THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No.: 2016-000652

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S.C. SUPREME COURT

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.

HAIG POINT CLUB AND COMMUNITY ASSOCIATION, INC., MELROSE PROPERTY OWNER'S ASSOCIATION, INC. AND BLOODY POINT PROPERTY OWNER'S ASSOCIATION'S RESPONSE IN OPPOSITION TO APPELLANT'S MOTION FOR COSTS

Pursuant to Rule 222(d) of the South Carolina Rules of Appellate Procedure, Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association ("POAs") hereby respond to Appellant's Motion for Costs. As set out herein, Appellant is not entitled to assess those costs for premiums associated with bonds Appellant secured pursuant to S.C. Code Ann. § 58-5-240(D) (the "Bonds"). Appellant did not seek or obtain the Bonds pursuant to Rule 241, SCACR, and therefore those premiums were not "costs incurred in pursuing the appeal." Martin v. Paradise Cove Marina, Inc. 348 S.C.

379, 383, 559 S.E.2d 348, 350 (Ct. App. 2001). Similarly, the Bonds were not obtained to preserve any appeal rights, but to establish the right to charge rates that have not been approved and that may never be approved.

Background

1. In its Application to the Public Service Commission of South Carolina ("Commission") dated June 9, 2015, Appellant sought approval of a new schedule of water and sewer rates (the "Proposed Rates") that would increase its revenues by 108.9% over and above the water and sewer rates in place at that time (the "Original Rates"). (R. pp. 1416-1483).

2. The Original Rates were approved by the Commission on July 10, 2012 by Commission Order 2012-515 in Docket No. 2011-229-WS. (Order No. 2015-846 at R. p. 31).

3. On December 8, 2015, the Commission issued Order No. 2015-846 approving rates for Appellant (the "Approved Rates") resulting in a revenue increase of $462,798. (Order No. 2015-846 at R. p. 60 at ¶ 8). On February 25, 2016, the Commission issued Order No. 2016-50 denying Appellant's Petition for Reconsideration and/or Rehearing. (R. pp. 6-27). (Order No. 2015-846 and Order No. 2016-50 are referred to herein as the "Commission Orders").

4. On January 20, 2016, Appellant filed its "Petition for Approval of Bond Pursuant to S.C. Code Ann. § 58-5-240"with the Commission, requesting that Appellant be allowed to put its Proposed Rates into effect, and proposing a bond of $700,000 representing Appellant's calculation of the difference between the Proposed Rates and

the Approved Rates that Appellant expected to collect during the appeal and before rates became final.

5. S.C. Code Ann. § 58-5-240(D) provides, in relevant part:

> If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities, respectively, entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested. During any period in which a utility shall charge increased rates under bond, it shall provide records or other evidence of payments made by its subscribers or patrons under the rate or rates which the utility has put into operation in excess of the rate or rates in effect immediately prior to the filing of the schedule.
>
> All increases in rates put into effect under the provisions of this section which are not approved and for which a refund is required shall bear interest at a rate of twelve percent per annum.
>
> The interest shall commence on the date the disallowed increase is paid and continue until the date the refund is made.

6. On March 1, 2016, the Commission issued its Order Approving Appeals Bond (Commission Order No. 2016-156, R. pp. 1-5), setting a bond (the "Initial Bond") in the amount of $787,867. The amount of the Initial Bond represents the additional annual revenue Appellant would receive (over and above the Approved Rates) by collecting the Proposed Rates, plus 12% annual interest. The Initial Bond approved by the Commission was to be effective from July 1, 2016 through June 30, 2017.

7. On June 28, 2017, the Commission issued its "Order Approving Joint Request for Bond During Appeal," Order No. 2017-402. Therein, the Commission

approved a proposal submitted by DIUC and the POAs that 1) continued the initial Bond for an additional six months (until January 1, 2018); 2) and required DIUC to obtain an additional surety bond (the "Additional Bond") in the amount of $415,728.00 to be in effect from July 1, 2017 and expiring on January 1, 2018. The Joint Request for Bond During Appeal came about because the appeal to this Court was still pending beyond the June 30, 2017 expiration of the Initial Bond. Commission Order No. 2016-156 and Order No. 2017-402 will be referred to as the ("Bond Orders").

8. Per the Bond Orders, implementation of the Proposed Rates has enabled DIUC to collect an additional $1,182,301 in annual revenues over and above the revenue resulting from the Original Rates, and an additional $719,503 in annual revenues over and above the revenues resulting from the Approved Rates. As of December 31, 2017, DIUC will have collected the Proposed Rates from its customers for eighteen (18) months.

9. Appellant's Motion for Costs seeks "Bond Premiums per S.C. Code Ann. § 58-5-240(D)" in the amount of $53,726.00.

Applicable Law

Rule 222(b), SCRAP provides:

> **Costs Allowed.** The party entitled to recover costs under this rule may, to the extent the party actually incurred these costs, recover the following: (1) the filing fee paid under Rule 203(d); (2) the cost of the court reporter's transcript; (3) premiums paid for costs of supersedeas bonds or other bonds obtained to preserve rights pending appeal; (4) the cost of printing the Record on Appeal under Rule 209; and (5) the cost of printing the party's final brief(s) under Rule 210. In addition, the party shall be entitled to recover an attorney's fee in an amount which shall be set by order of the Supreme Court. The allowance of additional costs will generally not be allowed except in the most extraordinary of circumstances.

Rule 241(c)(3) SCACR provides:

> The granting of supersedeas or the lifting of the automatic stay under this Rule may be conditioned upon such terms, including but not limited to the filing of a bond or undertaking, as the lower court, administrative tribunal, appellate court, or judge or justice of the appellate court may deem appropriate.

Arguments

The Bond Premiums Were Not "Costs Incurred" in Pursuing the Appeal

The "bonds" referenced in Rule 222(b)(3), SCACR ("supersedeas bonds or other bonds obtained to preserve rights pending appeal") are those bonds secured pursuant to Rule 241, SCACR. By contrast, the Bonds are not "supersedeas bonds or other bonds obtained to preserve rights pending appeal" pursuant to Rule 222(b), SCRAP, but as noted above bonds obtained pursuant to S.C. Code Ann. § 58-5-240(D). The Bond Orders did not consider or determine, pursuant to Rule 241(c)(2), SCACR, whether those orders were "necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot."

Under Rule 241, SCACR, a bond is a condition of a writ that either puts a granted right into effect (by removing the automatic stay applicable in certain cases) or keeps a previously established right in effect (via supersedeas). The Bonds did neither, but instead allowed the Proposed Rates (which have never been approved by the Commission) to go into effect, subject to Appellant's obligation to issue refunds to customers in the event the Commission approves (on remand) rates lower than the Proposed Rates.

The Bonds Are Not "Supersedeas Bonds"

Neither the Commission nor this Court issued a writ of supersedeas (or ordered a supersedeas bond) pursuant to Rule 241, SCACR in this case:

> In a case subject to an exception, any party may move for an order imposing a supersedeas of matters decided in the order, judgment, decree or decision on appeal after service of the notice of appeal. The effect of the granting of a supersedeas is to suspend or stay the matters decided in the order, judgment, decree or decision on appeal *and, where a prior order or decision was in effect at the time the appealed order, judgment, decree or decision was filed, to revive the terms of the prior order or decision.* (Emphasis added).

No party sought (pursuant to the process set out in Rule 241(d), SCACR) or obtained an order imposing a supersedeas of the Commission's Orders. More importantly, no action of the Commission or of this Court during the appeal 1) "suspended or stayed" the Commission Orders or 2) "revived the terms" of any "prior order or decision" of the Commission. Rule 241(c)(1), SCACR. The Commission Orders continued in full force during this appeal and until reversed by this Court. The "prior order or decision" of the Commission that existed before the issuance of the Commission Orders was Order 2012-515 issued in Docket No. 2011-229-WS and approving the Existing Rates. The terms of Order 2012-515 (and the Existing Rates) were not "revived" at any point during the appeal, (or upon remand for that matter).

Instead, Appellant implemented its Proposed Rates. Notably, the Commission's Order Approving Bond did not "revive the terms" of any prior order or decision, but instead allowed DIUC to implement rates that had not ever been lawfully approved by the Commission, and to collect substantial revenues that may be subject to refund. Therefore,

the Bonds did not "preserve" any right of Appellant, but affirmatively established rights during the appeal and until the Commission rules on remand.

The Bonds Did Not Lift Any Automatic Stay (None Existed)

No party sought to use Rule 241, SCACR to lift any automatic stay. This case (an appeal from the Commission) is an exception to the automatic stay set out in Rule 241, SCACR, as an appeal "from an administrative tribunal" as set out in S.C. Code Ann. Section 1-23-380(A)(2). Rule 241(b)(11), SCACR. As such, Appellant's appeal created no automatic stay that could be lifted by the process set out in Rule 241, SCACR.

The Bonds Were Not Obtained to Preserve Any Rights Pending Appeal

The fact that the Bonds were not issued in connection with a writ issued pursuant to Rule 241, SCACR is sufficient to demonstrate that Appellant cannot recover premiums paid for the Bonds pursuant to Rule 222, SCACR. Additionally, however, the Bonds do not preserve rights of Appellant that existed before the appeal, but instead provide surety for Appellant's right to *establish* rates (the Proposed Rates) that have never been approved by the Commission. The implementation of the Proposed Rates establishes substantive (conditional) rights that have continued beyond the appeal and that will continue until a final order from the Commission on remand. *Significantly, the Commission may approve rates that are below the Proposed Rates and require Appellant to provide refunds to its customers.*

Moreover, this Court's Decision reversing the Commission's Orders does not operate to "revive" or establish any right to charge the Proposed Rates. The Court's Decision neither affirmed a decision approving the Proposed Rates nor had the effect of reinstating previously approved rates. Nor did the Court's Decision direct the

Commission to approve the Proposed Rates. Therefore, because the appeal did not vindicate any rights of the Appellant with respect to the Proposed Rates, Appellant cannot recover bond premiums associated with implementing the Proposed Rates.

Unlike Bonds Issued Pursuant to Rule 241, SCACR, The Bonds Continue in Force on Remand

Appellant continues to collect the Proposed Rates following the issuance of the remittitur by this Court, pursuant to S.C. Code Ann. § 58-5-240(D): "[T]he utility may put the rates requested in its schedule into effect under bond only during the appeal *and until final disposition of the case*." (Emphasis added). Accordingly, the Bonds remain in effect. The Proposed Rates and the Bonds will remain in effect until the Commission approves rates that are final. That the Bonds (and the Proposed Rates) continue to be effective even though jurisdiction is no longer with this Court, is another difference between these Bonds and those referenced in Rule 222, SCACR and described in Rule 241, SCACR. An order granting a writ of supersedeas or an order granting the lift of an automatic stay (and any bonds required in connection therewith) only remains in effect while an appeal is still pending. Rule 241(c)(4) SCACR ("If an order is issued pursuant to Rule 241(c)(1), the terms of that order continue in effect during the pendency of the appeal ..."). Therefore, the Bonds do not protect rights solely during the pendency of the appeal as required by Rule 222, SCACR.

Appellant Cannot Recover Bond Premiums In Connection with Proposed Rates That May Not Be Ultimately Approved by the Commission

When the Commission rules on remand, and its decision becomes a final order, Appellant may be "required to refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities, respectively, entitled to the

amount of the excess, if the rate or rates put into effect [the Proposed Rates] are finally determined to be excessive . . . ." S.C. Code Ann. § 58-5-240(D). This Court's Decision did not uphold any right to charge the Proposed Rates or require that the Commission approve the Proposed Rates, and the Commission may approve rates that require Appellant to issue refunds (including interest) to customers. Because Appellant may have no right to charge the Proposed Rates at all, the recovery of premiums paid in connection with the Bonds is inappropriate.

Conclusion

Rule 222, SCACR does not allow Appellant to recover premiums paid for the costs of the Bonds. The POAs request that this Court deny Appellant's request for an award of those premiums paid, and grant such other relief as is just and proper.

Respectfully submitted,

John J. Pringle, Jr.
Lyndey Ritz Zwingelberg
Adams and Reese LLP
1501 Main Street, Fifth Floor
Columbia, South Carolina 29201
(803) 254-4190

Attorneys for Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association

September 13, 2017.

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PROOF OF SERVICE

I certify that I have served Respondent Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc. and Bloody Point Property Owner's Association's Response in Opposition to Appellant's Motion for Costs by depositing a copy in the United States Mail, postage prepaid, on September 13, 2017, addressed to the following:

Shannon Bowyer Hudson, Esquire
Andrew M. Bateman, Esquire
South Carolina Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201
Attorneys for Respondent Office of Regulatory Staff

Thomas P. Gressette, Jr., Esquire
G. Trenholm Walker, Esquire
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, SC 29413
Attorneys for Appellant Daufuskie Island Utility Company, Inc.

Victoria M. Cordoni – Paralegal

September 13, 2017.