THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Docket No. 2011-47-WS

Case Tracking No. 2012-208126

Carolina Water Service, Inc., ... Appellant,

v.

South Carolina Office of Regulatory Staff, Forty Love Point Homeowners' Association, and Midlands Utility, Inc., ... Respondents.

FINAL BRIEF OF APPELLANT

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF ISSUES ON APPEAL

1. Did the Public Service Commission err in completely denying rate relief to Carolina Water Service, Inc. by relying upon limited evidence pertaining to "quality of service concerns" to justify its determination where such reliance resulted in a failure of the Commission to discharge its duty to set just and reasonable rates?

2. Did the Public Service Commission err in completely denying Carolina Water Service, Inc. rate relief based upon a finding of unacceptable quality of service where the Commission failed to find that the utility violated any statute or regulation governing quality of water or wastewater service and failed to state facts which could support such a finding, thus rendering the decision both arbitrary and capricious as well as non-compliant with the Public Service Commission's duty to state facts supporting its decision?

3. Did the Public Service Commission err in completely denying rate relief to Carolina Water Service, Inc. on the basis of purported quality of service concerns where the Commission ignored the substantial evidence of record as a whole which, *inter alia*, demonstrated that the utility had incurred additional expenses and made additional investments, some of which improved the quality of service?

STATEMENT OF THE CASE

On January 27, 2011, Carolina Water Service, Inc. ("Utility" or "CWS") gave the Public Service Commission of South Carolina ("PSC" or "Commission") notice of its intent to file an application for rate relief in accordance with S.C. Code Ann. § 58-5-240 (A) (Supp.2010). On April 15, 2011, Utility filed with the PSC, pursuant to S.C. Code Ann. § 58-5-240 (Supp.2010) and 26 S.C. Code Ann. Regs. 103-512.4.A and 103-712.4.A (Supp.2010), an application for an increase in certain of its previously approved rates and charges for water and wastewater utility service. Forty Love Point Homeowners' Association ("Forty Love") and Midlands Utility, Inc. ("Midlands") timely filed petitions to intervene as parties of record in the proceeding. The South Carolina Office of Regulatory Staff ("ORS") was automatically made a party of record pursuant to S.C. Code Ann. § 58-4-10 (B) (Supp.2010).

Pursuant to PSC orders, "local public hearings" were held in Lexington, York, and Richland Counties on July 13, 2011, August 4, 2011, and September 7, 2011, respectively, at which customers and others were permitted to testify. On September 7, 2011, Utility and Midlands entered into a settlement agreement between them which was submitted to the Commission on the same date. The PSC also held a "public hearing" at its offices in Columbia on September 7 and 8, 2011, for the purpose of receiving evidence from the parties. On September 19, 2011, the PSC heard the closing arguments of counsel for the parties. During the hearing held on September 7, 2011, and at the closing argument heard on September 19, 2011, the PSC also permitted customers and non-customers to testify as "public witnesses." Subsequently, all four parties of record submitted proposed orders for the PSC's consideration.

On October 24, 2011, the PSC issued its Order No. 2011-784, denying Utility's application for rate relief in its entirety. On November 14, 2011, Utility filed its petition for rehearing or reconsideration pursuant to S.C. Code Ann. § 58-5-330 (Supp.2010) and 26 S.C. Code Ann. Regs. 103-854 (Supp.2010). Alternatively, Utility applied for approval of a bond form for the purpose of placing rates into effect pending appeal pursuant to S.C. Code Ann. § 58-5-240 (Supp.2010). On January 19, 2012, the PSC issued its Order No. 2012-31 denying Utility's petition for rehearing or reconsideration and approving Utility's bond form. Utility received written notice of entry of the PSC's Order No. 2012-31 on January 23, 2012. On January 31, 2012, Utility filed the required bond and thereafter placed rates into effect under bond. Utility timely served its Notice of Appeal to this Court on February 17, 2012.

STATEMENT OF FACTS

The Utility is a public utility authorized by the PSC to provide water and sewer services to customers in nine South Carolina counties. [R.9; Order No. 2011-784 at 7.] At the end of the test year adopted by the PSC, Utility was serving 18,607 customers, consisting of 7,645 water customers and 10,962 sewer customers. [R.1536; Tr. Vol. 5, p. 1305, ll. 2-6.] Its system facilities include thirty five (35) water wells, twenty nine (29) water storage tanks, one hundred and fourteen (114) miles of water distribution mains, nine (9) wastewater treatment plants that treat between 60,000 to 1,200,00 gallons per day of wastewater, one hundred twenty three (123) sewer lift stations, and two hundred and sixty five (265) miles of wastewater collection lines. [R.844; Tr. Vol. 3, p.596, ll. 11-19; R.1417; Tr. Vol. 5, p. 1186, ll. 3-9.] In addition, there are other types of equipment and property used and useful in providing service to customers, including a computer based billing system. [R.987-996; Tr. Vol. 5, p. 756, l. 3 – p. 765, l. 5.] The Utility has available approximately thirty (30) operators and managers who operate these facilities. [R.1417; Tr. Vol. 5, p. 1186, ll. 10-12.] The Utility is the largest public utility providing water and sewer service in the State. [R.1503; Tr. Vol. 5, p. 1272, ll. 15-16.]

On April 13, 2010, ORS instituted a rule to show cause proceeding[1] against CWS pursuant to S.C. Code Ann. § 58-5-710 (Supp.2011) alleging that CWS had failed to provide adequate and proper service to certain of its customers. [R.3137; ORS Petition, April 13, 2010, Docket No. 201-146-WS.] The allegations of the ORS petition principally pertained to customer service issues involving billing errors on the part of Utility. [Id.] The Utility filed its answer to the ORS petition on June 2, 2010, in which it

[1] The PSC, at the request of ORS, took notice of the docket established to consider the ORS petition and the pleadings and orders contained in that docket. [R.619-621; Tr. Vol. 3, p. 371, l.19 – p. 373, l.9; R.685-686; Tr. Vol. 3, p. 437, l. 24 – p. 438, l.5.]

admitted some of the allegations set out in the ORS petition pertaining to billing issues, stated the steps that it had taken to correct specific billing errors, and requested that the PSC recognize those steps and permit Utility to satisfy its obligations to customers under applicable law, rule or regulation. [R.3162; CWS Answer, June 2, 2010, Dkt. No 2010-146-WS.] After the issues were joined, the PSC held public hearings for customers and for customer witnesses testifying on behalf of ORS on June 30, 2010, and July 27, 2010, respectively. [R.607; Tr. V.3, p.359, ll.1-4.] Subsequently, CWS and ORS entered into a Joint Corrective Action Plan which provides for certain actions by CWS to address the issues raised in the ORS petition and customer witness testimony, including billing problems. [R.1282-1286; Tr. V.5, p.1051, l.20–p.1055, l.9; R.1306; Tr. V.5, p.1075, ll.1-16.] As part of that Joint Corrective Action Plan, CWS is required to meet certain benchmarks and performance metrics for billing and report them in detail on a quarterly basis to ORS under oath. [R.2940; Hrg. Exh. 36.] The proceeding established to consider ORS's petition in this regard remains pending at the PSC. [R.1286; Tr. V.5, p.1286, ll.6-9.]

On April 15, 2011, Utility filed its application for an increase in rates that is the subject of the instant appeal. At the time of this filing, Utility was charging rates approved by the PSC in an order dated December 30, 2008, which was issued on remand from an appeal to this Court from orders of the PSC in a 2006 rate case docket; these rates are based on a test year that began in 2004. [R.30; Application p.1, ¶2; R.845; Tr. V.3, p. 597, ll. 11-16; R.984; Tr. V.3, p.753, ll. 10-14.] Since its last rate proceeding, Utility had invested over $4.0 Million in improvements to its water systems and over $5.6 Million in improvements to its sewer systems [R.3005; Hearing Exhibit 46, Surrebuttal Audit Exhibits SGS-2, SGS-3 and SGS-5; R.3238; Order No. 2008-855, Exh.1, p.51] and experienced an increase in its expenses of over $700,000. [R.985; Tr. Vol. 5, p. 754. l.1.]

By its application, Utility sought an increase in its rates which would have resulted in additional annual water and sewer service revenues to the Utility of approximately $2,230,000. [R.48; Application at Exhibit B, p. 2.] This application was accepted by the PSC for filing as complete [R.554; Tr. Vol. 3, p. 306, ll. 5-17] and Utility was directed by the PSC to, *inter alia*, provide customers with written notice of the application. [R. 6; Order No. 2011-784, p. 4.]

Thereafter, ORS engaged in business compliance, operational, and financial audits of Utility, during which it made "facility site inspections" of Utility's "water supply/distribution and wastewater collection/treatment systems." [R. 1535-1536; Tr. Vol. 5, p. 1304, l. 11 – p. 1305, l. 10.] *See* S.C. Code Ann. § 58-4-50(A)(2) (Supp.2010).

At the September 7th and 8th hearings, Utility presented the testimonies of President and Chief Executive Officer, Lisa Sparrow; Regional Director of Southeast operations, Patrick Flynn; Executive Director of Regulatory Accounting and Affairs, Steven Lubertozzi, C.P.A.; Director of Customer Care and Billing, Karen Sasic; and Manager of Regulatory Accounting, Kirsten Weeks, C.P.A. ORS presented the testimonies of Senior Manager for Rate Cases, Sharon G. Scott, who conducted ORS's financial audit of the Utility's expenses and rate base, and Program Manager Willie J. Morgan, P.E., who was responsible for the revenue (as well as operations) audit of Utility. The results of these audits and inspections were introduced into the record of the case. [R. 2991-3043; Hearing Exhibits 45-47; R. 1481-1492; Tr. Vol. 5, p. 1250, l. 1 – 1261, l. 16; R. 1534-1548; Tr. Vol. 5, p. 1303, l. 19 – p. 1317, l. 22.]. The testimonies of these seven witnesses established that Utility had a rate base of between approximately $23.53 Million and $24.01 Million, which was an approximate increase of between $5.95 Million and $6.43

Million from the rate base determined by the PSC in Utility's prior rate case. [R.52; Application at Exh. B, p. 6; R.986-987; Tr. Vol.5, p. 755, l. 20 – p.756, l. 21; R.2825; Hearing Exh.32, p.6; R.1167; Tr. Vol.5, p.936, ll. 16-19; R.1482-1483; Tr. Vol.5, p.1251, l. 1 – p.1252, l. 12; R.3005; Hearing Exh.46, p.1; R.1536; Tr. Vol.5, p.1305, ll. 18-19; R.3202; Order No. 2008-855 at Order Exhibit 1, Exh. A, p.6, l. 17.] These testimonies further established that Utility's test year operating expenses were between $6.38 Million and $6.51 Million, representing an approximate increase of between $780,000 and $910,000 over the test year operating expenses allowed by the PSC in Utility's previous rate case. [R.48; Application at Exh. B, p.2; R.984-985; Tr. Vol.5, p.753, l. 7 – p.754, l. 1; R.2821; Hearing Exh. 32, p.2; R.2991; Hearing Exh. 45, p.1; R.3005; Hearing Exh. 46, p.1.] Based upon its audits, ORS recommended that certain accounting adjustments be made to the Utility's proposed test-year revenue, expense and rate base figures[2] As a result, ORS testified that the Utility's pro forma net operating income during the test year was $1.54 Million representing a return on rate base of 6.50%. [R.3005; Hearing Exh. 46, p. 1.] The Utility agreed with many of the ORS proposed adjustments (although Utility did not agree with the rate base adjustment proposed by ORS for the computer billing system), the effect of which was to reduce the amount of additional rate relief sought by the Utility to approximately $1,200,000, or a 20% increase in overall rates. [R.844-845; Tr. Vol.3, p.596, l.20 – p. 597, l.5; R.862; Tr. Vol. 3, p. 614, ll. 12-19; R.1120; Tr. Vol.5, p. 889, ll. 8-11.]

[2] With respect to rate base, one such adjustment proposed by ORS was a reduction of $397,643 to reflect the disallowance of approximately 75% of the allocated original cost of the new computer billing system implemented by Utility in 2008. [R.1489-1490; Tr. Vol. 5, p. 1258, l. 18 – p. 1259, l. 2.] A new computer billing system had been recommended in a management audit of the Utility requested by ORS and approved by an order of the PSC in 2006. [R.989; Tr. Vol.5, p.758, ll. 10-15.]

No other party presented testimony or evidence regarding Utility's rate base, operating expenses, or revenues.[3]

With respect to the Utility's operations, ORS witness Morgan's testimony regarding his inspection established that the Utility's water and sewer services were adequate. [R.1536; Tr. Vol. 5, p. 1305, ll. 12-13; R.1537; Tr. Vol.5, p. 1306, ll.10-12.] ORS also presented the testimony of Dawn Hipp, Director of ORS's Water and Wastewater Department, who testified regarding certain customer service issues, including billing. [R.1501-1531; Tr. Vol. 3, pp. 1270 – 1300.][4] In regard to the billing issues, Ms. Hipp supported the testimony of ORS witness Scott recommending that Utility's rate base be reduced to disallow approximately 75% of the capital investment in the customer billing computer system. [R.1508; Tr. Vol. 5, p. 1277, ll.6-23.] However, neither Mr. Morgan nor Ms. Hipp asserted that the PSC could or should deny rate relief entirely based upon the testimony heard by the PSC regarding the "quality of service" provided by Utility. [R.1501-1560; Tr. Vol. 5, pp. 1270 -1329.]

Midlands presented the testimony of its President, Keith Parnell, who stated that Utility provides bulk (*i.e.*, wholesale) wastewater treatment service to Midlands for use in the Vanarsdale Subdivision in Lexington County served by Midlands. [R.696-697; Tr. V.3, p. 448, l. 36 – p. 449, l. 25.] Mr. Parnell testified that Midlands and Utility agreed to settle their issues whereby Utility, *inter alia*, would increase the contract bulk sewer treatment service rate charged to Midlands by Utility in a percentage identical to any

[3] In addition to the testimonies of the aforementioned witnesses regarding accounting, operational and revenue issues, both Utility and ORS presented the testimony of witnesses regarding an appropriate return on equity for Utility. However, in view of the PSC's decision in the matter, these testimonies do not directly bear upon the issues in the instant appeal.

[4] Regarding these issues, Ms. Hipp's testimony included matter that had been raised before the PSC in the proceeding initiated by ORS under S.C. Code Ann. § 58-5-710 (Supp. 2009) for the purpose of requiring Utility to provide customers "adequate and proper service." [R.606; Tr. Vol. 3, p.358, ll.1–17; R.607; Tr. Vol.3, p. 359, ll. 16 - 25; R.685-686; Tr. Vol. 3, p. 437, l.24 – p. 438, l.5; R.3137; ORS Petition for Rule to Show Cause, April 13, 2010, Docket No. 2010-146-WS; R.1507-1508; Tr. Vol. 5, p.1276, l. 17-p.1277, l.5]

increase in the retail sewer service rates granted by the PSC. [R.686-706; Tr. Vol. 3, pp. 438-458.]

Forty Love presented the testimony of three of its members who are also customers of CWS. [R.621-685; Tr. Vol. 3, pp. 373-437.] Principally, these customers' testimonies related to dissatisfaction with the aesthetic quality of the water that was provided in that subdivision. [R.630-633; Tr. Vol. 3, p. 382-85; R.648-658; Tr. Vol. 3, p. 400-10; R.673-678; Tr. Vol. 3, p. 425-30.] In addition to the testimony of the three Forty Love customers, the PSC also heard testimony from 55 other customers.[5] A total of 45 of these other customers testified at the "local public hearings" held "to provide a forum, at a convenient time and location, for customers of CWS to present their comments regarding the service and rates of CWS." [R.7; Order No. 2011-784 at 5, fn.3; R.268-395; Tr. Vol. 1, pp. 20-147; R.410-434, 438-549; Tr. Vol. 2. pp. 162-186 and 190-301; R.556-604; Tr. Vol. 3, pp. 308-56; R.930-958; Tr. Vol. 4, pp. 682-710.] Of the 58 customer witnesses testifying, the PSC specifically referred to the testimony of 34 of them in its orders: 21 customers who stated that they had encountered problems with billing by Utility, 14 customers who stated that they were dissatisfied with the quality of their water; 6 customers who expressed concerns about customer service relations; and 2 customers who complained of experiences with sewage line blockages and backups.[6]

The Utility presented the testimony of five witnesses, Mr. Lubertozzi, Mr. Flynn, and Ms. Sasic, and Mac Mitchell and Bob Gilroy (the latter being Regional Managers of Utility) to address the testimony of other witnesses regarding the quality of utility service and customer service. Mr. Flynn's testimony described in detail the operational and

[5] In addition to the 58 customers, four legislators and a person who was a customer of another utility that is affiliated with the Utility were permitted to testify.

[6] Certain customers testified regarding more than one subject.

capital expenditures Utility had incurred to comply with regulatory requirements and provide reliable water and sewer services to its customers. [R.1156-1239; Tr. V. 5, pp. 925-1008.] Ms. Sasic addressed the steps taken by Utility to improve customer service processes consistent with recommendations contained in the PSC ordered management audit of CWS that was completed in 2007. [R.1245; Tr. V.5, p. 1014, ll.9-12; R.1289; Tr. V. 5, p. 1058, ll. 8-19.] In addition, Ms. Sasic responded to testimony regarding billing issues, explaining that these issues primarily affected the Utility's distribution-only water customers, had resulted from the Utility's 2008 implementation of a new "Oracle" billing system known as "Customer Care and Billing" or "CC&B", and had been addressed by Utility's implementation of additional procedures in 2010[7] which largely corrected the billing problems. [R.1240-1349; Tr.V.5, pp.1009-1118.] Mr. Mitchell addressed customer complaints concerning sewer line blockages and backups and identified the steps taken by Utility to address the issues. [R.1349-1358; Tr.V.5, pp.1118-1127.] Mr. Gilroy testified as to Utility's processes for operating and maintaining the water and sewer systems. Specifically, Mr. Gilroy addressed the practices concerning sewer and water line repair, routine maintenance of the water system to ensure the freshest water possible, and steps taken to maintain and improve water quality. [R.1358-1473; Tr. V. 5, pp.1127-1242.] Ms. Hipp and Mr. Morgan provided surrebuttal testimony in response to the testimonies of these Utility witnesses. [R.1517-1531; Tr.V.5, pp. 1286-1300; R.1551-1560; Tr. V.5, pp.1320-1329.]

Thereafter, counsel for the parties of record made closing arguments and submitted proposed orders. Consistent with the testimony of its witnesses, Utility's proposed order accepted many of the accounting adjustments proposed by ORS as a

[7] These procedures included those adopted in the Joint Corrective Action Plan entered into between CWS and ORS in connection with the 2010 rule to show cause proceeding pending at the PSC. [R.1306; Tr. Vol. 5, p.1075, ll. 4-16.]

result of its audit and recommended that rates be set based upon annual operating expenses of $6,506,422, an allowable rate base of $24.01 Million, and a return on equity of 11.50%. [R.79-83; Utility Proposed Order, pp.8-12.] The rate increase reflected in Utility's proposed order would have generated additional annual revenues of $1,255,070 and yielded a return on rate base of 9.05%. ORS's proposed order reflected the testimony of its witnesses who asserted that, based upon the results of its audits and investigation, the revenues, expenses, and capital expenditures claimed by Utility should be adjusted and that the Utility should be required to take certain steps to address billing and customer service issues which had been raised in the hearings. ORS recommended Utility's rates be set based upon annual operating expenses of $6,433,719, an allowable rate base of $23.6 Million, and a return on equity of 9.02%. [R.168; ORS Proposed Order at 50.] Based upon these recommendations, ORS proposed that rates be increased such that Utility would have the opportunity to earn an additional $501,133 in annual revenues, which resulted in a return on rate base of 7.08%. [R.125; ORS Proposed Order, p.7.] Midlands's proposed order did not reflect any proposed accounting adjustments or a recommended revenue requirement, but recommended only that the PSC accept the settlement between Utility and Midlands as being reasonable and in the public interest. [R. 185; Midlands Proposed Order, p. 1.] Forty Love's proposed order similarly did not recommend any accounting adjustments or appropriate revenue requirement. Rather, Forty Love requested that Utility "not be allowed to collect additional revenues in South Carolina until [Utility]" met certain requirements, including establishment of "a service office in South Carolina," conversion of the water system serving that subdivision to a bulk service arrangement, modification of the Utility's authorized rate schedule as it pertained to that subdivision, additional water quality reporting, and a limitation on

additional revenue the PSC might approve to that which would result from a return on rate base of not more than 7.80%. [R.182; Forty Love Proposed Order, p. 2.]

Notwithstanding the evidence of record submitted by Utility demonstrating that it had experienced increases in its rate base and operating expenses and that its provision of water and sewer services was adequate, and the evidence introduced by ORS corroborating the adequacy of water and sewer service, the PSC denied Utility's application for rate relief in its entirety. Although it recounted the testimony of the 34 customers described above (which constitutes 0.18% of Utility's customer base) and addressed the billing and customer service concerns presented in the testimony of ORS witness Hipp, the Commission failed to acknowledge Utility's extensive testimony and other evidence regarding billing, customer service and utility service issues, giving them only cursory mention to the extent necessary to discount the Utility's position on the billing and water quality issues in conclusory fashion. [R.18 and 20; Ord. No. 2011-784 at 16 and 18.] The PSC ignored the evidence regarding Utility's test year expenses and rate base and a proper return on equity, including that presented by ORS resulting from its investigation, audit, and inspection of Utility's operations, which demonstrated that, notwithstanding issues pertaining to customer service or billing, Utility was entitled to rate relief. [R.11-12 and 23; Ord.No. 2011-784, pp. 9-10 and 21; R.168; ORS Prop.Order at 50.] The PSC made no mention of the testimony of the cost of capital witnesses sponsored by Utility and ORS. Similarly, the PSC ignored the Utility's settlement with Midlands and Forty Love's recommendation that rates be set allowing Utility to achieve a return on rate base of not more than 7.80% (if that party's proposed limitations on implementation of such rates were met). Instead, the PSC simply recounted the testimony by Utility and ORS

witnesses regarding the returns on equity[8] and returns on rate base which result if the Utility's current rates remain in effect and noted that either calculation resulted in Utility earning "a positive rate of return." [R.23; Order No. 2011-784 at 21.]

Further, even though none of the parties of record suggested that the PSC could deny Utility's entire request for rate relief, the PSC found it had the discretion to do so. The PSC's majority stated that it had "the power to deny a rate increase in its entirety where it deems the quality of service provided by the utility to be unacceptable based upon the evidence in the record" pursuant to *Patton v. South Carolina Public Service Commission*, 280 S.C. 288, 312 S.E.2d 257 (1984). [R.23; Order No. 2011-784, p. 4.] In so ruling, the PSC's majority recognized that this Court's holding in *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011) ("*USSC*") had a direct bearing on the rate case before it, but sought to distinguish that holding on the basis that neither the General Assembly nor this Court had instructed the Commission that it lacked the power to completely deny rate relief where the evidence demonstrated that "the service delivered by the utility is simply unacceptable." [R.5; Order No. 2011-784, p. 3.]. This reading of *USSC* was not joined in by two of the commissioners, who appended a written dissent to the PSC's initial order. [R.25-27; Order No. 2011-784 at 23-25.] The PSC further concluded that this Court's holding in *Patton* instructed it to consider quality of service in setting just and reasonable rates and, thus, entitled it to deny all rate relief "[b]ased on quality of service concerns." [R.6; Order No. 2011-784 at 4.]

Subsequently, Utility timely filed and served a petition for rehearing and reconsideration pursuant to S.C. Code Ann. § 58-5-330 (Supp.2010). The PSC denied

[8] These returns on equity were 5.09% according to the Utility's calculation and 6.42% according to ORS's calculation, neither of which figure is supported by evidence of record.

Utility's petition without addressing its substance, but granted Utility's alternative application for approval of a bond form which would allow the Utility to place into effect rates which would generate additional annual revenue of $501,133 (the amount recommended by ORS in its proposed order) pending appeal in accordance with S.C. Code Ann. § 58-5-240 (D) (Supp.2010). [R. 28-29; Order No. 2012-31, pp. 1-2.]. This appeal followed.

SUMMARY OF ARGUMENT

The adequacy of Utility's water and sewer service to its 18,607 test year customers is not at issue in this case as neither the PSC's order nor the record below reflect that the Utility's customers do not receive reliable potable water service and sewerage collection, transportation and treatment service on a consistent basis that complies with regulatory standards set by the PSC or DHEC. Nor is the existence of adequate water and sewer facilities used to provide these services at issue as the record reflects that Utility's facilities meet the applicable regulatory standards. And, no question exists that Utility has invested the capital to create, and incurred the expenses necessary to operate and maintain, the systems serving these 18,607 customers as the parties who addressed these issues are in agreement that Utility had experienced increases in its expenses and rate base since its last rate proceeding. What is at issue, however, is the reliance by the PSC on "quality of service concerns," arising primarily out of acknowledged problems the Utility experienced with implementing its new computer based billing system that are addressed in the Joint Corrective Action Plan, to determine the case in a manner that is completely adverse to Utility without an examination of the expenses and rate base of the Utility and in circumstances where no party of record suggested such an outcome.

As noted by this Court in its reversal of the PSC in *USSC*, the Commission has an "obligation to provide [Utility] an opportunity to achieve a reasonable return" on its investment. *Id.*, 392 S.C. at 107, 708 S.E.2d at 761, n.8 (*citing Bluefield Waterworks v. West Virginia*, 262 U.S. 679 (1923) and *Southern Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n of South Carolina*, 270 S.C. 590, 244 S.E.2d 278 (1978). This obligation is to be met when the PSC discharges "its duty to fix 'just and reasonable rates.'" *Id.* 392 S.C. at 113, 708 S.E.2d at 764-65. The PSC is not relieved of this duty simply because it receives evidence of limited complaints regarding quality of service, but must consider quality of service in the context of discharging its duty to ascertain a utility's allowable rate base and expenses. *Id.* 392 S.C. at 111, 708 S.E.2d at 763. In other words, in setting just and reasonable rates, the PSC is bound to balance the interests of customers with Utility's right to earn a fair return on its investment. *See S.C. Cable Television Ass'n v. PSC*, 313 S.C. 48, 51, 437 S.E.2d 38, 39 (1993).

Here, the PSC failed to discharge its duty to set just and reasonable rates by balancing the interests of the Utility with those of the customers and, therefore, cannot have met its obligation to provide Utility an opportunity to earn a reasonable return on its investment. Clearly cognizant of this Court's instruction in *USSC* (*i.e.*, that the existence of limited evidence regarding utility improvements, operations and water quality does not permit the PSC to eschew its ratemaking duty), the PSC in the instant case attempted to modify its approach to ratemaking to focus on "quality of service concerns," instead of a utility's burden of proof regarding expenses and investments that the PSC improperly seized upon in *USSC*. The Utility submits that this was done so as to achieve the same result for which the PSC was reversed in *USSC*—a complete denial of rate relief without accounting for the Utility's operating expenses incurred and capital investments made in

its provision of service to the public. As recognized by two of the Commissioners in dissent, this approach is contrary to the principal teachings of *USSC*. Further, the PSC's order misapplies this Court's holding in *Patton,* as explicated in *USSC,* to preclude, rather than promote, "good business practices" by the Utility. Rather than balancing the interests of Utility and customers as required by *S.C. Cable Television Association*, the PSC considered only the customers' interests based upon the limited evidence presented to it regarding "quality of service concerns." In addition to these and other errors of law, the PSC's decisions are arbitrary and capricious and are unsupported by substantial evidence.

Accordingly, and for the reasons discussed more fully below, the PSC's decision should be reversed because it prejudices Utility's substantial rights as provided in S.C. Code Ann. § 1-23-380(5)(a, b, d-f) (Supp.2011). The case should be remanded to the PSC with specific instructions that it set just and reasonable rates based solely upon the existing evidence of record **plus** additional evidence pertaining to the recognition of Utility's rate case expense incurred as a result of the instant appeal.

STANDARD OF REVIEW

The legal principles governing this Court's scope of review of orders of the PSC are embodied in the South Carolina Administrative Procedures Act ("APA"), codified as S.C. Code Ann. § 1-23-380 (Supp.2011), other statutory provisions, and a number of decisions of this Court. While the APA does not permit this Court to substitute its judgment for that of the PSC as to the weight of evidence on questions of fact, the Court may reverse or modify decisions of the PSC which are clearly erroneous in view of the reliable, probative and substantial evidence of the whole record. *Welch Moving & Storage Co. v. Pub. Serv. Comm'n*, 301 S.C. 259, 391 S.E.2d 556 (1990). Although the

PSC's ratemaking decisions are entitled to deference if supported by substantial evidence, *USSC*, 392 S.C. at 103, 708 S.E.2d at 759, this Court may reverse or modify a PSC decision upon a convincing showing that the decision constitutes arbitrary or capricious action as a matter of law (*Chemical Leaman Tank Lines, Inc .v. S.C. Pub. Serv. Comm'n*, 258 S.C. 518, 521-22, 189 S.E.2d 296, 297-98 (1972); *Pullman Co. v. Pub. Serv. Comm'n*, 238 S.C. 358, 362, 120 S.E.2d 214, 215-16 (1961)), or is affected by other error of law. *USSC, supra.* In addition to the APA, statutory provisions specific to the PSC also provide standards applicable to the evidence of record required to support a PSC order.[9]

In accordance with the above-stated standard, a convincing showing by Utility that the PSC's decision to deny rate relief is contrary to law, is unsupported by substantial evidence, exceeds the PSC's authority, or embodies arbitrary or capricious action as a matter of law, or otherwise violates S.C. Code Ann. § 1-23-380 (5) (Supp.2011), will compel reversal of the PSC's orders by this Court.

ARGUMENT

I. The PSC erred in finding that it may deny utility's request for rate relief in its entirety based upon limited evidence regarding "quality of service concerns."

The PSC's orders are erroneous as a matter of law for a number of reasons, including their contravention of this Court's holdings in *USSC* and *Patton*.

[9] For example, in water and wastewater utility rate proceedings, the PSC's decision regarding a fair rate of return must be based exclusively upon reliable, probative and substantial evidence of record. *See Porter v. S.C. Pub. Serv. Comm'n, supra*, 333 S.C. at 21, 507 S.E.2d at 332; S.C. Code Ann. § 58-5-240 (H) (Supp. 2011) and all PSC decisions set forth in statutory language must include a concise and explicit statement of the underlying facts supporting its findings. *See Heater of Seabrook, Inc. v. Public Service Commission*, 332 S.C. 20, 28-29, 503 S.E.2d 739, 743 (1998) (citing S.C. Code Ann. § 1-23-350 (2005)).

A. *The PSC improperly failed to follow the Court's instructions in USSC*

The PSC was twice instructed by this Court in *USSC* that it may not simply rely upon limited testimony regarding operational expenditures, plant improvements and water quality to conclude that a utility was not entitled to rate relief. *Id.*, 392 S.C. at 112, 708 S.E.2d at 764 ("[t]he PSC was required to consider whether, even putting aside the expenditures it found questionable, [u]tility was entitled to some increase in its rates") and 392 S.C. at 115, 708 S.E.2d at 765 ("[T]he PSC must not deny an application in its entirety when only a small portion of the expenditures claimed by the utility have been called into question. Rather, the PSC must determine whether, even excluding the questioned expenditures, the utility is entitled to a rate increase"). Notwithstanding these specific and repeated instructions, the PSC's majority adopted a slightly modified approach to ratemaking designed to achieve the same result which was reversed in *USSC—i.e.*, a complete denial of rate relief without examining the Utility's investment and expenses and determining an appropriate return on rate base. In the instant case, the PSC concluded that testimony from a very small percentage of the Utility's customer base pertaining to alleged deficiencies in quality of service and testimony by ORS (primarily relating to the acknowledged problems Utility had experienced in implementing its new computer based customer billing system) supported its finding that there existed "widespread and pervasive problems with regard to quality of service" and that "[b]ased on quality of service concerns"[10] a complete denial of rate relief was justified. [R.3, 6, and 23; Ord.No. 2011-784 at 1, 4 and 21.]

[10] Although never defined by words or addressed in terms of applicable statutes or regulations (the latter of which, as discussed *infra* at pp. 34- 40, is in itself legal error), the PSC included within the penumbra of its "quality of service concerns" the following aspects of Utility's functions: billing [R.11-18; Order No. 2011-784 at 9-16], water quality [R.18-20; Order No. 2011-784 at 16-18], sewer line blockages [R.21; Order No. 2011-784

As recognized by two of the Commissioners in dissent (R. 25-27; Order No. 2011-784 at 23-25.), this conclusion runs afoul of the principal teachings of *USSC*, which are that the testimony of a customer specific to his or her service experience with a utility "could offer no insight" into the experience of other customers and that the existence of such evidence does not relieve the PSC from discharging its duty to set just and reasonable rates. *USSC*, 392 S.C. at 111, 708 S.E.2d at 763. By relying upon the testimony of less than two-tenths of one percent (0.18%) of Utility's customers to support a finding regarding the quality of Utility's service to 100% of Utility's customers, the PSC has ignored the holding in *USSC* that limited testimony specific to the experience of certain customers does not constitute evidence regarding the experience of all customers regarding a utility's service. *Id.* at 111, 708 S.E.2d at 763 ("we hold the PSC could consider customer testimony that Utility's water quality had not improved ... [but] the customer testimony in this case could only have 'raise[d] the specter of imprudence' as to expenditures that Utility claimed to have incurred in neighborhoods where customers alleged no improvements were made. These customers could offer no insight into

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at 19], and "customer service" [R.21-23; Order No. 2011-784 at 19-21]. With regard to the issues pertaining to billing, ORS recognized that it primarily dealt with the Utility's 2008 implementation of a new computer billing system to bill customers receiving bulk utility service such as "water distribution only" and "sewer collection only" which was being addressed in the separate rule to show cause proceeding initiated by ORS pursuant to S.C. Code Ann. § 58-5-710. [(R.1505 and 1507; Tr. Vol. 5, p. 1274, ll. 15-19 and p. 1276, ll. 19-21.] *See USSC*, 392 S.C. at 113, 708 S.E.2d at 765 (discussing distribution-only water customers). Seven and one-half pages of the PSC's twenty five page order address factual findings pertaining to "billing problems" found by the PSC to have existed based upon the testimony of these twenty customers, ORS, and the Utility. [R.11-18; Order No. 2011-784 at 9-16.] As noted above, ORS proposed to address the "billing problems" through a nearly $400,000 reduction in allowable rate base representing approximately 75% of the original cost of the new computer billing system allocable to Utility (the acquisition of which had been recommended in an independent management audit performed in 2006-07 at the direction of the PSC by a firm retained by ORS). *See* discussion at p.7, *supra*. This proposed reduction in rate base, although opposed by CWS before the PSC, is at least consistent with the Court's view of *Patton* as authorizing "reasonable requirements" to address deficiencies in utility plant. *See USSC*, 392 S.C. at 105, 708 S.E.2d at 760 ("the PSC is entitled to create incentives for utilities to improve their business practices. Accordingly, the PSC may determine that some portion of an expense actually incurred by a utility may not be passed onto customers.") The remaining four and one-half pages of the "Findings of Fact" section of the PSC's order pertain to the testimony of fourteen customers concerning water quality, six customers regarding customer service problems and two customers concerning sewer line blockages. [R.18-23; Order No. 2011-784, pp. 16-21.]

whether Utility made capital improvements in other neighborhoods"), *id.* at 112, 708 S.E.2d at 764 ("[c]ustomer testimony regarding water quality and the lack of capital improvements brought the prudence of certain other expenditures into question. However, the customers who testified represented only a small portion of the eighty-one neighborhoods in which Utility provides water service"). The scope of this error is perhaps best illustrated by the fact that the customer and ORS testimony in this matter did not extensively address Utility's sewer service, yet the PSC denied any sewer rate relief in the face of undisputed evidence of record that the Utility invested $5.6 Million in its sewer plant and had experienced an increase in sewer operating expenses of $75,000, since its last rate relief proceeding, which constituted 56% of the $10 Million total invested and 8.3% of the additional expenses incurred during that period. [R.3225, 3227, 3238; Order No. 2008-855, Exhibit 1, pp. 38, 40, 51; R.3005, 3007, 3015; Hearing Exhibit 46; pp. 1, 3, 11.] *Cf. USSC,* 392 S.C. at 112, 708 S.E.2d at 764 (holding that the PSC is obligated to consider a utility's entitlement to recognition of expenditures after taking into account ORS's recommendations that certain expenses be disallowed.)

And the PSC majority's failure to give effect to this Court's holding in *USSC* was not inadvertent, as the PSC specifically addressed the Court's opinion in that case in its initial order denying CWS rate relief. Therein, the PSC majority stated that

> "[w]e are aware of the South Carolina Supreme Court's most recent utility rate decision in [*USSC*], reversing our order therein denying rate relief. However, we do not believe the *USSC* decision **explicitly** holds that this Commission is without the power ... to issue a complete denial of a rate increase where the evidence demonstrates that the service delivered by the utility is simply unacceptable.[11] **Absent instruction by the** General Assembly or the **Supreme Court** to the contrary, we in the

[11] This is yet another undefined term (see n. 10, *supra*) which reflects the all encompassing arbitrary and capricious nature of the PSC's principal conclusion in this case that "widespread and pervasive problems with regard to quality of service" exist. [R.23; Order No. 2011-784 at 21, para.1.]

> majority decline to hold that the **current law** compels such a result. *Patton* instructs us that quality of service must be **considered** in setting just and reasonable utility rates. Based on quality of service concerns, the facts in this case demonstrate ample justification for denial of the Company's application."

[R.5-6; Order No. 2011-784 at 3-4 (emphasis supplied).] Thus, the PSC majority concluded that, as a matter of law, *Patton* authorizes it to abrogate its duty to set just and reasonable rates based on a single factor—quality of service—and that this Court's holding in *USSC* reversing the PSC's reliance upon limited testimony regarding a utility's expenses, investments and quality of service to justify its failure to set just and reasonable rates did not bear on its decision in this case because *USSC* does not expressly preclude the PSC from deciding a case solely on "quality of service concerns." An examination of the quoted language in the PSC's order, *vis-à-vis* the holdings of the Court in the cited cases, amply demonstrates the flaw in the PSC majority's analysis.

The PSC majority disregarded the Court's instruction that testimony from a small portion of a utility's customer base regarding the absence of capital and operational expenditures and improvements to the quality of water service is not evidence that can inform the Commission regarding the utility's expenditures and quality of service to all customers for purposes of determining the allowable expenses and rate base that are to be determined in setting just and reasonable rates. *USSC, supra.* In other words, the PSC failed to apply this explicit holding of *USSC* which renders the evidence relied upon by the PSC in this matter legally insufficient[12] to justify its conclusion that there exist

[12] As the Court is aware, *USSC* was not decided on the basis that the PSC lacked substantial evidence to support the conclusion it reached in that case. The Utility submits that the existence of substantial evidence is not necessarily implicated where, as here, an agency has committed legal error by failing to address the merits of a contested case matter – in this case, the constitutionally required setting of just and reasonable rates. However, even assuming that *USSC* can be read as having reversed the PSC on substantial evidence grounds, Utility submits that the PSC lacked substantial evidence to reach the conclusion that it did in the instant case. See discussion at pp. 39-47, *infra.*

"widespread and pervasive problems with regard to quality of [Utility's] service." [R.23; Order No. 2011-784 at 21.] As already noted, the PSC relied upon the testimony of only 34 out of a total of 18,607 customers (at the end of the test year) served by CWS. [R.11-23; Order No. 2011-784 at 9-21.] This is less than two-tenths of one percent (0.18%) of the Utility's entire customer base. Of these 34 customers whose testimony was cited by the PSC, 20 testified pertaining to billing issues, which is 0.10% of the end of test year customer base. Further, the testimony of ORS regarding billing problems (which are, as noted above pending before the PSC in the rule to show cause proceeding instituted by ORS) pertained to billing issues in the test year for approximately 100 customers and was repeatedly proposed by ORS to be addressed in this case by way of a reduction in rate base.[13] This limited testimony is not, as a matter of the law established by this Court in

[13] See, *e.g.*, testimony of ORS witnesses Scott and Hipp recommending that the PSC reduce Utility's rate base by approximately $400,000 to exclude 75% of the initial cost of a new computer billing system allocated to CWS. [R.1508; Tr. Vol. 5, p. 1277, ll. 15-17; R.1489; Tr. Vol. 5, p. 1258, ll. 18-20; R.145-148; Proposed Order of ORS at pp. 27-30, 36] Again, CWS does not agree with that adjustment, but it is noted here to provide the Court context regarding the PSC's determination in this matter regarding the billing issues notwithstanding the recommendation of ORS. Further, the Court may take notice of the fact that even assuming that the testimony of each of the 20 customers who testified regarding a billing issue dealt with **every bill issued** by Utility to them in the test year (which is not established in the record), that would mean that at most 240 bills were issued in error to these customers during the test year. *See Wise v. Wise* , 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct.App.2011) (holding that '[a]n appellate court can take judicial notice of something that was not before the trial court if it is indisputable"). The ORS testimony regarding billing issues reflected that it received 101 billing complaints in the test year ending September 30, 2010. [R. 1507; Tr. Vol. 5, p. 1276, ll. 8-15.] Thus, the record supports that not more than 341 erroneous bills were issued in the test year for service provided to 18,607 customers. The Utility submits that, for ratemaking purpose, this figure is not material. *Cf. Porter v. S.C. Public Serv. Comm'n*, 328 S.C. 222, 229, 493 S.E.2d 92, 96 (1997) (recognizing that a 0.3% difference in rate base resulting from use of a test year employee expense capitalization factor less than half of capitalization factors in prior years was not material for ratemaking purposes). Further, the ORS testimony in this regard reflected that the number of billing complaints declined to only 17 in the ten months immediately prior to the hearings in this matter. [R.1507; Tr. Vol. 5, p. 1276, ll. 8-15.] *Cf.* Order No. 2011-784 at 16 ("[U]tility claims to have made improvements to its billing and collection practices, but we believe the problems have persisted at an unacceptable level"). Furthermore, under Commission regulations, billing errors are capable of correction. *See, e.g.*, 26 S.C. Code Ann. Regs. 103-533.1 and 103-733.2 (Supp.2010) (providing for adjustment of bills to correct utility errors arising from "human or machine error"). And, as is evidenced by ORS's testimony reflecting approximately 17 billing complaints in the 10 months prior to the hearings in this matter, there has been improvement in the Utility's billing processes subsequent to the implementation of the Joint Corrective Action Plan. [R.1306; Tr. Vol. 5, p. 1075, ll.1-13.] Utility submits that if the scope of the billing problems were expressed in terms of expense or investment, this quantifiable improvement in the number of billing complaints would constitute a "known and measurable change after the test year" for which Utility would be entitled to credit. *See Heater of Seabrook, Inc. v. The Public*

USSC, sufficient to justify the conclusion reached by the PSC majority. Thus, not only did the PSC have explicit instructions from this Court in *USSC*, its order is contrary to those instructions.

Moreover, it appears from the above-quoted language of the PSC order that the Commission believes that it cannot be precluded from reaching a conclusion by methods that are contrary to law unless this Court has explicitly instructed it not to do so. Thus, because the PSC's determination that was reversed in *USSC* was based upon the conclusion that the utility had failed in its burden of proving increased expenses and rate base, and not upon the "quality of service concerns"[14] that it relied on in the instant case, the PSC majority reads the holding of *USSC* regarding the Commission's duty to set just and reasonable rates, even in the face of questionable expenditures or quality of service, as being of no application here. This is error.

Even if this analysis did not ignore explicit instructions by the Court in *USSC*, it would still be contrary to precedent as the absence of an explicit instruction from this Court regarding the method by which the PSC determines just and reasonable rates does not permit the PSC to ignore specific instructions regarding consideration of the facts the PSC must rely upon in selecting a method to set just and reasonable rates. *Cf. Heater of Seabrook, Inc.*, 332 S.C. at 25-26, 503 S.E.2d at 741-742 (reversing the PSC for failing to follow the Court's instruction that the facts and circumstances of the case must be considered by the PSC in selecting a ratemaking methodology on remand even though no specific direction was given by the Court that a particular ratemaking methodology be

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Service Commission of South Carolina, 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996). Utility submits that such an analysis is appropriate given that the effect of the PSC's decision is to deny the Utility credit for all expenses and investment associated with billing.

[14] As noted above, *USSC* involved one aspect of the "quality of service" examined by the PSC in this case, namely, water quality. *Id.* 392 S.C. at 111, 708 S.E.2d at 763.

adopted).[15] Although the instant appeal does not involve a prior remand to the PSC, the principle applied by the Court in *Heater of Seabrook* is the same. As noted above, *USSC* makes clear that the PSC has an obligation to provide Utility an opportunity to achieve a reasonable return on its investment and that this obligation is to be met when the PSC discharges its duty to fix just and reasonable rates. This Court has described that duty as one requiring the PSC to "establish rates that will produce revenues for the utility 'reasonably sufficient to assure the confidence in the financial soundness of the utility'" *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S. Carolina*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (quoting *Bluefield Water Works and Improvement Co. v. Pub Serv. Comm'n of W. Va.*, 262 U.S. 679, 693 (1923)). As this Court held in *USSC*, the PSC's duty cannot be avoided simply on the basis that a limited amount of testimony calls into question some portion of expenditures or quality of service. Here, as in *USSC*, the PSC failed to discharge its duty to set just and reasonable rates by relying upon legally insufficient evidence and therefore cannot have met its obligation to provide Utility an opportunity to earn a reasonable return on its investment by setting just and reasonable rates.[16]

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[15] *Compare also Hamm v. Southern Bell Tel. & Tel. Co.*, 305 S.C. 1, 406 S.E.2d 157 (1991) (holding that where rates collected under bond are ultimately determined by this Court to be unlawful, the absence of an explicit direction by this Court to the PSC that the case was remanded to require that a utility make refunds to customers is unnecessary where the law makes clear that the utility is not entitled to retain the unlawfully collected rates).

[16] The effort of the PSC majority to establish that it had set just and reasonable rates because it gave Utility an opportunity to earn a "positive" return on its investment (*see* pp.11-12, supra) is disingenuous because the PSC did not authorize rates which would allow the Utility to achieve that rate of return. *See* discussion at n.31, *infra*. The Commission's finding that the Utility will continue to have the opportunity to achieve previously authorized returns notwithstanding its denial of a rate increase disregards the evidence of allowable rate base, expenses, and a current rate of return on equity placed into evidence before the Commission in this case. *See USSC,* 392 S.C. at 115, 708 S.E.2d at 765, (citing *Heater of Seabrook*, 332 S.C. at 29, 503 S.E.2d at 743 (finding that it was "inappropriate" for the PSC in a 1997 order denying an increase to rely upon its reasoning in a 1992 order granting an increase to the same company because the 1992 order "was based on evidence, and a prior test year, completely different from [the utility's] financial condition at the time of the current application") and *Hamm v. S.C. Public Service Comm'n*, 309 S.C. 282, 422 S.E.2d 110 (1992) (holding that a return on equity adopted by the PSC must be within a range of returns supported by evidence of record)). Further, by adopting the expedient of "quality of service

B. *The PSC misinterpreted and misapplied Patton*

Further, the PSC majority grossly misinterprets and misapplies this Court's holding in *Patton* in several respects. As stated by the Court in *USSC,* its decision in *Patton* recognizes that the PSC is entitled "to create incentives for utilities to improve their business practices." *USSC*, 392 S.C. at 105, 708 S.E.2d at 760 (citing *Patton*, 280 S.C. at 292, 312 S.E.2d at 259–60); *see also* n.10, *supra.* Rather than giving Utility an incentive to improve its quality of service in the context of discharging its duty to set just and reasonable rates, the PSC's decision is a disincentive for Utility to acquire the resources to continue providing adequate and proper utility service, much less address the "quality of service concerns" relied upon by the PSC. This is so because the PSC decision leaves in place rates set in 2008 based upon 2004 expense and investment data provided to the Commission in a 2006 docket, even though Utility's expenses and investments have irrefutably increased. [R.845; Tr. Vol. 3, p.597, ll. 11-24.] Further, *Patton* recognizes that quality of service "is **a factor** to be considered in fixing [a] 'just and reasonable' rate." 280 S.C. at 293, 312 S.E.2d at 260 (citing *State ex rel. Util. Comm'n*, 285 N.C. 671, 208 S.E.2d 681 (1974) (emphasis supplied)). This Court's opinion in *Patton* does not even suggest, much less hold, that quality of service may serve as the sole factor the PSC is required to consider in setting just and reasonable rates. Thus, *Patton* does not adopt the holding of the North Carolina supreme court which the PSC majority cites as "current law" under *Patton*–i.e., that the PSC has "the power to deny a

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concerns" the PSC has sought to indirectly deny Utility the benefit of recovering its expenses and a reasonable return on its investment by couching its decision in other terms. The effect of what the PSC has done in the instant case is no different than the effect of its determination in *USSC* that was reversed by this Court. This violates another principal of law recognized specifically by this Court in a matter involving the PSC. *See City of Rock Hill v. Pub. Serv. Comm'n of S. Carolina*, 308 S.C. 15, 178-179, 417 S.E.2d 562, 564 (1992) (affirming Commission denial of municipal request to "unassign" area previously assigned to an electric utility on the ground that it would permit a municipality "to do indirectly that which it could not do directly").

rate increase in its entirety where it deems the quality of service provided by the utility to be unacceptable based upon the evidence of record." [R.3; Order No. 2011-784 at 1.] *Cf. Powers v. Smith*, 80 S.C. 110, 61 S.E. 222, 223 (1908) ("[w]hile the decree was adopted as the opinion of this court, it is not to be concluded the court intended to bind itself to every quotation and citation found in it").

To be certain, the Court's holding in *Patton* recognizes that the PSC's authority to regulate the service of a public utility under S.C. Code Ann. § 58-5-210 (1976) carries with it the discretion for the Commission to impose "**reasonable requirements** on its jurisdictional utilities **to insure adequate and proper service** will be rendered to the customers of the utility companies." 280 S.C. at 293, 312 S.E.2d at 260 (emphasis supplied). There, this Court found that precluding a utility from imposing newly approved rates on customers in one of eight subdivisions served by the utility until such time as it made improvements to the sewer system serving that subdivision so as to comply with Department of Health and Environmental Control ("DHEC") standards was a reasonable means of supervising and regulating the utility's service and insuring adequate service.[17] The utility in *Patton* was permitted, however, to immediately impose the just and reasonable rates approved by the Commission on all other customers of the utility.[18] This result is also consistent with the requirement that the PSC, in setting just

[17] As noted above and in the discussion to follow at pp. 34-40, the PSC majority cited no quality of service standards which were contravened by Utility and prescribed no steps that it required Utility to take in order to bring the quality of service into compliance with a standard, or even the Commission's undefined expectations. This, too, constitutes reversible error. Moreover, it demonstrates that the quality of service concerns were not significant as the PSC provided no remedy to the affected customers for the putative deficiencies. *Cf., Patton, supra.* This is likely explained, in part, by the fact that the PSC was plainly aware of the efforts by Utility to improve in the primary "quality of service" area discussed in the order—billing—and the beneficial effect those efforts had achieved as reflected in the decrease in billing complaints by its customers testified to by ORS. *See* n. 13, *supra.*

[18] The Court suggested that reducing the just and reasonable rate so that the customers served by the inadequate facility paid less than other customers was also a reasonable approach to the quality of service issue in *Patton.* 280 S.C. at 293, 312 S.E.2d at 260 ("In this instance, rather than reduce the rates and

and reasonable rates, balance the interests of customers and Utility. *See S.C. Cable Television Ass'n v. PSC, supra.*

Therefore, *Patton* can only be read for the proposition that a limitation on the implementation of, or a reduction in, just and reasonable rates to specific customers because of quality of service issues (measured by objective criteria) in specific parts of a utility's service area is an appropriate tool (i.e., a "reasonable requirement") available to the Commission to give utilities incentive to provide adequate service in the context of setting just and reasonable rates. Quality of service is recognized by *Patton* as one factor in setting just and reasonable rates. A total denial of rate relief without reference to the broader perspective of the utility's overall quality of service and other factors which must be considered in setting just and reasonable rates is in no way supported by the case. To the contrary, an interpretation of *Patton* to permit a complete denial of rate relief under the present circumstances is not only inconsistent with the Supreme Court's holding therein, it ignores the Court's analysis of the case in *USSC* (as well as the alternative to *Patton* suggested therein)[19] and the Commission's obligation to **balance** the interests of the Utility and those of its customers. *S.C. Cable, supra.*

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charges found reasonable for sewerage rendered in Linville Hills subdivision because of the poor quality of service, the Commission chose to give the utility company the opportunity and incentive to upgrade the system"). Nowhere in *Patton*, however, is it suggested that a deficiency in the quality of a utility's service authorizes the PSC to avoid its duty to set just and reasonable rates. And this Court has not varied in its characterization of the PSC's rate-setting function duty in its other decisions following *Patton*. *See USSC*, 392 S.C. at 113, 708 S.E.2d at 764 (citing *Seabrook Island Property Owners v. S.C. Public Service Comm'n* , 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991) (holding that '[i]it is **incumbent** upon the PSC to approve rates that are just and reasonable...**considering**...the **quality of** ...**service**.") (emphasis added)).

[19] This alternative is, of course, the exclusion of specific expenditures from allowable rate base or expense as suggested in *USSC*, 392 S.C. at 115, 708 S.E.2d at 765, and specifically recommended by ORS in this case with respect to Utility's computer based billing system.

C. *The Foreign Authorities Cited by the PSC Do Not Support the PSC's Determination*

In support of its conclusion that *Patton* sanctioned the abdication of its duty to set just and reasonable rates, the PSC relied upon a North Carolina case that is cited in *Patton, State ex rel. Utilities Comm'n v. General Tel., supra,* finding that it involved "a case very similar to the one now before us." [R.4-5; Order No. 2011-784 at 2-3.] [20] The PSC did not, however, engage in any analysis of how the facts in the North Carolina case were in any way analogous to those of the instant case. The PSC also cited in its order two other cases, *Nat'l Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n*, 709 A.2d 972, 975 (Pa. Commw. Ct. 1998, and *Petition of Valley Rd. Sewerage Co.,* 666 A.2d 992 (N.J. App. Div. 1995) in which the PSC found that "[s]imilar **results** were reached." Again, the PSC failed to analyze how the facts of either of these two cases were similar to those of the instant case. As discussed below, however, each of these three cases reflects elements of foreign law that are either contrary to, or do not exist in, South Carolina law.

For example, *Nat'l Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n, supra*, was based upon a statute which expressly permitted the Pennsylvania regulatory body to reject a rate increase for "inadequate" service. 709 A.2d at 976 (citing 66 Pa. Cons. Stat. Ann. § 526 ("The commission may reject, in whole or in part, a public utility's request to increase its rates where the commission concludes, after hearing, that the service rendered by the public utility is inadequate in that it fails to meet quantity or quality for the type of service provided.")). South Carolina has no such statute and the PSC, therefore, has no

[20] Even if true, which is disputed, this finding is not properly supported or stated and constitutes further error on the PSC's part. *See, infra* pp. 33-39 (discussing the PSC's failure to adequately state facts as required by S.C. Code Ann. § 1-23-350 (2005)); pp.39-46 (discussing the lack of substantial evidence); and–*USSC, supra* 392 S.C. at 114, 708 S.E.2d at 765 (discussing the impropriety of comparisons between a utility seeking rate relief and other utilities absent a statement of reasons why the compared utilities are "sufficiently similar").

such authority. *See S.C. Cable Television Ass'n*, 313 S.C. at 52, 437 S.E.2d at 40 (holding that "[t]he PSC possesses only the authority given it by the legislature").[21]

Similarly, *State ex rel Utilities Comm'n v. General Tel.* has as its underpinning North Carolina statutory provisions that do not exist in South Carolina. Specifically, North Carolina Gen. Stat. Ann. § 62-133 "lays down the procedure by which the [North Carolina Utilities] Commission is to fix rates which will enable the utility 'by sound management' to pay all of its costs of operation ... and have left a fair return." *Id.*, 208 S.E.2d at 687. As the North Carolina supreme court explained, this procedure was part of statute which constituted "a single, integrated plan" and was required to "be applied in light of ... the duty of the utility to render adequate service," which duty could be enforced under N. C. Gen. Stat. Ann § 62-131. The latter section provided that the North Carolina Utilities Commission "'is hereby vested with **all power** necessary **to** require and **compel** any public utility to provide ... reasonable service.'" *Id.* (emphasis added). Although sound management is certainly required of public utilities in South Carolina, this requirement has been enforced in the context of disallowing specific items of expense or investment where management has been imprudent in its expenditures or investments or failed to make reasonable efforts to control costs. *See e.g.*, *Hamm v. S.C. Public Service Commission*, 309 S.C. 282, 286-287, 422 S.E.2d 110, 12-113 (1992)

[21] As discussed below, the General Assembly has approved regulations adopted by the PSC establishing standards with respect to the adequacy of facilities of and quality of service by public utilities, none of which have been cited in the PSC's orders in this matter. Moreover, the legislature has established a procedure to be followed when an allegation is made that a public utility has failed to provide adequate or proper service which includes a hearing before the PSC to show cause why an order for adequate or proper service should not be issued, the imposition of penalties and fines if such an order is issued and not obeyed, and the appointment of a receiver where a willful failure to provide adequate and sufficient service is shown in a hearing before the PSC. *See* S.C. Code Ann. §§ 58-5-710 and 58-5-730, *et seq.* (Supp. 2011). As the record reflects, ORS has pursued the statutory procedure provided for in § 58-5-710 specifically with respect to the billing issue testified to by customers and ORS in this case. [R.1507; Tr. Vol. 5, p. 1276, ll. 19-21.] And, while S.C. Code Ann. § 58-5-740 permits the pursuit of other remedies prescribed by law relative to the control of public utilities, the refusal to set just and reasonable rates is not a remedy for a lack of adequate or proper service prescribed by South Carolina law. *Cf. S.C. Cable, supra,* 66 Pa. Cons. Stat. Ann. § 526.

(citing *Hamm v. S.C. Public Service Commission*, 291 S.C. 119, 122-123, 352 S.E.2d 476, 478 (1986) (holding that a statutorily required examination by the PSC of an electric utility's effort to control fuel costs did not require that utility fuel purchasing decisions be free from human error, only that the utility take reasonable steps to avoid error)). More importantly, there is no provision of South Carolina law granting the PSC the broad authority given the North Carolina Utilities Commission in North Carolina Gen. Stat. Ann. § 62-131. Rather, our legislature has seen fit to limit the PSC's authority under § 58-5-210 ("[t]he Public Service Commission is hereby, **to the extent granted**, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility."). *Accord, S.C. Cable Television Ass'n, supra.*

Finally, in *Petition of Valley Rd. Sewerage Co.*, the power of the New Jersey regulatory authority to withhold rate relief based upon a finding of inadequate service arose from a statute granting it "'general supervision and regulation of and jurisdiction and control over all public utilities' **to the extent necessary** for fulfilling its statutory mission." *Id.*, 666 A.2d at 996 (emphasis supplied). As noted by the New Jersey Court of Appeals, that state's "Supreme Court has characterized this authority as a **'sweeping' grant of jurisdiction** [internal citation omitted] intended to delegate the widest range of regulatory power over public utilities." *Id.* (emphasis added.) By contrast, and as already noted, § 58-5-210 specifies that the PSC is only given power and jurisdiction to supervise and regulate rates and services to the extent granted by the legislature. Having been given no authority to entirely deny rate relief based upon "quality of service concerns" in

58-5-210, the PSC lacks the authority given its New Jersey counterpart in the cited case. *S.C. Cable Television Ass'n, supra.* [22]

Accordingly, the foreign authorities cited by the PSC do not support its decision.[23] Neither *Patton* nor South Carolina statutes or regulations confer upon the PSC the

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[22] Moreover, the PSC incorrectly cites *Petition of Valley Rd. Sewerage Co.* for the proposition that its holding was to find that "total denial of [the] sewer utility's application of rate relief ...was a practical method of compelling the utility to remedy deficiencies" (R. 5; Order No. 2011-784 at 3) as the decision of the New Jersey court makes clear that no such outcome was anticipated in view of its agreement with the conclusion of the lower tribunal that "[the utility's] management [was] so incompetent and inefficient that it could not be relied upon to undertake and implement the necessary changes even if additional revenues were guaranteed." *Petition of Valley Rd. Sewerage Co.*, 666 A.2d at 996.

[23] In addition to these differences in law governing the powers of the Pennsylvania, North Carolina and New Jersey regulatory bodies, each of the foreign authorities relied upon by the PSC are also factually distinguishable from this case. For example, the utility in *Nat'l Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n* was found by the regulatory authority to have (1) been delinquent on nine of fifteen state government infrastructure loans, the payment of which was asserted as a primary basis for rate relief, (2) "persistently throughout [its] water systems...provide[d] inadequate quality and quantity of water...because there ha[d] been a significant failure on the part of [the utility] to provide water that is fit for all household purposes such as the basic, domestic purposes of drinking, washing, bathing and cooking," and (3) failed to pay electric bills for two water systems, "thereby putting itself at the risk of loss of electric service and placing its customers at risk of loss for water service." *Id.*, 709 A.2d at 972-975. Further, the reviewing court in *Nat'l Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n* noted that there was "a mountain of evidence indicating that its service to almost all individual systems was deficient" (*Id.*, 709 A.2d at 980) and the utility's request for rate relief was opposed in its entirety by all parties of record (which included two state agencies). And, finally, that utility's current rates (i.e., those in effect in 1998) in the Pennsylvania case were found to already generate "an overall rate of return of 7.08%." (*Id.*, 709 A.2d at 975.) None of these facts – and particularly the fact of a then (1998) current return on rate base of 7.08% -- exists in this case. In the North Carolina case, the telephone utility had sought and received rate relief in 1968 and 1971, even though the North Carolina regulatory authority had found service to be inadequate. *State ex rel Utilities Comm'n v. General Tel.* 208 S.E.2d at 689. In the latter of these two proceedings, the North Carolina commission "allowed a part of the requested increase but found the service inadequate and specified eleven respects in which it must be improved promptly," a finding that the telephone utility did not appeal. *Id.* In the cited case, the North Carolina regulatory body established a reasonable return for the telephone utility, but withheld from the utility the right to implement the resulting rates due to its inadequate service. *Id.* Faced with these facts, the North Carolina supreme court noted that in the proceeding then under consideration, the telephone utility had not only failed to make two of the improvements specified in the first two proceedings, but had asserted to the North Carolina "[c]ommission that these two improvements are 'unreasonable,' thus clearly indicating that it does not intend to make them unless compelled to do so." *Id.* The North Carolina court then concluded that:

> "[t]hus, three times in a period of five years the Commission has granted [the telephone utility] increases in rates, notwithstanding its finding of serious inadequacies in [its] service. This was within the administrative discretion of the Commission. [Internal citation omitted.] Having labored patiently with [telephone utility] in an effort to induce it to improve its service by allowing it rate increases, the Commission cannot be deemed to have acted arbitrarily in saying, as it has now done, that it would permit [telephone utility] to raise its rates so as to increase its return on the fair value of its properties from 6.65% to at least 8.02% if its service were adequate but it will not now permit

authority exercised by the regulatory bodies in any of the three states whose decisions are cited in the PSC's order. Because it lacks such power, its decision to the contrary must be reversed. *See S.C. Cable Television Ass'n, supra.* And, in each of the three cited cases, the factual distinctions are so great as to make them inapposite to the record before the PSC in this case.

D. ***The PSC should have read and applied USSC, Patton and its statutory authority together.***

In sum, *Patton* should have been read by the PSC in harmony with *USSC* and the PSC's statutory authority to regulate the rates and the services of CWS. Where testimony in a rate relief proceeding raises questions regarding the quality of utility service provided to a customer, the PSC may, in the context of discharging its duty to set just and reasonable rates, consider whether to include in allowable rate base and expenditures costs associated with the provision of service to that customer (as ORS recommended be done in this case). *USSC, supra.* Furthermore, the PSC may delay the imposition of just and reasonable rates in the portion of its service territory where poor quality of service

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> such increase in view of [the telephone utility's] persistent disregard of such inadequacy of service.

Id., 208 S.E. 2d at 689, 690 (citations omitted). It is hardly surprising, therefore, that the North Carolina court held that the decision of that state commission was appropriate "[t]o remove inadequacies of service resulting from the indifference of top level management and from incompetence or indifference of operating personnel." *Id.*, 208 S.E.2d at 690. None of these facts exist in the instant case. To the contrary, having submitted proposals for the resolution of the principle issue raised in the rule to show cause proceeding and of concern to the PSC in this case (billing) and not having sought rate relief since 2006, it cannot seriously be contended that the facts of the instant matter resemble those in *State ex rel Utilities Comm'n v. General Telephone.* Likewise, the New Jersey case is also factually distinguishable from the instant matter. As the PSC correctly noted, the facts in *Petition of Valley Rd. Sewerage Co.* demonstrated "chronic financial mismanagement, overdue gross receipts and franchise taxes, and repeated environmental violations." [R. 5; Order No. 2011-784 at 3.] In affirming the regulatory authority's conclusion, the New Jersey court commented that "the hearing transcripts fairly reek of chronic corporate mismanagement resulting in the company's abysmal failure to furnish adequate service to its customers." *Id.*, 666 A.2d at 995. Further, omitted from the PSC's discussion of this case is the fact that the scope of the utility's financial mismanagement was such that it was placed into receivership while the matter was appealed. *Id.*, 666 A.2d at 994. *Cf.* S.C. Code Ann. § 58-5-730 (Supp.2011). However, the PSC did not find, and the record here does not support, any similar conclusions with respect to the Utility as none of these facts exist in the instant case.

has been demonstrated (by some objective standard) in the interest of promoting good business practices. *Patton.* Or, the PSC may approve a lower rate for the portion of the utility's service area where customers have received inadequate service measured by objective criteria. *Id.* And, the PSC may address quality and adequacy of service concerns of customers in the context of the remedies provided for in S.C. Code Ann. §§ 58-5-710, *et seq.* (Supp.2011) as ORS has requested be done, or through the PSC's complaint process set forth in 26 S.C. Code Ann. Reg. 103-824 (Supp.2010).[24] Here, the PSC denied Utility rate relief in its entirety based upon its conclusion that the limited testimony it heard regarding "quality of service" entitled it to do so under South Carolina law. This "broad brush" approach is, in effect, simply another way for the PSC to deny Utility the presumption of reasonableness afforded to its expenses recognized in *Hamm* (and reiterated in *USSC*) and avoid its duty to set just and reasonable rates allowing Utility a reasonable return on its investment. Thus, the PSC's decision in this case effectively constitutes the same error for which the PSC was reversed in *USSC*. The Utility submits that the PSC must once again be reversed in order to protect Utility's constitutional rights.

[24] PSC regulations provide that "[a]ny person . . . may file a written complaint with the Commission requesting a proceeding." 26 S.C. Code Ann. Reg. 103-824. This process provides a forum in which customers, who believe a utility is providing service "in contravention of any statute, rule, regulation or order administered or issued by the Commission" including quality of service regulations governing water and wastewater utilities, may file an official complaint seeking relief from the PSC. Therefore, customers—and the PSC—have effective means in which to address unresolved billing or quality of service concerns.

II. The PSC erred in denying rate relief based on "quality of service concerns" where it made no finding that Utility violated any statutes or regulations governing the provision of utility service and stated no facts which could support such a finding, thereby rendering the decision arbitrary and capricious as well as non-compliant with the PSC's statutory duty to state facts supporting its decisions.

The PSC is vested with the "power and jurisdiction to supervise and regulate the rates and service of every public utility . . . [and to] fix such just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this state." *See* § 58-5-210; *see also* S.C. Code Ann. § 58-3-140(A) (Supp.2011). In exercising this power, the PSC has promulgated regulations establishing standards and quality of service to be rendered by water and wastewater utilities. *See, e.g.*, 26 S.C. Code Ann. Regs. 103-553 (Supp.2010), 103-570 (1976), 103-571 (Supp.2010), 103-753 (1976), 103-770 (1976), and 103-771 (Supp.2010). When the PSC finds, after hearing, that a utility has failed to provide adequate or proper service after being ordered to do so, it may impose fines or penalties on the offending utility. S.C. Code Ann. § 58-5-710 (Supp.2011).[25]

Notwithstanding the existence of this statute and these regulations, the PSC made no explicit finding that the utility service rendered by Utility was, in fact, inadequate or improper. [R. 9-10; Order No. 2011-47-WS at 7-8.] Moreover, it cited no regulatory standard by which Utility's service could be determined to be inadequate or improper. Rather, the PSC concluded that rate relief should be denied to Utility entirely because the PSC "deem[ed] the quality of the service provided by [] [U]tility to be unacceptable" based upon a record it found to be "replete with evidence of inadequate and unacceptable

[25] It is under the first part of this statute that ORS has sought, and the PSC has under consideration, the issuance of an order directing that the Utility correct deficiencies in its billing procedures. *See* n.4, *supra.* Also, if the PSC finds after hearing that a utility has **willfully** failed to provide adequate and sufficient service for an unreasonable length of time, or is unable to provide adequate and sufficient service, ORS has the right to petition the circuit court for appointment of a receiver to assume control of the utility. *See* S.C. Code Ann. § 58-5-730 (Supp.2011).

customer service by [U]tility." [R.3; Order No. 2011-784 at 1.] According to the PSC, these "quality of service concerns" constituted "facts" which "demonstrate ample justification for denial of the Utility's application" [R.6; Order No. 2011-784 at 4.] and demonstrated "widespread and pervasive problems with regard to quality of service ... sufficient to support a denial of the [Utility's] rate request." [R.23; Order No. 2011-784 at 21.]

An "arbitrary" decision is one "without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct.App.1985). The PSC's determination that "quality of service concerns" existed, which justified a complete denial of rate relief in this matter, is the epitome of an arbitrary decision. The PSC failed to make specific findings that Utility's services violated any objective criteria, including those established in the aforementioned statutes and regulations. This is clear error that, once again, contravenes a plain teaching of *USSC,* which is that the PSC may not adopt an arbitrary standard for purposes of ratemaking. 392 S.C. at 113, 708 S.E.2d at 764 (holding that a determination by the PSC that a distribution-only customer water rate implicated a question of "fairness" is an "arbitrary standard improper for consideration by the PSC in ratemaking" when it is not accompanied by "objective criteria"). The PSC order should therefore be reversed for that reason alone.

Furthermore, even assuming that the PSC had referred to the objective criteria provided by the aforementioned statutes and regulations, an error of law would still remain as the PSC's order does not set forth a concise and explicit statement of the underlying facts which could support any such conclusions in this regard as required by

law. *See* S.C. Code Ann. § 1-23-350 (2005). Utility submits that an examination of the record readily reveals the reason the Commission did not make findings of fact comporting with this statutory requirement.

For example, with respect to Utility's water service, the PSC stated that it "heard significant testimony concerning the odor and color of the water provided by the Utility and the impact it has had on customer's health, plumbing fixtures, household appliances, and finances." [R. 18; Order No. 2011-784, p. 16.] The Order then cites to the testimony of 12 customers addressing poor water quality, concluding that notwithstanding evidence of efforts by the Utility to improve water quality "the weight of customer testimony[26] indicates to [the PSC] that problems persist." [R. 20; Order No. 2011-784, p. 18.] However, the PSC does not identify which, if any, of its regulations governing water quality were violated by Utility. For example, 26 S.C. Code Ann. Reg. 103-770.A (1976) provides that "[e]ach utility shall provide water that is potable and, **insofar as practicable,** free from objectionable odor, taste, color and turbidity." (Emphasis supplied). The PSC made no finding that the water supplied by Utility was not potable or free from objectionable odor, taste, or color to the extent **practicable**. Along these same lines, the PSC did not find that Utility's water was not "[o]f such quality as to meet the standards of the South Carolina Department of Health and Environmental Control." *See* 26 S.C. Code Ann. Reg. 103-770.B (1976) .[27]

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[26] This statement is in and of itself inaccurate as only 12 water customers out of 7,645 testified, which is less than two-tenths of one percent (0.16%) of the Utility's water customer base - a figure that is clearly immaterial under *Porter, supra.* Moreover, this finding simply ignores the testimony of ORS and the Utility regarding water quality using objective criteria as is required under *USSC.*

[27] There is no evidence that the water failed to meet DHEC standards or comply with PSC regulations because the evidence of record demonstrates otherwise. ORS presented testimony demonstrating that CWS provides adequate water supply and distribution services to its residential and commercial customers, each of the inspected water systems were in compliance with DHEC requirements, and no violations of applicable PSC regulations were noted. [R. 1536; Tr. Vol. 5, p. 1305, ll. 12-22; R. 3019-3029; Hearing Exhibit 47, pp. 1-11.]

Similarly, the Order references the testimony of two customers[28] in one subdivision "describ[ing] their frustrations with blockages in the sewage lines and sewage backups." [R. 21; Order No. 2011-784, p. 19.] However, in addressing this aspect of the perceived customer service problems, the PSC did not conclude that the sewage plant of Utility was not "constructed, installed, maintained [or] operated in accordance with accepted good engineering practice to assure, as far as **reasonably** possible, continuity of service, uniformity in the quality of service furnished, and the safety of persons and property." 26 S.C. Code Ann. Reg. 103-550 (1976). (Emphasis supplied.) In addition, the PSC made no finding that Utility did not make "**reasonable** efforts to avoid interruptions of service," 26 S.C. Code Ann. Reg. 103-571.A (Supp.2010) (emphasis supplied), did not reestablish service "within the shortest time **practicable**," *id.* (emphasis supplied), did not "adopt a program of regular inspection of its sewerage plant in order to determine the necessity for

[28] One customer testified that the Utility accepted liability for the damage resulting from a line blockage (which the customer attributed to the method by which a service line was connected to a main near his residence) [R. 21; Order No. 2011-784 at 19], which is borne out by the record reflecting that the customer was compensated by payment from an insurance carrier for Utility. [R. 411-412; Tr. Vol 2, p. 163, l. 23 – p. 164, l.1.] Notably, however, the PSC failed to reflect other testimony from the same customer praising the Utility's local personnel and noting that his comments were "no reflection on the hard work that they do" and that he did not want the PSC "to think that we have bad local workers." [R. 411; Tr. Vol. 2, p.163, ll. 1-10.] Further, the PSC failed to address testimony from the Utility's witness explaining the reasons why the method of connecting the service line to the main was different than the method the customer believed to be appropriate. [R.1354-1355; Tr. Vol.5, p. 1123, l.6 – p. 1124, l.1.] And, as the PSC's order notes, the other customer whose testimony is cited in this regard testified that "she dealt with the main line at her own expense." [R. 21; Order No. 2011-784 at 19.] This customer also testified that she was attempting to verify whether the blockage was in a line on her property and therefore covered by insurance that she had procured or in the Utility's line—a distinction that bears on relative responsibility for a line blockage. *See* 26 S.C. Code Ann. Regs. 103-502.4, 103-502.6, and 103-502.12 (Supp. 2010) (delineating lines owned by sewer utility customers and lines owned by sewer utilities); and 26 S.C. Code Ann. Reg. 103-555.B (Supp. 2010) (apportioning responsibility for maintenance of a customer service pipe to the customer). Both of these facts suggest that the blockage may not have been attributable to CWS. Thus, of the two customers mentioned in the PSC order, one had been compensated for the problems caused by a sewer blockage while the responsibility for the sewer back-ups described by the other customer was undetermined at the time of hearing. Further, the two customers whose testimony is relied upon in this section of the PSC's order constitute 0.02% of the wastewater customer base, which is an immaterial percentage. *Porter, supra.* And, this was the only testimony specific to sewer service cited in the PSC's order. Accordingly, the PSC decided that it could deny Utility any sewer rate relief based on the complaints of 2 out of 10,962 sewer customers, even though the evidence of record demonstrated that Utility had incurred $75,000 in additional sewer expenses and made $5.6 Million in additional sewer rate base investments. [R. 3225, 3227 and 3238; Order No. 2008-855, Exhibit 1, pp. 38, 40, 51; R.3005, 3007, and 3015; Hearing Exhibit 46; pp. 1, 3, 11.] Nothing could more clearly violate the principal teaching of *USSC* regarding reliance on limited customer testimony.

replacement and repair," 26 S.C. Code Ann. Reg. 103-554 (1976), or did not "adopt a program of periodic tests, inspections, and preventative maintenance designed to achieve and maintain efficient operation of its system and the rendition of safe, adequate and continuous service." 26 S.C. Code Ann. Reg. 103-560.A (1976).[29]

In addition, the Order describes as "Customer Service Problems" the fact that (a) customer payments are required to be mailed to an address in Maine, (b) customer service call centers and customer service representatives for the Utility are located in Florida instead of South Carolina, and (c) no local customer service office is maintained in this State. [R. 21-23; Order No. 2011-784 pp.19-21] Again, however, the PSC fails to reference any statute or regulation requiring Utility to receive payments in South Carolina, have its customer service personnel physically present in the state, or to maintain a customer service center in this State. *Cf.* 26 S.C. Code Ann. Regs. 103-530.E and 103-730.E (Supp. 2010) ("Each utility shall . . . [p]rovide adequate means (telephone, etc.) whereby each customer can contact an authorized representative of the utility at all hours in cases of emergency or unscheduled interruptions of service"); 26 S.C. Code Ann. Reg. 103-538.A (Supp.2010) ("Complaints . . . shall be investigated promptly and thoroughly"). 26 S.C. Code Ann. Regs. 103-738.A (same); 103-563.A (1976) ("Each utility shall provide for the receipt of customer trouble reports at all hours and make a full and prompt investigation of all complaints).[30]

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[29] And it could not have given the un-refuted testimony of the Utility's witness regarding Utility's maintenance programs and response to sewer back-ups. [R. 1167-1172; Tr. Vol. 5, p. 936, l. 16 – p. 941, l. 2; R. 1352-1355; Tr. Vol. 5, p. 1121, l.16 – p. 1124, l. 4;]

[30] The PSC's reliance on the absence of a company call center or customer service center in South Carolina as a justification for completely denying Utility rate relief [R. 10, 21-22; Order No. 2011-784, p. 8 and 19-20] is particularly demonstrative of the arbitrary and capricious nature of the PSC's decision in this case. In addition to there being no statute or regulation requiring such a presence in this State, the centralization and consolidation of call centers is a specific recommendation of the management audit conducted at ORS's

Finally, because the Order makes no determination that Utility's services are inadequate (much less that the Utility violates any quality standards set forth in regulation or otherwise), any finding by the PSC with respect to quality or adequacy of Utility's services must be implied. [R. 9-10; Order No. 2011-784 at 7-8.] This Court has, however, held that implicit findings of fact are not permissible in PSC orders. *See Heater of Seabrook*, 332 S.C. at 26, 503 S.E.2d at 742 (quoting *Able Comm'n, Inc. v. S.C. Pub. Serv. Comm'n*, 290 S.C. 409, 351 S.E.2d 151 (1986)). Utility further notes that the PSC also did not specify (much less require) any improvements to Utility's facilities or service or set a standard by which such improvements would be measured and thereby promote good business practices by Utility. *Cf. USSC, supra,* 392 S.C. at 104, 708 S.E.2d at 760 (citing *Patton, supra*). Utility submits that no such guidance could be given since there is no evidence of record that Utility's facilities or services were inadequate in any particular.

Because the PSC failed to identify any regulation or statute governing the provision water and wastewater service that Utility purportedly violated, its conclusion "that the service delivered by Utility is **unacceptable**", without more, necessarily reflects

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request, which was approved by the PSC, using an independent auditor retained by ORS. [R. 1245; Tr. Vol.5, p.1014, ll.2-8.] Moreover, even assuming that the presence in this State of an office and personnel to provide customer service were an appropriate consideration for the PSC in its ratemaking function (which is disputed), it could not have been lawfully considered in this case as Utility had no knowledge of a requirement in regard to the location of call centers and customer service representatives and therefore could not lawfully have been found to have provided inadequate or unacceptable customer service as a result. *Cf. USSC,* 392 S.C. at 108, 708 S.E.2d at 761-762 (holding that a utility cannot be required to provide information or data beyond that required by regulation absent notice and an appropriate opportunity to be heard). The PSC failed to put Utility on notice, and does not cite to any statutory or regulatory basis for such a notice, that it is required to maintain customer service representatives or utilize a customer service call center located within South Carolina. Further, even if such a notice had been provided to Utility, the PSC failed to articulate a basis for concluding that the use of out-of-state mailing addresses or customer service personnel **in and of itself** affected customers in a negative way. Although two customers complained regarding the imposition of late fees that they attributed to the delay occasioned by mailing a payment to Maine, the record reflects that CWS provides alternative means by which customers may timely remit payment for service other than relying on the U.S. Postal Service, including credit cards and automatic bank drafts. [R. 3176; Answer of Carolina Water Service, Inc., June 2, 2010, Docket No. 2010-146-WS, Exhibit 3, p.3.; R. 459; Tr. Vol. 2, p. 211, ll. 3-7.]

the application of an arbitrary and capricious standard. *See Deese*; *USSC, supra.* And, even had the PSC cited to any of the aforementioned statutes or regulations in this regard, it failed to adhere to the requirements of Section 1-23-350. The PSC order must therefore be reversed for these reasons as well.

III. The PSC's Denial of Rate Relief to Utility on the Basis of Quality of Service Concerns is not Supported by the Substantial Evidence of Record.

As noted above, Utility does not read *USSC* as a case decided based upon a lack of substantial evidence. *See* n.12, *supra.* However, to the extent that the reversal of the PSC in that case can be read to have been decided on that basis, Utility submits that the PSC should be reversed in the instant case on that ground as well.

The "substantial evidence" requirement means that the PSC's decision must be supported by something more than "a mere scintilla of evidence" or "evidence viewed blindly from one side, but...evidence which, **when considering the record as a whole**, would allow reasonable minds to reach the conclusion that the agency reached." *Welch Moving & Storage Co.*, 301 S.C. at 261, 391 S.E.2d at 557 (emphasis supplied) (quoting *Palmetto Alliance v. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)). A scintilla of evidence "is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." *Howle v. Woods*, 231 S.C. 75, 97 S.E.2d 205 (1957). Substantial evidence, on the other hand, is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Hamm v. Cent. States Health and Life Ins. Co. of Omaha*, 292 S.C. 408, 410, 357 S.E.2d 5, 6 (1987) (citing *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

Here, the substantial evidence of record demonstrates that Utility provided 18,607 customers [R. 1536; Tr. Vol. 5, p. 1305, ll. 2-6] with potable water and domestic

wastewater collection, transportation and treatment service through 15 miles of water distribution mains, 265 miles of wastewater collection lines, 35 water wells, 123 lift stations, and 9 wastewater treatment plants on a daily basis during the test year. [R. 844; Tr. Vol. 3, p.596, ll. 11-19, R. 1417; Tr. Vol. 5, p.1186, ll. 3-9.] There is nothing in the record to suggest that these basic components of the Utility's services were not consistently provided to customers. The provision of these basic service components are the essence of what is regulated by the PSC. *See* S.C. Code Ann. § 58-5-10(4) (Supp.2011). Notwithstanding these indisputable and overarching facts, the PSC determined that it could refuse to discharge its duty to set just and reasonable rates[31] for Utility's provision of these services based upon: (a) testimony from less than two-tenths of one percent of its customers regarding dissatisfaction with the aesthetic quality of water, billing errors (which clearly inure to the detriment of Utility, can be rectified under PSC regulations to the extent that they result in any financial disadvantage to the customer, and have been, according to ORS's testimony, significantly reduced in the time period since the end of the test year), two occasions of sewer line blockages, and

[31] It should be reiterated that the PSC did not find that Utility did not need rate relief under the standard set in *Bluefield* and recognized by this Court in *Southern Bell Telephone Co., supra.* To the contrary, it simply deflected its duty to determine just and reasonable rates under the rubric of addressing "customer service concerns," which Utility submits was simply an effort to avoid running afoul of this Court's holding in *USSC* while achieving the same result. In so doing, the PSC failed to address the substantial evidence of record demonstrating that, since its last rate case, Utility had incurred significantly increased operating expenditures and made substantial investments to its facilities used to render service to its customers and was entitled to rate relief at some level. In the Utility's previous rate case, the Commission found that Utility's operating expenses were $5,514,147 and that it had a rate base of $17.6 Million. [R. 3225; Order No. 2008-855, Order Exhibit 1, Exhibit A, p. 30.] Utility's accounting witness in the instant case testified that the Utility had experienced an increase in expenses of approximately $1.00 Million and had added approximately $10 Million in plant and equipment additions ($13.2 Million net of depreciation and contributions in aid of construction) since its last rate case. [R.984-985; Tr. Vol. 5, p. 753, l. 7 – p. 754, l. 1; R.986-987; Tr. Vol. 5, p. 755, l. 20 – p. 756, l. 21; R.1167; Tr. Vol. 5, p. 936, ll. 16-19; R.2821, 2825; Hearing Exhibit 32, pp. 2 and 6.] ORS's audit and testimony entered into the record of this case demonstrated that Utility had incurred $6,419,800 in expenses on an as adjusted basis, and had a rate base of $23.6 Million. [R.3005; Hearing Exhibit 46, p. 1.] No witness in the case disputed that the Utility had incurred additional expenses or made additional capital expenditures since its last rate case; accordingly, the PSC had no basis to disbelieve this evidence, *USSC, supra,* (citing *Hilton Head Plantation Utilities, Inc. v. Public Service Comm'n of S.C.*, 312 S.C. 448, 451, 441 S.E.2d 321, 323 (1994), and the substantial evidence on the record as a whole demonstrating that Utility was in need of rate relief.

dissatisfaction that the Utility does not maintain customer service offices and personnel in this State; and (b) testimony from ORS that Utility had failed to properly bill 101 customers in the test year and that in certain limited instances its current billing practices were not perfect. For the reasons discussed below, the PSC's decision is not supported by substantial evidence of record and therefore must be reversed.

In support of its conclusion denying Utility's application in its entirety, the PSC's order cites only the testimony of various customers and ORS witness Hipp as evidence of "widespread and pervasive problems with regard to quality of service" provided by Utility. However, the PSC's reliance upon this testimony in this regard reflects a one-sided view of the evidence presented at the hearing. Specifically, the PSC ignores the substantial evidence of record demonstrating that, although Utility may have encountered some problems in the course of providing water and sewer service to its 18,607 customers during the test year, it took numerous measures to address those problems and expended considerable time, effort, and money in the process.

For example, the order cites to the testimony of ORS witness Hipp that Utility did not issue timely and accurate bills to customers who received water distribution and wastewater collection services.[32] [R. 11-12; Tr. Vol. 5, pp. 9-10.] However, the PSC failed to recognize evidence that the Utility responded to problems encountered after the initial implementation of the CC&B system, and that in most respects, the billing errors had been rectified. In particular, Utility witness Karen Sasic acknowledged the problems encountered billing water distribution and wastewater collection customers and described

[32] Ms. Hipp did not testify that Utility failed to issue timely and accurate bills to *all* of its customers, and excluded Utility's water service and wastewater treatment customers from her testimony in this regard. It was for this reason that ORS recommended that 74.65% of the initial cost of its customer care and billing ("CC&B") system—and not the entire amount—be disallowed. Because 25.35% of the capital cost of CC&B was uncontested, it is presumed reasonable and should be included in Utility's allowable rate base. *See* discussion, *supra*, p. 17-23.

the measures taken by Utility to remedy the issues encountered. Ms. Sasic testified that the billing problems have now been corrected to the extent that their resolution is within the Utility's control.[33] [R. 1311; Tr. Vol. 5, p. 1080, ll. 1-8.] In addition, the PSC ignored Utility's responses to complaints lodged by customers with respect to specific service and billing concerns. Utility presented testimony that, upon learning of inadvertent overbilling due to the proration of base facility charges, it refunded each of the customers affected by the error and reprogrammed its billing system to prevent such occurrences in the future. [R. 1277-1279; Tr. Vol. 5, pp. 1046-48.] *See also* 26 S.C. Code Ann. Reg. 103-733.2 (Supp.2010) (requiring a water utility to refund the excess amount paid in the event of an inadvertent overcharge). Utility also presented evidence demonstrating the significant lengths to which it had gone to ensure timely and accurate bills since the implementation of its new billing system. These steps included the development of additional controls in the billing process, establishment of key performance indicators for the billing and customer service operations (reflected in the Joint Corrective Action Plan agreed to by Utility and ORS), and waiver of all late payment charges and reconnection charges in certain affected areas. [R. 1302-1304; Tr. Vol. 5, pp. 1071-73.] As a result of these steps, the evidence presented by Utility reflected that the timeliness and accuracy of

[33] Ms. Sasic testified that the billing delays were caused by the utility following its tariff approved by this Commission. Utility is authorized to pass through the cost of its bulk provider invoices without mark-up. *See USSC*, 392 S.C. at 113, 708 S.E.2d at 764 (describing a bulk water pass-through provision in a utility's PSC approved rate schedule and an ORS proposal for the modification of same). Utility therefore must wait until it is billed by its bulk service providers before the utility can calculate and mail its bills to its customers. Utility receives its bulk service invoices approximately two to three weeks after the bulk service provider reads the master meter and determines Utility's usage. At the time of these proceedings, Utility had reduced the amount of time from the receipt of the bulk service provider invoice to the time it billed its customers to a period of three to four days. [R. 1265-1272; Tr. Vol. 5, p. 1034, l. 9 - p. 1041, l. 24.] Furthermore, Ms. Sasic and Ms. Hipp agreed that the root cause of most of Utility's billing problems is the current pass-through mechanism for charging water distribution customers the cost of bulk water purchased from third party providers—a mechanism that is part of Utility's rate schedule and was approved by the PSC. [R.1296-1297, 1509; Tr. Vol. 5, pp. 1278, 11. 1-22; 1065, l. 16-1066, l. 14] As was the case in *USSC*, ORS proposed a specific modification to Utility's rate schedule to address a customer concern regarding the effect of the pass-through provision on water bills, which was similarly not addressed by the PSC in this case.

billing significantly improved since the initial implementation of the new billing system, that the problems Utility had experienced with billing are both correctable and capable of being financially remedied (from the perspective of the affected customers), and that these problems have largely been corrected. [R. 1304-1305; Tr. Vol. 5, p. 1073, l. 6-1074, l. 7.] This evidence was corroborated in part by ORS's testimony that billing complaints it received from customers had been reduced from 101 in the test year to 17 in the ten months prior to the filing of its testimony in this matter. [R. 1507; Tr. Vol. 5, p. 1276, ll. 11-15.]

Similarly, the Order recited the testimony of six customers who complained about customer service issues. [R. 21-23; Order No. 2011-784, pp. 19-21.] The PSC merely recited certain limited aspects of this customer testimony and failed to acknowledge or address the expansive testimony in the record concerning Utility's efforts to reorganize and improve its customer service. These efforts included consolidating its call centers nationally, improving its existing billing system, and implementing metrics to monitor performance in all areas.[34]

Citing water quality concerns and the prevalence of sewer problems as part of its basis for denying rate relief, the Commission references the testimony of 12 water customers complaining of odor, taste, and mineral content of the water supplied by Utility and two sewer customers complaining of blockages in the sewage lines and sewage backups. However, the PSC again ignored the testimony of Utility regarding its response and significant steps taken to improve customer service in this regard. In the Forty Love Point subdivision, the PSC cited the testimony of four customers complaining of aesthetic water quality issues stating, in part that certain customers experienced "fear" in being exposed to this water. [R. 19; Order No. 2011-784, p. 17.] Yet the PSC

[34] As noted above, these efforts were consistent with the recommendations contained in the management audit conducted by an independent auditor at the request of ORS with the approval of the PSC.

failed to reference the evidence of record that the water supplied by Utility on this system complies with all federal, state and local regulations or that ORS witness Morgan testified that Utility regularly tested and complied with all DHEC regulations for this system. [R. 3024; Hearing Exhibit 47, p. 6.] Further, the Order ignores the extensive efforts Utility undertook to resolve customer's concerns about the aesthetics of the water supplied including flushing, sanitization, and repeated testing of the system, installation of water softener systems, and implementation of a manganese sequestration system. [R. 1361-1473; Tr. Vol. 5, pp. 1130-1242.] As a result, Utility testified that the number of complaints from these customers fell dramatically. [R. 1443; Tr. Vol. 5, p.1212, ll. 17-22.] Similarly, the Order ignored the evidence presented by Utility of expenses incurred to replace its aging sewer facilities and to maintain its sewer collection system and keep it free from blockages. [R. 1167-1172; Tr. Vol. 5, p. 936, 11. - p.941, 1.2.] Furthermore, the PSC disregarded ORS's conclusion that Utility provides adequate water supply and distribution services [R. 1536; Tr. Vol. 5, p. 1305, 1.11.12-13] and that the majority of Utility's wastewater collection and treatment systems operate adequately and within PSC and DHEC guidelines. [R. 1306; Tr. Vol. 5, p. 1306, ll.10-12.]

In addition, the PSC overlooked substantial evidence demonstrating that water quality in other systems is not the result of improper operation of maintenance of the system by Utility. One customer testified to discolored water, but acknowledged that a plumber could not ascertain whether the intermittent discoloration was the result of Utility's water supply or from the supply lines in her own home. [R. 2394; Hearing Exhibit No. 12, p.3.] More importantly, however, a substantial portion of the testimony referenced by the PSC in its conclusion that water quality concerns are pervasive ignores the fact that in many of the systems, Utility only provides water distribution service. [R.

3025; Hearing Exhibit No. 47, p. 7.] The water is supplied from a third-party supplier and Utility does not have direct control over the water quality. Consequently, any concerns over water quality alleged by these customers would be unable to be addressed by Utility and not due to any operational shortcomings on its part.[35]

Notwithstanding the substantial evidence directly contradicting the customer testimony cited by the PSC, the Order avoids any discussion of this evidence in explaining the PSC's reasoning in reaching its findings. This Court has stated that when material facts are in dispute, the PSC must make "specific, express findings of fact *Kiawah Property Owners Group v. Public Serv. Comm'n*, 338 S.C. 92, 97, 525 S.E.2d 863, 865 (1999). Here, the Order fails to consider any evidence presented by Utility[36] (much less recite how it conflicts with other evidence) and state the PSC's rationale for not considering this evidence in making its findings of fact. Rather, the PSC only cites "evidence viewed blindly from one side of the case." *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). As a result, the PSC's

[35] By contrast, where a system is served by wells, the PSC was quick to note its desire that a bulk interconnection be effected. [R. 20; Order No. 2011-784 at 18.]

[36] There was significant evidence presented by Utility which was not mentioned by the PSC, including some evidence corroborated by ORS. For example, Utility presented uncontroverted evidence that it made substantial improvements to systems for which there were no customer complaints regarding billing, customer service, water quality, or sewer service. Utility witness Flynn testified that, since its last rate case, Utility completed capital projects on its Friarsgate, Smallwood Estates, Oakland Plantation, Glenn Village, and Rollingwood wastewater systems totaling $662,000. [R. 1168-1172; Tr. Vol. 5, pp. 937-41.] No customer or party presented any testimony concerning these capital improvements, or asserted any complaints that would raise the specter of imprudence suggesting that they were not reasonable. To the contrary, ORS witness Morgan testified that the Friarsgate and Oakland Plantation systems were in full compliance with both DHEC and PSC regulations. Similarly, Mr. Flynn presented testimony that Utility made improvements to several of its water systems not addressed by customer testimony. These capital improvements were made on the Blue Ridge, Falcon Ranch, Mallard Cove, and Stonegate water systems reflecting a total incurred cost of $508,000. Again, Mr. Morgan testified that each of these systems—none of which were the subject of customer complaints or contrary evidence presented by any party—were all operating satisfactorily and in compliance with all PSC and DHEC regulations. Thus, all of Utility's expenditures that affected neighborhoods where there were no customer complaints were entitled to the presumption of reasonableness. *USSC, supra.* Nevertheless, the PSC failed to consider the unchallenged evidence with respect to expenditures and, even though no specter of imprudence was raised as to the reasonableness of these capital improvements, denied Utility's ability to recover a rate of return on these investments. *Id.*

order cannot be supported by substantial evidence as the requirements of *Hamm v. Central States, Welch* and *Palmetto Alliance, Inc.* are simply not met by the evidence the PSC relied upon in this regard.

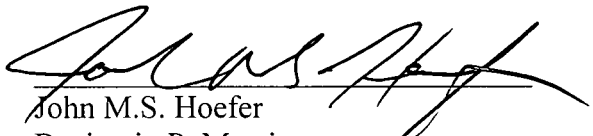
Also, in view of the size of Utility's customer base, Utility submits that the level of customer testimony complaining about service quality referenced in the Order is not substantial evidence because it is not material in view of the size of the customer base. *Cf. Porter v. S.C. Public Service Comm'n, supra*). Utility provides water supply and/or distribution services to 7,645 residential and commercial customers and wastewater collection and/or treatment services to 10,962 residential and commercial customers. [R. 1536; Tr. Vol. 5, p. 1305, ll. 2-6; R. 3039; Hearing Exhibit 47, p. 21.] A total of 58 customers, amounting to 0.32% of Utility's total customer base, testified in the proceedings below. In support of its denial of the Utility's rate application, the PSC relied upon the testimony of less than the total number of customers who testified, citing the testimony of only 34 customers,[37] or 0.18% of the customer base. Although the PSC may rely upon the sworn testimony of customers "when determining whether to credit Utility with the expenditures for capital improvement that it claimed." *USSC*, 392 S.C. at 111, 708 S.E.2d at 763, the Utility submits that this limited amount of testimony is insufficient to constitute substantial evidence. *Cf. Porter, supra.* .

[37] Importantly, not all of Utility's customers testified regarding quality of service issues with a significant number confining their comments to general concerns about the proposed rate increase. Out of the 59 customers who testified before the PSC, 15 customers only lodged general objections to the requested rate increase; however, they did not allege concerns about the provision of service. In fact, some of the customers stated that they either had experienced no problems with the Utility's quality or service or had noticed an improvement in quality and service. [R. 317, 319; Tr. Vol. 1, p. 69, 11.23-25; p. 71, 11.9-11; R. 516, Tr. Vol. 2, p. 268, 11.14-17; R. 579; Tr. Vol. 3, p. 331, 11.8-15]. Rather, only 23 alleged problems with billing (0.12% of the total customer base), 6 alleged problems with customer service issues (0.03% of the total customer base), 12 alleged problems with water quality (0.16% of the total number water customers and 0.06% of the total customer base), and 9 alleged concerns about sewer service (0.08% of the total number water customers and 0.04% of the total customer base). As noted, *supra*, some customers testified to more than one complaint with Utility's services.

CONCLUSION

In light of the foregoing, Utility submits that its substantial rights have been prejudiced in violation of S.C. Code Ann. § 1-23-380 (5)(a, b, d, e and f) (Supp.2011) and the PSC should therefore be reversed and this case remanded for further proceedings. Such proceedings should be limited to a determination by the PSC of just and reasonable rates based upon the existing evidence of record without the taking of additional evidence except such evidence as may be necessary to ascertain Utility's additional rate case expenses associated with the instant appeal.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Docket No. 2011-47-W/S

Case Tracking Number 2012-208126

Carolina Water Service, Inc., ... Appellant,

v.

The South Carolina Office of Regulatory Staff, Forty Love Homeowners' Association, and Midlands Utility, Incorporated, ... Respondents.

CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of each of the **Final Reply Brief of Appellant and Final Brief of Appellant** via the method indicated below and addressed to each as follows:

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The undersigned hereby certifies that the Final Briefs of Appellant Carolina Water Service, Inc., comply with the Rule 211(b), SCACR.

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