THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No.: 2016-000652

Daufuskie Island Utility Company, Inc., ... Appellant,

v.

South Carolina Office of Regulatory Staff;
Haig Point Club and Community Association, Inc.;
Melrose Property Owner's Association, Inc.;
Bloody Point Property Owner's Association, and
Beach Field Properties, LLC, ... Respondents.

BRIEF OF RESPONDENTS HAIG POINT CLUB AND COMMUNITY ASSOCIATION, INC., MELROSE PROPERTY OWNER'S ASSOCIATION, INC., AND BLOODY POINT PROPERTY OWNER'S ASSOCIATION

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STATEMENT OF THE CASE

This appeal involves two Orders issued by the Public Service Commission of South Carolina ("Commission"): December 8, 2015 (Order No. 2015-846, R. pp. 30-65) and February 26, 2016 (Order No. 2016-50, R. pp. 6-26) (together "the Commission's Orders"). The South Carolina Office of Regulatory Staff ("ORS") and Intervenors Haig Point Club and Community Association, Inc. ("HPCCA"), Melrose Property Owner's Association, Inc. ("MPOA"), and Bloody Point Property Owner's Association ("BPPOA") support the Commission's Orders.

The case arises out of Daufuskie Island Utility Company, Incorporated's ("DIUC") Application dated June 9, 2015, which sought approval of a new schedule of rates and charges for water and sewer service provided to DIUC's customers within its authorized service area. (R. pp. 1416-1483). Petitions to Intervene were filed on behalf of HPCCA, MPOA, and BPPOA ("the POAs") on July 23, 2015, and on behalf of Beach Field Properties, LLC ("Beach Field") on July 27, 2015. (R. pp. 1410-1413). ORS was a party of record in the case pursuant to S.C. Code Ann. § 58-4-10(B) (2015).

The POAs asked the Commission to schedule a public night hearing at a convenient time and location for customers of DIUC to present their comments regarding

the service and rates of DIUC. On September 15, 2015, the Commission held a public night hearing on Daufuskie Island.

On October 27, 2015, the POAs and ORS submitted a Settlement Agreement ("Settlement Agreement") to the Commission and served it on all parties. (R. pp. 820-833.) Upon presentation of the Settlement Agreement, DIUC objected and asserted it was error for the Commission to accept the Settlement Agreement into evidence. Beach Field did not object to the Settlement Agreement.[1] In the Settlement Agreement, the POAs agreed with all ORS adjustments recommended in ORS's pre-filed testimony, except for the adjustment for bad debt expenses (R. p. 574, lines 20-24; R. p. 576, lines 11-14; and Order No. 2015-846 at R. pp. 30-65.) The POAs agreed to adopt the methodology for calculating the bad debt expenses from DIUC's Application. (*Id.*)

On October 28, 2015, the Commission held a merits hearing on DIUC's Application. (R. pp. 304-1349.) Following the submission of Proposed Orders by several of the parties, on December 8, 2015, the Commission issued Order No. 2015-846 ruling on DIUC's Application. (R. pp. 30-65.) Order No. 2015-846 included evidence and findings which concurred with recommendations found in pre-filed testimony[2] and DIUC's Application. (*Id.*)

On December 21, 2015, DIUC filed a Petition for Reconsideration and/or Rehearing ("Petition") of Commission Order No. 2015-846. (R. pp. 192-216.) On

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[1] By letter dated July 12, 2016, Beach Field stated to this Court it does not have a position regarding the issues on appeal and does not intend to participate as a respondent.

[2] Commission rules and regulations require parties to pre-file written testimony prior to the hearing. S.C. Code Ann. § 58-3-140(D) (2015); 10 S.C. Code Ann. Regs. 103-845.C (2012). Pursuant to Commission Order No. 2015-57-H, DIUC filed its written direct testimony on September 18, 2015, and all other parties, with the exception of Beach Field, filed their written direct testimonies on October 2, 2015. Afterwards, DIUC filed written rebuttal testimony on October 9, 2015. ORS and the POAs filed surrebuttal written testimony on October 16, 2015.

February 25, 2016, the Commission denied the Petition. (Order No. 2016-50 at R. pp. 6-26.) DIUC filed and served a Notice of Appeal of the Commission's Orders on March 22, 2015. (R. pp. 87-146.)

STATEMENT OF FACTS

In its Application, DIUC requested approval of a new schedule of rates and charges for water and sewer service. DIUC sought an increase in revenues of 108.9% for combined operations equaling $1,182,301, consisting of water revenue increases of $590,454 and sewer revenue increases of $591,847. (Application Schedules A-4, W-C and S-C at R. pp. 1439, 1445-1451, 1463.) DIUC's requested revenue increase utilized a return on equity of 10.5% based on the rate of return on rate base methodology and a 2014 historical test year.

In DIUC's Previous Rate Case before the Commission, (Docket No. 2011-229-WS), the Commission approved a settlement entered into by the POAs and DIUC that was not objected to by ORS whereby DIUC received a revenue increase of $291,485 based on a $5,000,000 rate base; an operating margin of 16.64%; and a return on equity of 8.81%. (Order No. 2015-846 at R. p. 31.)

Counsel for DIUC was fully aware ORS and the POAs were engaged in a discussion regarding a potential resolution of the disputed issues prior to the Commission's hearing on October 28, 2015. DIUC knew ORS and the POAs planned to recommend a potential settlement to the Commission. DIUC declined to enter into any such discussions. At the outset of the hearing on October 28, 2015, the Settlement Agreement was entered into the record. (R. pp. 820-833.) DIUC objected to the submission of the Settlement Agreement to the Commission by ORS and the POAs. (R.

pp. 314-316.) DIUC's objection was overruled by the Commission. (R. p. 320.) The hearing proceeded and testimony was presented by DIUC, ORS, and the POAs. Beach Field did not pre-file testimony or present any live testimony at the hearing.

Following the Commission's Hearing, on December 8, 2015, the Commission issued Order No. 2015-846 granting DIUC a revenue increase of $462,798. (Order No. 2015-846 at R. p. 60 at ¶ 8.)

STANDARD OF REVIEW

A. *Factual findings by the Commission are presumptively correct and should be affirmed if there is substantial evidence to support them.*

"[J]udicial review of administrative agency orders is limited to a determination whether the order is supported by substantial evidence." *MRI at Belfair, LLC v. Dep't. of Health & Envtl. Control*, 379 S.C. 1, 6, 664 S.E.2d 471, 474 (2008). If there is substantial evidence to support a decision by the Commission, the Court will affirm the decision. *Hamm v. South Carolina Pub. Serv. Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992). Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Porter v. South Carolina Public Service Commission,* 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998). Substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 307 (1981). Under the substantial evidence standard, a finding upon which reasonable people may differ will not be set aside. *Id.*, 276 S.C. 130 at 137, 276 S.E.2d 304 at 307.

This Court has held it "may not substitute its judgment for the Commission's on questions about which there is room for a difference of intelligent opinion." *Duke Power Co. v. Public Service Commission*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001). "Because the Commission's findings are presumptively correct, the party challenging a Commission order bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." *Id.* (citing S.C. Code Ann. § 1-23-380(A)(6)).

B. The Commission is considered an expert in utility rate making.

As this Court has recognized, "rate making is not an exact science, but a legislative function involving many questions of judgment and discretion." *Parker v. Public Service Commission*, 280 S.C. 310, 312, 313 S.E.2d 290, 291 (1984). "The 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. Public Service Commission*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004); *Patton v. Public Service Commission*, 280 S.C. 288, 312 S.E.2d 257 (1984).

Further, the weight and credibility assigned to evidence presented is a matter peculiarly within the province of the Commission. *South Carolina Cable TV v. Southern Bell and the Public Service Commission*, 308 S.C. 216, 417 S. E. 2d 586 (1992). The Commission has the duty to "believe or disbelieve evidence submitted," and "sits like a jury of experts." *Hilton Head Plantation Utilities, Inc. v. Public Service Commission*, 312 S.C. 448, 451, 441 S.E.2d 321, 323 (1994).

ARGUMENTS

DIUC is displeased with the Commission's Orders, despite the Commission's decision to provide DIUC with an annual revenue increase of $462,798, which in turn follows a decision in 2012 approving an annual revenue increase of $291,485. However, DIUC's disagreement with the Settlement Agreement between ORS and the POAs does not constitute reversible error. Nor does the Commission's decision not to consider evidence presented by DIUC for the first time in its Petition for Rehearing and/or Reconsideration. And try as it might, DIUC cannot construe existing case law to shift the burden of proof that it did not carry in this case, or overcome the substantial evidence in the record supporting the Commission's Orders. While DIUC disagrees with the findings and conclusions reached by the Commission, it has failed to demonstrate reversible error with respect to any of the arguments it raises and therefore, this Court should affirm the Commission's Orders.

I. THE COMMISSION COMMITTED NO ERROR OF LAW IN CONSIDERING THE SETTLEMENT AGREEMENT BETWEEN ORS AND THE POAS.

DIUC argues the Commission's admission of the Settlement Agreement into evidence at the outset of the hearing was contrary to (1) Commission Rule 103-846 and Rules 401 and 402 of the Rules of Evidence because the Settlement Agreement was not relevant to the proceeding (Appellant's Brief at pp. 14-17); (2) Rule 403, S.C. R. Evid., because the Commission's consideration of some, but not all, of the parties' proposed settlement prejudiced DIUC (*id.* at pp. 17-18); and (3) Rule 408, S.C. R. Evid., because the Settlement Agreement "improperly suggested that DIUC was unreasonable because it

did not agree with and would not 'settle with' ORS and Intervenors [the POAs] on the same terms" (*id.* at pp. 18-19).

For purposes of this Court's review, DIUC asserts the POAs and ORS attempted to use the Settlement Agreement to "usurp the fact finding of the Commission and suggest to the Commission that it need not do its job of sorting through and weighing the evidence to arrive at its final decision on the merits" (Appellant's Brief at p. 15), and "[t]he Commission's ruling should be reversed since it rests on its improper consideration" (*id.* at p. 19) of the Agreement. DIUC therefore alleges the Commission's acceptance of the Settlement Agreement tainted the proceeding and/or the Commission's decision-making ability or process and constitutes reversible error.

However, this Court's charge, as articulated by decisions in *Porter v. S.C. Public Service Commission*, 333 S.C. 12, 507 S.E.2d 328 (1998), and *Able Communications, Inc. v. S.C. Public Service Commission*, 290 S.C. 409, 351 S.E.2d 151 (1986) (cited by DIUC, Appellant's Brief at p. 12), is to determine whether the Commission has made sufficiently detailed findings, supported by evidence in the record, and applied the law correctly to those findings. Put another way, if, as contended by DIUC, the Commission accepted the Settlement Agreement and its adjustments "without making sufficient factual findings based on the evidence to support each of those adjustments," then this Court's review would identify those errors. (*See* Appellant's Brief at p. 18.)

The contentions by DIUC regarding the Settlement Agreement, even if true, do not constitute reversible error. "Conduct of a trial, including admission and rejection of testimony, is largely within the trial judge's sound discretion, the exercise of which will not be disturbed on appeal unless appellant can show abuse of such discretion,

commission of legal error in its exercise, and resulting prejudice to appellant's rights." *American Federal Bank v. Number One Main Joint Venture*, 321 S.C. 169, 174-75, 467 S.E.2d 439, 442 (1996). To justify a reversal because of improper admission of evidence, the appellant must show not only error in the admission of such evidence but also that it was prejudiced or the verdict of the fact finder was probably influenced thereby. *Gaskins v. Firemen's Ins. Co.*, 206 S.C. 213, 33 S.E.2d 498 (1945).

Put another way, as the Court of Appeals has recognized, "whatever doesn't make a difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (citing *Cox v. Cox*, 290 S.C. 245, 349 S.E.2d 92 (Ct. App. 1986) (appellant has the burden of showing that an error was prejudicial). As described below, the Settlement Agreement prejudiced *none* of DIUC's rights in this case. Even if the POAs or the ORS had attempted to "influence the Commission on the merits" as Appellant contends (*see* Appellant's Brief at p. 15), intended to show "DIUC would not compromise" (*id.* at p. 19), or posit "DIUC was unreasonable" (*id.*) (and these parties did no such thing), the Commission's act of admitting the Settlement Agreement would not justify reversal.

Similarly, DIUC's legal contentions are without merit because they are based upon a misunderstanding of the plain language and purpose of the Settlement Agreement and the Commission's role as the factfinder and decision-maker in the case. As such, DIUC's citation (Appellant's Brief at pp. 15-16) to *Powers v. Temple*, 250 S.C. 159, 156 S.E. 2d 759 (1967), a case addressing those issues that might prejudice the decision of a *jury*, misses the mark completely.

A. The Settlement Agreement is merely a proposal.

At the hearing, DIUC objected to the introduction of the Settlement Agreement, arguing the Settlement Agreement was "not a settlement" because issues remained for the Commission to hear and decide. (Appellant's Brief at p. 14; R. p. 315.) The POAs could not agree more. The language of the Settlement Agreement specifically recognizes that disputed issues remained in the case for the Commission's consideration: "the Parties hereby stipulate and agree to the following terms which, *if adopted by the Commission in its Order addressing the merits of this proceeding* ...." (emphasis added). (R. pp. 820-833.) Moreover, counsel for the POAs articulated very clearly that point. (R. pp. 313-314, 575-577.)

DIUC's argument that the Agreement is "confusing" (Appellant's Brief at p. 16) is belied by the Agreement's plain language, the explanation of the Agreement by counsel for the POAs to the Commission on the record, and (perhaps most clearly) by the separate findings of fact, conclusions, of law, and analysis set out in Order No. 2015-846. Moreover, DIUC itself does not find the Agreement "confusing," recognizing in its own Brief that the Agreement was merely a proposal (*see* Appellant's Brief at p. 47 ("The Commission erred in adopting the reductions to Plant in Service *proposed* by the Settlement Agreement.") (emphasis added).)

The POAs never argued, and the Commission never understood, that this case had been "settled," insofar as that term connotes a negotiated agreement between all parties that fully and finally resolves all disputed issues of law and/or fact. The Agreement was executed solely between ORS and the POAs, and is not binding on DIUC, any other party, or, most critically, the Commission. (R. p. 822 at ¶ 6: "[t]he Parties agree to

cooperate in good faith *with one another in recommending* to the Commission ....") (emphasis added).)

Under applicable law, the Commission is not required to approve *any* agreement, even if *all* of the interested parties to a case have executed same and presented it to the Commission for approval. In *Utilities Services of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011), this Court recognized:

> Considering these authorities together, we hold the PSC is the ultimate fact-finder in a ratemaking application. It has the power to independently determine whether an applicant has met its burden of proof. The PSC is not bound by ORS's determination that an expenditure was reasonable and proper for inclusion in a rate application. The PSC may determine—independent of any party—that an expenditure is suspect and requires further scrutiny.

Id. at 106, 708 S.E.2d at 761. Accordingly, ORS and the POAs never argued the Commission *must* approve the Settlement Agreement. Nor did the POAs or ORS claim or advocate that the Settlement Agreement prevented any party from presenting any evidence or presenting its case. The existence of the Settlement Agreement did not short-circuit the Commission's decision-making process required by law.

B. The Settlement Agreement is relevant.

DIUC is incorrect in claiming there was no purpose for the Agreement other than to improperly influence the Commission. (Appellant's Brief at p. 15.) The Agreement's purposes are contained in its plain language: (1) as described above, to memorialize the parties' recommendation and agreement to cooperate in presenting same to the Commission (R. p. 822 at ¶ 6); and (2) to inform the Commission the parties had agreed to stipulate the pre-filed testimonies and exhibits of their witnesses "without objection or cross-examination" (R. p. 821 at ¶ 1).

Moreover, the statutory mandate of the ORS includes, among other things, the requirement "to serve as a facilitator or otherwise act directly or indirectly to resolve disputes and issues involving matters within the jurisdiction of the commission." S.C. Code Ann. § 58-4-50(A)(9) (2015). There is no requirement ORS attempt to reach a resolution or agreement with *all* parties. (*See id.*) In fact, there is statutory authority encouraging partial settlements. *See* South Carolina Base Load Act, which applies to new electric generation under the Commission's jurisdiction, S.C. Code Ann. § 58-33-287(A) ("[i]f a settlement agreement is reached between some or all parties ...."

C. The probative value of the Settlement Agreement was not outweighed by any danger of unfair prejudice.

Nor could the existence of the Settlement Agreement have caused any prejudice to DIUC, much less any unfair prejudice that could support excluding same under Rule 403, S.C. R. Evid. As described above, DIUC was not denied the opportunity to present testimony and evidence during the hearing. As noted throughout Appellant's Brief, DIUC offered testimony opposing (1) the Settlement Agreement; (2) the rates the Settlement Agreement would produce, and (3) the adjustments underlying the Settlement Agreement. In other words, the existence of the Settlement Agreement, and the Commission's admission of the Settlement Agreement into evidence at the outset of the hearing, did not in any way or prevent or limit DIUC from analyzing and attempting to rebut the Settlement Agreement (or otherwise presenting its case). Therefore, DIUC can claim no unfair prejudice as a result of the Settlement Agreement.

D. The Commission's admission of the Settlement Agreement did not run afoul of S.C. Rule of Evidence 408.

Rule 408, S.C. R. Evid., provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

The Settlement Agreement was not offered to *prove* anything. As the record reveals, all parties (with the exception of Beach Field) presented evidence supporting their positions during the hearing through both witness testimony and documentary evidence *following* the Commission's admission of the Settlement Agreement. Further, the Commission's Orders considered and weighed evidentiary proof, including both findings of fact and conclusions in the Orders and analyzing and weighing the testimony and documentary evidence submitted during the Hearing.

As reflected in the Commission's Orders, the rates proposed by the Settlement Agreement were calculated primarily upon the adjustments presented in previously pre-filed testimony of ORS witnesses. (Order No. 2016-50 at R. p. 27.) Therefore, Rule 408 is not applicable in this proceeding.

E. The Commission did not err in allowing the POAs to present testimony after submission of the Settlement Agreement.

DIUC's additional contention the Commission erred in allowing the POAs to present testimony after their submission of the Settlement Agreement (Appellant's Brief at pp. 19-21) is without merit.

The Settlement Agreement specifically contemplated the POAs (and ORS) would present their testimony and exhibits (which had already been pre-filed with the

Commission) following the submission of the Settlement Agreement. (R. p. 821 at ¶ 1.) The POAs did not "settle" with DIUC, and therefore did not waive or lose their right to put on their case before the Commission. (*See id.*) As described above, the POAs' presentation of testimony and documentary evidence resulted in no unfair prejudice of any type to DIUC, because DIUC also presented its entire case unhindered, (including providing testimony at the hearing responding to the specific provisions that were contained in the Settlement Agreement).

F. The Commission did not "violate" its Settlement Procedures.

DIUC's contention the Commission violated its Settlement Policies and Procedures ("Procedures") (Appellant's Brief at p. 21) is baseless. DIUC cites Section V of the Procedures and alleges a settlement may only be entered into when "all parties to a proceeding" resolve "all issues" in the matter. (*See* Appellant's Brief at p. 21.) The plain language of the Procedures does not mandate settlement with all parties, but rather, outlines procedures the Commission will apply only "when all parties to a proceeding reach agreement with regard to all issues . . . ." (Procedures, R. pp. 1484-1485 at Section V.) As DIUC argues (Appellant's Brief at p. 21), not all parties consented to the Settlement Agreement and the Settlement Agreement did not purport to reflect all parties' agreement to its terms.

In addition, language in the Procedures makes clear "[t]he Commission is not bound by settlements. It will independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy." (Procedures, R. pp. 1484-1485 at Section IV.) In addition, "[a]pproval of such settlements shall be based upon substantial

evidence in the record. (Procedures, R. pp. 1484-1485 at Section II.) Again, assuming for the sake of argument that the admission of the Agreement did violate some Commission procedure (and it did not), DIUC cannot show it was prejudiced such that reversal of the Commission's Orders is warranted.

II. THE COMMISSION COMMITTED NO ERROR OF LAW IN ITS DENIAL OF DIUC'S PETITION FOR RECONSIDERATION AND/OR REHEARING.

DIUC filed a Petition for Reconsideration and/or Rehearing ("Petition") of Order No. 2015-846, pursuant to S.C. Code Ann. § 58-5-330 and Commission Rule 103-854. In its Petition, DIUC attempted to support its contention "[t]he rates as approved will force DIUC into default" (R. p. 192) by reference to the covenants contained in DUIC loan documents for SunTrust Bank financing ("Covenants"), and through an attachment to the Petition entitled "Impact of Commission's Order Accepting ORS/POA Settlement" ("Attachment A").

The Commission was justified in refusing to consider the Covenants or Attachment A in evaluating DIUC's Petition. Order No. 2016-50 fully described all of the reasons the Commission could not consider DIUC's opinions and Attachment A provided after the Hearing. (R. pp. 9-13.) Simply put, such evidence had not been presented to the Commission, either in pre-filed testimony or at the Merits Hearing. *See Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E. 2d 843, 855 (2009) (attachment to Rule 59(e), S.C. R. Civ. P. motion could not be considered on appeal). In addition, the Petition (R. pp. 194-196) and Attachment A characterize the effect Order No. 2015-846 *might* have on DIUC's compliance with the Covenants, offering speculative opinions that were not offered via testimony during the hearing.

As such, the POAs (as well as the other parties and the Commission) were unable to test those opinions, (or the inputs and assumptions leading to those opinions) by cross examining a witness. As a result, the Commission's acceptance and consideration of the opinions in the Petition and Attachment A would have substantially prejudiced the POAs and violate their due process rights. *See Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998).

III. THE COMMISSION'S ORDERS WERE NOT AFFECTED BY AN ERROR OF LAW

A. *The Commission previously approved a "management fee" expense amount for Guastella Associates.*

DIUC curiously argues the Commission did not approve management fees for Guastella Associates ("GA") in the Previous Rate Case (Docket No. 2011-229-C) ("Previous Rate Case Management Fees"). (Appellant's Brief, pp. 33-34.) Commission Order 2012-515 (R. pp. 68-86) does just that by approving a Settlement Agreement in the Previous Rate Case specifically "based on the test year revenues after adjustments proposed by ORS in its pre-filed testimony and exhibits." (Settlement Agreement in Docket No. 2011-229-WS, ¶ 4, R. p. 77). As such, the amount for Previous Rate Case Management Fees (and other expenses reflecting ORS adjustments) was approved by the Commission in Order No. 2012-515. Contrary to the contention of DIUC, the Previous Rate Case Management Fees amount was a "Commission-approved" fee.

B. *The Commission committed no error of law in using the previous rate case management fees as a baseline.*

DIUC maintains it was error for the Commission to "rely on" Order No. 2012-515 in the Previous Rate Case (Docket No. 2011-229-WS) (Appellant's Brief, pp. 34-35

(citing *Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011)) in considering ORS's adjustments to the management fees of GA ("Management Fees") (as well as DIUC's rate case expenses). The Commission's analysis in its Order on Reconsideration (R. pp. 21-23) is sound according to South Carolina law, and should not be disturbed. As set out below, DIUC has completely mischaracterized *Utilities* and its application to this case.

The Commission did not "rely on" Order 2012-515 in approving ORS's adjustments in this case. Instead, the Commission followed established South Carolina practice in using the amount of Previous Rate Case Management Fees approved by Order 2012-115 as a *baseline* (a starting point) and then relying on the evidence provided by ORS and the POAs to justify its decision in this case.

This Court ruled in *Utilities* it is error for the Commission to use the *existence* of a previous rate increase as *justification* for denying a rate increase.

> The PSC must not use the simple fact of a recent rate increase as a reason to deny a utility's rate application. An application for a rate increase must stand or fall on its own merits. A recent rate increase provides only a starting point for determining whether a utility's rate base or expenses have increased, such that additional revenues are required.

Utilities, 392 S.C. at 115, 708 S.E.2d at 765. The Order and Order on Reconsideration make clear the Commission did not base any part of its decision on the "simple fact" that DIUC had increased its rates in 2012.

In contrast to the argument put forth by DIUC, *Utilities* speaks directly to what took place in this case, recognizing "a previous rate increase may provide a baseline for the PSC to use in determining whether a utility has incurred additional expenses requiring additional revenue." *Id.* The Commission used the expenses approved by Order No.

2012-515 in Docket No. 2011-229-C (including the amount of Previous Rate Case Management Fees) as a baseline for its consideration of DIUC's proposed expenses in this case, but used the evidence in *this* case to justify its decisions in the Order.

C. *The Commission did not misapply applicable case precedent when evaluating the reasonableness of DIUC's proposed management fees (or other fees and expenses).*

DIUC's argument about the "presumption that its expenditures were reasonable and incurred in good faith" and the fact that this presumption[3] "shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence" (Appellant's Brief at p. 37) leaves out the salient analysis and conclusions contained in *Utilities*—that DIUC has the burden of demonstrating the reasonableness of its proposed Management Fees (and indeed all its proposed fees and expenses) *when those fees are challenged by the ORS and the POAs.*

> Although the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility's expenses are presumed to be reasonable and incurred in good faith. This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence. This evidence may be provided ... through the Commission's broad investigatory powers. The ultimate burden of showing every reasonable effort to minimize ... costs remains on the utility.

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[3] The Commission's conclusion DIUC was not entitled to this initial presumption with respect to the proposed Management Fees, pursuant to *Hilton Head Plantation Utilities, Inc. v. Public Serv. Comm'n,* 312 S.C. 448, 441 S.E.2d 321 (1994), because GA is an affiliate of DIUC is supported by substantial evidence in the Record, including the Agreement between GA and DIUC (R. pp. 945-953), and Mr. Guastella's position as a member of the DIUC Board of Directors (R. p. 499). DIUC's Brief alleges that GA and DIUC are not affiliates, but makes no argument in support of that contention. As such, DIUC has abandoned that issue. *See Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (a party's failure to argue an issue constitutes abandonment of the issue and precludes consideration on appeal).

Utilities, 392 S.C. at 109, 708 S.E.2d at 762-63 (quoting *Hamm*, 309 S.C. 282, 286-87, 422 S.E.2d 110, 112-13 (1992)).

As this Court is aware (and in sharp contrast *to this case* wherein both the ORS and the POAs demonstrated "a tenable basis for raising the specter of imprudence" with respect to DIUC's expenses), in *Utilities neither the ORS nor any intervenor challenged the reasonableness of the utility's expenses before the Commission.* Therefore, DIUC simply cannot fit this case in the *Utilities* box.

Accordingly, DIUC cannot *satisfy* its burden of proof simply by comparing the current test year expenses with those in the previous rate case. *Utilities,* 392 S.C. 109, 708 S.E.2d 762. Instead, when the reasonableness of proposed fees and expenses are challenged (as here), "the burden remains on the utility [DIUC] to demonstrate the reasonableness of its costs." *Id.* In other words, whatever presumption of reasonableness DIUC might have enjoyed *absent challenge* simply did not exist in this case.

And as Order No. 2015-846 makes clear (R. pp. 55-56), the Commission determined, based on substantial evidence in the record (including the testimony of POA witnesses), DIUC did not carry its burden to demonstrate those challenged costs were reasonable. In sum, the Commission followed the procedure contemplated by South Carolina law, and *Utilities* in particular, in making adjustments to DIUC's proposed fees and expenses.

IV. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS THE COMMISSION'S ORDERS.

In its Brief, DIUC attempts to re-litigate factual issues that were thoroughly litigated before the Commission. Furthermore, Appellant's Brief merely cites testimony

and evidence disagreeing with the Commission's decision, conveniently leaving out the wealth of evidence supporting the Commission's conclusions. However, the Commission's Orders fully support its rulings with respect to property taxes (Order No. 2015-846 at R. pp. 51-53; Order No. 2016-50 at R. pp. 14-15), management fees, rate case expenses and other expenses (Order No. 2015-846 at R. pp. 53-56; Order No. 2016-50 at R. pp. 16-20), the Elevated Water Tank and plant-in-service figures (Order No. 2015-846 at R. pp. 47-50; Order No. 2016-50 at R. pp. 23-25), and bad debt expense (Order No. 2015-846 at R. p. 56).

The POAs support the arguments made by ORS in its Brief, and will not repeat those here.

CONCLUSION

Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association respectfully request the Court affirm Commission Orders 2015-846 and 2016-50 because both are supported by substantial evidence and neither is governed by any error of law.

The POAs respectfully request this Court affirm the Commission's Orders, pursuant to SCACR 221(c), based upon any ground or grounds appearing in the Record on Appeal.

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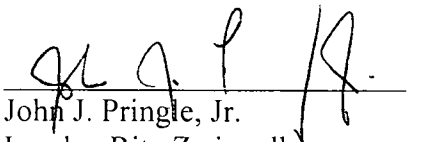
Respectfully submitted,



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October 20, 2016.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No.: 2016-000652

Daufuskie Island Utility Company, Inc., ... Appellant,

v.

South Carolina Office of Regulatory Staff,
Haig Point Club and Community Association, Inc.,
Melrose Property Owner's Association, Inc.,
Bloody Point Property Owner's Association, and
Beach Field Properties, LLC, ... Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association by depositing a copy in the United States Mail, postage prepaid, on October 20, 2016, addressed to the following:

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October 20, 2016.