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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION
PSC Docket No. 2014-153-S

Arch Enterprises, LLCAppellant,

v.

Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities
and South Carolina Office of Regulatory Staff.....Respondents.

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ISSUES ON APPEAL

1. Whether the Public Service Commission erred in granting Alpine's Motion to Dismiss on an Expedited Basis without providing Arch Enterprises, LLC with notice or an opportunity to be heard on the motion.

STATEMENT OF THE CASE

On April 8, 2014, Arch Enterprises, LLC filed a Complaint with the South Carolina Public Service Commission (Commission) against Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities (Alpine). (Arch Complaint, dated April 8, 2014.) On April 11, 2014, Alpine filed and served its Motion to Dismiss on an Expedited Basis. (Alpine Motion to Dismiss, April 11, 2014.) Four days later, on April 15, 2014, the Clerk of the Commission issued a Notice of Hearing, setting a hearing on the Complaint for July 9, 2014. (Notice of Hearing, Prefile Testimony Letter, and 30 Day Notice, all dated April 15, 2014.)

On May 1, 2014, the Commission met and voted to dismiss Arch's Complaint as requested in Alpine's Motion to Dismiss. (Tr. of Meeting, May 1, 2014.) The Commission did not issue a Notice of Hearing to inform Arch that Alpine's Motion to Dismiss would be acted upon on May 1, 2014.

Following the May 1, 2014 meeting, the Commission issued a Directive bearing Order No. 2014-400, wherein the Commission dismissed Arch's Complaint. (Directive and Order No. 2014-400.) The Standing Officer issued a Standing Officer Directive on May 6, 2014, canceling the previously scheduled July 9, 2014 hearing on Arch's Complaint. (Standing Officer Directive, dated May 6, 2014.)

On May 14, 2014, Arch filed its Petition for Rehearing and Reconsideration of Arch Enterprises, LLC. (Arch Petition for Rehearing, May 14, 2014.) Alpine filed an

Answer in Opposition to Petition for Rehearing or Reconsideration on May 16, 2014. (Alpine Answer in Opposition to Petition for Rehearing or Reconsideration filed May 16, 2014.)

On May 21, 2014, the Commission met and voted to deny Arch's Petition for Rehearing. (Commission Directive, dated May 21, 2014.) The Commission did not issue a Notice of Hearing to inform Arch that its Petition for Rehearing would be acted upon on May 1, 2014.

Arch filed its Notice of Appeal with this Court on June 13, 2014.

Thereafter, on June 26, 2014, the Commission issued its Order Denying Petition for Rehearing and Reconsideration. (Order Denying Petition for Rehearing and Reconsideration, Order No. 2014-453, dated June 26, 2014.) Arch filed its Amended Notice of Appeal on June 30, 2014, in order to bring the June 26 Order before this Court in this appeal.

STATEMENT OF THE FACTS

On April 8, 2014, Arch filed a Complaint with the Commission against Alpine because it had received a Notice of Intent to Disconnect Sewer Services from Alpine showing a past balance due of \$59,450.40. (Arch Complaint, dated April 8, 2014.) In its Complaint, Arch Enterprises, LLC disputed the past due amount. (*Id.*)

On April 11, 2014, Alpine filed and served its Motion to Dismiss on an Expedited Basis. (Alpine Motion to Dismiss, April 11, 2014.) Four days later, on April 15, 2014, the Clerk of the Commission issued a Notice of Hearing, Prefile Testimony Letter, and 30 Day Notice, setting a hearing on Arch's Complaint for July 9, 2014. (Notice of Hearing,

Profile Testimony Letter, and 30 Day Notice, all dated April 15, 2014.) The Clerk of the Commission did not issue a Notice of Hearing on Alpine's Motion to Dismiss.

The following appeared as agenda item number 8 on the agenda for the May 1, 2014 Commission meeting:

DOCKET NO. 2014-153-S - Arch Enterprises, LLC d/b/a McDonalds, Complainant/Petitioner v. Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities, Defendant/Respondent - Discuss with the Commission the Motion to Dismiss on an Expedited Basis Filed on Behalf of Palmetto Wastewater Reclamation, d/b/a Alpine Utilities.

(Public Service Commission Utilities Agenda for Week of April 28, 2014.)

On May 1, 2014, the Commission met and voted to dismiss Arch's Complaint as requested in Alpine's Motion to Dismiss. (Tr. of Meeting, May 1, 2014.) Following the May 1, 2014 meeting, the Commission issued a Directive bearing Order No. 2014-400, wherein the Commission dismissed Arch's Complaint. (Directive and Order No. 2014-400.) The Standing Officer issued a Standing Officer Directive on May 6, 2014, canceling the previously scheduled July 9, 2014 hearing on Arch's Complaint. (Standing Officer Directive, May 6, 2014.)

On May 14, 2014, Arch filed its Petition for Rehearing and Reconsideration of Arch Enterprises, LLC. (Arch Petition for Rehearing, May 14, 2014.) The basis of Arch's Petition for Rehearing was the Commission's action of dismissing Arch's Complaint without providing Arch with an opportunity to be present its opposition to dismissal at the May 1, 2014 meeting. (*Id.*) Alpine filed an Answer in Opposition to Petition for Rehearing or Reconsideration on May 16, 2014. (Alpine Answer in Opposition to Petition for Rehearing or Reconsideration filed May 16, 2014.) Again, the Commission issued no Notice of Hearing on Arch's Petition for Rehearing.

The following appeared as agenda item number 12 on the agenda for the May 21, 2014 Commission meeting:

DOCKET NO. 2014-153-S – Arch Enterprises, LLC d/b/a McDonalds, Complainant/Petitioner v. Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities, Defendant/Respondent – Discuss with the Commission the Petition for Rehearing and Reconsideration Filed on Behalf of Arch Enterprises, LLC.

(Public Service Commission Utilities Agenda for Week of May 19, 2014.)

At the May 21, 2014, the Commission voted to deny Arch's Petition for Rehearing. (Commission Directive, dated May 21, 2014.) Arch filed its Notice of Appeal with this Court on June 13, 2014.

Thereafter, on June 26, 2014, the Commission issued its Order Denying Petition for Rehearing and Reconsideration. (Order Denying Petition for Rehearing and Reconsideration, Order No. 2014-453, dated June 26, 2014.) Arch filed its Amended Notice of Appeal on June 30, 2014, in order to bring the June 26 Order before this Court in this appeal.

STANDARD OF REVIEW

The general standard for judicial review of administrative decisions is set forth in the Administrative Procedures Act as follows:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380(5). Regarding review of decisions of the PSC in particular, this Court has held:

The PSC's ratemaking decisions are entitled to deference, and will be affirmed if supported by substantial evidence. *S.C. Energy Users Comm. v. S.C. Public Service Comm'n*, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010). “Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action.” *Porter v. S.C. Public Service Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). “We will not substitute our judgment for that of the PSC where there is room for a difference of intelligent opinion.” *Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004). However, we “may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the [PSC's] findings, inferences, conclusions, or decisions are: ... (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; [or] (d) affected by other error of law.” S.C. Code Ann. § 1-23-380(5) (2005 & Supp.2010).

Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 103-04, 708 S.E.2d 755, 759 (2011).

ARGUMENT

1. **The Public Service Commission erred in granting Alpine’s Motion to Dismiss on an Expedited Basis without providing Arch Enterprises, LLC with notice or an opportunity to be heard on the motion.**

The Public Service Commission erred in failing to provide notice and an opportunity to be heard on the matter of Alpine’s Motion to Dismiss the Arch Complaint. The Commission’s dismissal of Arch’s Complaint without notice or hearing was in error and should be reversed because it is in violation of certain constitutional, statutory, and regulatory provisions; is in excess of the statutory authority of the agency; and was made upon unlawful procedure. Accordingly, this Court should reverse the Commission’s dismissal of Arch’s Complaint and instruct the Commission to schedule a properly noticed hearing on Alpine’s Motion to Dismiss at which all parties are permitted to present oral argument.

Proper notice and opportunity to be heard are the hallmarks of procedural due process. *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (S.C. Ct. App. 2002). These rights are protected by the Constitution of the State of South Carolina, the South Carolina Code of Laws, and the South Carolina Code of Regulations.

As to the Constitution of the State of South Carolina, Article I, Section 3 provides that no “person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. Const. art. 1, § 3 (2009). Article I, Section 22 of the Constitution even more specifically provides that “[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.” S.C. Const. art. 1, § 22 (2009). This Court has previously held that

administrative agencies “must comport with standards of due process established by Article I, Section 22, of the South Carolina Constitution.” *League of Women Voters of Georgetown Cnty*, 305 S.C. 424, 427, 409 S.E.2d 378, 380 (1991)

The South Carolina Code of Laws also provides for due process before administrative agencies pursuant to the Administrative Procedures Act (APA), S.C. Code Ann. § 1-23-300 *et seq.* The Commission is subject to the requirements of the APA; it is a state agency “authorized by law to determine contested cases.” S.C. Code Ann. § 1-23-10(2). A contested case is any “proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency.” S.C. Code Ann. § 1-23-310(3) (2005). Specifically, the APA provides that all parties to a contested case are entitled to a hearing after notice of not less than thirty days. S.C. Code Ann. § 1-23-320 (Supp. 2013).

Perhaps most importantly, the Commission is also required to comply with its own regulations regarding due process. The Commission may “only exercise those powers which have been conferred upon [them] by the South Carolina General Assembly.” *Triska v. Dep’t of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987) (citing *S.C. Tax Comm’n v. S.C. Tax Bd. of Review*, 278 S.C. 556, 299 S.E.2d 489 (1983)). As a state administrative agency, the Commission “must also follow its own regulations and the provisions of the Administrative Procedures Act . . . in carrying out the legitimate purposes of the agency.” *Id.* (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981)).

Proceedings before the Commission are governed by Chapter 103, Article 8, of the South Carolina Code of State Regulations. S.C. Code Reg. 103–800 (2012). The

purpose of Article 8 is “to define standards of proper practice before the Public Service Commission.” S.C. Code Reg. 103–802 (2012). The procedures provided for in Article 8 “are intended to insure that all parties participating in proceedings before the Commission [are] accorded the procedural fairness to which they are entitled by law,” and “to promote efficiency in, and certainty of, the procedures and practices” before the Commission. S.C. Code Reg. 103–802 (2012).

With respect to motions, Section 103-829 governs the filing and consideration of motions before the Commission:

A. Motions, except those made during hearings, will be reduced to writing and filed with the Chief Clerk at least ten (10) days prior to the commencement of a hearing. Responses to such motions are due within ten days after service of said motions. Replies to responses to motions shall be filed with the Commission within five days of service of the response. These times may be modified by order of the Commission or its designee for good cause. Written motions to quash a subpoena will be made pursuant to R. 103-832.

B. The Commission, in its discretion and upon **due** notice to all parties of record, may **entertain oral argument** and response on prefiled motions in advance of the scheduled hearing in the proceeding to which the motions pertain. **Otherwise, such argument and response** shall be made at the commencement of the hearing. The presiding officer may make a ruling upon such motion at the completion of oral argument, at the conclusion of the hearing, or in the written order making disposition of the subject matter of the proceeding.

S.C. Code Reg. 103–829 (emphasis added).

The plain language of Section 103-829(B) specifically provides that the Commission will provide notice to all parties of record when a Motion is to be decided. S.C. Code Reg. 103–829(B). This regulation gives the Commission the discretion to hear oral argument on a motion at a hearing in advance of the scheduled hearing of the proceeding to which the motion pertains or at the commencement of the hearing of the proceeding to which the motion pertains. *Id.* This regulation requires the Commission to

decide a motion only after oral argument; it **does not** authorize the Commission to decide a motion without hearing oral argument. *Id.*

In this case, the Commission did not schedule a hearing on Alpine's Motion to Dismiss. It merely noted on an agenda that the matter of the Motion to Dismiss would be discussed. (Public Service Commission Utilities Agenda for Week of April 28, 2014.) Because the Commission granted Alpine's Motion to Dismiss without a hearing providing for oral argument, the Commission failed to comply not only with the Constitutional and statutory requirements for notice and hearing but also failed to comply with its own rules of procedure. Thus, this Court should reverse the Commission's grant of Alpine's Motion to Dismiss and Remand the matter to the Commission to schedule and properly notice a hearing providing for oral argument from all parties.

In defense of its dismissal of Arch's Complaint without notice or oral argument, the Commission held in its Order Denying Petition for Rehearing and Reconsideration:

1. That it had provided sufficient notice that the matter would be decided in the agenda for the meeting on May 1, 2014 (Order Denying Petition for Rehearing and Reconsideration p. 1-2) and
2. That sufficient opportunity to be heard was provided by the opportunity to submit a return in response to Alpine's Motion to Dismiss. (*Id.* p. 2.)

As to the sufficiency of the agenda as notice, the agenda states only that the Commission will "discuss" Alpine's Motion to Dismiss. The Commission contends that the introductory language "Commission Action on the Following Items" is sufficient to have put Arch on notice that the Commission would rule upon Alpine's Motion to Dismiss. (Order Denying Petition for Rehearing and Reconsideration p. 1.) This is erroneous. The

only action that the agenda gave any indication that the Commission intended to take on Alpine's Motion to Dismiss was to "discuss" the motion. (Public Service Commission Utilities Agenda for Week of April 28, 2014.) There was no indication that the Commission would go beyond the action of discussion and rule on the Motion to Dismiss. *Id.* Moreover, what was noticed on the agenda was not a hearing on Alpine's Motion to Dismiss because no hearing was scheduled. Even if Arch had been represented at the May 1, 2014 meeting, there was no provision in the agenda for the taking of oral argument by any party. *Id.*

This same failure of notice applies not only the vote granting Alpine's Motion to Dismiss but also to the Commission's vote to deny Arch's Petition for Rehearing. Here again, the only indication that the matter was to come before the Commission was the agenda item stating that the Commission intended to "discuss" the Petition for Rehearing. (Public Service Commission Utilities Agenda for Week of May 19, 2014.) Such statement alone was not sufficient to put Arch on notice that the Commission would in fact go beyond discussion and vote to deny its Petition for Rehearing. In addition, even if Arch had been represented at the May 21, 2014 meeting, there was no provision on the agenda for the taking of oral argument.

The Commission defends its failure to Arch with an opportunity to present oral argument by holding that Arch somehow waived its right to present oral argument on the Motion to Dismiss by not filing a return to Alpine's Motion to Dismiss. (Order Denying Petition for Rehearing and Reconsideration p. 2.) Arch does not dispute that S.C. Code Reg. 103-829(B) **permits** the submission of a return in response to a motion within 10 days of the service of such motion. However, Arch disputes that this language **requires**

the submission of a return such that failure to submit a return waives any further opposition to the motion permitting the Commission may decide the motion without hearing.

There are instances in rules governing other bodies where a failure to file a return to a motion may be considered acquiescence to the motion. For example, the South Carolina Appellate Court Rules provide, "Failure of a party to timely file a return may be deemed a consent by that party to the relief sought in the motion or petition." Rule 240(e), SCACR. Thus, an appellate court could consider a failure to file a return to a motion consent by the non-moving party to the relief sought in the motion.

The rules of procedure for the Commission contain no analogous provision. The Commission exceeded its authority in reading such requirement into its rules of procedure where none was expressly stated. In fact, it would turn this State's rules of procedure on their head to find that where a non-moving party is permitted to file a return to a motion that such return must be filed.

The fact that Section 103-829(A) does not permit the Commission to decide a motion without oral argument regardless of whether a return is filed or not is further supported by the fact that the Commission's rules do provide in two other instances for a decision on a motion without oral argument, neither of which is availing to the Commission.

The first of these is found at Section 103-817, which states:

Where provided by law, any proceeding initiated under these rules may be disposed of without hearing by Order of the Commission within 14 days after the pleading has been accepted for filing, upon the written opinion of the Commission that the pleading on its face shows that a hearing is not necessary, in the public interest, or for the protection of substantial rights.

S.C. Code Ann. Regs. 103-817. This section gives the Commission the authority to decide a motion without hearing if it does so within 14 days of the pleading being accepted for filing. The fact that Section 103-817 specifically provides for action on a motion without hearing whereas Section 103-829 does not indicates that Section 103-829 does not permit action on a motion without oral argument.

Furthermore, Alpine filed its Motion to Dismiss on April 11, 2014. (Alpine Motion to Dismiss.) The Commission did not rule on the Motion to Dismiss until May 1, 2014. ((Directive and Order No. 2014-400.) Thus, it could not have utilized Section 103-817 to justify its dismissal of Alpine's Complaint without hearing.

The Commission attempts to defend its actions based upon another rule of Commission procedure, Section 103-803. Section 103-803 provides:

In any case where compliance with any of these rules and regulations produces unusual hardship or difficulty, or where circumstances indicate that a waiver of one or more rules or regulations is otherwise appropriate, such rule or regulation may be waived by the Commission upon a finding by the Commission that such waiver is not contrary to the public interest.

S.C. Code Reg. § 103-803.

The Commission attempts to utilize this rule of procedure as a post-hoc rationalization of its dismissal of Arch's Complaint without oral argument. (Order Denying Petition for Rehearing and Reconsideration p. 3.) However, this rule requires a finding by the Commission that waiver of a rule of procedure is not contrary to the public interest at the time that it decides to waive a rule. This rule cannot be used after the fact to justify the Commission's failure to follow its own rules of procedure; otherwise the Commission could invoke this rule with impunity any time its failure to follow its own rules of procedure was questioned.

Furthermore, the Commission failed to schedule oral argument on Arch's Petition for Rehearing and Reconsideration as well as Alpine's Motion to Dismiss. Nowhere in its Order Denying Petition for Rehearing and Reconsideration does the Commission invoke Section 103-803 as a basis for failing to schedule oral argument on Arch's Petition for Rehearing. Thus, Section 103-803 provides no procedural authority for the Commission's failure to schedule oral argument on Alpine's Motion to Dismiss or Arch's Petition for Rehearing.

As demonstrated by the foregoing, the Commission was required by the Constitution of the State of South Carolina, the South Carolina Code of Laws, and its own rules of procedures as set forth in the applicable regulations to provide Arch with notice and an opportunity to present oral argument regarding Alpines' Motion to Dismiss and Arch's Petition for Rehearing. In failing to do so, the Commission acted in violation of constitutional or statutory provisions; in excess of its statutory authority; and upon unlawful procedure. Accordingly, the Commission's dismissal of Arch's Complaint should be reversed and remanded to the Commission for a full and fair hearing on the matter.

Because of the Commission's failure to accord procedural due process to Arch in this proceeding, Arch will not address the Commission's final conclusion that Arch's Complaint failed to state a cause of action upon which relief could be granted because, in the Commission's estimation, Arch was seeking prohibited retroactive ratemaking. (Order Denying Petition for Rehearing and Reconsideration p. 3.) Regarding the effect of a failure of procedural due process, the Court of Appeals has held:

It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be

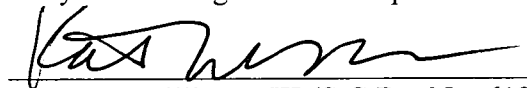
heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights. *Murdock*, 338 S.C. at 334, 526 S.E.2d at 248. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on. *Id.*

Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002).

In this case, both of the Commission's decisions—dismissing Arch's Complaint and denying Arch's Petition for Rehearing—were made in violation of Arch's due process rights. Thus, the Commission was without jurisdiction to adjudicate these matters and its decisions were nullities. Accordingly, it is appropriate for this Court to reverse the Commission's dismissal of Arch's Complaint and remand to the Commission for a properly noticed hearing at which all parties are afforded an opportunity to present oral argument.

CONCLUSION

Based upon the foregoing, Arch requests that this Court determine that the Commission acted in violation of constitutional or statutory provisions; in excess of its statutory authority; and upon unlawful procedure. Arch further requests that this Court reverse the Commission's rulings and remand Arch's Complaint to the Commission for a properly noticed hearing providing an opportunity for oral argument to all parties.



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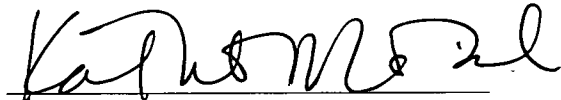
Palmetto Wastewater Reclamation, LLC d/b/a Alpine Utilities
and South Carolina Office of Regulatory Staff.....Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants on the following by causing a copy to be mailed to the parties on July 23, 2014, at the addresses shown below:

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