THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICES COMMISSION

PSC Docket No. 2013-42-S

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

v.

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

INITIAL REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

It is often said that ratemaking is more of an art than a science, *see e.g. Chesapeake Utilities Corp. v. Delaware Pub. Serv. Comm'n*, 705 A.2d 1059, 1065 (Del. Super. 1997). If that is the case, then the PSC approached this case like a sculptor who uses an axe where a small chisel is required. To further articulate why this is so, the Appellants submit the following brief points of discussion in response to the Respondents' arguments.

In general, the utility ratemaking process should result in charges that are just and reasonable not only from the standpoint of the investors but also from the standpoint of the consumers. *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603, 64 S. Ct. 281, 288, 88 L. Ed. 333 (1944) ("[T]he fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests."). The PSC "has a responsibility to protect the customers of a utility from unwarranted, excessive or discriminatory charges." *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 605, 244 S.E.2d 278, 286 (1978) (Ness, J., concurring and dissenting) *holding modified by Parker v. S. Carolina Pub. Serv. Comm'n*, 280 S.C. 310, 313 S.E.2d 290 (1984). If the rightful expectations of the investor are not compatible with those of the consuming public, it is the latter which should prevail. *See Citizens Util. Bd. v. Illinois Commerce Comm'n*, 276 Ill. App. 3d 730, 737, 658 N.E.2d 1194, 1200 (1995) (quoting *Camelot Utilities, Inc. v. Illinois Commerce Comm'n*, 51 Ill. App. 3d 5, 10, 365 N.E.2d 312, 315 (1977) and surveying case law of other jurisdictions). A rate structure is hardly just and reasonable if

it subjects any customer class to "rate shock." *See State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 351 N.C. 223, 243, 524 S.E.2d 10, 23 (2000).

One of the roles of the PSC is to serve as a substitute for the forces of competition—forces that are absent in the realm of regulated service utilities. *See e.g. N. Indiana Pub. Serv. Co. v. Carbon Cnty. Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986). Here, the PSC abdicated that role as demonstrated by the rate shock imposed upon the Appellants. Following its decision, monthly sewer charges are set to rise from $401.52 to $1509.30 (376% increase) for the Appellant Sensor Enterprises and from $806.86 to $1755.72 (218% increase) for the Appellant J-Ray. (Tr. of Hrg, p. 279 lines 8 and 11.) In granting PUI's rate increase, the PSC has allowed PUI to exploit its monopoly position and has disregarded the unfairness of the rate design as applied to the Appellants.

If the PSC's Order stands, the Appellants will be charged for an amount of wastewater far in excess of what they actually produce. Water consumption is a reasonable proxy for wastewater volume because approximately 90% of water consumed becomes wastewater discharge. (Tr. of Hrg, p. 213 line 10; Order p. 11.) The Appellants' monthly water consumption has averaged 86,000 (Sensor) and 107,000 (J-Ray) gallons. (Tr. of Hrg, pp. 214 line 6; 215 line 11.) Under the rate design approved by the PSC, Sensor is going to pay for an assumed discharge of 306,750 gallons of wastewater and J-Ray for 490,500 gallons of wastewater. Charging the Appellants for four times the amount of wastewater they could actually produce, exceeds all bounds of reasonableness. Accordingly, this Court should reverse the PSC's approval of PUI's rate application.

I. THE PSC'S REJECTION OF THE APPELLANTS' ALTERNATIVE RATE DESIGN WAS BASED ON A FACTUAL DETERMINATION FOR WHICH THERE WAS NOT SUBSTANTIAL EVIDENCE AND WAS ARBITRARY AND CAPRICIOUS.

This Court may reverse or modify the PSC's decision if it concludes that the findings, inferences, conclusions or decisions are not supported by substantial evidence or are arbitrary and capricious. S.C. Code Ann. § 1-23-380(5) (Supp. 2013). Further, an abuse of discretion occurs when a decision is based on factual conclusions for which there is no evidentiary support. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006); *Mictronics, Inc. v. S. Carolina Dep't of Revenue*, 345 S.C. 506, 548 S.E.2d 223 (Ct. App. 2001). Opinions are of no probative value if there is no evidentiary showing of the facts upon which the opinion is predicated. *Parker v. S. Carolina Pub. Serv. Comm'n*, 281 S.C. 215, 217, 314 S.E.2d 597, 599 (1984). Testimony that rests entirely on surmise, conjecture and speculation is not probative. *McDowell v. Stilley Plywood Co.*, 210 S.C. 173, 179, 41 S.E.2d 872, 875 (1947).

In this case, the PSC concluded that a rate structure based on water consumption, as proposed by the Appellants, was not feasible. (Order p. 27.) Specifically, the PSC found that PUI lacks "access to water billing records or the right to meter flow from a City of Columbia water line or a Town of Winnsboro water line to affect (sic) the alternative rate design proposed by the" Appellants. (*Id.*) This finding is solely based on opinion and not factual evidence. Mr. Jones's testimony that the towns "don't like to provide that information and probably wouldn't" (Tr. of Hrg, p. 62.) exemplifies the speculative nature of the purported evidentiary support for the finding of infeasibility. Other witnesses provided no more substance. Mr. Wallace, for instance, testified that

"[i]t's difficult to have some other utility read the meters and give it to you on a timely basis, and then you are—the problem that you have is that, if they make a correction, you're not aware of it and you have to go back and try to re-correct it." (Tr. of Hrg, p. 100 lines 9-14.) These are opinions that are not predicated on facts developed in the record. They constitute nothing but speculation and conjecture of the witnesses called by PUI. Furthermore, the supposed inaccessibility of water consumption records is contradicted by Mr. Wallace's later testimony regarding development of a formula to support the reduction from 40 to 10 gallons of wastewater per car per day, which formula was based on water consumption information provided by its customers. (Tr. of Hrg, p. 314 line 25; p. 316 line 1.)

Contrary to the testimony of other PUI witnesses and the PSC's finding, Mr. Wallace showed how a rate design based on metered water consumption could function. He testified that Palmetto's sister company in Florida obtains water records from the water supplier and uses volume billing. (Tr. of Hrg, p. 100 lines 4-5.) In response to a question from one of the commissioners Mr. Wallace elaborated:

> We would get their water bill and we would have a rate that would be designed for, generally, conservation billing, which means the more that a customer uses, the more they would be charged, which is what we do in Florida. And so a restaurant would be charged much greater on a volume basis than would a residential customer, because they would use more volume and it would kick them into this higher category for sewer that's charged by water. We would also have a factor that would include our rate design that would be comparable to what we have in the cost of our plants. So those things would be included. . . . [W]e do use volume in those areas.
>
> (Tr. of Hrg, pp. 100 lines 20-5; 101 lines 1-6 and 9.).

The same process has been implemented by Palmetto Richland County, a PUI's sister company in South Carolina. (Tr. of Hrg, p. 100.) Mr. Wallace acknowledged that

the system of collecting water meter data from the water supplier is "coming along but it is not a very exact process." (Tr. of Hrg, p. 100 lines 8-9.) He further noted that the process presents some difficulty where there is a later correction made to the water billing records that must then be accounted for in the sewer billing records. (Tr. of Hrg, p. 100 lines 10-14.) However, an issue such as this, which may pose some inconvenience to PUI, does not render a rate design based upon water usage infeasible, and the PSC erred in choosing PUI's convenience over ratepayers' welfare.

Thus, the PSC rejected the Appellants' alternative rate design based upon a finding of infeasibility for which there was not substantial evidence. To determine that the Appellants' alternative rate design was infeasible in light of the evidence that two of PUI's sister companies use this method, was also arbitrary and capricious.

II. THE PSC'S ACCEPTANCE OF PUI'S ESTIMATE OF 10 GALLONS PER CAR PER DAY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As previously set forth in the Appellants' Initial Brief, utilization of the 10 gallons per day per car factor still results in the Appellant J-Ray and Sensor being charged together for more than four times more wastewater than they could actually produce. In contrast, David Russell testified that he calculated the actual per car usage for the Appellants to be 2 gallons per day. (Tr. of Hrg, p. 203.) This fact alone demonstrates the arbitrary and capricious nature of permitting such a rate structure.

In addition, the 10 gallon per car formulation is based upon certain assumptions and compiled estimates. The 20% peaking factor added to PUI's formula is one example of those assumptions for which there is no factual support. Mr. Wallace testified that PUI utilizes a 20% peaking factor but he provided no basis for its use. (Order pp. 17-18; Tr. of Hrg, pp. 323-24.)

This is analogous to an issue presented to this Court in *Parker v. S. Carolina Pub. Serv. Comm'n, supra*. In that case, this Court held that in light of the absence from the record of factors necessary for determination of a depreciation rate, witnesses' "*opinions* that a 4% depreciation rate was reasonable for rate making purposes . . . [*were] of no probative value* . . . ." *Id.* at 217, 314 S.E.2d at 599 (emphasis added). Similarly, the testimony that a 20% peaking factor "should be used" (Tr. of Hrg, p. 299 line 18.) and "[was] appropriate," (Tr. of Hrg, p. 290 lines 11-13.) without further articulation of reasons for its necessity or its particular level, constitutes an opinion of no probative value. Accordingly, there was no substantial evidence for the PSC's approval of the 10 gallons per car daily wastewater production estimate.

III. THE PSC ACCEPTED PUI'S CAR COUNT ESTIMATES AND ERRED IN DOING SO.

Respondents argue that the PSC did not accept PUI's car counts in its Order. However, the Order specifically recognizes Mr. Melcher's testimony that "the Company determined that the number of cars attributable to Sensor and J-Ray was 1,225 and 1,635, respectively." (Order p. 15.) The Order makes no mention of Mr. Pippin and Mr. Valdes's testimony regarding the actual car counts at their restaurants. Furthermore, the PSC expressly approved an operating margin of 17.98% for PUI, which operating margin is premised upon a revenue increase of $609,897. (Order p. 22.) This revenue increase, in turn, is attainable based upon new monthly charges to Sensor and J-Ray of $1,509.30 and $1,755.72, respectively, (Order p. 16), which must have been calculated by PUI by utilizing the car counts determined by PUI rather than those presented by the Appellants. Thus, by approving the 17.98% operating margin and revenue increase, the PSC implicitly adopted PUI's car count estimates and rejected the car counts presented by the

Appellants. Adoption of the car count estimates from PUI, despite testimony from the Appellants that the car counts do not reflect the actual number of cars served per day at their restaurants, was arbitrary and capricious.

IV. CONCERNS ABOUT RATE UNIFORMITY SHOULD NOT HAVE PREVENTED THE PSC FROM ADOPTING EITHER OF THE APPELLANTS' ALTERNATIVE RATE STRUCTURES

As set forth in their presentation to the PSC and in their Brief of Appellants, the Appellants proposed two alternative rate structures to the PSC. The first was to base billing upon metered water usage. The second was to reduce the loading factor for cars at drive-thrus from 10 gallons per car per day to 2 gallons per car per day. The Respondents argue, citing *August Kohn & Co., Inc. v. Pub. Serv. Comm'n of S. Carolina*, 281 S.C. 28, 313 S.E.2d 630 (1984), that these alternatives would result in non-uniform rate structures and therefore the Appellants bear the burden of proving special circumstances.

As to the alternative based upon metered water usage, the Respondents' argument is belied by the fact that PUI's own rate structure contemplates non-uniformity of rates when it would result in higher revenues for PUI. In Section 12 of its Rate Schedule (Settlement p. 5.), PUI reserves a right to resort to the water consumption data for an upward adjustment of the number of Single Family Equivalents to be charged its customers. In that case, actual water usage rather than the DHEC loading guidelines, S.C. Code Ann. Regs. 61-67 app. A, would provide the basis for calculating single family equivalencies, resulting in non-uniformity among customers

The Appellants' second alternative rate schedule premised upon 2 gallons per car per day would merely further reduce the loading factor attributable to cars at drive-thru restaurants and would have no effect on the uniformity of rates. Accordingly, non-

uniformity of rates should not have been a basis for the PSC to reject either of the Appellants' alternative rate structures.

V. ISSUE PRESERVATION

PUI argues that certain issues were not preserved for appeal because the Appellants did not raise them in their motion for reconsideration. PUI is incorrect. A motion for reconsideration is necessary only for the issues that were not ruled upon by the lower court. In the case cited by PUI, the court clearly stated that an issue may not be preserved for appeal only when it "*has not been ruled upon* by the trial judge nor raised in a post-trial motion[.]"*Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993) (emphasis added). Here, the Appellants only appeal from matters decided by the PSC and expressly set forth in its Order. Thus, unless the traditional rules of issue preservation are found to be inapplicable to PSC proceedings, all of the issues presented by the Appellants have been preserved for this Court's review.

CONCLUSION

For the reasons stated above, this Court should reverse the Order of the Public Services Commission.

Respectfully submitted,

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July 10, 2014

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellants on the following parties by causing a copy to be mailed to the parties on July 10, 2014, at the addresses shown below:

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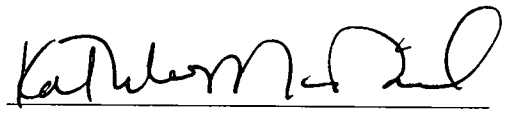

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