circumstance justifying a non-uniform rate. The Commission's refusal to provide Appellants with such a rate therefore cannot have been arbitrary and capricious as it was a proper

[3] Notwithstanding their position below that a rate should be set for themselves, Appellants now ask this Court to remand to the Commission for a determination of commercial (but not residential) customer rates. See Br. of App. at 12. In addition to being an unwarranted attempt at "a second bite at the apple," *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 32, 507 S.E.2d 328, 338 (1998), this request is at the least an implicit acknowledgment by Appellants that the Commission can only set a rate for a class of customers when there is evidence of record to support that rate, and that Appellants failed to assert a rate resulting from any such evidence below. Further, this request effectively seeks piecemeal rate-making in which commercial rates are set in isolation of residential rates. No such request was made by Appellants below and should therefore not be considered now. *See Wilder Corp. v. Wilkie*, 330 S.C. 71, 497 S.E.2d 731 (1998).

[4] Appellants did not seek reconsideration of the Commission's ruling that they failed to meet their burden of proving the existence of special facts and circumstances under *August Kohn and Co., Inc.* [Order No. 2013-660 at 27, n.11, R. __; App. Pet. for Reh., R. __.] Thus, even if Appellants had raised this issue in their brief, it would not have been preserved for review. *See Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). Because Appellants have not appealed that ruling by raising it as an issue in the instant appeal it has become the law of the case. *See Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000).

application of *August Kohn* to facts established by substantial evidence of record, and thus, cannot have violated the standard enunciated by *Deese* and *Taylor*, *supra*.

B. The Commission's Determination that a Rate Design Based Upon Water Consumption Was Not Feasible is Supported by Substantial Evidence of Record.

The Commission concluded that the Appellants' alternative rate design was not feasible because Utility did not have access to the requisite water consumption information and because the costs of obtaining the information – which would have to be passed on to all of Utility's customers – was unknown. [Order No. 2013-660 at 27, R. __.] Appellants assert that the Commission's determination in this regard is unsupported by substantial evidence of record. Br. of App. pp. 6-7. Utility disagrees.

Of course, the fact Appellants were willing to provide their water consumption records cannot establish that all (or even any) of its other customers would be willing to provide this information to Utility. *Cf. Utilities Services of S.C.*, 392 S.C. at 111, 708 S.E.2d at 763 (holding that testimony from customers in one neighborhood regarding a lack of capital improvements "could offer no insight into whether [a] [u]tility made capital improvements in another neighborhood"). Because Appellants were not entitled to a non-uniform rate under *August Kohn*, consumption information for all customers would have been required in order for the Commission to give effect to the alternative rate design proposal of Sensor and J-Ray. Further, the question of the availability of metered water consumption records from the two municipalities supplying Appellants and the associated costs of obtaining that information was raised by Appellants, whose witness simply "assume[d] that a customer's metered water consumption is available at a reasonable cost." [Tr. p.213, ll. 16-18, R. ___.] In response, the Utility's witnesses testified that it did not have access to municipal water facilities which it could meter or the consumption records for its customers, and that the cost of obtaining that

information was unknown. [Order No. 2013-660 at 27, n.11, R.__.] The Appellants did not provide any evidence to rebut this testimony by Utility's witnesses, even though they had that opportunity. [Order No. 2013-660, p. 19, R. __.] [5]

The Commission is entitled to give testimony such weight as it deems appropriate. *See* 1-23-380(5), *supra*. Thus, in view of the testimony of the parties' witnesses, it was entirely appropriate for the Commission to determine that Utility did not have access to customer metered water consumption information and that the cost of obtaining that information was unknown. Accordingly, the evidence supports the Commission's determination that Appellants' alternative rate design, which was admittedly dependent upon the availability of water consumption information at a reasonable cost, was not feasible under the circumstances of this case. Only by viewing the evidence blindly from one side could it be said that the Commission's determination that the alternative rate design proposed by Sensor and J-Ray was not feasible for

[5] Appellants also contend that because a PUI witness testified "that a sister company to PUI, Palmetto Richland County, does in fact utilize 'volume billing' and bases waste water (*sic*) billing upon metered water usage," this is evidence that contradicts the PSC's finding that Appellants' alternative rate design was not feasible, and thus, renders it unsupported by substantial evidence. Br. of App. at 6-7. Initially, PUI would note that this assertion was not made below to the PSC in Appellants' petition for rehearing or reconsideration to the Commission as is required under S.C. Code Ann. §58-5-330 (Supp. 2013) ("[t]he application must set forth specifically the ground on which the applicant considers the decision or order to be unlawful") and 10 S.C. Code Regs. 103-828.A.(4)(a-b)(2012) ("[a] Petition for Rehearing or Reconsideration shall set forth ... the factual and legal issues forming the basis for the petition [and] [t]he alleged error or errors in the Commission order"). [App. Pet. for Reh. or Recon. At 1-2, R. __.] Thus, the Commission was not given an opportunity to rule on this assertion, and this ground of appeal is therefore not preserved for review. *Pelican Bldg. Centers, supra*. Moreover, to accept Appellants' argument in this regard would require this Court to view the evidence of record blindly from one side in contravention of its holding in *Welch, supra*. This is so because Utility's witness explained that PUI's affiliate, a separate public utility regulated by the PSC which held the right to obtain water consumption information from the City of Columbia, was able to obtain that information pursuant to a contractual obligation of the City undertaken in connection with a sale of a sewer system by the City to the affiliate. This witness explained that the customers served by that former City system were already being billed for sewer based on their water consumption and a term of the contract involved in that transaction required that the customers continue to be billed in that manner after PUI's affiliate acquired the system from the City. The witness further testified that the City's provision of this water consumption data did not involve a cost that would be passed on to the affiliate's customers in rates. [Tr. p. 324, l.14 – p. 325, l.11, R. __.] In addition to constituting evidence that a reasonable person might conclude supports the determination that Appellants' alternative rate design was not feasible because PUI did not have access to water consumption data for all of its customers, the foregoing testimony from PUI's witness demonstrates clearly why information regarding another public utility's ability to obtain metered water consumption data would not have offered the Commission any insight into the feasibility of PUI obtaining that information from the Town of Winnsboro – much less the City of Columbia. *Utilities Services of S.C., supra.*

these two reasons is unsupported by substantial evidence. This the Court may not do and Appellants' argument in this regard must therefore be rejected. *See Welch, supra*; *Utilities Services of S.C., supra.*

C. Section 12 of Utility's Rate Schedule Does Not Render the Commission's Decision Unsupported by Substantial Evidence, Arbitrary, or Capricious.

Section 12 of Utility's rate schedule authorizes it to require a commercial customer to provide water consumption records in circumstances where Utility suspects that the customer's wastewater discharge is exceeding the design maximum capacity flow guidelines under Appendix A to R.61-67. [Order No. 2013-660, Order Exhibit 1 at 12, R. __.][6] If it is determined that actual wastewater flows exceed these design guidelines, Utility has the right to recalculate the commercial customer's equivalencies and bill the customer accordingly. [Id.] Appellants contend that because this rate schedule provision would "permit[] PUI to increase billing based upon actual usage, but not to require [Utility] to base billing upon actual usage, [it] is unfair to the customer." Br. of App. at 8. Appellants further contend that Utility's ability to impose higher charges based upon evidence of increased water consumption is evidence that Appellants' proposed alternative rate design is feasible, and that the Commission's refusal to adopt their alternative rate design in light of this provision is both unsupported by substantial evidence of record and is arbitrary or capricious. Br. of App. at 7-8. Utility disagrees for several reasons.

First, Appellants' reading of Section 12 is inconsistent with its plain language. Appellants erroneously assert that Section 12 "permit[s] PUI to increase its billing based upon metered

[6] This provision, which was contained in Utility's previously approved rate schedule, is applicable to commercial customers only by virtue of the fact that residential customers are not billed on the basis of an SFE, but are billed a flat monthly charge under Sewer Rate Schedule Section 1.a, while commercial customers are billed the flat monthly rate multiplied by the number of SFEs under Sewer Rate Schedule Section 1.b. [Order No. 2013-660, Ex. 1, p. 1, R. __.] By its terms, Section 12 only applies to customers whose rates are determined based upon the number of SFEs – i.e., commercial customers. [Order No. 2013-660, Ex. 1, p. 12, R. __.] This simply reflects the Commission's permissible policy choice – which is supported by substantial evidence of record – to structure rates in a manner in which there may be some subsidization of residential customers by commercial customers. [Tr. p. 316, ll. 10-22, R. __;Tr. p. 350, l. 5- p. 351, l.7, R. __.]

water usage." Br. of App. at 8. This is patently incorrect as the provision clearly states that Utility may only recalculate a commercial customer's equivalency rating and bill based upon a recalculated equivalency if it is determined that actual wastewater flows or loadings exceed the design wastewater flows or loadings under Appendix A to R.61-67. [Order No. 2013-660, Ex.1 at 12, R. __.] The provisions of a utility rate schedule approved by the Commission have the force and effect of law and are enforceable to the same extent as a regulation adopted by the Commission. *Carroway v. Carolina Power & Light Co.*, 226 S.C. 237, ___, 84 S.E.2d 728, 731 (1954). The language of an agency regulation is required to be given its "plain and ordinary meaning without resort to a subtle or forced construction to limit or expand the regulation's operation." *Byerly v. Connor*, 307 S.C. 441, 444, 415 S.E.2d 796, 799 (1992). Because the plain meaning of Section 12 requires a determination by Utility that a commercial customer's wastewater flows exceed the peak capacity design guidelines for that customer before its charges may be increased, and does not simply permit Utility to increase charges based upon water consumption, Appellants' argument to the contrary is without merit as a matter of law.

Second, underlying Appellants' argument in this regard is an unspoken, but illogical, premise – *i.e.*, if it makes sense for Utility to obtain the water consumption records of a given commercial customer as an aid in determining whether that customer's wastewater discharges exceed maximum capacity design flows, it perforce also makes sense that Utility is in a position to economically obtain water consumption records from all customers as a means of fairly distributing its revenue requirement among all customers. This premise simply ignores the differences between the two circumstances. As the plain language of rate schedule Section 12 reflects, Utility may occasionally desire to review a commercial customer's water consumption records for the purpose of ascertaining whether that customer's wastewater discharge is

exceeding the capacity design guidelines under Appendix A of R. 61-67 and may require that the customer provide this information. [Order No. 2013-660, Ex. 1, p. 12, R. __.] Thus, this provision of the approved rate schedule is simply another tool – in addition to physical inspection of a commercial customer's premises – available to Utility in the event that it suspects that a given commercial customer's wastewater flow is exceeding the peak, maximum design guideline upon which its charges by Utility are based. [Tr. p. 351, ll. 8-15, R. __.]

Third, the evidence of record supports only the conclusion reached by the Commission regarding the infeasibility of Appellants' alternative rate design. Notwithstanding the plain meaning of Section 12, Appellants argue that "if it is fair and reasonable to permit PUI to increase its billing based upon metered water usage, the converse, i.e., to permit a customer to decrease its billing upon metered water usage, must also be fair and reasonable." Br. of App. at 8. However, and as acknowledged by Appellants' expert witness at hearing, the water consumption of a residential customer very likely bears no direct relation to its actual wastewater discharge. [Tr. p. 223, ll. 1-7, R. __ .] Moreover, the undisputed evidence below demonstrated that the unknown cost of obtaining or monitoring all customer water consumption would have to be passed on to all customers, would potentially benefit only a few customers, and would have the effect of destroying the uniform rate structure which this Court recognized to be preferable in *August Kohn*. [Tr. p. 351, l. 16 – p. 352, l.6, R.__.] Given these facts, a reasonable mind could conclude that Section 12 of Utility's rate schedule did not demonstrate that obtaining water consumption information from all of PUI's customers was feasible, and the Commission's determination in this regard is therefore supported by substantial evidence. *See Porter, supra*; *Welch, supra.*

Finally, because the Commission's determination that Appellants' proposed alternative rate design was not feasible is supported by substantial evidence of record and is in no way contrary to the plain meaning of Section 12 of Utility's approved rate schedule, it cannot constitute an arbitrary or capricious decision as defined by *Deese*, *supra* and *Taylor*, *supra*. The rational basis for the Commission's determination is found in the evidence of record demonstrating that Utility did not have access to customer water consumption records or the right to meter municipal water facilities. Further, this determination was not based simply upon the Commission's will, but reflected a reasoned exercise of judgment that Appellant's proposed alternative rate design had implications for other customers as to the cost of Utility's service which Appellants simply failed to address in their testimony. The adequate determining principles for its determination were supplied by this Court's decisions in *Utilities Services of S.C.* requiring an objective and measurable framework for determining the fairness of a rate structure, and in *August Kohn* placing the burden of demonstrating the appropriateness of a non-uniform rate structure on the party seeking it. Therefore, the Commission's decision was neither arbitrary nor capricious, and Appellants are not entitled to relief under §1-23-380(5)(f).

II. THE PUBLIC SERVICE COMMISSION DID NOT ERR IN APPROVING THE RATE DESIGN PROPOSED BY RESPONDENTS WHERE IT FAIRLY DISTRIBUTED THE UNDISPUTED REVENUE REQUIREMENT OF PALMETTO UTILITIES, INC. AMONG ITS CUSTOMER CLASSES BASED UPON AN OBJECTIVE AND MEASURABLE FRAMEWORK.

The Commission approved a modification to Utility's previously approved rate design employing equivalencies based on R. 61-67, Appendix A, Subpart FF.3 that was proposed by Utility and ORS and reduced the capacity factor for cars served by fast food restaurants with drive-thru facilities from forty (40) gallons to ten (10) gallons per car. [Order No. 2013-660 at

25, R. __.] The effect of this was to reduce the per car equivalency rating by 75% [Id.] The Commission based its decision in this regard on a formula developed by PUI which "took into account both water consumption by fast-food restaurants and wastewater discharge at [Utility's treatment plant], as well as an adjustment of 20% to address peak flow demands." [Id. at 17, R. __.] The Commission noted that Utility's witness explained the inputs into this formula which generated "the ten (10) gallons per car equivalency factor" proposed by Respondents and the calculation producing that result under the formula was entered into evidence. [Id. at 18, R.__; Hrg. Ex. No. 3, R. __.] Among these inputs were estimated averages of daily water consumption and cars served by drive-thru restaurants based upon data compiled by Utility from various sources, one of which was Sensor. [Tr. p. 146, ll.19-24, R. ___;Tr. p. 314, l.25 – p. 315, l. 24, R. __; Tr. p. 324, l.11 – p. 325, l.3, R. __.] Again, Appellants offered no testimony to rebut the evidence adduced by Respondents in this regard. [Order No. 2013-660 at 19, R. __.]

In adopting Respondents' proposal in this regard, the Commission rejected Appellants' proposal for a greater reduction in the per car capacity factor from forty (40) gallons to two (2) gallons per car served under R.61-67, Appendix A, Subpart FF.3 (and a reduction in the per seat capacity factor under R.61-67, Appendix A, Subpart FF.1 which Appellants do not pursue in this appeal) on the ground that the evidence presented by Appellants in support of their proposal "failed to specify what rates should be used to generate the additional annual revenue found appropriate for [Utility]" and therefore did "not provide the objective and measurable framework required for rate design." [Order No. 2013-660 at 27, 30, R. __.] The Commission further observed that Appellants had adduced no testimony to refute the evidence presented by Utility which demonstrated that adoption of Respondents' proposed further modifications to the rate

design would allow Sensor and J-Ray to pay less than what they had been paying for service previously. [Id. at p.16, R. __; p. 30, n.13, R.__.]

Appellants now assert that the Commission's determination in this regard cannot have been supported by substantial evidence because Utility did not utilize as inputs into its formula "the actual number of cars and water consumption for Sensor and J-Ray", and instead, relied upon "compiled estimates" for these inputs. Br. of App. at 9. Appellants further assert that in view of Utility's use of estimates, "the PSC should have granted PUI's calculation little credibility" and that by "ignor[ing] the overwhelming weight of evidence as to actual documented usage of water per car" the Commission's determination was arbitrary and capricious. *Id.* Utility submits that this argument – assuming that it is preserved for review[7] -- is without merit for a variety of reasons.

Initially, Utility asserts that the underlying premise of this argument is that Appellants were entitled to have the Commission set a rate designed specifically for Sensor and J-Ray instead of setting a uniform rate. This is so because the number of cars served and amount of water consumed by Appellants on a daily basis would have had little (if any) measurable impact in a formula using average figures to develop a capacity factor for cars served by all fast-food restaurants as was proposed by Utility and agreed to by ORS. As discussed above, the

[7] The second issue on appeal presented by Sensor and J-Ray asserts that the Commission erred in not weighing the evidence regarding their proposal for modifications to the rate design in their favor and that this error renders the PSC's decision unsupported by substantial evidence and arbitrary and capricious. Br. of App. at 9. However, Appellants' petition for rehearing or reconsideration to the Commission did not mention the evidence presented by Utility in rebuttal that challenged Appellants' proposed modifications to the rate design and supporting the modification to the rate design proposed by Respondents. Rather, Appellants contended only that the Commission erred in adopting the rate design proposed by Respondents because Appellants had presented evidence they contended supported a further modification to that rate design. [App. Pet. Reh. At 2, paragraph 4, R. __.] Section 58-5-330 required Appellants' petition for rehearing or reconsideration to set forth with specificity the ground upon which the PSC's order was asserted to be unlawful, and 10 S.C. Code Regs. R.103-828.A.(4)(a-b)(2012) required them to set forth the factual and legal issues that formed the basis for their petition and alleged errors committed by the Commission's order. Because Appellants failed to assert below that the competing testimonies of the parties' witnesses should have been weighed in their favor, the Commission was thus not given an opportunity to rule on this assertion and this ground of appeal is therefore not preserved for review. *Pelican Bldg. Centers, supra.*

Commission correctly concluded that Appellants had failed to meet their burden of demonstrating their entitlement to a rate different than that applicable to other similarly situated customers under *August Kohn*, *supra*. Having failed to meet that burden, the testimony of Appellants' expert witness estimating a reduced capacity factor of two (2) gallons per car based on Appellants' individual water consumption and claimed car counts cannot have supplied the Commission with a reason to reject Utility's estimates used in determining an appropriate capacity factor for cars served by all fast-food restaurants. Moreover, because Appellants failed to specify a rate that would result from their proposal, no objective and measurable framework existed under which the Commission could conclude that Appellants' proposal resulted in a fair distribution of Utility's revenue requirement as required by *Utilities Services of S.C.*, *supra*. Thus, the determination by the Commission to reject Appellants' proposal is supported by substantial evidence as required by *Porter*, *supra*, and is not arbitrary or capricious under the standard supplied by *Deese*, *supra* and *Taylor*, *supra*.

Furthermore, the weight to be given on an issue of fact is a judgment within the exclusive province of the Commission under S.C. Code Ann. §1–23–380(5). The average water consumption of a fast-food restaurant and the number of cars served by its drive-thru facilities is a question of fact and the Commission was entirely within its right to give weight to the testimony of Utility's witness, but not Appellants' witness, in this regard. The estimate of Utility's witness was based on a number of sources regarding these inputs into its formula, while the estimate of Appellants' witness was based only upon their individual water consumption figures and car counts. The Commission's decision to give more weight to Utility's evidence in this regard is supported by substantial evidence and is unassailable under S.C. Code Ann. §1-23-380(5).

Finally, the testimony of Appellants' witness cannot have supplied substantial evidence to support the contrary conclusion now sought by Sensor and J-Ray. This is so because Appellants' witness failed to rebut any of the testimony of Respondents' witnesses regarding the inputs into the formula used by Utility to determine an appropriate average number of gallons of wastewater per car to be assigned fast-food restaurants with drive-thru facilities. [Order No. 2013-660 at 19, R. __.] To consider the testimony of Appellants' witnesses without considering the unrefuted testimony of Respondents' witnesses would clearly contravene this Court's holding in *Welch, supra.*

III. THE PUBLIC SERVICE COMMISSION DID NOT ERR IN REJECTING APPELLANTS' PROPOSED ALTERNATIVE RATE DESIGN WHERE APPELLANTS RAISED THE QUESTION OF WHETHER THE STRENGTH OF THEIR WASTEWATER DISCHARGE WAS THE SAME AS OF OTHER CUSTOMERS, BUT FAILED TO DEMONSTRATE THAT THIS WAS THE CASE.

In adopting Respondent's proposed rate design, the Commission observed that it "treats similarly situated commercial customers uniformly, while recognizing that differences exist in the pollutant strength of wastewater and the volume of wastewater flow between commercial and residential customers." [Order No. 2013-660 at 29, R. __.] Appellants assert that because "no credible evidence in the record support[s]" this statement, the PSC necessarily relied upon "mere speculation," and therefore, the Commission's decision in this regard is unsupported by substantial evidence and is arbitrary and capricious. Br. of App. pp. 9-10. Appellants' argument in this regard is without merit both as a matter of law and fact.

The portion of Appellants' brief addressing this argument begins with a reference only to a portion of the testimony given by one of Utility's witnesses in rebuttal, which Appellants contend "presumed that the 'strength' of [Appellants'] wastewater stream is greater than that of

the average residential household." Br. of App. at 9.[8] Appellants fail to mention, however, that it was Appellants' own expert witness who raised the issue of the pollutant strength of wastewater flow from their fast-food restaurants in his direct testimony recommending a rate structure for Appellants based solely on water consumption – which recommendation was admittedly based upon this witness's assumption that the pollutant levels in the wastewater streams of commercial and residential customers were the same. [Tr. p.199, l.25 – p. 200, l.4, R. __; Tr. p.213, ll. 1-4, R. __.] As the proponent of an alternative rate design for themselves based on their water consumption, it was Appellants' burden to demonstrate the existence of special facts and conditions that justified their proposal under *August Kohn, supra.* Thus, Appellants' contention that it was somehow Utility's burden to "produce evidence that Appellants or any other commercial customer's wastewater discharge is of any different strength" (Br. of App. at 10) is contrary to law.

Furthermore, because the opinion of Appellants' expert witness was based upon only his assumption that Appellants' "strength of flow" was not different than that of a residential customer, no facts exist in the record with respect to the strength of the wastewater flow from Appellants upon which his opinion could be based. *See Hamm v. Southern Bell Tel. and Tele.*

[8] The testimony of Utility's witness cited by Appellant contains no such presumption, but reflects a factual basis for that witness's testimony – *i.e.*, his knowledge that because Appellants are required to maintain minimum standards of cleanliness established and overseen by DHEC, Appellants will be cleaning cooking equipment, utensils, kitchens, dining areas and sanitary facilities on a more frequent basis than would a homeowner, who is not bound by such oversight standards. Thus, the witness stated that Appellants discharge greater concentrations of commercial grade detergents or cleansers than would a residential customer, and therefore, cause Utility to incur a higher cost of treatment than would a typical residential customer. [Tr. p. 301, l.27 – p. 302, l.11, R. __.] *Cf.* S.C. Code Regs. R.61-25.V.A.1 (requiring cleaning of certain cooking equipment and utensils on a daily or more frequent basis). Furthermore, Appellants reference to only one portion of the testimony of one of Utility's witnesses in support of their argument in this regard (Br. of App. at 9-10) ignores other evidence of record in this regard. Two of Utility's other witnesses also testified that the strength of flow was a consideration in determining the appropriateness of Appellants' alternative rate design and both of them also testified that the pollutant strength of wastewater from a fast-food restaurant is greater than that of the typical residential customer. [Tr. p. 292, ll. 19-24, R. __; Tr. p. 314, ll.16-20, R. __; Tr. p. 315, l.25 – p. 316, l.3, R.__; Tr. p. 336, ll.15-19, R. __; Tr. p.347, ll. 8-18, R. __; Tr. p.359 , ll. 8-13, R. __.] Further, the ORS witness addressing the appropriateness of Appellants' proposed alternative rate design confirmed that the level of cleaning required for a fast-food restaurant added to Utility's cost of providing service. [Tr. p.271, l. 23- p.272, l.4, R. __.]

Co., 302 S.C. 132, 394 S.E.2d 311 (1990) (holding that expert opinions are of no probative value unless an evidentiary showing of the facts upon which the opinion is made). Accordingly, as a matter of law the Commission cannot have erred in rejecting Appellants' proposed alternative rate design as it was based upon an expert opinion that was not supported by evidence. Therefore, the PSC's determination in this regard could not have been arbitrary or capricious as it reflected an application of pertinent law to the facts presented to it to reach the result that it did. *Deese*, *supra* and *Taylor*, *supra.*

In arguing that the Commission's determination regarding the relative pollutant strengths of residential and commercial wastewater is unsupported by substantial evidence, Appellants assert that the testimony of one of Utility's witness that "Appellants use commercial cleansers that would increase the strength of [their] waste water (*sic*) stream" was "mere speculation [that] is not probative." In support of this contention, Appellants cite *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 41 S.E.2d 872 (1947). There, this Court held that proof of the employee status of a workers compensation claimant could not be based "**entirely** on surmise, conjecture and speculation" as that had no probative value. *Id.*, 210 S.C. at 179, 41 S.E.2d at 875 (emphasis supplied). For several reasons, *McDowell* does not compel the result urged by Appellants.

First, the Utility witness referred to by Appellants (who, again, was one of three witnesses testifying in rebuttal to the assumption made by Appellants' expert that all wastewater streams have the same pollutant strength), stated clearly that the basis for his testimony was the fact that restaurants are required to meet DHEC standards for cleanliness that require Appellants to frequently clean their kitchen facilities, equipment and utensils while residential customers are not subject to such standards. It is not surmise, conjecture or speculation that Appellants are required by law to frequently (at least daily in some instances and constantly in others) clean

their utensils, equipment, and kitchen facilities used in the operation of their business. *See* R.61-25.V.A.1, *supra.* Similarly, it is not surmise, conjecture or speculation that more frequent cleaning leads to more discharges of cleansers or detergents into Utility's system, but a reasonable inference to be drawn from the fact that more frequent cleaning is required of Appellants under DHEC standards. *Cf.* S.C. Code Ann. §1-23-380 (5), *supra* (allowing for reversal of an agency determination where an inference is unsupported by substantial evidence). Further, it is not surmise, conjecture or speculation that the typical residential customer does not need to clean his/her kitchen facilities, utensils, and equipment as frequently as do Appellants, but a reasonable inference to be drawn from the fact Appellants serve in excess of one thousand meals per day while the typical residential customer does not.[9] Moreover, even assuming that the witness's testimony was "mere speculation" as contended by Appellants, the Commission's conclusion in this regard was not based **entirely** on this evidence as the DHEC standards – specifically referred to by the witness – support the conclusion drawn. Thus, *McDowell* does not compel the result sought by Appellants.

Second, the question of whether the testimony of Utility's witnesses regarding this point can constitute the reliable, probative and substantial evidence of record required by S.C. Code Ann. §1-23-380(5)(e) is arguably not governed by *McDowell* as that case was decided long before the Administrative Procedures Act was enacted by the General Assembly in 1977. *See* 1977 S.C. Act No. 176. This Court has held that "[t]he substantial evidence rule ... means that we will not overturn a finding of fact by an administrative agency 'unless there is **no reasonable**

[9] Appellants acknowledge serving meals to in excess of one thousand customers per day via drive-thru facilities alone. Br. of App. at 12. This Court may take notice of the fact that a typical residential customer would not serve this number of meals per day. *See State v. Squires*, 311 S.C. 11, 426 S.E.2d 738 (1992) (taking appellate judicial notice of certain infrared science used by the DataMaster blood alcohol test); *Hemingway v. Small*, 284 S.C. 42, 324 S.E.2d 335 (Ct. App. 1984) (reaffirming the ability of an appellate court to take original judicial notice of adjudicative findings, but limiting the ability to matters which are indisputable) (quoting *Masters v. Rodgers Dev. Group, S.C., Inc.*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984)); *see also Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) (quoting *Masters* in the context of judicial notice of a summons and complaint).

probability that the facts could be as related by a witness upon whose testimony the finding was based.'" *Nucor Steel v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 322 (1992) (citing *Lark v. Bi-Lo, Inc.*, 276, S.C. 130, 135-36, 276 S.E.2d 304,307 (1981)) (emphasis added). In view of the testimony of Utility's witness regarding the application of DHEC standards to Appellants' food service businesses, Utility submits that a reasonable mind could reach the conclusion drawn by the Commission that "differences exist in the pollutant strength of wastewater" among different classes of customers. Accordingly, there is no basis for this Court to find that there is no reasonable probability that the facts could be as related by this witness and the testimony of the three witnesses on behalf of the Respondents regarding this point therefore constitutes substantial evidence. *Lark v. Bi-Lo, supra.*

Finally, even assuming that *McDowell* applies, Utility's witnesses were not engaging in speculation in stating "that Appellants' use commercial cleansers." Br. of App. at 10. This is so because a witness for Sensor testified that it acquired cleaning products from "K-Chemicals," which is a manufacturer approved by Sensor's franchisor (McDonald's), and that these products were used for floor cleaning, soap sink, and towel sanitization. [Tr. p. p. 168, ll. 12-22, R. __; Tr. p. 180, ll. 15-19.] Furthermore, the statement of Appellants' expert witness (that he assumed the pollutant strength of flow for all customers of Utility was the same) supports a reasonable inference that differences can exist. Thus, substantial evidence of record exists to support the Commission's statement that "differences exist in the pollutant strength of wastewater" independent of the testimony of Utility's witnesses.

IV. THE PUBLIC SERVICE COMMISSION DID NOT ERR IN REQUIRING THAT APPELLANTS SPECIFY THE NON-UNIFORM RATE THAT THEY SOUGHT FOR THEMSELVES AND DEMONSTRATE THE EFFECT OF THEIR PROPOSED ALTERNATIVE RATE DESIGN ON OTHER CUSTOMERS WHERE APPELLANTS BORE THE BURDEN OF DEMONSTRATING THAT THEIR PROPOSAL RESULTED IN JUST AND REASONABLE RATES FOR ALL CUSTOMERS.

The Appellants concede that they "did not propose a specific rate to be charged" or "evaluate the effect the rate billed to them would have on the overall revenue stream of PUI," but assert that it was Utility's burden – at least to some extent -- to calculate the rate which would result from the adoption of their two proposals. Br. of App. at 11.[10] Unsurprisingly, Appellants cite no authority for this proposition as none exists. Moreover, Appellants' argument is contrary to law.

Initially, Utility submits that Appellants' fourth issue on appeal should not be considered by this Court. As noted by the Commission, the burden of establishing entitlement to a non-uniform rate was on Appellants under *August Kohn, supra.* [Order No. 2013-660 at 27, n. 11 and 28, R. __.] Appellants' brief does not assert any basis for a reversal of the Commission's conclusion in this regard or any authority for the proposition that all or a portion of Appellants' burden in this regard can, or should have been, shifted to Appellants. Because Appellants' argument is expressed only "in a short conclusory statement without supporting authority" it should be deemed abandoned and not considered by this Court. *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993).

[10] Without reference to any portion of Order No. 2013-660, Appellants assert that the Commission's order "states that it rejects Appellants' position because the Appellants failed to proposal (*sic*) an **alternate rate design**" and "fails to provide any authority for this foundation of its decision." Br. of App. at 11 (emphasis supplied). Appellants go on to assert that "[i]n fact, the Appellants did propose two alternate rate designs." *Id.* Neither of these statements are correct. The Commission's order states only that Appellants failed to propose a **rate** to be charged to Appellants or other customers as a result of their alternative rate design which would have been based upon customers' metered water consumption or as a result of their proposed further modifications to the previously approved rate design. [Order No. 2013-660 at 26-27, R. __.]

Even assuming that Appellants have not abandoned this issue, their argument is without merit. Of course, it was clearly the burden of Utility to persuade the Commission that the proposed modification to its previously approved rate design resulted in just and reasonable rates, *i.e.*, rates that fairly distribute among all customers the cost of Utility's service based upon some objective and measurable framework as required by *Utilities Services of S.C.*, *supra*. *See Hoffman v. Greenville County*, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963) ("[t]he burden of proof is upon the party who by the pleadings has the affirmative on the issue"). As discussed above, substantial evidence supports the Commission's effective conclusion that Utility met this burden as it found that the rates proposed by Utility were just and reasonable. The obligation of Utility to meet this burden does not, however, entitle Appellants to shift their burden of submitting evidence to substantiate their position that their alternative rate design, or their proposal for further modifications to the previously approved rate design, resulted in just and reasonable rates. *Cf. Reliance Ins. Co. v. Smith*, 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997) (holding that, as the finder of fact, the administrative law court may properly consider the failure of the party which does not bear the burden of proof to submit evidence substantiating its position).[11]

Appellants recognize that they bore some burden in connection with their proposals to the Commission as they contend that it was "arbitrary and capricious for the PSC to find that the Appellants **solely** shouldered this burden." Br. of App. at 11 (emphasis supplied). Utility submits that the Commission properly apportioned the parties' relative burdens under *August*

[11] In support of their argument, Appellants state that "PUI knew prior to this hearing that the Appellants would argue for these two alternate rate plan proposals." Br. of App. at 11. While this is true as a result of Appellants having pre-filed their direct testimony with the Commission as required by 10 S.C. Code Regs. 103-845.C (2012), Appellants were likewise aware before hearing that Utility was asserting that Appellants were required to state the specific rate they sought for themselves and the effect that would have on other customers. Appellants chose not to file surrebuttal testimony to address Utility's assertion in this regard. [Order No. 2013-660 at 19, R. __.] Accordingly, Appellants could not have been lured into any sense of complacency by this fact as their statement might be read to suggest.

Kohn. Moreover, as the finder of fact in this case, the Commission correctly concluded that in order to ascertain whether Appellants' alternative rate design or further modifications to Utility's previously approved rate design met the requirements of *Utilities Services of S.C., supra*, it was necessary for Appellants to specify the non-uniform rate they sought for themselves and the rate which would apply to all other customers. *Reliance Ins. Co. v. Smith, supra.* Appellants have therefore not made the convincing showing necessary for this Court to conclude that the Commission's decision in this regard constitutes arbitrary or capricious action as a matter of law and are therefore not entitled to relief in judicial review. *See Chemical Leaman Tank Lines, Inc., supra.*[12]

V. THE PUBLIC SERVICE COMMISSION DID NOT ERR IN FAILING TO ADOPT THE NUMBER OF CARS CLAIMED TO BE SERVED DAILY BY J-RAY, INC. FOR PURPOSES OF DETERMINING ITS SINGLE FAMILY EQUIVALENCIES IN VIEW OF THE SUBSTANTIAL EVIDENCE OF RECORD AND A PROPER EXERCISE OF THE COMMISSION'S JUDGMENT AND DISCRETION.

Appellants argue that the Commission "erred in accepting PUI's estimated car counts for J-Ray, Inc. despite the fact that J-Ray, Inc. presented testimony regarding the actual number of cars visiting the drive-through window of its restaurant each month." In support of this argument, Appellants assert that "PUI's estimates of cars at J-Ray's store cannot be a credible count" because J-Ray's witness testified to "an actual count[] based upon [his] personal knowledge," that "the only evidence upon which to base a decision" regarding the car count for J-Ray is the

[12] Appellants state at page 11 of their brief that the effect of the Commission's decision is that "all customers who are aggrieved by a rate increase" would be required to specify a just and reasonable rate and demonstrate the effect of this rate on other customers. Thus, Appellants assert, this would "preclude the majority of customers from ever intervening or filing complaints in rate cases." These statements are simply incorrect since, under *August Kohn, supra*, the only customers who would be required to make such a showing are those proposing a non-uniform rate such as Appellants.

testimony of its witness, and that a finding "contrary to [J-Rays' witness's] estimate would not be supported by substantial evidence and would be arbitrary and capricious." Br. of App. at 12. Utility submits that this argument is without merit.

Initially, Utility notes that Appellants' recitation of the evidence presented in this regard is one-sided and fails to discuss the evidence of record as a whole on this point. Appellants' assertion that Utility witness Melcher testified that "PUI estimated the number of cars for the J-Ray restaurant to be 1,635 per day" (Br. of App. at 11-12) is neither an accurate nor complete description of the testimony. This witness testified that Utility conducted a site inspection of J-Ray's business premises in connection with a commercial customer rate study Utility performed prior to the rate case filing, and communicated to J-Ray Utility's determination that the average number of cars being served by J-Ray was 1,400 per day. [Tr. p. 128, l.24 – p. 129, l.3, R. __; Tr. p. 287, ll.17-24; Hrg. Ex. 11, pp. 3-4.] This witness further testified that, as a result of a follow-up inspection conducted by ORS, and ORS's recommendation to apply a 20% peaking factor to average car counts, Utility's position was that the correct number of cars to be counted in determining the equivalency rating for J-Ray would be 1,635. [Order No. 2013-660 at 15, R. __; Tr. p. 290, ll. 2—25, R. __; Tr. p. 297, l.23 – p. 298, l.2, R. __.] In addition to the testimony of this PUI witness, a witness for ORS confirmed the 1,635 average car count for J-Ray, and further testified that J-Ray had "rebuilt [its] facility" but had not communicated that physical alteration to its premises at the "Town Hall" meeting Utility had conducted. [Tr. p. 275, l.18 – p. 276, l.12; R. __; Tr. p. 281, ll. 14-17.] Another witness for Utility confirmed that the number of cars served by J-Ray had increased significantly over the intervening years between the establishment of its account with Utility and the present. [Tr. p. 365, l.20 – p. 366, l.6, R. __; Tr. P. 366, l. 24 – p. 367, l.8, R. __.] In light of the foregoing, considering only Appellants' version of the

evidence presented would be improper. *Cf. Welch, supra.* Moreover, where there is conflicting evidence, this Court's standard of review defers to the Commission's findings. *Risher v. S.C. Dep't of Health and Envtl. Control*, 393 S.C. 198, 712 S.E.2d 428 (2011). Therefore, no error can exist in this regard.

Further, Appellants fail to assert that the Commission made a finding in this regard that is reviewable. Br. of App. at 11 ("the PSC appears to have accepted PUI's car counts"). The Commission's order makes no finding regarding the actual number of cars served by J-Ray, nor was it required to do so, since the issue in the case involved the establishment of just and reasonable rates for all of Utility's customers and not a rate specific to J-Ray (*cf. August Kohn*) and was not a complaint proceeding (*see* discussion at p. 38, *infra*). Furthermore, as this Court has held, ratemaking is not an exact science and the PSC is allowed to exercise judgment and discretion in determining rates. *Hamm, supra.* As the evidence of record reflects, the equivalency factors for commercial customers under the rate design adopted for Utility by the Commission can and do change. In arguing this issue on appeal, Appellants have not challenged the use of the 20% peaking factor recommended by ORS where daily car counts are based on an average. The rate design chosen by the Commission does not require the level of exactness Appellants now contend that J-Ray is entitled to receive with respect to the equivalency factors attributable to its service.[13] *Cf. Hamm v. S.C. Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) (holding that "absolute precision ...is not required" in determining allowable utility expenses for ratemaking purposes). In view of the foregoing, the Commission did not act in an arbitrary and capricious manner, but instead properly exercised its judgment and discretion in setting rates. No error can therefore result.

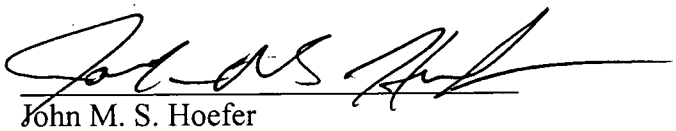
[13] As discussed above, J-Ray received the benefit of paying monthly charges to Utility based on SFEs determined using a car count significantly below what even J-Ray now acknowledges to be a correct daily car count.

Finally, even assuming that the Commission should have found the specific number of cars served daily to be counted in establishing the SFEs attributable to J-Ray in accordance with that Appellant's view of the evidence, its substantial rights cannot have been prejudiced as required by S.C. Code Ann. §1-23-380(5). Should J-Ray believe that an incorrect average number of cars served daily by its drive-thru facilities is being used by Utility to determine the SFEs attributable to J-Ray under the approved rate schedule, J-Ray has the ability to pursue its complaint to the Commission and obtain relief regarding any improper billing by Utility from and as of the date of the Commission's order in this matter. *See* S.C. Code Ann. §58-6-270 (Supp. 2013) and 10 S.C. Code Regs. 103-533 (2012).

CONCLUSION

For the reasons discussed above, Appellants have failed to demonstrate convincingly that the Commission's orders below were unsupported by the reliable, probative, and substantial evidence in the record or the result of arbitrary or capricious action. Accordingly, the decision of the Commission must be affirmed.

Respectfully submitted,



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June 20, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2013-002492
SCPSC Docket No. 2013-42-S

Sensor Enterprises, Inc. and J-Ray, Inc., ... Appellants,

v.

Palmetto Utilities, Inc. and South Carolina Office of Regulatory Staff, ... Respondents.

PROOF OF SERVICE

This is to certify that I have caused to be served upon Appellants and Respondent South Carolina Office of Regulatory Staff this day via United States mail, first class postage affixed, one (1) copy of the Initial Brief and Designation of Matter of Respondent Palmetto Utilities, Inc. addressed to each as follows:

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