STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2018-001107

Daufuskie Island Utility Company, Inc.,

Appellant,

v.

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

Respondents.

REPLY BRIEF OF APPELLANT

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A. Neither of Respondents' Briefs provides validation for the Order on Rehearing's exclusion of every single invoice of the $542,978 in documented Rate Case Expenses of Guastella Associates, particularly when at the initial hearing ORS advocated for and the Commission approved recovery of a portion of these same expenses.

DIUC originally anticipated it would incur rate case expenses totaling about $380,000 to complete the current case. However, the Application prepared by DIUC's manager, Guastella Associates ("GA"), sought to include only $191,000 for Rate Case Expenses within the rate structure.[1] Because DIUC's owners were willing to absorb 50% of the anticipated 2014 rate case expenses, the proposal presented a significant direct benefit to the ratepayers. ORS rejected the proposal.[2] This very expensive and lengthy rate case followed.

To date, this matter has involved the 2015 evidentiary hearing, multiple motions and briefings on the necessity of collecting rates under bond in order to pay its bills, the very complex prior appeal, a favorable decision from this Court, more discovery on remand at the request of ORS and the Intervenors, further bonding costs to collect rates pending rehearing, a complete second *de novo* rehearing trial, and now a second appeal. As supported by the evidence at the rehearing on remand, DIUC's actual rate case expenses incurred as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services, totaled

[1] DIUC only sought $10,000 more than the $181,900 it sought in its 2011 rate filing. (Appellant's Brief p. 13) (citing R. p. 1456, line 10 – p. 1457, line 8)

[2] Had ORS and Intervenors accepted this proposal, it would have resulted in a tremendous savings to the ratepayers. (R. p. 602, line 22 – p. 603, line 10) (the requested $191,200 was much lower than the actual costs of the highly contested rate case which totaled $450,000 [before the later appeals and remand costs].)

$794,201.17, plus $60,781.56 DIUC incurred for the bonds necessary to keep the utility open through the appeals and remand of this case. (R. p. 645, lines 1-12 and Appellant's Brief p. 16)

DIUC could not afford to absorb these staggering rate case expenses. So, on remand DIUC updated its application to include the $60,781.56 for bond costs and the $794,210 for DIUC's rate case expenses to be amortized over 3 years. (R. p. 1041, lines 15-17). In response, ORS totally reversed its previous position and announced for the first time that every single rate case expense for GA's services should be excluded. ORS recommended a wholesale exclusion of $542,978 of DIUC's incurred rate case expense. ORS's new position relied upon the testimony of Dawn Hipp who testified about applying new criteria to analyzing the GA costs; however, Hipp conceded there was no public notice of these novel "standards," that they were not published standards, and that ORS did not allow DIUC the usual "back and forth with the company, to make sure we thoroughly understand the expenditures for which they're seeking recovery." (R. p. 1087, line 16 – p. 1088, line 10 and Appellant's Brief pp. 18-20) ORS convinced the Commission to adopt its last-minute position rejecting all GA invoices, even though it is undisputed that GA prepared the rate Application and accompanying schedules, responded to the hundreds of information requests, testified at the two hearings, and was otherwise integrally involved in the proceedings.[3] As set forth in Appellant's Brief, ORS admitted three essential flaws in its position that require reversal of the Commission's Order on Rehearing that adopted it:

> 1. The ORS recommendation to reject $542,978 of GA invoices is not the result of the usual process whereby ORS engages with the applicant to resolve questions and formulate a thoroughly vetted recommendation (R. pp. 1087-88);

[3] The Order on Rehearing adopted the ORS position and deferred a final answer on the GA costs to a later case. (R. p. 131) ("[W]e will allow the Company to request approval of these expenses in its next rate case, if it can provide supporting information for its invoices that satisfy the criteria listed by ORS witness Hipp presented at the rehearing.")

2. When challenged by DIUC for the raising of this issue last minute, ORS retreated to claim that it was rushed by the emergent timetable facing DIUC after the delays ORS created by entering into the Settlement Agreement which denied DIUC even basic income; this Settlement Agreement necessitated the DIUC's prior appeal and remand rate case expenses (R. p. 1088, lines 2-10 and Appellant's Brief pp. 20-21);

3. The "guidelines" applied by ORS to reject all the GA invoices were never provided to DIUC, t are not published, and are not available online nor part of any industry standard. Utilities cannot identify these "guidelines" unless they ask during the "give and take" exchange that ORS testified it did not provide to DIUC in this case. (R. p. 1087, lines 16-24 and Appellant's Brief pp. 17-18)

ORS's admissions render ORS's rejection of all GA rate-case invoices unreliable, arbitrary, and unsupported by substantial evidence. Finally, none of the testimony in the record negates or contradicts that the excluded work was actually performed by GA or that it was necessary to DIUC.

Rather than addressing the Order's shortcomings and the lack of evidence in the record to support its result, the ORS Brief boldly asserts that ORS's recommendation to exclude the GA invoices should be sufficient for the Commission and this Court. Specifically, the Brief states:

> ORS utilized its significant experience to formulate a recommendation of allowable rate case expenses that it deemed reasonable and in the public interest. S.C. Code Ann.§§ 58-4-10(8) and 58-4-50(A)(l) (2015). Inherent in ORS's recommendation was its judgment stemming from expertise and experience as the state of South Carolina's sole utility regulation investigatory agency.

(ORS Brief p. 26) It is not enough for ORS to simply refer to its statutory authority and ask this Court to ignore the inherent contradiction between positions asserted by ORS within this same proceeding, particularly given the admitted shortcomings of the ORS position and the Order adopting it. It is also not enough for ORS to claim that its experience and expertise are sufficient for the Court to rule in its favor on issues just because ORS says so.

ORS further seeks to justify the Order's allowance of only $75,000 in rate case expenses by claiming that "DIUC previously agreed to seek $75,000 in Rate Case expenses in its most recently approved previous rate case." (ORS Brief p. 26) That claim is simply untrue. DIUC never

sought rate case expenses of only $75,000 in the last rate case. The last rate case was settled with no specific mention of the amount allowed for rate case expenses. (R. p. 2651)

1. ORS's purported concerns about the GA invoices do not provide substantial evidence to support the Order on Rehearing's conclusion to exclude all GA rate case expenses.

Attempting to defend the Order on Rehearing, both Respondents' Briefs cite the testimony of Dawn Hipp and her explanation of the asserted "shortcomings" of the GA invoices. This is the same testimony the Commission cited. However, the findings and conclusions of the Order on Rehearing are simply not supported by substantial evidence. As such, these findings and conclusions should be reversed and the requested GA rate case expenses allowed.

An order of the Public Service Commission will be affirmed by this Court if, and only if, the order is "supported by substantial evidence." S.C. Energy Users Comm. v. S.C. Public Service Comm'n, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010); see also Utilities Services of S.C., Inc. v. S.C. Off. of Reg. Staff, 392 S.C. 96, 103, 708 S.E.2d 755, 759 (S.C. 2011). This Court has further explained:

> We have defined "substantial evidence" to mean "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' ... This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Hamm v. S.C. Pub. Serv. Commn., 309 S.C. 295, 299, 422 S.E.2d 118, 120 (1992) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-36, 276 S.E.2d 304, 307 (1981).

The reasons in the record provided by ORS to reject the GA invoices are simply not reasonable, plausible, or adequate to support the asserted conclusion. For example, the idea that GA invoices should be rejected because the GA travel *could* have included outrageous overspending is simply ridiculous. It is clear that ORS did not really have a concern that travel costs of on average $1,450 each for the three hearing witnesses to fly to Columbia, obtain

transportation to/from the airport, spend at least two nights required by the two-day hearing, and purchase 6 or more meals for each person over the 3-day travel period might have been hiding the "lavish expenditures related to employee travel (i.e. private jets, $50 alcoholic drinks)" that ORS claims to be worried *might* have been hidden in those costs.

Evidence must be plausible in order for a reasonable mind to determine the same is adequate to support the conclusion. See Porter v. South Carolina Public Servic Commission, 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998) (citing Hamm v. South Carolina Pub Serv Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992) (Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.)). No reasonable mind could conclude that the GA invoices were actually hiding —or even *could* be hiding— the kind of outrageous expenses alluded to by Ms. Hipp. Equally insufficient to justify the alarm alleged by ORS were the ORS allegations of mathematical errors, no names on bills (instead of GA employees' title), and no ability to know the period when consulting services were provided, when, in fact, all bills were on GA's letterhead, dated with the months of service and hours of the employees' titles, along with descriptions of the work performed each month, and there was no mathematical error but instead a clerical typo of a $35 hourly rate instead of $350 on only one bill that resulted in a lower charge. (See Appellant's Brief pp. 22 to 33) (addressing specifically and in detail why the ORS assertions are insufficient to lead a reasonable mind to the Commission's ruling).

This Court should not affirm a Commission order that merely parrots ORS conjecture and pandering about the unsubstantiated, irrelevant what-ifs and maybes of corporate malfeasance that may, or may not have, occurred in some other instance totally beyond the record of this case.

2. DIUC was not permitted ample time to gather data to respond to the ORS critique of the GA invoices.

This Court has clearly ruled that "consistent with its obligation to provide Utility an opportunity to achieve a reasonable return, the PSC is obligated to accord Utility a meaningful opportunity to rebut the evidence presented in opposition to its proposed rates." Utils. Servs. of S.C. v. S.C. Off. of Reg. Staff, 392 S.C. 96, 107, 708 S.E.2d 755, 761 (2011) (citing 26 S.C. Code Ann. Regs. 103-845(C)). That means that without question when the Commission evaluates evidence of a challenge to proposed costs for inclusion in a rate case, the Commission "must give an applicant an appropriate opportunity to gather data in response." Utils. Servs. at 109, SE2d at 762.

In briefing the issue ORS cites to Rehearing Exhibit 10 (found at R. pp. 2643-2650) as ORS's explanation of its position and then goes on to allege that "DIUC never provided or offered additional information nor rebuttal evidence put forth by ORS, despite opportunities." (ORS Brief pp. 27-29) That statement is exactly what is wrong with the Commission's Order.

On remand for the first time ORS witness Hipp asserted all GA invoices should be rejected. DIUC attempted to respond via the Rebuttal Testimony of John Guastella. Then, on December 5, 2017, less than 48 hours before the rehearing began on December 7, 2017, ORS provided Hipp's Rehearing Surrebuttal Exhibit DMH-1 (admitted as Rehearing Exhibit 10), which was the first notice to DIUC of the particular reasons ORS claimed for rejecting all GA rate case expenses. The ORS Brief confirms this:

> During her testimony ORS witness Hipp specifically cited a number of invoices that were insufficient for reasons varying from lack of detailed description of work performed to mathematical errors. (ORS DMH Surrebuttal Exhibit 1, Rehearing Exhibit 10) Additionally, ORS witness Hipp attached an exhibit detailing the problems with each invoice for which ORS recommended an adjustment.

(ORS Brief p. 28) (internal citations omitted)

It is important to note that ORS's particular "concerns" about GA's invoices would have been evident from the face of the GA invoices for the entire duration of this rate case, yet ORS did not decide these were fatal "deficiencies" until two days before the evidentiary hearing on remand. DIUC had no opportunity to rebut Hipp's unfounded surrebuttal testimony that completely reversed its previous recommendation to the Commission that it award rate case expenses based on these same GA invoices.

ORS witness Hipp admitted ORS had not previously disclosed its position and that it came up with a supposed basis for adjustment of GA's rate case expense only because DIUC continued to point out there was no support in the record for the ORS position.

> Q: So, in fact, isn't the first time that anyone ever used that audit conference as evidence in this case, for any position, is when you raised it in your surrebuttal testimony?
> A: I did raise it in my surrebuttal testimony.
> Q: And isn't that the first time it was raised in this case?
> A: It was – it would be the first time that it's raised in testimony, yes.
> Q: And when it was raised in testimony, for what purpose did you assert that the audit conference was important to the analysis of rate-case or management fees?
> A: **The reason that information was provided during my surrebuttal testimony was to refute the claim that Daufuskie made that they had not heard that the invoices had any sort of discrepancy or problem, or what ORS's concerns were.**

(R. p. 1068, lines 8-24) (emphasis added) The late timing of this newly fabricated reason to exclude $542,978 of rate case expense was improper and unfair. Reasonable minds could not disagree. DIUC was not provided "an appropriate opportunity to gather data in response" to ORS. The Commission erred by relying on ORS's last-minute, entirely new reason for rejecting DIUC's rate case expenses that was not based on any regulatory standard, ignored that the expenses were

actually incurred, and prevented DIUC from having an adequate opportunity to respond.

B. This Court did not intend its instructions on remand or its ruling as to Parker v. South Carolina Public Service Commission, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to provide ORS an opportunity on remand to alter its position on DIUC's Rate Case Expenses by relying on a newly articulated set of "standards" that produces an entirely different result than what ORS advocated in the original hearing.

When this Court reversed the Commission's adoption of the ORS-Intervenors' Settlement Agreement and remanded the matter "for a new hearing as to all issues," the Court also addressed the applicable scope of remand in such circumstances:

> Furthermore, we take this opportunity to overturn *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986), to the extent it holds the Commission may consider new evidence on remand only if explicitly authorized to do so by an appellate court. We now hold that a remand to the Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence. Rate cases are heavily dependent upon factors which are subject to change during the pendency of an appeal, thus it serves no purpose to bind parties to evidence presented at the initial hearing which may no longer be indicative of the current economic realities on remand.

Daufuskie Island Util. Co., Inc. v. S.C. Off. of Reg. Staff, 420 S.C. 305, 316, n.8, 803 S.E.2d 280, 286 (2017). Relying on this ruling as to Parker, in response to DIUC's dire need to recover its significantly increased rate case expenses upon rehearing, ORS named new witnesses who determined for the first time that DIUC should not be reimbursed anything for the $542,978 owed GA for its extensive rate case work performed in this case since 2014.

In responding to the Appellant's briefing of this issue, Respondent ORS fails to address the fact that when ORS initially announced its rejection of all GA invoices there was no explanation provided as to which invoices were questioned and why. (R. pp. 1039-61) DIUC tried to flush out the answer by serving an Interrogatory asking ORS to "Please identify which GA invoices ORS contends should be rejected for which reason(s)." (R. p. 2773) ORS responded by providing the chart that was also submitted as Hipp Surrebuttal Exhibit DMH-1 then admitted as

Rehearing Exhibit 10. (R. pp. 2643-50) (see also Appellant's Brief pp. 25-26) Now, in response to Appellant's Brief highlighting all the shortcomings in ORS's position as set forth in the Interrogatory Response, ORS doubled-down and asserts that it was too rushed to do anything other than address the three adjustments specifically commented on in this Court's opinion on the previous appeal.[4] The ORS Brief states:

> Due to DIUC's requested expedited schedule, ORS did not re-evaluate all recommendations made in the Original Proceeding and instead focused on adopting and incorporating the Supreme Court Guidance and reviewing any new evidence presented by the Appellant.
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> ***
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> "Due to the expedited schedule in this remand case, as requested by the company, ORS did not re-audit the books and records of the company for the rehearing nor did it investigate further the audit performed as part of Docket No. 2011-229-WS or revisit the audit performed by Ivana C. Gerhart as part of this docket."

(ORS Brief p. 27) (quoting ORS witness Hipp's testimony found at R. p. 1008, lines 9-15)

ORS's characterization is just not accurate. As reflected in the ORS witnesses' testimony and in the Order on Rehearing following remand, ORS went back and reviewed previously submitted evidence on the GA costs for rate case expenses and determined that it would reverse its previous acceptance of that evidence. (R. p. 1042, lines 3-15). Second, as this Court is aware, DIUC's rate collection bonds were expiring and DIUC had no way of renewing them if a decision was not rendered before December 31, 2017; the need for a decision was not a convenience to DIUC, it was a necessity created by the three years of litigation and appeals in this case. (see generally R. p. 382-86, Applicant's Proposal for Procedure Following Remand and Expedited

[4] "While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal." Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 420 S.C. 305, 316, 803 S.E.2d 280, 286 (2017). The Opinion goes on to discuss: (1) Rate Base and the Elevated Tank Site, (2) Property Tax Expense, and (3) Bad Debt Expense.

Hearing) DIUC did not ask for special treatment or request any scheduling as a matter of convenience or preference; the deadline was set in motion by the expiration of DIUC's bonds and DIUC's inability to operate without sufficient revenue.

This is surely not the result this Court intended when it held that "a new hearing necessarily grants the parties the opportunity to present additional evidence." When ORS loses on appeal and the case is remanded, ORS should not be allowed to revisit evidence already in the record and reverse its position to the detriment of the Applicant. To allow otherwise, as ORS asserts here, would be to allow ORS to punitively respond to an Applicant's successful appeal.

As set forth in Appellant's Brief, the Commission's drastic exclusion of all $542,978 of the invoices of GA that were reasonable and necessary expenses of DIUC's rate case was arbitrary and capricious and not supported by substantial evidence. (Appellant's Brief p. 18) Additionally, the testimony of ORS witnesses demonstrated the purported "criteria" used by ORS witnesses who reviewed the GA invoices did not result in evidence sufficient to support the Order's exclusion of every single GA invoice. Finally, the Commission erred by relying on ORS's last-minute, entirely new reasons for rejecting DIUC's rate case expenses that were not based on any regulatory standard, ignored that the expenses were actually and unavoidably incurred, and prevented DIUC from having an adequate opportunity to respond. (Appellant's Brief pp. 22 and 30) The Commission misapplied this Court's instructions regarding Parker and therefore the Order on Remand is premised upon an error of law requiring reversal.

When DIUC demonstrated ORS's untimely disclosure of reasons for excluding the GA invoices, ORS flippantly blamed DIUC. (See ORS Brief p. 34) ("if DIUC believes it incurred any hardship resulting from this condensed schedule, it results from its request") ORS's inaccurate explanation for its delay should be rejected.

C. DIUC has demonstrated the Commission failed to properly apply the presumption of reasonableness to DIUC's Rate Case Expenses.

Instead of first providing DIUC the benefit of the presumption that its rate case expenses are reasonable and were incurred in good faith and then requiring ORS to meet the burden of production mandated by Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011), the Commission permitted ORS to reverse its position based on the format of GA invoices which ORS had already approved in the original proceeding. Then, without any showing of even the "specter of imprudence" or the production of any basis for disregarding the presumptive reasonableness of the expenses (which, again, ORS had supported in the initial hearing and the Intervenors joined in the Settlement Agreement), the Commission erroneously disregarded the standard set out by this Court in Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011).

All three parties agree that a utility's expenses are presumed to be reasonable and incurred in good faith. See Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011)). However, the Appellant differs from Respondents regarding what is sufficient "to demonstrate a tenable basis for raising the specter of imprudence" as to an expense such that it overcomes the presumption of reasonableness of a utility's expenses under the instruction of Utils. Servs. The essential part of the analysis here is the meaning of "tenable basis for raising the specter of imprudence." There should be no confusion as this Court has been clear – "if an investigation initiated by ORS ... yields evidence that overcomes the presumption of reasonableness, a utility must further substantiate its claimed expenditures." Utilities Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 110; 708 S.E.2d 755, 763 (2011). That means the ORS "investigation" must yield evidence of imprudence and that evidence must be presented to the Commission before the presumption of reasonableness is overcome requiring the

utility to further support its filing. The Commission did not apply Utils. Servs. properly in this case.

In Utils. Servs. the applicant (Utilities Services of South Carolina, Inc. or "US") sought to increase its rates to include capital improvement expenditures of $3 million incurred by US for "plant additions" since its last rate case. During public hearings on the application multiple residents testified regarding their unhappiness with the service and quality of water provided by US. Also, "customers from eleven neighborhoods testified they had not seen any capital improvements and/or improvements in water quality since the last rate increase." Utils. Servs. at 102, 708 S.E.2d at 758. At the Commission hearing, a witness for US "listed the types of capital improvements [US] had made ... but he did not specify which of these improvements had occurred since the last rate increase." Id. On appeal of the Commission decision denying the requested rate increase, this Court held that the customer testimony could have been sufficient to "raise the specter of imprudence" regarding "expenditures that Utility claimed to have incurred in neighborhoods where customers alleged no improvements were made." Utils. Servs. at 113, 708 S.E.2d at 764. In this case, however, there was no such "imprudence" raised by testimony or otherwise. Neither Respondent has asserted and the Commission did not find that DIUC has in any way been untruthful or that DIUC has engaged in any "imprudent" behavior. Without evidence supporting a challenge, the presumption cannot be overcome. The Respondents in this case did not meet their burden of raising "the specter of imprudence" and the Commission's Order is not supported by substantial evidence and therefore based on an error of law requiring reversal.

D. DIUC's request to recover rate case expenses of $269,356 for Guastella Associates fees incurred through September 30, 2017 is supported by the evidence and circumstances of this proceeding.

Due to the unique procedural posture of this matter and the amount of time necessitated by

the prior appeal and rehearing, the rate increase needed by DIUC has surpassed the amount noticed to the public when the case began. (R. p. 648, line 6 – p. 649, line 12) To keep the final rates within the Application's original 108.9% increase noticed to the ratepayers, DIUC proposed to leave outstanding that portion of its rate case expenses beyond those that could be included within a 108.9% increase. (R. p. 461 and p. 563) DIUC therefore asked the Commission on reconsideration to correct the $699,631 excluded from Utility Plant In Service and to increase the allowed rate case expense so that DIUC can recover $269,356 for GA fees incurred through September 30, 2017. (R. p. 563) That would leave outstanding about one-half of the $541,738 of GA fees invoiced through September 30, 2017, or $273,662. DIUC also asks that this Court do the same in conjunction with instructing the Commission to correct the erroneous exclusion of $699,631 in Rate Base/Plant In Service and permit remaining GA fees invoiced could to be presented for consideration as part of DIUC's next rate proceeding. (Appellant's Brief pp. 45-46)

The ORS Brief asserts this request is somehow improper or would result in an arbitrary decision. (ORS Brief pp. 28-29) However, as the record demonstrates, there is ample support for these costs which means that the Order on Rehearing denies facts actually witnessed by the Commissioners themselves.

The Order's exclusion of the entire $542,978 of incurred rate case expense since 2014 is punitive, arbitrary, and an abuse of discretion; it denies facts known and documented in the Commission record and facts witnessed by the Commissioners themselves. See Smith v. S.C. Ret. System, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App.1999)("An abuse of discretion occurs where the trial court is controlled by an error of law or where the Court's order is based on factual conclusions without evidentiary support."); see also Deese v. S.C. State Bd. Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985)("A decision is arbitrary if it is 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.")

The Commission's refusal to allow DIUC to recover for any GA rate case expenses is contrary to the testimony, is not supported by the record, and it defies what the Commissioners themselves have witnessed. The ruling is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record and it borders on an abuse of discretion.

II. THE PUBLIC SERVICE COMMISSION'S FINDINGS AND CONCLUSIONS IN ITS ORDER ON REHEARING THAT EXCLUDING FROM RATE BASE $699,631 OF USED AND USEFUL UTILITY PLANT IN SERVICE WERE LEGALLY ERRONEOUS, ARBITRARY, UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND PREJUDICED SUBSTANTIAL RIGHTS OF DIUC.

A. The Commission excluded $699,631 of DIUC's plant in service based upon an unsupported adjustment that ORS carried forward from 2011 paperwork. ORS admits it failed to conduct any research or analysis of the amount and the record includes no factual basis explaining the $699,631 incorporated into the Order on appeal.

In response to DIUC's 2011 application for new rates, someone working for ORS at the time recommended that DIUC's Rate Base should be reduced by $1,624,696 because of "non-allowable" amounts. That proposed adjustment was never analyzed in an order of the Commission because the parties resolved the 2011 application by settlement. As part of the settlement, the parties stipulated to a $5,000,000 Rate Base. The Settlement Agreement also provided that the $5,000,000 negotiated Rate Base would "not be binding in future proceedings, instead those proceedings will be determined based on the evidence presented in each docket and the applicable law." (R. p. 2660, 2011 Settlement Agreement adopted by Order 2012-515; see also R. p. 2651)

In 2014 DIUC filed the current Application proposing a total rate base of $7,085,475 for

its combined water and sewer operations. (R. p. 18). In response to the 2014 Application, ORS chose not to use the $5,000,000 rate base amount from the Settlement in Docket No. 2011-229-WS. (R. p. 21, n. 18) Instead, "ORS used the carryforward rate base from the last rate case in Docket No. 2011-229-WS, $4,615,755,...." (Id.) ORS again, as in 2011, sought to deduct $1,624,696 from DIUC's gross plant in service for non-allowable plant; Order 2015-846 tellingly explained this amount included ORS's carried forward "adjustments from the previous case [that were disputed by DIUC in the last case and therefore were] not carried forward by DIUC in this Application." (R. p. 21-3)

According to ORS witness Ivana Gearheart who defended the carried forward reduction of $1,624,696 in rate base in the 2015 evidentiary hearing, ORS included the 2011 adjustment in this entirely separate rate proceeding without any substantive reason. Gearheart explained the previous deductions from the DUIC rate base "were simply carried over from the [2011] rate case" but admitted she did not analyze the numbers because she "wasn't part of that [2011] case." (R. p. 1799, lines 18-21) When challenged at the 2015 hearing about the *actual* issues that led ORS to recommend reduction of the DIUC rate base, Gearheart could only state that "ORS's procedure for calculating plant-in-service is to roll forward plant-in-service from the last rate case." (R. p. 1799, line 18 – p. 1800, line 13)

In response to the current 2014 Application, ORS via Gearheart restated the 2011 ORS conclusion about "undocumented costs" and she did nothing to evaluate the adjustment. She testified:

> Q: The adjustment that you made said "undocumented costs," I think, or something like that, did it not?
> A: [GEARHEART] Yes, it did.
> Q: And what research did you do to determine documentation of those costs of that plant-in-service?
> A: [GEARHEART] Those adjustments were simply carried over

> from the last rate case, and we do not retest or retry anything that was approved in the last rate case.

(R. p. 1801, lines 4-11) In other words, ORS's position is based completely on the fact that in 2011 an ORS staff member recommended an adjustment which DIUC disputed and which was never resolved because the 2011 case was resolved by a settlement. Then, when DIUC applied for a rate increase in 2014, ORS just copied over the 2011 adjustment without any analysis or research, and then negotiated the invalid 2015 "Settlement Agreement" with Intervenors incorporating the carried forward adjustment to DIUC's Rate Base. (R. p. 241)

The Commission approved the ORS-Intervenors Settlement Agreement and its adoption of the ORS reduction of $1,624,696, but on appeal this Court ruled the amount was unsupported and directed the Commission recalculate DIUC's Rate Base to include its "water tank, well, pipes, and other utility equipment located on the Elevated Tank Site." Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 420 S.C. 305, 317, 803 S.E.2d 280, 286 (2017). On remand, ORS included the Elevated Tank Site thereby reducing its adjustment to only $699,631 for "non-allowable" items.

At the 2017 rehearing ORS continued to assert the validity of the proposed 2011 adjustment as adequate support for excluding $699,631 worth of plant from DIUC's Rate Base. Gearheart did not testify at rehearing. Instead, ORS presented Dawn Hipp, Director of Utilities Rates and Services for the Office of Regulatory Staff. However, Hipp made no changes to the testimony of Gearheart ORS witness Daniel Sullivan also adopted the testimony of Gearheart. Sullivan, like Hipp, did not further explain any reasoning for the $699,631. (R. p. 1011, lines 5-11 and p. 1019, lines 17-23)

Without any testimony beyond the repetition of Gearheart's blind adoption of the adjustment ORS proposed in 2011 in the last DIUC rate case, the Commission entered an order

excluding $699,361 of DIUC's gross plant in service. The Commission's finding and conclusion were unsupported by any valid factual basis for excluding this plant. Instead, the Commission made only the conclusory statement that the adjustment was for "non-allowable plant, adjustments from the previous case not carried forward by DIUC in this Application, and asset retirements." (R. p. 118)

The Commission did not have sufficient evidence to justify the exclusion of $699,631 of items never specifically identified from DIUC's Rate Base. The decision is therefore arbitrary, capricious, based upon unwarranted exercise of discretion, and clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

B. There is no factual or legal basis for Respondents' arguments that the Order's $699,631 reduction of DIUC's Rate Base/Utility Plant In Service is justified by the 2011 case and Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 708 S.E.2d 755 (2011).

In an attempt to convert Gearheart's testimony into something substantive regarding the 2011 case, the ORS Brief relies heavily on an assertion that the ORS analysis and Gearheart's conclusions properly relied on the 2011 case as a "baseline." (ORS Brief p. 36) ORS defends its actions and the Order on Rehearing by stating:

> Using the previous case as a baseline or starting point is intuitive, practical and allows consistency and continuity for ORS in carrying out its statutory duty to provide recommendations to the Commission with respect to proposed rates. It additionally provides certainty and an understandable baseline for the Commission-regulated utilities.

(ORS Brief p. 36) The problem, of course, is that in the current case because there is no testimony in the record about the 2011 case or what was supposedly analyzed by ORS in 2011, the Order adopting the ORS position provides absolutely no clarity, consistency, or continuity. "Carrying forward" is completely unreliable in this instance because neither ORS's previous rate base nor its utility plant in service calculations were actually approved in the last rate case and no factual basis

was provided for this huge adjustment to plant.

The settlement in the 2011 case contains the parties' stipulation that rate base will be determined in future rate cases by the evidence presented in that future case, not by the record in the 2011 case:

> The Parties agree and stipulate that DIUC shall be allowed to set rates and charges on a rate base of $5,000,000. **This stipulated rate base shall not be binding in future proceedings, instead those proceedings will be determined based on the evidence presented in each docket and the applicable law.**

(R. p. 2660) (emphasis added) There has been no evidence presented in this docket as to the basis of the 2011 ORS exclusions from rate base. After seven years, ORS has yet to identify the particular plant it is excluding and the reasons for doing so. There is no basis for the Order's reliance on Hipp's incorporation by reference back to Gearheart's "carry forward" conclusion in 2011 when the basis for that conclusion was never explained.

Because the 2011 case was settled and there were no terms in the settlement confirming what ORS did or did not do, the filings from that case are not a proper "baseline" for evaluating the instant 2014 Application. Ignoring this reality, Intervenors' Brief mistakenly asserts that the 2017 Order on Rehearing did not need to identify the $699,631 worth of items being excluded from DIUC's rate base because "DIUC did not verify those assets in Docket No. 2011-329-WS, and did not justify their inclusion in rate base at that time." (Intervenors' Brief p. 10) However, there is absolutely no testimony in the record regarding what analysis ORS did (or did not) complete in the 2011 case and there is nothing in the record that supports a conclusion that DIUC did not justify the items in its rate base. The only testimony on that issue in the instant case was from Gearheart, and she did not know what was done in the previous case. (R. p. 1799, lines 18-21) Without any proof as to what plant ORS excluded and why, DIUC had no opportunity to respond to the unsubstantiated adjustment proposed by ORS.

The ORS reliance upon Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 109, 708 S.E.2d 755, 762 (2011), is misplaced; that case's application to this issue is simply to state that the Commission can use a previous rate case as a starting point for analysis. Specifically, the Court held:

> Our case law suggests that a previous rate increase may provide a baseline for the PSC to use in determining whether a utility has incurred additional expenses requiring additional revenue. Cf. Heater of Seabrook, Inc. v. Public Service Comm'n of S.C. (Heater of Seabrook I), 324 S.C. 56, 61, 478 S.E.2d 826, 828 (1996) ("To show that its expenses have increased, Heater need only introduce data comparing the expenses from the test year used in the previous rate case with those from the test year in this case....").

Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 114, 708 S.E.2d 755, 765 (2011). Utils. Services addresses the premise that the Commission may consider a previous rate decision to determine whether the utility's expenses have increased in the interim. That necessarily requires a *finding* or a *decision* in the previous case; there was no decision in the 2011 DIUC rate case, as it was settled. Also, even if a decision was not required, clearly Utils. Services does not hold that ORS and the Commission can merely identify documents filed in a previous case as the factual basis for adjustments and findings in a later rate case.

Clearly, the ORS adjustments to rate base in 2011 were not identified in the approved settlement in that case and therefore there was no basis for "carrying them over" into this case. Because the ORS adjustments were not documented or explained in this case, the 2011 adjustments to rate base and plant in service adopted by the Commission's Orders are not supported by the reliable, probative, and substantial evidence on the whole record.

C. Respondents cannot correct the fact that Rehearing Exhibit 8 and the Order on Rehearing do not identify the specific items of plant that the Order excluded from Rate Base/Utility Plant In Service.

The Order on Rehearing states that Rehearing Exhibit 8 "shows the specific items

composing the $699,361" that was excluded as "non-allowable plant, adjustments from the previous case not carried forward by DIUC in its Application, and asset retirements." (R. p. 118) However, that is not what the Exhibit shows. (See Appellant's Brief p. 25). Nowhere does the one-page Audit Exhibit DFS-5 (admitted as Rehearing Exhibit 8) identify a single specific item of plant – it only shows the NARUC plant "accounts" identified by a general "description." The Exhibit is not a listing of *specific* plant items, it is a listing of *accounts* of plant items. (See R. p. 3069, Highlighted Copy of Ex. Attached to DIUC Reply to ORS Answer re Pet for Recon) "Accounts" in this use is a descriptive term for a *category* comprised of hundreds of items; it is not an identification of *specific* items. The record is void of, and therefore the Order lacks, any factual basis to identify, for example, which meter(s) or main(s) from the category "Water and Sewer Mains" is/are being excluded for what reason.

Attempting to address this deficiency, the ORS Brief states:

> The DIUC Application statement of plant investment listed general categories for both water and sewer. Those categories are in its depreciation schedule. ORS's adjustments for Plant in Service correspond to those plant categories listed in DIUC's Application, and ORS used the list of Plant in Service categories in DIUC's Application to show adjustments.
>
> Therefore, ORS disagrees with Appellant's assertion that the Commission committed error in utilizing the list of plant service categories, that DIUC itself utilizes, in recommending adjustments to Rate Base.

(ORS Brief p. 40) (internal citations omitted)

The ORS Brief demonstrates a failure to understand the difference between the NARUC plant "accounts" identified by a general "description" and the thousands of actual pipes and mains and wells that are included within and itemized under those categories. The primary plant accounts include individual items of plant that make up the totals in the various accounts. The depreciation schedules are based on a group method that applies depreciation rates to the totals in each

account. ORS's argument is in effect regulatory double talk. However, this Court understands rate setting methodology and what happened here. DIUC's Application shows utility plant totals, by account, then ORS and subsequently the Commission's Order reduced those totals relying on Rehearing Exhibit 8. But Rehearing Exhibit 8 only shows the categories that were reduced. The Exhibit and therefore the Order do not identify which items within those categories are being excluded.

These are the specifics necessary to identify items of plant. Instead, however, ORS and the Order refer only to the Gearheart testimony about her opinion that certain unnamed and unspecified items within the NARUC Plant Accounts should be excluded for a total of $699,631 based solely upon Gearheart's carry-forward of a 2011 adjustment that has never been subjected to any review.

ORS failed to give the Commission a sufficient record. Contrary to the Order's statement, Rehearing Exhibit 8 does not identify specific items of plant, the specific cost of the items being adjusted is not provided, and there is no information about ORS's reasons for the adjustments. The Order on Rehearing's reliance on Rehearing Exhibit 8 is misplaced and it fails to demonstrate substantial evidence to support its conclusion. See Porter v. South Carolina Public Servic Commission, 333 S.C. 12, 23, 507 S.E.2d 318, 324 (1998)(citing Hamm v. South Carolina Pub Serv Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992)(Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.) DIUC's Rate Base/Utility Plant In Service should include the $699,631 disallowed by ORS's carry over of the unsubstantiated numbers from the 2011 paperwork.

D. DIUC's unrebutted proof of the cost of the known plant items in accordance with NARUC standards is substantial evidence of their cost and was sufficient, if not conclusive, documentation of their value in the absence of contrary proof of their value.

At the original hearing and at the rehearing, ORS asserted some unidentified portion of its adjustment to utility plant was based on the alleged absence of specific contemporaneous documentation of the precise cost of construction of facilities. Guastella testified, however, that the absence of those invoices does not constitute a lack of documentation of cost for ratemaking when there is no question the facilities are in service, used and usable, as is the case here. (R. p. 1424, line 15 – p. 1425, line 2 and R. p. 1425, line 16 – p. 1427, line 25) ORS has never countered Guastella's testimony that the excluded plant is in service.

Now, on appeal, Intervenors attempt to resurrect this argument by asserting that the absence of cost invoices requires the exclusion of known plant even if it is undisputed that plant is in service. Intervenors' Brief states:

> Aware that it lacked invoices that could support or verify its "documentation" of the utility plant costs at issue, DIUC then cites the NARUC Uniform System of Accounts (USoA) and its requirement of an "estimate of plant values when there is no supporting documentation available."

(Intervenors' Brief p. 12) (internal citations omitted)

The record demonstrates that DIUC had to take over the defunct Melrose Utility and that there was no paperwork beyond the books and records wherein these costs were recorded contemporaneously by the predecessor utility. That recorded information is, in fact, evidence that the items were booked contemporaneously at the time of purchase. DIUC provided ORS with ample documentation, including itemized assets by primary plant account, description, original costs as booked, year of installation and in-service dates. (R. p. 1426, lines 6-13 and R. p. 1426, line 25) Furthermore, it is not disputed that these items are actually in use within the DIUC system. The items can be located, seen, and assessed. Mr. Guastella also testified that it is consistent with the NARUC Uniform System of Accounts to estimate the cost of utility plant in the absence of

documentation. (R. p. 1478, line 19 – p. 1479, line 8) Intervenors' expert witness Charles Loy also testified that "The NARUC USoA requires an 'estimate' of plant values when there is no supporting documentation available." (R. p. 1660, line 21 – p. 1661, line 1)[5] There is no better estimate than the contemporaneously booked values DIUC has provided to ORS and to the Commission where the precise invoices are unavailable.

ORS should have properly identified the items ORS suggested be excluded from rate base and then, second, determined whether the costs recorded, booked, and now presented by DIUC constitute reasonable estimates in the absence of the paperwork ORS might prefer.

The Commission also erred in its response to this issue. When pressed by DIUC's Motion for Reconsideration, the Commission Order Denying Rehearing (Order 2018-346) stated:

> [T]he Company must provide proper documentation for such items in future proceedings, if it seeks approval of them. Such documentation can be provided by various sources, such as obtaining duplicate invoices from vendors, presenting cancelled checks as proof of payment, obtaining copies of cancelled checks from banking institutions when necessary, supplying copies of paid contracts, and/or obtaining independent third party estimates for questioned items.

(R. p. 151)

First, DIUC still does not know which specific items of plant have been excluded, so it does not know which of the hundreds of items are included within the $699,631 carry-forward adjustment from 2011. Without that information, DIUC cannot do anything. Second, as the record also made clear, DIUC cannot obtain "duplicate invoices from vendors" for these transactions which took place sometimes over 10 years ago in a predecessor entity that abandoned its operation. When Melrose abandoned the people of Daufuskie, it did not leave behind bank records or

[5] ORS witness Gearheart testified she was not familiar with the NARUC provisions that addresses inclusion of estimated costs in the absence of documentation. (R. p. 1801, line 15 – p. 1803, line 8 and R. p. 1805, lines 13-19)

"cancelled checks as proof of payment" and its files were in shambles. There were no "copies of paid contracts" that DIUC could have supplied to the Commission. Finally, if ORS had actually identified the specific items of concern, DIUC might have been able to obtain some third party's estimate.

ORS did not submit substantial evidence to support the Order's finding and conclusion excluding from DIUC's Rate Base/Utility Plant In Service equipment totaling $699,631.[6]

E. DIUC has demonstrated the Commission failed to properly apply the presumption of reasonableness to values DIUC presented for its Rate Base/Utility Plant In Service.

Commission Order 2018-346 erroneously held that DIUC has not established a process for preparing accounting estimates that can be audited by an independent third party, such as the ORS and therefore that DIUC was not entitled to the presumption that its utility plant costs are reasonable and were incurred in good faith. (R. p. 151) Endorsing this error, the Intervenors' Brief asserts that the Order held "DIUC failed to verify (through invoices, estimates, or other reasonable method) certain plant values, and therefore those values are not even "known and measurable, much less presumed reasonable." (Intervenors' Brief p. 8) To reach this conclusion, however, the Commission and Intervenors' have written into Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998) and Parker v. South Carolina Public Service Commission, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986) additional requirements that DIUC must meet before it is entitled to the presumption that its asset values are reasonable and were incurred in good faith. The Commission's implementation of an additional requirement constitutes an error of law.

In Porter this Court confirmed that Southern Bell v. Pub. Serv. Comm'n of South Carolina,

[6] The record does not include any ORS testimony in support of excluding capital costs and legal costs associated with plant in service (i.e., the "Land and Land Rights" as shown in Rehearing Exhibit 8). (Appellant's Brief pp. 42-55)

270 S.C. 590, 602, 244 S.E.2d 278, 284 (1978) "requires [the] PSC to consider known and measurable changes that occur after the test year in order to accurately calculate figures that affect the company's overall rate of return and customer." Porter, 333 S.C. 12, 26; 507 S.E.2d 328, 335. In so considering the out-of-year information, the Commission in Porter explained in its reconsideration order that it had in that instance determined "it preferred to rely upon *audited* data" regarding salary and wage expenses. Id. (emphasis in original). However, on appeal this Court held that unaudited information and testimony presented to the Commission regarding the elements of rate base is not by definition "pure speculation" and that such unaudited information should not be automatically rejected.

In Porter this Court clearly ruled the Commission can certainly utilize such unaudited data and testimony. The specific issue in Porter was what amount of income from a BellSouth subsidiary should be attributed to BellSouth in its rate base. Testimony and unaudited information from the Consumer Advocate demonstrated that the audited data was significantly lower. This Court reversed the Commission's decision that the out-of-year unaudited data and testimony was too speculative finding that the testimony contradicting the audited data was convincing. See Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 23, 507 S.E.2d 328, 333 (1998).

Likewise, here, ORS and the Commission should have at least evaluated the data and testimony instead of flatly rejecting it as speculative. DIUC provided ORS with books and records wherein these costs were recorded contemporaneously by the predecessor utility and included itemized assets by primary plant account, description, original costs as booked, year of installation and in-service dates. (R. p. 1426, lines 6-13 and R. p. 1426, line 14 – p. 1427, line 25)

Through Guastella's testimony, DIUC also provided the Commission with proof about the recorded data. The Commission's failure to even consider this evidence constitutes an error of

law.

CONCLUSION

This Court should reverse or modify the Public Service Commission Order on Rehearing because the Order's findings and conclusions that DIUC is not entitled to recover any of the $542,978 in documented Rate Case Expenses of Guastella Associates and excluding $699,631 of used and useful Rate Base/Utility Plant In Service should be excluded from rate base were legally erroneous, arbitrary, unsupported by substantial evidence, and prejudiced substantial rights of DIUC.

As more fully set forth in the Request for Instructions for Remand contained in Appellant's Brief (at p. 45), the Appellant respectfully requests this Court instruct the Commission to correct the erroneous exclusion of $699,631 in Rate Base/Utility Plant In Service and to increase the allowed Rate Case Expenses so that DIUC can recover $269,356 for GA fees incurred through September 30, 2017, up to a total revenue increase not to exceed the 108.9% increase noticed by the Application.

Respectfully submitted,

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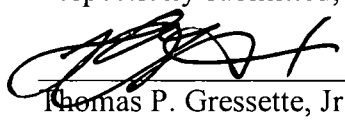
CERTIFICATE OF COMPLIANCE

By signing below, I hereby certify that this Brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
JAN 11 2019
S.C. SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2018-001107

Daufuskie Island Utility Company, Inc.,

Appellant,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Vicki Volponi, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have this 9th day of January 2019, served a copy of the following to counsel of record by placing the same in the United States Mail, first-class postage prepaid:

- Copy of Correspondence from Gressette to Hon. Shearouse dated January 9, 2019;
- Final Brief of Appellant with Certificate of Compliance with SCACR 211(b);
- Final Reply Brief of Appellant with Certificate of Compliance with SCACR 211(b);
- Index (revised) to the Record on Appeal;
- Volume VII of the Record on Appeal [R. pp. 2932 to 3053]
  - Rehearing Exhibit DMH-1 (Marked for ID/Received in evidence as part of Rehearing Exhibit 9, previously designated CONFIDENTIAL);
- Appendix to Record on Appeal [R. pp. 3054 to 3073]
  - DIUC Reply to ORS Answer re Petition for Reconsideration with Attachment
  - Includes copy of Consent to Supplement Record signed by all parties;
- Additional Copies of Oversize Exhibits
  - ROA pp. 2779 and 2780;
- Copy of this Certificate of Service.

All parties were served as follows to their counsel of record:

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