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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 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 SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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STATEMENT OF THE CASE

This case involves the appeal of two orders issued by the Public Service Commission of South Carolina ("Commission") in response to an application for rate relief filed by Palmetto Utilities, Inc. ("PUI"). On January 28, 2013, in accordance with S.C. Code Ann. § 58-5-240(A) (Supp. 2012), Palmetto Utilities, Inc. ("PUI") filed with the Public Service Commission of South Carolina ("Commission") notice of intent to file an application for rate relief. On March 12, 2013, PUI filed its application seeking an adjustment of rates and charges for the provision of sewer service and for modification to certain terms and conditions related to PUI's provision of sewer service. (Application,

dated March 12, 2013.)

Pursuant to S.C. Code Ann. § 58-4-10(B) (Supp. 2012), the South Carolina Office of Regulatory Staff ("ORS") was automatically a party of record to the case. On April 23, 2013, Sensor Enterprises, Inc. d/b/a McDonald's ("Sensor") and J-Ray, Inc. ("J-Ray") (collectively "Appellants") filed separate Petitions to Intervene and Protest.

The PSC held a public hearing on PUI's application on August 13, 2013. On September 17, 2013, the PSC issued its Order No. 2013-660 granting adjustments to PUI's rates and charges and approving the settlement agreement between PUI and ORS. The Appellants filed a Petition for Rehearing and/or Reconsideration on October 7, 2013. The PSC denied the Petition by its Order No. 2013-771, dated October 23, 2013. Appellants timely filed and served their Notice of Appeal to this Court on November 22, 2013.

FACTS

PUI is a regulated public utility providing sewer service in a service area of approximately eighty-four square miles in northeastern Richland County, the Town of Blythewood, and southeastern Kershaw County. Tr. p. 37, ll. 1-6; R. ___. In March 2013, PUI filed an application to increase its monthly residential service charge from $33.00 to $39.00 and to increase its commercial service charges from $33.00 to $39.00 per single family equivalent ("SFE"). Application, Exhibit A; Tr. p. 157, ll. 6–11; R. ___. The rates proposed in PUI's application would generate an additional $1,471,758 in annual sewer revenues. Order No. 2013-660, p. 20; Application, Schedule B, p. 3 of 14; Tr. p. 157, ll. 6–11; R. ___. PUI's rates in effect at the time of the application were approved by the Commission on March 15, 2011, and were based upon a test year ending

April 20, 2010. Tr. p. 39, ll. 14–22; R. ___. The monthly service rate approved by the Commission in that case was $33.00 per residential customer and commercial single family equivalency. *Id.* The rate design for PUI's rates as approved by the Commission in the last rate case, and in previous rate cases, used a single family equivalency rating system based upon the "Unit Contributory Loading Guidelines" as set forth in DHEC Regulation 61-67, Appendix A. Tr. p. 339, ll. 4–11; Tr. p. 340, l. 7 – p. 342, l. 20; R. ___.

Under the currently approved rate design under appeal, as well as previously approved rate schedules of PUI, the Unit Contributory Loading Guidelines are used to determine the distribution of PUI's revenue requirement among the various types of customers. Tr. p. 339, ll. 7 – p. 344, l. 14; R. ___. PUI's rate design employs the design flows for residential customers and commercial customers under the Unit Contributory Loading Guidelines to establish equivalencies for distributing the cost of providing service between the residential and commercial customer classifications. Tr. p. 119, l. 20 – p. 120, l. 2; R. ___. A residence has a design capacity of four hundred gallons per day, and this constitutes one single family equivalent ("SFE"). Tr. p. 111, l. 23 – p. 112, l. 9; Tr. p. 120, ll. 2-4; R. ___. The design capacity for various types of commercial customers is expressed in the number of gallons per capacity factors that are specific to different types of commercial customers. Tr. p. 112, ll. 4-6; Tr. p. 120, ll. 2-10; R. ___. The commercial rates for the different types of commercial establishments are determined by multiplying the monthly residential customer service rate (considered to be one SFE) by the number of equivalencies for each type of commercial establishments. Tr. p. 112, ll. 9–16; Tr. p. 120, ll. 6–10; R. ___. Each commercial establishment is a

minimum of one SFE. *Id.*; Order No. 2013-660, p. 9, n.5; R. ___.

The rate design employed by PUI results in residential customers being charged a flat monthly rate while each commercial customer is charged a rate calculated by multiplying the residential monthly rate by the total number of the capacity factors for that commercial customer under the Unit Contributory Loading Guidelines. Tr. p. 112, ll. 9-4; p. 120, ll. 2-10; R. ___. To determine the monthly commercial rate, the number of capacity design factors is multiplied by the design flow for that factor where the design flow is expressed in gallons. Tr. p. 112, ll. 4–16; Tr. p. 120, ll. 2–10; R. ___. The resulting product is then divided by the single family residential design flow of 400 gallons per day, and this result provides the commercial customer's total SFEs. *Id.* The charges are then calculated by multiplying the monthly residential customer rate by the number of SFEs[1]. *Id.*

PUI periodically updates the number of SFEs of its commercial customers by conducting a study of its commercial customers' business operations. Tr. p. 128, ll. 21–p.

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[1] The following narrative and illustrative, hypothetical example are provided to demonstrate the calculation of a commercial monthly rate for a fast food restaurant with drive-through facilities:

- Step 1 – Calculate the Equivalent for the Seats in the Restaurant
  [Number of seats (with table) at (inside and outside) the restaurant X Loading Gallons Per Day = Total Gallons Per Day / 400 Gallons Per Day (Commercial Equivalent for the Seats)
- Step 2 – Calculate the Equivalent for the Drive-Through Window
  [Number of cars served (with food) through the Drive-Through X Loading Gallons Per Day = Total Gallons Per Day / 400 Gallons Per Day (Commercial Equivalent for the Drive-Through Window)
- Step 3 - Calculate the Total Commercial Equivalents
  [Commercial Equivalent for the Seats + Commercial Equivalent for the Drive-Through Window = Total Commercial Equivalent for the Restaurant]
- Step 4: Calculate the Monthly Rate for the Restaurant
  [Total Commercial Equivalent X Monthly Residential Customer Service Rate = Monthly Rate for the Restaurant]

For a fast-food restaurant with drive-through facilities having 100 seats in the restaurant and serving 500 cars per day through the drive-through facilities, the calculation of the monthly rate is

- Step 1 – 100 seats x 40 Gallons Per Day = 4,000 Gallons Per Day / 400 Gallons Per Day = 10 (Commercial Equivalent for Seats)
- Step 2 – 500 cars served x 10 Gallons Per Day* = 5,000 Gallons Per Day / 400 Gallons Per Day = 12.5 (Commercial Equivalent for the Drive-Through Facilities)
  (* Example utilizes the modification to the equivalency contained in the Settlement Agreement and approved by the Commission in Order No. 2013-660)
- Step 3 – 10 (Commercial Equivalent for Seats) + 12.5 (Commercial Equivalent for the Drive-Through Facilities) = 22.5 (Total Commercial Equivalent for the Restaurant)
- Step 4 – 22.5 (Total Commercial Equivalent) X $36.00** (Monthly Residential Customer Service Charge) = $810.00
  (** Example uses the monthly residential customer service charge approved by the Commission in Order No. 2013-660)

129, l. 8; Tr. 135, ll. 22 – p. 136, l.3; R.___. The study includes a premises inspection by a utility representative to ascertain the existence and extent of the equivalency factors required for the computation of the monthly service charge based on the number of SFEs. Tr. p. 128, l. 24 – p. 129, l. 3; Tr. p. 135, l. 27 – p. 136, l. 1; R. ___. The equivalency factors track the loading factors set forth in the Unit Contributory Loading Guidelines as provided for in PUI's rate schedule. Tr. p. 129, ll. 4–8; Tr. p. 136, ll. 1–3,; R. ___. In anticipation of the instant rate case, PUI undertook a study to update commercial equivalencies and determined there were some commercial customers whose equivalency ratings were higher than the equivalency ratings for which they were being billed and other commercial customers whose equivalency ratings were lower than the equivalency ratings for which they were being billed. Tr. p. 129, ll. 15–21; Tr. p. 136, ll. 13-16; R. ___.

Appellants Sensor and J-Ray are commercial customers of PUI operating McDonalds restaurants. Order No. 2013-660, p. 2; R. ___. After PUI's study to update commercial equivalencies, PUI determined that both Sensor and J-Ray had been undercharged under the approved rate schedule then in effect. -Tr. p. 297, l. 16 – p. 298, l. 5; Tr. p. 288, ll. 6–24; R. ___. By letter dated March 5, 2013, PUI advised its commercial customers, including Sensor and J-Ray, of the recent study of commercial accounts and the resulting number of SFEs attributable to service on the customer's account based upon PUI's approved rate schedule which utilized the equivalency factors for their commercial category under the Unit Contributory Loading Guidelines. Tr. p. 130, ll. 4–16; Tr. p. 137, ll. 6–18; R. ___. PUI determined that Sensor had been billed for 11.59 SFEs when Sensor should have been billed for 133.8 SFEs and that J-Ray had been

billed for 24.45 SFEs when J-Ray should have been billed for 171.4 SFEs. Tr. p. 288, ll. 6–24; Tr. p. 297, l. 6 – p. 298, l. 5; R. ___. PUI informed Appellants that their monthly charges would increase based upon the updated SFEs as determined by PUI's commercial account study. *Id.*; Hearing Exhibits 4 and 11; R. ___.

After advising its commercial customers of the results of the study updating commercial account equivalencies, PUI filed its application to increase its monthly service charges from $33.00 to $39.00 per residential account and per SFE for commercial accounts. PUI calculated this proposed increase in rates would increase annual service revenues by $1,471,758. Order No. 2013-660, p. 20; Application, Exhibit B, Page 3; R. ___.

ORS conducted its examination of PUI's application, which included verifying that the operating experience reported by PUI in its application was supported by PUI's accounting books and records for the test year period ended September 30, 2012. Tr. p. 230, ll. 5-19; R. ___. ORS's examination also tested the underlying transactions in the books and records for the test year to ensure the transactions were adequately supported, had a stated business purpose, were allowable for ratemaking purposes, and were properly recorded. *Id.* ORS made adjustments to the revenues, expenditures and capital investments to normalize PUI's operating experience and operating margin in accordance with generally accepted regulatory principles and prior Commission orders. *Id.* Following ORS's investigation, PUI and ORS reached a settlement of the issues, and the Settlement Agreement between PUI and ORS was filed with the Commission on July 1, 2013. Order No. 2013-660, p. 2; R. ___. The settlement provided for an increase in revenue, after accounting and pro forma adjustments, of $609,897, and a proposed

monthly sewer service charge of $36.00 for residential customers and $36.00 per single family equivalent (as a minimum) for commercial customers. The Settlement Agreement also provided for a modification of PUI's rate design which would reduce the gallons attributable to cars served by fast-food restaurant drive-through facilities from the 40 gallons per car served as provided in the Unit Contributory Loading Guidelines to 10 gallons per car served. Hearing Exhibit 1, pp. 2–3, ¶ 3; R. ___.

This modification to the rate design reducing the gallons of the capacity design flow factor attributable to cars served at fast food restaurant drive-through facilities reflected PUI's conclusion that the previously approved rate design would not result in a reasonable rate to fast-food restaurants with drive-through facilities. Tr. p. 300, l. 2 – p. 302, l. 15; Tr. p. 291, l. 1 – p. 292, l. 4, R. ___. To prevent unreasonable charges to fast-food restaurants with drive-through facilities, PUI developed a formula to determine the appropriate number of gallons per car. Tr. p. 312, l. 12 – p. 316, l. 9; Tr. p. 320, l. 1 – p. 324, l. 3; R. ___. This formula took into account both water consumption by fast-food restaurants and wastewater discharge at PUI's Spears Creek Wastewater Treatment Plant, and an adjustment of 20% to address peak flow demands. *Id.* This modified rate design reduced by 75% the SFEs calculated for cars served at drive-through facilities of fast-food restaurants. Tr. p. 322, ll. 15–21; R. ___. Under the rate schedule agreed to as part of the Settlement Agreement, the total SFE's used to calculate Appellants' monthly bills would be reduced from 133.8 to 41.9 for Sensor and from 171.4 to 48.77 for J-Ray. Tr. p. 291, l. 13 – p. 292, l. 18; Tr. p. 300, l. 28 – p. 301, l. 23; R. ___.

Appellants proposed two alternative rate designs for the Commission to consider. Appellants proposed an alternative rate design for PUI based upon water consumption.

Tr. p. 202, ll. 8–9; Tr. p. 18, ll. 6–9; R. ___. The second alternative rate design proposed by Appellants retained the use of the equivalency system of the Unit Contributory Loading Guidelines but modified the capacity design flow attributed to cars served by fast-food restaurant drive-through facilities from forty (40) gallons to two (2) gallons per day and reduced the capacity design flows attributed to seats in fast-food restaurants from forty (40) gallons to ten (10) gallons per day. Order No. 2013-660, pp. 11-12; Tr. p. 202, l. 22 – p. 203, l. 7; Tr. p. 218, ll. 10–23; R. ___. The Commission rejected both of Appellants' alternative rate design proposals. Order No. 2013-660, pp. 26-30; R. ___.

The Commission approved the Settlement Agreement offered by PUI and ORS, and the rate design contained therein. This rate design underlying the Settlement Agreement retained use of the previously approved Unit Contributory Loading Guidelines with the modification reducing the gallons attributable to cars served by fast-food restaurant drive-through facilities from the 40 gallons per car served as provided in the Unit Contributory Loading Guidelines to 10 gallons per car served. Hearing Exhibit 1, pp. 2–3, ¶ 3; R. ___. Under the rates approved in Order No. 2013-660, PUI was granted an increase in rates and charges to provide additional annual revenues of $609,897 and an operating margin of 17.98%. Order No. 2013-660, p. 22; R. ___.

Appellants filed a petition for rehearing and reconsideration of Order No. 2013-660, and the Commission denied Appellants' petition with the issuance of its Order No. 2013-771, dated October 23, 2013. Appellants then filed their Notice of Appeal on November 22, 2013. Thereafter, on March 21, 2014, Appellants filed with the Commission a Petition for a Writ of Supersedeas and/or Equitable Stay wherein Appellants sought a ruling from the Commission allowing them to pay rates for monthly

service during the pendency of this appeal of $401.52 for Sensor and $806.86 for J-Ray. These were the rates billed to Appellants before PUI's commercial customer study. The Commission denied Appellants' petition for a writ of supersedeas by Order No. 2014-403 issued on May 1, 2014.

STANDARD OF REVIEW

With regard to matters involving utility rate making, "[t]he PSC is considered 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." *Kiawah Property Owners Group v. Pub. Serv. Comm'n*, 359 S.C. 105, 109, 597 S.E. 2d 145, 147 (2004); *Accord, Patton v. Pub. Serv. Comm'n*, 280 S.C. 288, 312 S.E. 2d 257 (1984).

"This Court employs a deferential standard of review when reviewing a PSC decision and will affirm that decision when substantial evidence supports it." *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 20, 507 S.E. 2d 328, 332 (1998); S.C. Code Ann. § 1-23-380 (Supp. 2012). This standard of review, as established in the South Carolina Administrative Procedures Act, S.C. Code Ann. § 1-23-380, provides that this Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(5) (Supp. 2013); *Long Cove Home Owners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 138, 488 S.E. 2d 857, 860 (1997).

A reviewing court may reverse or modify a decision of an agency if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions of that agency are ... clearly erroneous in view of the reliable, probative and substantial evidence on the whole record, or arbitrary or

capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. S.C. Code Ann. § 1-23-380(5)(e) and (f) (Supp. 2013). Under this "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 603-4, 550 S.E. 2d 287, 292-3 (2001).

"Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached." *Waters v. South Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 226, 467 S.E. 2d 913, 917 (1996). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E. 2d 102, 105 (1999). "[T]he burden is on Appellants to prove convincingly that the agency's decision is unsupported by the evidence." *Waters*, 321 S.C. at 226, 467 S.E. 2d at 917.

ARGUMENT

I. The rate design and resulting rates approved by the Commission in Order No. 2013-660 and Order No. 2013-771 are appropriate and based upon substantial evidence of record.

Appellants phrase the predominant issue on appeal as a policy question of whether it is appropriate for the Commission to approve commercial rates for PUI using the Unit Contributory Loading Guidelines as the guide or underlying basis for calculating the rates. Appellant Brief, p. 5. In reaching its decision on the proper rate design to adopt in this case, the Commission reviewed the rate design set forth in the Settlement Agreement

and reviewed Appellants' suggested modifications. The Commission set forth its decision in detail in Order No. 2013-660. Order No. 2013-660, pp. 26-30; R. ___.

The Commission has wide-latitude to determine its methodology in setting rates, and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate. *Kiawah Island Property Owners Group v. The Public Service Comm'n of South Carolina,* 357 S.C. 232, 593 S.E.2d 148, n.5 (2004). In recognizing the exercise of discretion in determining an appropriate rate design, the Commission acknowledged this Court's direction that "it is incumbent upon [the Commission] to fix rates which 'fairly distribute the revenue requirements of the utility'." Order No. 2013-660, p. 28 citing *Seabrook Island Property Owners Ass'n v. Public Service Comm'n,* 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991) ("It is incumbent upon the PSC to approve rates which are just and reasonable, not only producing revenues and an operating margin within a reasonable range, but which also distribute fairly the revenue requirements, considering the price at which the company's service is rendered and the quality of that service."). The Commission also acknowledged that it may consider "fairness" provided it does so in the context of an objective and measurable framework. *See Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 113, 708 S.E.2d 755, 765 (2011) ("The PSC is not precluded from considering fairness, provided it does so in the context of an objective and measurable framework.").

Appellants assert use of the Unit Contributory Loading Guidelines in rate-making results in unjust and unreasonable rates for commercial customers with drive-through restaurants. Appellant Brief, pp. 5-6. Following this general assertion challenging the use of the Unit Contributory Loading Guidelines in the rate design, Appellants set forth

three specific arguments alleging the Commission decision was not based upon substantial evidence of record and was arbitrary and capricious. These three arguments are discussed separately below.

A. The Commission's approval of the proposed equivalency rate of 10 gallons per drive-through vehicle is based upon substantial evidence of record and is not arbitrary or capricious.

First, Appellants challenge the Commission's approval of the proposed equivalency rate (or equivalency factor) of 10 gallons per drive-through vehicle. Appellant Brief, p. 9. In its orders, the Commission approved and adopted a Settlement Agreement reached by PUI and ORS. The Settlement Agreement provided *inter alia* for modification of the single family equivalency factor for fast-food restaurants' drive-through facilities. The modification reduced the number of gallons of wastewater attributable to cars served at the drive-through windows of these restaurants from forty (40) gallons per car to ten (10) gallons per car. Order No. 2013-660, p. 21, ¶5. The effect of this modification reduces the equivalency rating per car served from 0.10 to 0.025. Order No. 2013-660, p. 25; Tr. p. 314, ll. 11–15; Tr. p. 322, ll. 15–21; R. ___.

The Commission recounted the evidence of record from PUI witness Melcher concerning PUI's study of commercial customer accounts to ensure that PUI was billing the correct number of SFE's per customer. Order No. 2013-660, p. 8; Tr. p. 128, l. 21 – p. 130, l. 16; Tr. p. 135, l. 13 – p. 137, l. 18; R. ___. In conducting the study, PUI representatives visited the customers' premises to verify the type and number of equivalency factors. Tr. p. 128, l. 24 – p. 130, l.3; Tr. p. 135, l. 22 – p. 136, l. 29; R. ___. The results of the study were that certain commercial customers' bills required adjustment, with some accounts facing increases in the equivalency factors while other

accounts received a reduction in the equivalency factors. Tr. p. 129, l. 15 – p. 130, l. 16; Tr. p. 136, l. 13 – p. 137, l. 4; R. ___.

The Commission also acknowledged the testimony from Appellants' witnesses contesting both PUI's proposal to calculate sewer rates using Unit Contributory Loading Guidelines as set forth in R. 61-67 Appendix A and the assumptions with regard to the number of cars served at their drive-through facilities and the number of seats in their respective restaurants. Order No. 2013-660, p. 9; Tr. p. 173; Tr. p. 187, ll. 6–17; R. ___. Appellants' witness Russell asserted that use of the single family equivalents to calculate Appellants' monthly sewer charges would result in charges that are excessive, inequitable, and disproportionate. Order No. 2013-660, p. 10; Tr. 210, l. 23 – p. 211, l. 3; R. ___. Further, the Commission noted witness Russell's testimony that use of the Unit Contributory Loading Guidelines to determine rates applicable to the Appellants results in charges that "are not remotely related to the cost of providing service to them, resulting in charges that are inequitable and unreasonable." Order No. 2013-660, p. 11; Tr. p. 216, ll. 5–8; R. ___.

Despite Appellants' argument, substantial evidence of record exists to support the Commission's determination in its orders. As expected, Appellants' witnesses presented testimony against PUI's rate schedule. PUI presented evidence in support of the proposed rate schedule. Order No. 2013-660 contains the Commission's review of the evidence and the Commission's resulting findings and conclusions. The evidence of record is documented in the order, and the Commission's determinations explained. Order No. 2013-660, pp. 15–19; p. 23; pp. 26–30; R. ___. Substantial evidence of record supports the findings of the Commission. The Commission was presented with two sides

of the issue and made a decision based upon the evidence presented by PUI. There is no error as the Commission's decision is supported by the record. This Court will not substitute its judgment for that of the Commission's upon a question about which there is room for a difference of opinion. *Duke Power Co. v. Public Serv. Comm'n*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001). Accordingly, the Commission decision to adopt the rate design set forth in the Settlement Agreement should be affirmed.

B. References in Order No. 2013-660 to strength of flow of wastewater discharge are based upon the evidence of record and are not arbitrary or capricious.

Next, Appellants assert error to the extent the Commission based its decision upon the assumed strength of Appellants' wastewater discharge. Appellant Brief, p. 9. The Commission in setting forth the evidence relied upon in making its findings of fact and conclusions of law stated

> The current rate design providing for uniform, flat rates for residential customers meets this requirement in that it recognizes that even though residential wastewater flow can vary considerably by and among customers, there is no means by which these variances in demand may be readily and economically measured. Thus, spreading the cost associated with that service equally among all customers within the class based upon design guidelines projecting their relative maximum daily wastewater discharges – which is what R. 61-67 Appendix A sets forth -- is both objective and measurable. Similarly, the imposition of flat rates on commercial customers based upon equivalencies established under the [Unit Contributory Loading Guidelines] found in Appendix A to R. 61-67 satisfies this requirement in 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, p. 29; R. ___.

The Commission recognized testimony from both the Appellants and witnesses

for PUI concerning strength of wastewater flow. The Appellants' witness Russell in advocating for use of water consumption as the basis for setting rates recognized that strength of flow is a consideration in the rate structure. The Commission took notice of this in its Order No. 2013-660 citing to Mr. Russell's testimony

> In regard to the last of these propositions, Mr. Russell asserted that, assuming the strength of flow (i.e., pollutant levels) from customers are the same and that metered water consumption data "is available at a reasonable cost," the "best way to determine the relative costs of serving customers is to measure the amount of wastewater each contributes to the collection system." He proposed that this measurement be based upon metered water consumption because "the percentage of water returned as wastewater is very high (on the order of 90% plus), and for those customers that don't return a large percentage, other means are available to measure or estimate the amount that is not returned to the collection system."

Order No. 2013-660, p. 11; R. ___.

The Commission considered Mr. Russell's testimony and that of PUI witnesses Wallace and Walsh. As to PUI witness Wallace's testimony, the Commission stated, "Mr. Wallace contended that the absence of a variable to account for strength of flow and a means of obtaining metered water consumption information rendered the proposed new rate design infeasible." Order No. 2013-660, p. 17; R. ___. In considering the testimony of PUI witness Walsh concerning the strength of flow, the Commission stated

> Mr. Walsh noted that the recommendation that the intervenors be billed based upon water consumption alone failed to address the strength of flow of the intervenors' wastewater discharge and the cost of obtaining such consumption data. ... Mr. Walsh further noted that the analysis employed by Mr. Russell to support his contention failed to address the wastewater discharge resulting from cleaning of cooking equipment, utensils and kitchen floor areas with commercial grade detergents in which the intervenors routinely engage.

Order No. 2013-660, pp. 18-19; R. ___.

In Order No. 2013-660, the Commission set forth the portions of the record which it considered in its deliberations reaching its decision and set forth the reasons for its determinations. Substantial evidence of record supports the finding of the Commission on this issue. The Commission was presented with two sides of an issue and ultimately based its decision upon the evidence presented by PUI. "The Commission sits as a trier of fact, akin to a jury of experts." *Hamm v. Public Service Comm'n,* 309 S.C. 282, 287, 422 S.E.2d 110, 113 (1992). "This Court is without authority to set aside an agency's judgment on a factual issue where there is substantial evidence of record to support the agency's decision." *Id.* The Court shall not substitute its judgment for that of [the Commission] as to the weight of the evidence on questions of fact. *Lark v. Bi-Lo,* 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). "We will not substitute our judgment for that of the PSC where there is room for a difference of intelligent opinion." *Utilities Services of South Carolina v. S.C Office of Regulatory Staff,* 392, S.C. 96, 103, 708 S.E.2d 755, 759 (2011) citing *Kiawah Property Owners Group v. Public Service Comm'n of S.C.,* 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004).

The record supports the Commission's statement acknowledging the appropriateness of the rate design being adopted in Order No. 2013-660 "in 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, p. 29; R. ___. There is no error as substantial evidence supports the conclusion of the Commission.

C. In approving the Settlement Agreement and the rate design using the Unit Contributory Loading Guidelines to calculate SFEs for commercial

customers, the Commission did not err but relied upon the evidence of record in reaching its decision.

Appellants assert that the Commission "erred in accepting PUI's estimated monthly car counts for [Appellants] despite ... testimony regarding the actual number of cars visiting the drive-through window of [their] restaurant[s]." Appellants' Brief, p. 11. Appellants provided testimony that their drive-through restaurants served 1,035 cars per day in the case of Appellant Sensor and "around" 1,100 cars per day by Appellant J-Ray. Tr. p. 166, ll. 21 - 24; p. 173; p. 185, ll. 1 - 3; p. 187, ll. 16 – 17; R. ___. Contrary to Appellants' assertion, the Commission made no specific finding of the appropriate car count on which to base Appellants' monthly rates. The Commission approved a rate design for PUI but did not approve a specific car count associated with either Appellant's drive-through facilities.

Cars served at drive-through facilities and seat counts in the restaurants are examples of two of the loading factors or capacity design factors contained in the Unit Contributory Loading Guidelines. These factors are used to determine the monthly rate charged to commercial customers (see discussion of determining the monthly commercial rate at pp. 3-4 and note 1, *supra.*) PUI witness Melcher testified concerning revisions PUI made the number of drive-through cars served per day and the number of seats in Appellants' restaurants. Tr. p. 297, l. 13 – p. 302, l. 15; Tr. p. 287, l. 10 – p. 295, l. 7; R. ___. Mr. Melcher explained that the drive-through cars served per day and the number of seats in their restaurants are included as loading factors and under PUI's current rate schedule are included as equivalency factors used to determine the total number of SFEs for the Appellants' fast food restaurants. Tr. p. 288, ll. 6–10; Tr. p. 297, ll. 16–19; R. ___. According to Mr. Melcher, PUI conducted a follow-up investigation of the car

count and restaurant seats and determined the drive-through car count for Appellant Sensor as 1,225 and the number of seats count as 113, while the drive-through car count for Appellant J-Ray was determined to be 1,635 and the number of seats determined to be 79. Tr. p. 288, ll. 13–24; Tr. p. 297, l. 19 – p. 298, l. 1; R. ___. *See also,* Tr. 281, ll. 12–16; R. ___. (ORS witness Morgan testified that he identified 113 seats and 1,225 drive-through customers at Sensor's location, and 79 seats and 1,635 drive-through customers for the J-Ray location.) Mr. Melcher testified that the car counts and seat counts he presented were not based upon assumptions but on the information developed by PUI. Tr. p. 298, ll. 1 – 2; R. ___. This information included taking into account comments from Sensor regarding the car count and applying a peaking factor of 20% to the average daily car count to establish the equivalency factor. Tr. p. 290, ll. 3–19; Tr. p. 299. ll. 8–22; R. ___. When J-Ray provided no response to PUI's letters concerning the updating of the SFE computations contained in PUI's letter dated March 5, 2013, PUI conducted a site inspection and concluded the daily average number of cars served to be 1,635. Tr. p. 290, ll. 20–25; Tr. p. 299, ll. 24–29; R. ___.

While the evidence of record contains testimony concerning car counts assigned to Appellants' businesses, the Commission's order does not make a specific finding of fact concerning the number of cars served by either Appellant. The evidence of record provided by PUI witness Melcher supports the rate design approved by the Commission. Witness Melcher described the steps PUI took to ascertain the number of cars served at the drive-through facilities to use in determining the equivalency ratings under the Unit Contributory Loading Guidelines for calculating Appellants' monthly sewer charges. PUI witness Melcher also described how the number of equivalency factors used in PUI's rate

design to determine the SFEs of commercial customers could change. Tr. p. 129, l. 15 – p. 130, l. 3; Tr. p. 136, ll. 18-29; R. ___. In approving the rate design proposed by PUI, the Commission made no specific finding of fact regarding the number of cars served daily in calculating the SFEs for either Appellant's business under the Unit Contributory Loading Guidelines.

Evidence of record is present to support the Commission's determination of an appropriate rate design. The possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding. *Porter v. S.C. Public Service Comm'n,* 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). The weight and credibility assigned to evidence presented is a matter within the province of the Public Service Commission. *South Carolina Cable Television Ass'n v. Southern Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). In approving the Settlement Agreement and the rate design included in therein, the Commission accepted the testimony PUI witness Melcher and ORS witness Morgan. Accordingly, the decision of the Commission is supported by the evidence of record, and the orders of the Commission should be affirmed.

II. The Commission did not err in rejecting Appellant's alternate rate design.

The duty of the Commission "to fix 'just and reasonable' rates includes a duty to 'distribute fairly the revenue requirements of the utility.'" *Utilities Services of South Carolina,* 392 S.C. at 113, 708 S.E.2d at 764, citing *Seabrook Island Property Owners Ass'n v. S.C. Public Service Comm'n,* 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991). In ruling that the Commission "may consider whether the structure of the requested rate increase is unfair such that a different method of raising the necessary revenues might be

preferable," this court has also held that the Commission "is not precluded from considering fairness, provided it does so in the context of an objection and measurable framework. *Utilities Services of South Carolina,* 392 S.C. at 113 - 114, 708 S.E.2d at 765.

A. The Commission's decision adopting the rate design in the Settlement Agreement is based upon substantial evidence, is fully documented in the orders, and is not arbitrary or capricious.

The Commission adopted the Settlement Agreement between PUI and the ORS. The Settlement Agreement continued the rate design previously approved for PUI which contained a flat monthly charge for sewer service for residential customers and employed a single family equivalency rating system based upon the "Unit Contributory Loading Guidelines" set forth in DHEC Regulation 61-67, Appendix A for determining charges for commercial customers. Tr. p. 339, ll. 4–9; R. ___. These Unit Contributory Loading Guidelines determining wastewater flow capacity design are used in PUI's rate design to determine the distribution of PUI's revenue requirements among the various types of customers it serves. *Id.*

In reaching its decision on the appropriate rate design, the Commission considered the proposals of Appellants and determined that Appellants' alternative rate design, basing rates on metered water usage, was not feasible because PUI does not have access to water billing records and because it was not based upon a measurable framework in light of PUI's lack of access to metered water consumption data of its customers. Order No. 2013-660, pp. 27 and 29; R. ___. Information concerning the availability and the costs of obtaining metered water consumption records from the municipal providers serving Appellants was not presented during the hearing and

therefore are not in the record. Appellants' witness Russell stated that the Appellant's proposed billing method "assumes, of course, that a customer's metered water consumption is available at a reasonable cost." Tr. p. 213, ll. 16-18; R. ___. The Commission in its order noted that "Mr. Russell recognized that the cost of obtaining metered water consumption data is an issue by making the assumption, for the purpose of his recommendation, that this data is available to the Company 'at a reasonable cost.'" Order No. 2013-660, p. 27, n.11; R. ___. The Commission further noted that "no cost information in this regard was provided and insufficient evidence provided that the data could be obtained." *Id.* The record does contain, however, testimony of additional issues related with basing sewer rates upon water consumption records from a third party provider such as billing disputes between the customer and the water provider, billing delays, and lack of Commission jurisdiction over the municipal providers. Tr. 349, ll. 1–15; R. ___. After considering the evidence of record, the Commission determined that utilizing the Unit Contributory Loading Guidelines and the equivalencies contained therein to calculate the rates of commercial customers meet the requirement of an objective and measureable framework because this rate design treats similarly situated commercial customers uniformly and recognizes differences in the pollutant strength of wastewater and volume of wastewater flow between commercial and residential customers. Order No. 2013-660, p. 29; R. ___.

The Commission also rejected Appellants' proposed modification to the equivalency factor under the Unit Contributory Loading Guidelines for seats and cars served through their drive-through facilities. Order No. 2013-660, pp. 29 - 30. In rejecting Appellants proposed modification of the number of gallons in the equivalency

factor for seats, the Commission found that the proposed modifications would result in an advantage over other fast-food restaurants resulting in a discriminatory rate and that the gallons per seat under the Unit Contributory Loading Guidelines are already lower per seat than other restaurants. Order No. 2013-660, p. 30; R. ___. As for denying the modification to lower the gallons of the equivalency factor for per car served at the drive-through, the Commission concluded the modification "does not provide the objective and measurable framework required for rate design." Order No. 2013-660, p. 30; R. ___. In noting that Appellants' proposed modification to the equivalency factor for seats in the restaurants and for cars served at the drive-through, the Commission stated

> no witness refuted the testimony of [PUI] witness Melcher that the adoption of [Appellants'] proposal for a further reduction in the gallons attributable to cars served and a reduction in the gallons attributable to seats in their restaurants would result in monthly charges to them which are less that they currently pay ...this fact is evidence that the rate design proposals of [Appellants] would not fairly distribute the cost of providing service among all customers.

Order No. 2013-660, p. 30, n.13; R. ___.

Appellants challenge the use of the Unit Contributory Loading Guidelines in determining rates because the "guidelines were developed in the 1970's for the sole purpose of providing guidance in the design of wastewater systems so as to ensure adequate capacity for those systems." Appellants' Brief, p. 5, citing Tr. p. 111, ll. 2-8; R. ___. To refine the Unit Contributory Loading Guidelines applicable to commercial customers with drive-through facilities, the Settlement Agreement provided for a modification of PUI's rate design which reduced the gallons attributable to cars served by fast-food restaurant drive-through facilities from the 40 gallons per car served as contained in the Unit Contributory Loading Guidelines to 10 gallons per car served. This

modification reducing the gallons of the capacity design flow factor attributable to cars served at fast food restaurant drive-through facilities reflected PUI's conclusion that the previously approved rate design would not result in a reasonable rate to fast-food restaurants with drive-through facilities. Tr. p. 291, l. 1 – p. 292, l. 4. PUI developed a formula to determine the appropriate number of gallons per car with the formula taking into account both water consumption by fast-food restaurants and wastewater discharge at PUI's Spears Creek Wastewater Treatment Plant as well as an adjustment of 20% to address peak flow demands. Tr. p. 314, l. 16 – p. 315, l. 24; Tr. p. 323, l. 1 – p. 324, l. 3; Hearing Exhibit 3; R. ___. The modification to the rate design reduced by 75% the SFEs calculated for cars served at drive-through facilities of fast-food restaurants. Tr. p. 314, ll. 11-15; Tr. p. 322, ll. 15-21; R. ___.

Further, Appellants assert that the design of a wastewater treatment system and estimating flow from particular customers are completely different purposes. Appellants' Brief, p. 5, citing Tr. p. 212, ll. 3-4. The Commission in approving the Settlement Agreement and continuing the use of the Unit Contributory Guidelines as the basis for determining rates for PUI's commercial customers found use of the guidelines appropriate, stating "[t]hus, spreading the cost associated with that service equally among all customers within the class based upon design guidelines projecting their relative maximum daily wastewater discharges – which is what [the Unit Contributory Guidelines] sets forth – is both objective and measureable." Order No. 2013-660, p. 29; R. ___. The Commission noted in Order No. 2013-660 when citing to PUI witness Walsh's testimony, the "guidelines are not intended to replicate any type of sewer customer's actual discharge to a wastewater system, but are simply maximum design

guidelines which are used as a means to distribute a sewer utility's revenue requirement among its various customers. Order No. 2013-660, pp. 18-19; R. ___. Similarly, PUI witness Sadler explained that DHEC uses the guidelines to ensure adequate capacity in the wastewater utility systems to meet maximum customer needs while PUI employs the guidelines to establish equivalencies for distributing the cost of providing service between residential and commercial customer classifications. Tr. p. 119, l. 4 – p. 120, l.10; R. ___.

The Commission's decision to approve the rate design offered in the Settlement Agreement is supported by the evidence of record. PUI witness Wallace explained that the "distribution of [PUI's] revenue requirement is based upon single-family equivalents, or SFEs, derived from the DHEC wastewater flow loading guidelines set out in Regulation 61-67, Appendix A." Tr. p. 312, ll. 12–15; R. ___. Mr. Wallace explained PUI's proposed reduction in the number of gallons attributed for vehicles served at the drive-through and opined that Appellants' further reduction to that loading factor from 10 gallons to 2 gallons per car was not supported by fact or quantitative analysis. Tr. p. 79, l. 17 – p. 82, l. 12; Hearing Exhibit No. 3; Tr. p. 317, ll. 3 – 12; R. ___.

PUI's witness Walsh also discussed Appellants' proposed modification to the equivalency rate of gallons per car and per seat. Mr. Walsh explained that the Unit Contributory Loading Guidelines are used as a means of distributing PUI's revenue requirement among the customers. Tr. p. 352, ll. 17 – p. 353, l. 2; R. ___. Mr. Walsh also testified that unlike the modification to the equivalency for cars served proposed by PUI, Appellants offered no quantitative basis for their recommended per seat and per car equivalencies of two and ten gallons. Tr. p. 353, ll. 17 – p. 354, l. 3; R. ___.

Evidence of record is present to support the Commission's determination. The possibility of drawing two inconsistent conclusions from the evidence does not prevent a court from concluding that substantial evidence supports an administrative agency's finding. *Porter v. S.C. Public Service Comm'n,* 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). The weight and credibility assigned to evidence presented is a matter within the province of the Public Service Commission. *South Carolina Cable Television Ass'n v. Southern Bell Tel. & Tel. Co.*, 308 S.C. 216, 417 S.E.2d 586 (1992). Further, the Commission has a duty to distribute fairly the revenue requirements of the utility. *Seabrook Island Property Owners,* 303 S.C. at 499, 401 S.E.2d at 675. The Commission's decision is supported by the evidence of record and documented in the Commission's order. There is no error in the Commission's determination; therefore, the decision of the Commission should be affirmed.

B. The Commission's findings, conclusions, and reasoning in evaluating the rate design proposals should be affirmed.

Appellants assert error by the Commission by stating "[t]hroughout its Order, the [Commission] states that it rejects the Appellants' position because Appellants failed to proposal (sic) an alternate rate design." Appellants' Brief, p. 11. Interestingly, Appellants provide no citation to Order No. 2013-660 of these alleged erroneous statements by the Commission. Respondent ORS's review of Order No. 2013-660 reveals only three possible instances which may or may not be the instances alleged by Appellants.

On page 21, paragraph 6 under the Commission's "Findings of Fact," the Commission recognized that Appellants offered no evidence concerning the impact their proposed alternative rate design or proposed reduction in equivalencies for seat count or

car count would impact the revenues and expenses of PUI or the resulting rates. Order No. 2013-660, p. 21; R. ___. The Commission also noted that Appellants did not propose a specific rate to be used in the recommended alternative rate design based upon water consumption. Order No. 2013-660, p. 25; R. ___. Finally, the Commission in its discussion of the evidence concerning rate design acknowledged that the Appellants' witnesses, who were presented to support Appellants' alternate rate design that the sewer bills be calculated using water consumption records, provided no information with respect to the costs to obtain billing records from third party water suppliers or the rates which would result from Appellants' proposed alternate rate design. Order No. 2013-660, p. 27; R. ___.

In deciding a rate case, "it is incumbent upon the [Commission] to approve rates that are just and reasonable, not only producing revenues and an operating margin within a reasonable range, but distributing fairly the revenue requirements considering the price at which the utility's service is rendered and the quality of that service." *Seabrook Island Property Owners,* 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991). Thus, it is appropriate for the Commission to consider the evidence presented as to revenues, expenses, revenue requirement, and distribution of that revenue requirement. Just as the Commission must consider the evidence presented, the Commission may consider what was not presented. *Cf. Reliance Inc. Co. v. Smith,* 327 S.C. 528, 489 S.E.2d 674 (Ct. App. 1997) (Party which did not bear the burden of proof alleged administrative law court improperly considered that party's failure to submit evidence on its position. Court of Appeals held that the administrative law court as the finder of fact may consider the failure of a party which does not bear the burden of proof to submit evidence supporting its position.)

In adopting the rate design for PUI in Order No. 2013-660, the Commission recognized it is required to "fix rates which distribute fairly the revenue requirements of the utility." *Seabrook Island Property Owners Ass'n v. S.C. Public Service Comm'n,* 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991). The Commission also acknowledged that its "determination of 'fairness' with respect to the distribution of [PUI's] revenue requirement is subject to the requirement that it be based upon some objective and measurable framework. Order No. 2013-660, p. 28 citing *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 113-114, 708 S.E.2d 755, 764-765 (2011); R. ___. Finally, the Commission held that "uniform rates are generally preferred, and the burden of establishing the reasonableness of a non-uniform rate design lies with those seeking it. *See August Kohn and Co., Inc. v. The Public Service Commission of South Carolina,* 281 S.C. 28, 313 S.E.2d 630 (1984) ("The burden is not upon the [Commission] to justify a uniform rate ... [r]ather the burden is upon the party challenging uniformity and seeking allocation to show that the case so warrants.")

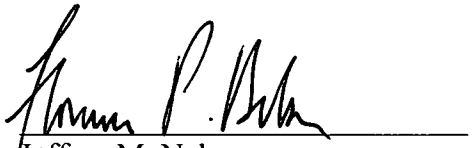
Applying these principles to the case before it, the Commission correctly concluded that Appellants' alternative rate design was not based upon a measurable framework, that Appellant's proposal to modify the number of gallons per seat would result in a discriminatory rate, and that Appellant's proposal to further reduce the gallons per car did not meet the "objective and measurable framework required for rate design." Order No. 2013-660, pp. 29 – 30; R. ___. A review of Order No. 2013-660 shows clearly that the Commission considered and evaluated the Appellants' proposals. However, that evaluation led to the Commission determining that Appellant's alternate rate designs

were not feasible due to the lack of access to records needed to implement Appellants' proposal and to increased costs to PUI and ultimately other ratepayers, costs not defined by Appellants. Order No. 2013-660, p. 27; R. ___. There is no error in the Commission's analysis, and the decision of the Commission should be affirmed.

CONCLUSION

For the reasons set forth above, the relief requested by Appellants should be denied. ORS respectfully urges the Court to affirm Order No. 2013-660 and Order No. 2013-771.

Respectfully submitted,



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June 20, 2014

THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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.

CERTIFICATE OF SERVICE

This is to certify that I, Karen D. Elliott, have this date served one (1) copy of the **Initial Brief of Respondent and Designation of Matter** in the above-referenced matter to the person(s) named below by causing said copy to be deposited in the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below:

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