

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-000300

Commission Docket No. 2017-292-WS

RECEIVED

MAR 22 2019

S.C. SUPREME COURT

In Re: Application of Carolina Water Service, Inc.
for Approval of an Increase in its Rates for
Water and Sewer Services

**MOTION TO REMAND TO THE SOUTH CAROLINA
PUBLIC SERVICE COMMISSION**

Appellant Carolina Water Service, Inc. ("CWS"), pursuant to Rule 240, SCACR, moves this Court to remand this action to the South Carolina Public Service Commission ("Commission") so that the Commission can consider and rule on a petition for reconsideration filed by CWS prior to the filing of the notice of appeal. In support of the motion, CWS would show the following.

1, The notice of appeal in this matter was filed on February 25, 2019. Exhibit A. In the cover letter filing the notice, counsel for CWS explained that it had filed a petition for reconsideration pursuant to S.C. Code Ann. §58-5-330 ("Petition" or "CWS Petition," Exhibit B) and that the notice of appeal was being filed in an abundance of caution because of the possibility that the CWS Petition would be considered an impermissible "successive" petition since the order for which CWS sought reconsideration was itself the result of a rehearing requested by another party, the Office of Regulatory Staff ("ORS").

2. On February 27, 2019, the ORS filed a response (“ORS Response,” Exhibit C) to the CWS Petition in which ORS argued (1) that the CWS notice of appeal divested the Commission of jurisdiction over the Petition and (2) that the Petition was not permitted because it was a successive petition that followed a rehearing.

3. On March 5, 2019, CWS filed a reply (“CWS Reply,” Exhibit D) in which it argued: (1) that its Petition was allowed under S.C. Code Ann. §58-5-330; (2) that this Court had, in similar circumstances, held an appeal from the Commission in abeyance pending a final ruling on a petition for reconsideration; and (3) that this Court’s precedent on Rule 59(e) issues strongly supported the Commission having the authority to rule on the Petition.

4. On March 7, 2019, the Commission issued Order No. 2019-178 in which it dismissed the CWS Petition on the ground that the notice of appeal divested the Commission of jurisdiction. Exhibit E.

5. As explained in the CWS Petition and Reply, the issues on which CWS sought reconsideration were issues that CWS had not had any opportunity to raise prior to the Petition. Order No. 2018-802 ruled on these issues in a way that was contrary to the previous rulings in the proceeding. Its Petition for Reconsideration was the first time that CWS had an opportunity to ask the Commission to review its decision on these issues. This Court’s ruling in *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, (2004) explained the importance of allowing the lower courts (and administrative bodies) a full opportunity to address all issues before those issues are reviewed on appeal.

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam, supra, 361 S.C. at 23. The ruling in *Elam* strongly supports the CWS motion to remand.

6. In addition, the provisions of S.C. Code Ann. §58-5-330 emphasize the importance of a full review by the Commission of issues prior to any appeal.

Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists. No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified.

In the proceeding before the Commission, there has been no opportunity for the Commission to review and reconsider its rulings in Order No. 2018-802. Under these circumstances, it is appropriate and necessary that this matter be remanded to the Commission for its consideration of the CWS Petition.

WHEREFORE, CWS respectfully requests that this Court issue an order remanding this matter to the Commission for consideration of, and a ruling on, the CWS Petition for Reconsideration. The remand will ensure that this Court only reviews on appeal matters that were fully presented to the Commission.

Dated this 22nd day of March, 2019.



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February 25, 2019

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

**Re: Carolina Water Service, Inc. for Approval of an Increase in its Rates for
Water and Sewer Services - Docket No. 2017-292-WS**

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal and Certificate of Service in the above matter. A check in payment of the \$100 filing fee is also enclosed.

This Appeal is being filed with the Supreme Court pursuant to Rule 203(d)(2). On January 25, 2019, Carolina Water Service, Inc. ("CWS") filed a Petition for Rehearing and Reconsideration ("Petition") of Order No. 2018-802 with the South Carolina Public Service Commission. The Petition was filed pursuant to S.C. Code Ann. §58-5-330. Ordinarily, our notice of appeal would not be ripe until the Commission ruled on the Petition. However, in this case Order No. 2018-802 was a ruling arising from a previous petition for rehearing filed by another party. Because of uncertainty as to whether successive petitions for rehearing toll the time for filing a notice of appeal, CWS is filing this notice of appeal today.

Please stamp the extra copy provided and return it with our courier. Should you have any questions, please contact me.

Yours truly,

Frank R. Ellerbe, III,

FRE:teh
Enclosures

cc. Public Service Commission of South Carolina (via electronic filing)
Parties of Record in Docket No. 2017-292-WS

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2017-292-WS

RECEIVED

FEB 25 2019

S.C. SUPREME COURT

In Re: Application of Carolina Water Service, Inc.
for Approval of an Increase in its Rates for
Water and Sewer Services

NOTICE OF APPEAL

Carolina Water Service, Inc. ("CWS") in Docket Number 2017-272-WS before the Public Service Commission of South Carolina ("Commission") hereby appeals Commission Order Number 2018-802 dated January 25, 2019. CWS received the order on January 25, 2019. A copy of the Order is attached as **Exhibit 1**.

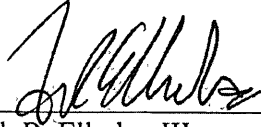
Dated this 25th day of February, 2019.

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[SIGNATURES CONTINUE ON NEXT PAGE]

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BEFORE THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2017-292-WS – ORDER NO. 2018-802¹
JANUARY 25, 2019

IN RE: Application of Carolina Water Service,)
 Inc. for Approval of an Increase in Its)
 Rates for Water and Sewer Services) ORDER ON REHEARING

I. INTRODUCTION

By Commission Order No. 2018-494 (July 11, 2018), the Public Service Commission of South Carolina (“Commission”) granted rehearing in the above-referenced Docket on four issues raised by the South Carolina Office of Regulatory Staff (“ORS”). The four issues are sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design. This Order is limited to addressing only these issues.

Originally, this matter came before the Commission on the Application (“Application”) of Carolina Water Service, Inc. (“CWS” or “Company”) filed on November 10, 2017, whereby CWS sought approval of an increase in rates and charges for the provision of water and sewer service and the modification of certain terms and conditions related to the provision of such service. The Application, filed pursuant to S.C. Code Ann. § 58-5-240 (2015) and S.C. Code Ann. Regs. 103-512.4.A. and 103-712.4.A (2012), employed a test year ending August 31, 2017, and sought a water revenue increase of \$2,272,914 and a sewer revenue increase of \$2,238,500 for a combined increase to CWS’s operating revenue of \$4,511,414. The proposed increase utilized a return on

¹ Although this Order, “Order on Rehearing” is being issued on January 25, 2019, a Directive was issued by the Commission on December 5, 2018, which designated Order No. 2018-802 as the order number to be assigned to this Order upon its issuance. Accordingly, although the order is being issued in 2019, the designated Order No. 2018-802 is being retained.

equity ("ROE") of 10.5% based on the rate of return methodology and a historical test year beginning September 1, 2016 and ending August 31, 2017.

On May 17, 2018, the Commission issued Order No. 2018-345 approving an ROE of 10.50% and additional operating revenues of \$2,936,437 consisting of an increase in water revenues of \$1,286,127 and an increase in sewer revenues of \$1,650,310. The Commission also approved several changes to the terms and conditions of service, an increase in the Water Meter Installation Charge, and eliminated the base facility charge on customers with residential irrigation meters.

On May 21, 2018, CWS filed a letter with the Commission advising the Commission that CWS and ORS had determined that a correction to the rates ordered by the Commission in Order No. 2018-345 was necessary. The correction was due to the *pro forma* estimated Uncollectible Accounts calculation and resulted in an overall net reduction to revenues of \$8,662. Thereafter, the Commission issued Order No. 2018-345(A) on May 30, 2018, in which the error in the *pro forma* estimated Uncollectible Accounts calculation was corrected.

On June 19, 2018, counsel for ORS filed with the Commission a Petition for Rehearing or Reconsideration ("Petition"). On June 25, 2018, CWS filed a Return to ORS's Petition. The Commission considered ORS's Petition in its weekly Commission meeting and issued Directive Order No. 2018-494. By Order No. 2018-494, the Commission granted rehearing on four issues raised by ORS (sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design) and denied reconsideration or rehearing on the remaining issues.² The Commission

² The Commission denied rehearing or reconsideration on issues raised relating to return on equity and the impact of the Federal Tax Cuts and Jobs Act.

also directed the Commission Staff to set an aggressive schedule for rehearing. By Order No. 2018-89-H dated July 12, 2018, the Hearing Officer set dates for the pre-filing of testimony for the rehearing and set the date of the rehearing for September 6, 2018.

On September 6, 2018, the Commission, with Chairman Comer H. “Randy” Randall presiding, heard the rehearing arising from ORS’s Petition at the Commission’s Hearing Room at 101 Executive Center Drive in Columbia, South Carolina.

At the rehearing, CWS was represented by Charles L.A. Terreni, Esquire, Scott Elliott, Esquire, and John M.S. Hoefer, Esquire. Intervenor Forty Love was represented by Laura P. Valtorta, Esquire, and Intervenor James Knowlton appeared pro se. Jeffrey M. Nelson, Esquire, and Florence P. Belser, Esquire represented the ORS.

At the rehearing, CWS presented the testimony of Michael R. Cartin (rehearing direct and rehearing rebuttal testimony), Robert M. Hunter (rehearing direct and rehearing rebuttal testimony), Kevin Laird (rehearing direct and rehearing rebuttal testimony), Robert H. Gilroy (rehearing rebuttal testimony), and Keith M. Babcock, Esquire (rehearing revised direct testimony). Forty Love presented the testimony of Jay Dixon (rehearing direct testimony). ORS presented the testimony of Bill Stangler (rehearing surrebuttal testimony), Daniel F. Sullivan (rehearing direct and rehearing surrebuttal testimony) and Dawn M. Hipp (rehearing direct and rehearing surrebuttal testimony).

II. REVIEW OF EVIDENCE AND EVIDENTIARY CONCLUSIONS

A. Sludge Hauling Expense

By Order No. 2018-494, the Commission granted ORS’s request for rehearing on the proper amount to be included for sludge hauling expense. In Order No. 2018-345(A), the

Commission had approved CWS's requested sludge hauling expense and denied ORS's adjustment to normalize the expense. In its Petition, ORS asserted the sludge hauling expenses during the test year were atypical and should be normalized. ORS proposed an adjustment to remove \$96,892 to normalize the expense. CWS argued the sludge hauling expenses were known and measurable during the test year.

CWS's Position: Mr. Cartin testified that this rate case should be based upon test year expenses. Tr. p. 34, ll. 16-17. Witness Cartin opined that the sludge hauling costs cannot be viewed in isolation and suggested that while the sludge hauling had been lowered after the April 3, 2018 hearing date that other expenses had increased. Tr. p. 34, ll. 9 – 16. He then discussed other expense categories which he stated are expected to increase due to factors occurring after the test year and in the future. Tr. p. 34, ll. 12-16; p. 35, ll. 21 – p. 36, l. 6. Upon questioning by the Commissioners and cross examination, Mr. Cartin stated that sludge hauling expenses for the test year and through the audit cut-off date were known and measurable and would continue for the foreseeable future. Tr. p. 67, ll. 19 – 24; p. 90, ll. 6-14.

At the request of the Commission, CWS witness Cartin provided an update to CWS's sludge hauling expenses from February 1, 2018 through June 30, 2018. Tr. p. 28, l. 4 – p. 29. Witness Cartin also updated the amount of sludge hauled for that same period. Tr. p. 30, line 12 – p. 31. Mr. Cartin acknowledged that the recent update provided in his testimony showed lower sludge hauling cost subsequent to the April 2018 hearing. Tr. p. 34, ll. 12-13. Responding to ORS's testimony, Mr. Cartin offered that the reduction in CWS's recent sludge hauling expenses were due to the Company taking affirmative measures to reduce sludge hauling costs (such as renting a sludge press) and optimizing plant operations. Tr. p. 36, ll. 13 – 21.

ORS's Position: ORS found the test year expenses for sludge hauling expense at the Watergate and Friarsgate Wastewater Treatment Facilities (WWTFs) atypical in comparison to the sludge hauling expenses reported by CWS for 2015 and 2016. Tr. p. 367, ll. 17-22. In reviewing CWS's Application, ORS obtained trial balances for the test year and the previous two years. Tr. p. 345, ll. 9-11; p. 351, ll. 9-10. ORS then compared the test year balances of each account with the balances for the previous two years. Tr. p. 345, ll. 11-13; p. 351, ll. 10-12. ORS set threshold criteria for dollar increases and percentage increases to identify accounts for which ORS would request explanations for the increases. Tr. p. 345, ll. 14-17; p. 351, ll. 12-14. In this case, the threshold criteria to identify accounts for which to request additional information were set at \$20,000 and 10 percent. Tr. p. 345, ll. 17-20; p. 351, l. 14-16. In addition, ORS also selected additional accounts which did not meet the set threshold criteria to request additional information for review. Tr., p. 345, ll. 20-22; p. 351, ll. 16-18.

ORS witness Sullivan testified that sludge hauling expense (Account 6410) increased \$150,555 or 76 percent from 2016 to 2017 and was identified as an account meeting the threshold criteria to request additional information. Tr. p. 345, l. 23 – p. 346, l. 3; p. 351, ll. 18-20. Upon request of ORS, CWS provided an explanation of the increase in sludge hauling expense and responded that the sludge hauling expense had increased partially due to control of the Friarsgate WWTF sludge inventory at the plant and that sludge hauling was also being addressed through CWS's inflow and infiltration ("I&I") capital project on the Friarsgate collection system. Tr. p. 346, ll. 1-9; p. 351, l. 20 – p. p. 352, l. 2. ORS's analysis identified the Friarsgate and Watergate business units as the units primarily responsible for the increase in sludge hauling expense. Tr. p. 346, ll. 9-13; p. 352, ll. 2-5.

ORS proposed the adjustment to normalize the expense to reflect sludge hauling expenses in a typical year and normalize CWS's operating experience. Tr. p. 347, ll. 12-15; p. 352, ll. 9-11. In calculating the adjustment of (\$96,892), ORS averaged the sludge hauling expense amount for the test year and the two previous years. Tr. p. 347, ll. 8-11; p. 354, ll. 5-7. Based on responses received from CWS, ORS concluded that test year sludge hauling expense was atypical and abnormal due to a South Carolina Department of Health and Environmental Control ("SC DHEC") consent order for the Friarsgate WWTF, work being conducted on the equalization basin at the Friarsgate WWTF involving removal of large amounts of sludge, and a capital project to correct I&I issues at the Friarsgate collection system. Tr. p. 346, ll. 14-25; p. 353, l. 11 – p. 354, l. 7. ORS found these conditions to be nonrecurring and contributors to the increase in sludge hauling expense. Tr. p. 347, ll. 1-4.; p. 353, l. 23 – p. 354, l. 2.

ORS recognized that, even without the SC DHEC consent order and the work on the Friarsgate system to correct I&I issues, sludge hauling expense would continue, but not at the level of the test year expense. Tr. p. 347, ll. 4-11; p. 354, ll. 2-7. Because sludge hauling expense would continue without these factors attributing to the increase in sludge hauling during the test year (the SC DHEC consent order, removal of sludge due to the EQ basin project, and the work to correct I&I issues), ORS proposed the adjustment to "normalize" test year sludge hauling expense to reflect ongoing operations. *Id.* In calculating the adjustment, ORS averaged sludge hauling expenses for 2015, 2016, and 2017. Tr. p. 368, ll. 3-10; p. 352, ll. 6-9. In calculating the adjustment in this manner, ORS's "normalizing" adjustment incorporates the test year expenses which were higher than the previous years. *Id.*

In support of this adjustment ORS witness Hipp offered that the test-year sludge hauling expenses are abnormally high and do not represent normal operating conditions going forward. Tr. p. 382, ll. 7-9. Ms. Hipp also offered that, if the interconnection with the City of Columbia is completed, then the Company's sludge hauling expense will be further reduced. Tr. p. 382, ll. 10 – 16; p. 410, l. 17 – p. 411, l. 3.

Discussion: In establishing the test year for this case, this Commission stated in Order 2018-345(A) as follows:

A fundamental principle of the ratemaking process is the establishment of a historical test year as the basis for calculating a utility's return on rate base. To determine the utility's expenses and revenues, we must select a 'test year' for the measurement of the expenses and revenues. *Heater of Seabrook v. PSC*, 324 S.C. 56, 59 n. 1 (1996). While the Commission considers a utility's proposed rate increase based upon occurrences within the test year, the Commission will also consider adjustments for any known and measurable out-of-test year changes in expenses, revenues, and investments, and will also consider adjustments for any unusual situations which occurred in the test year. When the test year figures are atypical, the Commission should adjust the test year data. See *S. Bell Tel. & Tel. Co. v. Pub. Serv. Com.*, 270 S.C. 590, 603 (1978).
(Italics added to case names.)

Order 2018-345(A), p. 6.

ORS has challenged CWS's test year sludge hauling expense as atypical for the test year and not reflective of ongoing sludge hauling expense for the future period. As noted above, this Commission recognizes that a test year should be adjusted when the test year figures are shown to be atypical. "The object of test year figures is to reflect typical conditions. — Where an unusual situation exists which shows that the test year figures are atypical the [C]ommission should adjust the test year data." *Parker v. S.C. Pub. Serv. Comm'n*, 280 S.C. 310, 312, 313 S.E.2d 290, 292 (1984). "The test year is established to provide a basis for making the most accurate forecast of

the utility's rate base, reserves, and expenses in the near future when the prescribed rates are in effect. ... Where an unusual situation exists resulting in test year figures that are atypical and thus do not indicate future trends, the Commission should adjust the test year data." *Porter v. S C Pub. Serv Comm'n*, 328 S.C. 222, 228–29, 493 S.E.2d 92, 96 (1997) (internal citations omitted).

ORS reviewed the test year sludge hauling expense because the test year amount increased 76 percent or \$150,555 from 2016 to 2017. From information supplied by CWS, ORS concluded the increase was attributed to control of sludge inventory at the Friarsgate WWTF pursuant to a SC DHEC consent order, work being performed on the equalization basin at Friarsgate WWTF, and work on I&I issues at Friarsgate. ORS further concluded that the work pursuant to the consent order, the work on the equalization basin, and the I&I project were non-recurring events.

In response to ORS's adjustment to sludge hauling and at this Commission's request, CWS provided an update to CWS's sludge hauling expenses from February 1, 2018, through June 30, 2018. Tr. p. 28, l. 4 – p. 31. CWS's witness Cartin admitted that the expenses after the April 2018 hearing in this case were lower. Tr. p. 22, 8-10. Mr. Cartin stated that a major factor contributing to the decrease in sludge hauling for the updated period provided in this rehearing is the use of sludge press that began after CWS hired an outside contractor to operate the Friarsgate WWTF in late February 2018. Tr. p. 22, ll. 12-23.

We find that ORS's adjustment of (\$96,892) to normalize sludge hauling expense for the test year to be appropriate. On its face, the increase in the expense account of 76 percent or \$150,555 required additional scrutiny from ORS. That review identified several factors which ORS concluded were nonrecurring and which this Commission agrees are nonrecurring. Accordingly, we find an adjustment to normalize test year sludge hauling expense proper and the

amount of the adjustment to be reasonable. ORS used an average of the test year and the two preceding years. This calculation of the adjustment provides some effect of the higher expense amount of the test year tempered by the expense amounts from the prior two years to provide a reasonable forecast of future expense.

CWS's position that the sludge hauling expense was known and measurable for the test year and would continue for the foreseeable future provides no assistance with determining whether the expense should be normalized. There is no dispute the test year expense was known and measurable. Likewise, there is no dispute that CWS will continue to experience sludge hauling expense. ORS has raised a tenable issue of the amount of the expense due to the dollar amount increase and percentage increase over the previous year. While ORS identified several non-recurring factors which increased the amount of test year expense, CWS provided no evidence or explanation to refute that the higher sludge hauling expenses in the test year were non-recurring. We find ORS's proposal to normalize sludge hauling expense appropriate to reflect normal operations.

We are not persuaded by CWS's argument that the normalization expense is not appropriate because other expenses would increase in the future. Similarly, we are not convinced by CWS's contention that ORS's normalization adjustment is an issue viewed in isolation and not in the context of the overall operating perspective as a routine cost of doing business. The adjustment recommended by ORS and adopted in this Order was based on the test year expense and ORS's further inquiry into the amount of the test year expense which was much larger from the two previous years.

This adjustment is being considered in the context of a full rate case where CWS has proposed *pro forma* adjustments and other adjustments based on known and measurable occurrences. CWS's income and expenses have been examined in the context of this comprehensive rate case. If during the rate case, CWS was aware of verifiable increases in other expense categories, CWS had the opportunity to present those matters in this case. The adjustment does not take into account any expenses or occurrences after the test year. The adjustment is based on an average of the test year expense and annual expense of the two prior years, and, as noted above, the adjustment moderates the higher than normal test year amount with annual expenses of the two previous years. The sludge hauling expense is not eliminated or reduced to zero but is adjusted to reduce the amount of the expense from the abnormal test year expense amount to an amount more reflective of normal operations. CWS receives coverage for sludge hauling expense but at an amount adjusted to reflect normal operations.

B. Litigation Costs

At the original hearing in April 2018, CWS had sought, and been awarded by Order No. 2018-345(A), recovery of \$998,606 in litigation expenses to be amortized over 66.67 years. In its Petition, ORS challenged the allowance of litigation expenses related to several actions in federal court, state court, and the Administrative Law Court ("ALC"). In granting rehearing, the Commission requested that disaggregated litigation expenses be provided and specified that expenses for each legal action be provided along with a description of each legal action and an outcome or status of each case. Order No. 2018-494. CWS provided disaggregated expenses by case. ORS asserted that inclusion of the litigation costs as an allowable expense forces ratepayers to pay for CWS's failure to comply with environmental laws and also requires ratepayers to pay

for an unsuccessful defense of a civil action. CWS argued in response that the Company had to defend itself against lawsuits, that the litigation expenses are a cost of doing business, and that the expenses are known and measurable.

CWS's Position: On rehearing, CWS is seeking to recover \$991,509³ which when amortized over the requested 66 2/3 years results in an annual expense of \$14,894. Tr. p. 23, ll. 13 – 16; p. 32, 1-11. Rehearing Exhibit 8, Appendix B. Upon request of the Commission in its Order granting rehearing, CWS provided a breakdown of litigation expenses by case. Tr. p. 33. Rehearing Exhibit 8, Appendix B. CWS seeks recovery of litigation expenses for the case of *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.* (Civil Action Number 3:15-cv-00194-MBS) ("*Riverkeeper*") in the amount of \$395,196; for the case CWS filed against the United States Environmental Protection Agency ("US EPA") and the Town of Lexington in the amount of \$146,420; for the ALC case of the SC DHEC Permit denial of \$233,223; for the ALC case related to the I-20 Connection of \$51,039; and for the condemnation case of \$78,482. Tr. p. 33. In addition, CWS seeks recovery of expenses of \$12,320 and Advances of \$74,828. *Id.*

CWS witness Carlin asserted that ORS's recommendations on the treatment of litigation expenses was inconsistent because ORS recommended that litigation expenses related to the condemnation case and the ALC cases be assigned to a regulatory asset while recommending denial of the litigation expenses associated with the two federal court cases, Tr. p. 42, ll. 17-23.

³ The amount of litigation expenses sought on rehearing is lower than the amount originally sought and awarded by the Commission. Upon inquiry by ORS of certain invoices, CWS admitted that three invoices totaling \$5,617 were improperly included in the calculation of litigation expense and that an additional \$1,480 was also removed as not being associated with the I-20 litigation. Tr. p. 23, ll. 13-22; p. 32, ll. 1-11; p. 43, ll. 1-12. Also, the amounts listed below total \$991,508 (the difference with this amount and what CWS is seeking to recover on rehearing, \$991,509, is due to rounding).

CWS presented Keith M. Babcock, Esquire to address the reasonableness of the attorneys' fees for which CWS seeks recovery in this Docket. Tr. p. 196, ll. 18-23. Mr. Babcock explained that he met with CWS's counsel and received an overview of the five different cases that form the basis for the litigation expenses. He reviewed the pleadings, motions, court filings, and the legal bills from the cases. He noted that there were two federal cases – one being the *Riverkeeper* lawsuit and the other being the lawsuit filed by CWS against the US EPA, two ALC cases, and the condemnation case.

Witness Babcock stated that, once the *Riverkeeper* lawsuit was brought, CWS had no choice but to fight the suit "as hard as they could." Tr. p. 205, ll. 1-6. He stated that the idea of bringing the lawsuit against the US EPA to change the 208 plan or force the interconnection was "an excellent one" and "good legal" strategy but he acknowledged that the lawsuit against the US EPA was a long shot. Tr. p. 205, l. 7-18. The two ALC cases involved the SC DHEC permit – one was the case involving the permit denial and the second was a challenge to a SC DHEC order requiring CWS to present plans to construct a connection to the Town of Lexington's line. Tr. p. 205, l. 19 – p. 206, l. 1. This second ALC case was "a protection appeal" to protect CWS in the event the permit denial was upheld. *Id.* The condemnation case was filed by the Town of Lexington to condemn CWS's I-20 wastewater system. Tr. p. 223, ll. 6-9. Mr. Babcock characterized the condemnation as a unique situation because the Town of Lexington started the condemnation after being forced by SC DHEC to do so. *Id.*

Mr. Babcock opined that the attorneys' fees charged as a result of the litigation concerning these five cases were reasonable. Tr. p. 222, ll. 1-3. Mr. Babcock described his review of the invoices and his analysis under the factors listed in Rule 407, SCACR, Rule 1.5. He also

referenced the standard used by South Carolina courts in some cases. From his analysis, Mr. Babcock stated his opinion that the fees and costs at issue are “incredibly reasonable.” Tr. p. 219, ll. 5-10; p. 229, ll. 18-20.

ORS’s Position: In this rehearing, ORS requests that the Commission amend its ruling in Order No. 2018-345(A) to deny recovery of the litigation expenses attributed to the two federal court cases and to establish a regulatory asset for litigation expenses related to the Town of Lexington’s condemnation case and the two ALC cases. Tr. p. 366, l. 18 – p. 367, l. 13.

ORS requests the Commission disallow \$155,974 in legal expenses where the description of professional services was redacted. Tr. p. 394, l. 20 – p. 395 l. 6; Rehearing Exhibit 16, Rehearing Exhibit DMH-4; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. ORS identified adjustments necessary to properly disaggregate litigation expenses between the five court cases utilizing CWS’s starting balances. Tr. p. 395, ll. 7–18. Rehearing Exhibit 16, Rehearing Exhibit DMH-5. ORS further identified adjustments necessary to properly allocate advances between the court cases. Tr. p. 417, l. 14 – p. 418, l. 7. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2.

ORS requests the Commission deny recovery of the litigation expenses associated with the *Riverkeeper* lawsuit, deny recovery of the litigation expenses associated with the suit brought by CWS against the US EPA, and deny recovery of undocumented and unsupported expenses and advances CWS did not assign to legal actions and did not provide documentation to support. Tr. p. 366, l. 18 – p. 367, l. 13; p. 418, l. 8 – 9.

ORS requests the Commission establish regulatory assets in the amount of \$124,603, \$173,283, and \$36,521 for the Town of Lexington’s condemnation case and the two ALC cases.

respectively. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. The remainder of the \$991,509 in litigation expenses results in a balance of \$657,102 associated with the federal court cases and undocumented and unsupported advances which ORS believes CWS did not assign to legal actions and did not provide documentation to support.

ORS objects to the recovery of the litigation expenses related to the federal court cases because these cases stem from CWS failing to provide service in compliance with its DHEC permits and State and federal law. Tr. p. 369, ll. 5 - p. 370, l. 15, p. 412, ll. 12-18. CWS was found by the federal court to have violated the Clean Water Act and was fined by that court. *Id.* ORS witness Hipp stated that ORS's position related to these litigation expenses rests on the policy that ratepayers should not bear the burden of legal costs related to CWS's failure to operate its I-20 sewer system in accordance with its NPDES permit. Tr. p. 382, l. 19 – p. 383, l. 2. ORS does not challenge the reasonableness of the fees, the hourly rates, or the hours spent. Tr. p. 473, ll. 10-13. However, ORS does challenge requiring the ratepayer to pay these expenses for litigating the *Riverkeeper* and *US EPA* lawsuits because the expenses are not expenses related to providing adequate sewer service to the customers but result from a failure to manage the I-20 system to comply with the NPDES permit requirements. Tr. p. 387, ll. 13 – 15. The federal court order made several findings regarding CWS's violations of its NPDES permit. Tr. p. 413, l. 15 – p. 414, l. 16.

Alternatively, should the Commission not agree with ORS's position to deny the litigation expenses related to the *Riverkeeper* federal court case, ORS requests that the following adjustments be made to the litigation balance associated with the *Riverkeeper* lawsuit. ORS requests the Commission remove \$79,178 in litigation expenses due to redactions on the invoices which limited ORS's ability to review the description of work performed. Tr. p. 418, l. 14 – p. 419,

I. 20; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2 and Rehearing Exhibit 16, Rehearing Exhibit DMH-4. The legal invoices contain numerous entries with work descriptions which detail the work performed for different legal cases. *Id.* Billed time was not separated by legal action. *Id.* Where redactions occurred in the work description, ORS states that it could not verify the legal action to which the redaction should be attributed and how the time should be allocated. *Id.*

ORS presented Bill Stangler, the Congaree Riverkeeper, as a witness. Mr. Stangler stated that the citizen lawsuit his agency brought in federal court *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.* (Civil Action Number 3:15-cv-00194-MBS) was brought in an effort to bring CWS's I-20 facility into compliance with their Clean Water Act permit. Tr. p. 265, ll. 7 – 20. The permit required the I-20 plant to connect to a regional wastewater treatment system and cease discharging into the Lower Saluda River. *Id.* Yet, years later, discharges from the I-20 plant continued, and there were numerous effluent limitation violations from the I-20 facility. *Id.* Mr. Stangler stated that *Riverkeeper* case sought to address both the connection to a regional treatment system and the numerous effluent limitation violations. *Id.* Mr. Stangler testified that the Congaree Riverkeeper monitors all sorts of sites and polluters in the watershed and takes enforcement action when necessary. Tr. p. 265, l. 21 – p. 266, l. 21. He also testified that CWS's pattern of ongoing effluent violations was one of the issues which brought the CWS I-20 facility to the Congaree Riverkeeper's attention and was a key factor in deciding to file the lawsuit. *Id.*

Mr. Stangler also discussed the federal court's ruling in the *Riverkeeper* lawsuit. In March 2017, the federal court issued its order holding that CWS violated the Clean Water Act permit by failing to connect to the regional system for over 15 years and by repeatedly violating multiple

effluent limits in its permit. Tr. p. 278, ll. 1-5. The court imposed a \$1.5 million-dollar penalty against CWS for violation of the connection requirement and a \$23,000 fine against CWS for violation of the effluent limits. *Id.* Following motions of the court's order, the federal court granted reconsideration on the \$1.5 million penalty because the parties had agreed that they would present evidence on an appropriate penalty if CWS was found liable and the parties had not had a chance to present such evidence at the time of the Court's ruling. Tr. p. 278, ll.6 – p. 279, l. 2. The case is still ongoing with respect to an appropriate penalty of the violation of the requirement to connect. *Id.* The federal court did not grant reconsideration on its ruling that CWS had violated its NPDES permit for failing to connect to the regional facility and for exceeding the effluent limitations. *Id.*

Discussion: CWS seeks recovery of expenses related to cases in litigation in federal court, state court, and the ALC. All of these cases arise from the issues with CWS's I-20 system. ORS opposes recovery of the litigation expenses related to the federal cases and requests that the expenses related to the ALC cases and the condemnation case be booked to a regulatory asset for review in a future rate proceeding after those cases are concluded.

This Commission recognizes that these cases must be reviewed carefully because an underlying contention related to all the cases involves numerous violations of CWS's NPDES permit. When litigation involves claims asserting failure of the utility to adhere to state or federal law, we must look carefully at the matter to determine whether expenses associated with defending the action should be included in rates paid by customers.

(a) Federal Court Cases – The federal court cases arose when the Congaree Riverkeeper filed a citizen lawsuit in 2015. Following the filing of the *Riverkeeper* lawsuit, CWS

filed an action for a declaratory judgment and injunction against the US EPA and the Town of Lexington.

CWS through witnesses Cartin and Babcock have asserted that CWS must defend itself when litigation is filed. Mr. Gilroy testifying for CWS stated that CWS has sought interconnection with the Town of Lexington on several occasions. Tr. p. 168, l. 3 – p. 171, l. 10. Mr. Gilroy recounted several instances where CWS approached the Town of Lexington about interconnection, but these attempts were not successful. *Id.*

ORS witness Hipp stated ORS's position that ratepayers should not bear the burden of legal costs related to CWS's failure to operate its I-20 sewer system in accordance with its NPDES permit. Tr. p. 412, ll. 12-18. Witness Hipp also stated that these costs should be the responsibility of CWS's shareholders, otherwise no incentive exists for regulated utilities to operate in compliance with federal, state, and local laws. *Id.*

In response to the Order Granting Rehearing, CWS provided expert testimony from Mr. Babcock on the reasonableness of the attorney's fees incurred. Mr. Babcock described his analysis and concluded that the attorney's fees incurred in the litigation were reasonable. ORS witness Hipp stated that ORS was not contesting the reasonableness of the attorney's fees, but rather the propriety of requiring the ratepayers to pay these costs incurred by CWS. Tr. p. 473, ll. 10-13.

In considering this issue, the Commission is mindful that it must balance the interests of the utility with those of the ratepayer. In reviewing the record before us, we find that recovery of the litigation expenses related to the *Riverkeeper* case should be denied, but the recovery of litigation expenses related to the action brought by CWS against the US EPA and the Town of Lexington should be allowed to be amortized.

With regard to the *Riverkeeper* litigation, CWS seeks recovery of expenses defending its noncompliance or failure to comply with the obligations contained in its NPDES permit. CWS was not successful in defending this action in federal court. We find that ratepayers should not be responsible for the payment of litigation expenses incurred in defending this action in which the ratepayers derived no benefit from the expenditures. This Commission agrees with the statement of Witness Hipp that allowing recovery of expenses related to defending this action brought about by CWS's own noncompliance with its NPDES permit provides no incentive for regulated utilities to operate in compliance with federal, state, or local laws.

S.C. Code Ann. Regs. 103-570(A) requires CWS to "comply with all laws and regulations of State and local agencies pertaining to sewerage service." S.C. Code Ann. Regs. 103-540 (2012) requires CWS to "operate and maintain in safe, efficient and proper conditions all of its facilities and equipment used in connection with the services it provides to any customer."

While we have located no South Carolina case addressing this issue, we are aware of the North Carolina case of *State ex. rel. Utilities Comm'n v. Pub. Staff, N. Carolina Utilities Comm'n*, 317 N.C. 26, 343 S.E.2d 898 (1986), and this case provides guidance on this issue of recovery of litigation expenses. In this case, the North Carolina Supreme Court reversed a decision by the North Carolina Utilities Commission allowing inclusion of utility legal fees in approved operating expenses resulting from the utility contesting a penalty that had been assessed for failure to provide adequate service. The North Carolina Supreme Court noted that the legal fees in question were not associated with the utility's provision of water service but were a result of the utility's failure to provide adequate water services in the first place. The North Carolina Supreme Court concluded it would be improper to require ratepayers to pay for the utility's penalty-related legal fees through

inclusion in the utility's regulated expenses. The North Carolina Supreme Court also concluded that the expense could not be considered reasonable or necessary because the utility could have avoided the expense if the utility had carried out its responsibility of providing adequate service. 317 N.C. 26, 41, 343 S.E.2d 898, 907-8.

As a public utility operating under the laws of South Carolina and pursuant to its federally granted NPDES permit, CWS was required to operate its facilities in compliance with federal, state, and local laws. In its orders, the federal court found significant violations by CWS. While the *Riverkeeper* case is still ongoing as to the penalty to be imposed, the order of the federal court found CWS to be in violation of its permit. We believe it would be improper to impose these expenses upon the ratepayers when the ratepayers were already paying for the Company to provide its services in compliance with its permits and with applicable federal and state laws, and, accordingly, were not deriving any benefit from the expenditure.

In contrast, we hold that litigation expenses in the federal case brought by CWS against the US EPA and the Town of Lexington should be allowed to be amortized. CWS's witness Babcock indicated that, although the case was dismissed and would have been difficult to win, the filing of that litigation was a smart strategic effort to try to unlock the logjam created by the 1997 208 Plan and the inability of CWS to gain an interconnection of the I-20 system to the Town of Lexington. (Tr. p. 224, ll. 20-24). For this reason, we believe that the Company was serving ratepayer interests when it filed this action, and, therefore, should be compensated for its effort by being allowed litigation expenses.

(b) ALC Cases – CWS seeks recovery of litigation expenses related to two cases pending in the ALC. These two cases are held in abeyance pending the court case involving the

condemnation of the I-20 sewer system by the Town of Lexington. Tr. p. 385, l. 18 – p. 386, l. 2. CWS shows the litigation expenses related to both cases as totaling \$284,262, with expenses of \$233,223 attributed to the ALC SC DHEC Permit Denial case and expenses of \$51,039 attributed to the ALC I-20 Connection case. Tr. p. 33. However, ORS witness Hipp addressed the reallocation of \$19,759 in attorneys' fees, classified by CWS as expenses related to the ALC SC DHEC Permit Denial case, as attorneys' fees related to the *Riverkeeper* case. Tr.p. 395, ll. 7-12; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Witness Hipp also addressed reallocation of \$2,985 in attorneys' fees, booked by CWS to the ALC I-20 Connection case, as attorneys' fees were expenses related to the condemnation case. Tr. p. 395, ll. 13-18; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. ORS Witness Hipp proposed adjustments to the claimed litigation expenses to remove \$40,181 from the ALC DHEC Permit Denial case and to remove \$11,534 from the ALC I-20 Connection case. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. These two adjustments proposed by ORS related to removal of legal fees where redactions of the descriptions limited ORS's review of the work performed. Tr. p. 394, l. 20 – p. 395, l. 6; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Company witness Cartin's rehearing rebuttal testimony stated that, even with the redactions, the invoices provide ample basis to allow recovery of these expense. (p 6 of 7, Cartin rehearing rebuttal testimony). Considering the invoices submitted in confidential Exhibit DMH-4, the Commission agrees with witness Cartin that these expenses are proper. With these adjustments, the litigation expenses proposed by ORS for the ALC SC DHEC Permit Denial case are \$173,283 and for the ALC I-20 Connection case are \$36,521 totaling \$209,804. Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. The Commission finds that the litigation expenses to be allowed for deferral, as

discussed below are \$213,463 for the ALC – DHEC Permit Denial case and \$48,054 for the ALC I-20 Connection case after adding back the redacted invoices removed by ORS.

Because these cases have not yet concluded, and no final order has been issued, ORS asserts it would be premature to allow recovery of litigation expenses related to these two cases. Tr. p. 391, l. 1- p. 392, l. 2. ORS recommends establishment of a regulatory asset in which to defer the litigation expenses associated with these two ALC cases and for ratemaking treatment to be deferred until a future rate proceeding. *Id.* ORS also recommends that the regulatory asset be limited to litigation expenses for the ALC cases, that the regulatory asset not be allowed to accrue carrying costs, and that the amortization period for the regulatory asset deferral be established during the next rate proceeding after all facts related to the cases are known. *Id.*

The Commission finds ORS's recommendation to establish a regulatory asset in which to defer the litigation expenses associated with these two ALC cases reasonable and appropriate. Given that the cases are not concluded and all facts surrounding the cases are not yet known, it is appropriate to establish a regulatory asset to defer ratemaking treatment of these litigation expenses. The regulatory asset for these litigation expenses shall be limited to litigation expenses for these ALC cases, the regulatory asset shall not accrue carrying costs, and the amortization period for the regulatory asset deferral shall be established during the next rate proceeding after all facts related to the cases are known.

(c) Condemnation Case – At the hearing CWS stipulated that it agreed to place the litigation expenses related to the condemnation case in a regulatory deferral account to be carried without carrying costs until the next rate case when the results of that case are known. Tr. p. 245, l. 23 – p. 246, l. 14. This was the position of ORS with regard to the litigation expenses associated

with the condemnation case. Tr. p. 383, l. 11 – 16. Therefore, upon the agreement of CWS and ORS, the expenses associated with the condemnation proceeding of \$124,603⁴ are to be placed in a regulatory deferral account without carrying costs. This amount includes an update from ORS's surrebuttal testimony to include \$52,442 in advances paid for consulting services which originally had not been assigned to a specific litigation case. Tr. p. 417, l. 10 – 16. The deferral should be further adjusted to include \$9,306 in invoices that ORS removed due to redactions. The total amount to be deferred for the Condemnation case is \$133,909.

(d) Expenses and Advances – ORS made an adjustment of \$20,377 to remove expenses related to the Winston and Strawn invoices. Tr. p. 415, l. 9 – p. 416, l. 6; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2 and Rehearing Exhibit 16, Rehearing Exhibit DMH-2. CWS had categorized \$19,912 of the Winston & Strawn invoices as work and expenses related to the *Riverkeeper* case, but the invoices indicated the work was for a matter that was not the *Riverkeeper* case. *Id.* The remaining \$465 was categorized under the Expenses category on surrebuttal rehearing Exhibit DMH-2, Hearing Exhibit No. 18. We agree that the Company's Winston & Strawn invoices should be disallowed in this case, based on the description of work performed relating to employee benefits and executive compensation, and that expenses and allowances be included net of reallocations and disallowances. ORS also reallocated \$73,491 in mailing, court reporting, and advances paid to Berkeley Economic Consulting, Inc. Tr. p. 418, ll. 3-7; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2. Of the reallocation, \$21,049 should be reassigned to the *Riverkeeper* case and \$52,442 should be reassigned to the Town of Lexington condemnation case. ORS also proposed to re-allocate \$19,760 to the *Riverkeeper*

⁴Tr., p. 33, Tr. p. 44, ll. 7-10; Rehearing Exhibit 18, Surrebuttal Rehearing Exhibit DMH-2.

lawsuit for legal hours incorrectly attributed to the legal action ALC-DHEC Permit Denial. CWS originally included these costs and attorneys' fees in the ALC Permit denial case when these costs were in fact incurred in the *Riverkeeper* case. Tr. p. 395, ll. 7-12. We agree with ORS with regard to the \$19,760. In addition, we accept ORS's correction of allocations from the I-20 Connection case with a reassignment of \$2,985 to the Town of Lexington condemnation case.

Further, with regard to the \$155,975 removed by ORS due to redactions reflected on legal invoices, we disagree. ORS recommended the Commission exclude \$155,974 in fees resulting from any item on any invoices that included a redaction. Citing one example of an invoice entry where the nature of the legal matter was unclear, the ORS objected to 152 such invoices. (Tr. p. 418, l. 14 - p. 419, l. 11; Exhibit 16 and Conf. Exhibit 17). ORS claimed the Company's need to protect the confidentiality of attorney-client communications or attorney work product was irrelevant. (Tr. p. 419, l. 21 - p. 420, l. 3). Mr. Cartin, a former ORS employee, testified that he had never encountered a circumstance where the ORS stood behind redactions to deny recovery of legal fees. (Tr. p. 44, l. 12 - p. 45, l. 2). The ORS position raises concerns over a utility's ability to recover legitimate litigation costs while protecting confidential information and litigation strategy. ORS disallowed expenses even when otherwise detailed time entries had one or two words redacted. (See Exhibit 16 and Conf. Exhibit 17). The mere presence of a redaction in a time entry is not sufficient to justify its rejection. This issue must be examined on a case-by-case basis. Examination of the invoices in this case indicates to this Commission that the redacted material would not prevent a reader from determining what work was performed. Accordingly, in this case, we reject this exclusion, and hold that these costs should be allowed and included in

amortization amounts. Below is a table showing litigation expenses allowed, litigation expenses disallowed, and litigation expenses deferred:

<u>Litigation Expenses</u>							
Town of Lex v.							
Summary of Adjustments	CRK v. CWS	CWS (condemnation)	ALC - DHEC Permit Denial	ALC - I-20 Connection	CWS v. EPA	Expenses and Advances	TOTAL
Starting Balance	\$ 395,196	\$ 78,482	\$ 233,223	\$ 51,039	\$ 146,420	\$ 87,148	\$ 991,568
ORS Adj - Exh DMH-4	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -
ORS Adj - Exh DMH-2	\$ (19,912)	\$ -	\$ -	\$ -	\$ -	\$ (165)	\$ (20,377)
ORS Adj - Exh DMH-3*	\$ -	\$ -	\$ -	\$ -	\$ -	\$ (73,491)	\$ (73,491)
ORS Adj - Exh DMH-5	\$ 19,760	\$ 2,985	\$ (19,760)	\$ (2,985)	\$ -	\$ -	\$ -
Advance Reallocation - Surrogate	\$ 21,049	\$ 52,442	\$ -	\$ -	\$ -	\$ -	\$ 73,491
Ending Balance	\$ 416,093	\$ 133,909	\$ 213,463	\$ 48,054	\$ 146,420	\$ 13,192	\$ 971,131
Deny all legal expenses for CRK v. CWS	\$ (416,093)	\$ -	\$ -	\$ -	\$ -	\$ -	\$ (416,093)
Defer legal expenses for condemnation and ALC**	\$ -	\$ 133,909	\$ 213,463	\$ 48,054	\$ -	\$ -	\$ 395,426
Grant legal expenses for CWS v. EPA and other expenses***	\$ -	\$ -	\$ -	\$ -	\$ 146,420	\$ 13,192	\$ 159,612

*Of the \$73,491, the amount reallocated to the CRK v. CWS case was \$21,049, and \$52,442 was reallocated to the Town of Lexington v. CWS condemnation case

** Defer legal expenses for condemnation and ALC for consideration in a future rate proceeding

*** These expenses are to be amortized over 66.67 years

We also hold that all legal expenses approved for recovery in this Order shall be amortized over the previously approved period of 66.67 years, with no carrying costs. In addition, the Company is authorized to make any further adjustments that may fall out of the decision described in this Order.

C. Friarsgate EQ Basin Liner Project

In its Petition, ORS requested reconsideration with CWS recovering expenses associated with the replacement of the Equalization Liner ("EQ Project"). ORS asserted that the work on the EQ Project was not completed and that recovery of expenses in this case was not appropriate because the liner was not yet "in service" and did not meet the "used and useful" standard of

providing service to customers. In Order No. 2018-494, this Commission granted rehearing of this issue and stated that it would consider an update on the status of the EQ Liner replacement including expenditures and the projected final completion date. Order No. 2018-494.

CWS's Position: CWS witness Cartin addressed the expenses associated with the EQ Project. He explained the remediation work on the EQ Project was required by SC DHEC Consent Order 16-039-W, which required CWS "to remove and properly dispose of the solids and grit from the EQ basin and complete repairs to the basin liner" at the Friarsgate WWTF. Tr. p. 25, ll. 5 – 12; see also, Tr. p. 140, ll. 12 – 16. The remediation work began in September 2017, but was not completed until February 2018, because it was more involved than originally anticipated. Tr. p. 25, ll. 13 – 16. CWS witness Laird offered that the expenses of the remediation would have been required even if CWS had not planned to replace the EQ Liner. Tr. p. 141, ll. 1 – 7.

In November 2017, SC DHEC notified CWS that both Richland County and the City of Columbia had treatment capacity for the flow from the Friarsgate WWTF. Tr. p. 26, ll. 1 – 12. This notice triggered a condition in CWS's NPDES permit for the facility to affect an interconnection with an available regional wastewater provider, *Id.* CWS entered into discussions with both Richland County and the City of Columbia and, in February 2018, CWS chose to proceed with the City of Columbia for an interconnection agreement. *Id.* Thereafter, based on the recommendation from its engineering consultant, CWS decided to incorporate the EQ basin work scope into the interconnection project. Tr. p. 26, l. 13 – p. 27, l. 3. Mr. Cartin then explained that CWS is not seeking recovery of any costs associated with the EQ liner repair project phase in this case but that CWS will seek to recover the costs of the interconnection project, which now encompasses the EQ basin liner repair, in its next general rate proceeding. Tr. p. 27, ll. 14 – 19.

Presently, the EQ basin project was approved in Order No. 2018-682, dated October 30, 2018, but awaits Midlands Region Council of Governments' approval of an amendment to the 208 Water Quality Management Plan that would permit the equalization basin to remain in operation after decommissioning of the Friarsgate WWTF. Tr. p. 139, l. 20 – p. 140, l. 5

ORS's Position: The EQ Project began on May 16, 2017 and was identified by CWS as Project #2017093. Tr. p. 396, l. 13 – p. 397, l. 16. CWS requested \$1,081,375 be included in plant-in-service for this Project which was to replace the equalization basin liner at the Friarsgate plant. *Id.* This project was not completed by April 3, 2018, (which was the first day of the hearing on CWS's Application) and was not providing service to CWS's customers. *Id.* ORS therefore adjusted CWS's pro-forma plant-in-service by \$1,081,375 to exclude the EQ Project from this rate case. *Id.* ORS's reasoning for excluding this project was the fact that the plant covered by the EQ Project was not yet "in service" and was not "used and useful." Tr. p. 397, ll. 17 – p. 398, l. 15.

Subsequent to the April hearing, CWS provided ORS with updates on the EQ Project and responded to discovery requests from ORS related to this rehearing. Responses to ORS's discovery requests initially revealed that the EQ Project (originally designated as Project #2017093) had been separated into two phases. Tr. p. 398, l. 19 – p. 399, l. 5. CWS's testimony filed for the rehearing further revealed that the project has been separated into three phases. Tr. p. 373, ll. 4- 13. Phase 1 is for the project expenses related to soil remediation. Phase 2 is for the project expenses related to the line installation and the interconnection with the City of Columbia, and Phase 3 is for the project expenses related to the Friarsgate collection system infrastructure repairs and replacement. *Id.*

After CWS divided the Project into the different phases, witness Hipp recommended \$1,079,132.84 remain as plant-in-service for Phase 1 site remediation work and Phase 3 collection system infrastructure repairs. Tr. p. 373, ll. 4 – 17; p. 420, l. 21 – p. 421, l. 13. As a result of the changes and reclassifying the project into different phases, ORS recommends an adjustment to remove \$2,242.51. Tr. p. 373, ll. 18 – 23. This adjustment to plant-in-service removes \$2,130.00 for the portion of the vendor invoices related to costs to reinstall grass matting in the proper location after the matting where the grass matting was installed at the wrong location and also removes \$112.51 for late fees paid to vendors that should not be charged to CWS's customers by the Company. Tr. p. 373, ll. 18 – 23; p. 400, l. 14 – 22; p. 421, ll. 7 – 8.

Discussion: CWS and ORS are in agreement that \$1,079,133 should remain in plant-in-service. Following the April 2018 hearing, CWS modified the project from one large project to two separate phases (one being the remediation work and the other being the repair of the liner). Following the negotiations with the City of Columbia for interconnection of the Friarsgate plant, the repair phase was modified into two distinct phases with one phase being the project expenses related to the line installation and the interconnection with the City of Columbia and the second phase being the project expenses related to the Friarsgate collection system infrastructure repairs and replacement. This Commission finds it appropriate to keep this agreed upon amount of \$1,079,133 in plant-in-service as costs of the remediation work (Phase 1 site remediation work) and the collection system infrastructure repairs (Phase 3) have been completed and are in service. CWS has now included the EQ liner repair in the phase which includes the cost of the interconnection project and has expressed its intention to seek recovery of those costs in the next general rate proceeding. ORS's adjustment totaling (\$2,242.51) for extra costs related to re-

installing grass matting which was installed at the wrong location (\$2,130.00) and for late fees (\$112.51) is approved. We conclude that ratepayers should not pay for the mistake of the vendor installing the matting in the wrong location or pay for late fees incurred by CWS. Further, we note that CWS did not contest ORS's adjustment.

D. Rate Design

By its Petition, ORS questioned the adoption of the rate schedule set forth in Order No. 2018-345(A). ORS maintained the rates approved in Order No. 2018-345(A) were only presented by CWS in its proposed Order, which was filed after the record in the case was closed and no discussion in the Order explained the manner of the approved rate design. Petition, page 4. In granting rehearing on this issue, the Commission directed the parties to describe the method used to determine rates. Order No. 2018-494.

CWS's Position: CWS's witness Hunter addressed the issue of rate design. Mr. Hunter explained the two Water Service Territories and difference in the Water Supply Customers and the Water Distribution Customers. Tr. p. 107, ll. 11-14. He also described the rate structure for sewer service customers. Tr. p. 108, ll. 21 – p. 109, l. 2. For the water service customers, Mr. Hunter explained the Base Facilities Charge ("BFC") is set according to the size of a customer's meter and stated the BFC is the same for Water Supply Customers and Water Distribution Customers with the same meter size. Tr. p. 107, ll. 14 -16. In addition to the BFC, water service customers pay a Commodity Charge for the water consumed, but the Commodity Charge for Water Supply Customers is different from the Commodity Charge for Water Distribution Customers Tr. p. 107, l. 16 – p. 108, l. 2. Sewer service customers pay the same rates regardless of whether the customer received sewer treatment and collection service or Collection-Only service. *Id.*

For CWS's water service, the rates in the two service territories are different. Tr. p. 108, ll. 3-4. The rates for water service in each service territory were calculated using the financial statements created to establish the cost of service for each service territory with revenue required to earn the approved 10.50% ROE. Tr. 108, ll. 3 – 13. Mr. Hunter stated that he created financial statements for the test year and applied known and measurable adjustments to establish a unique cost of service for the different service territories. Tr. p. 109, ll. 3 – 13. This process allowed him to calculate the current ROE (before the increase) that each service territory was earning. *Id.* He then calculated the incremental revenue required in each service territory to reach the 10.50% ROE approved by the Commission. *Id.* He then used the rate structure approved in the previous rate case and adjusted the current BFC and Commodity Charge by applying a percentage increase to all rates within each respective service territory to arrive at the revenue required to earn the 10.50% ROE. *Id.* Each set of rates was calculated using the financial statements created for each service territory to establish the cost of service along with the revenue requirement to achieve the allowed 10.50% ROE. Tr. p. 109, ll. 14 – 20.

In Rebuttal testimony, Mr. Hunter addressed ORS's concern that the revenue requirement in CWS's proposed order was different from the revenue allocation contained in the Application. Tr. p. 115, ll. 10 – 15. Witness Hunter reiterated that CWS allocated the revenue requirement to each service territory based on the cost of service for that service territory, Tr. p. 116, ll. 1 – 9. To address why the rates requested in the Application differed from those offered by CWS in the proposed order, Mr. Hunter stated that the rates in the proposed order were based on the revenue requirement calculated on the cost of service for each service territory after adjustments during the audit performed by ORS and using any other known and measurable adjustments which arose

between the Application being filed and the proposed order. Tr. p. 116, ll. 15 – 21. One specific example related to an adjustment made by ORS to adjust pro-forma property taxes. ORS identified that CWS had allocated property taxes to Water Service Territory 1, which should have been allocated between Water Service Territory 1 and the unified Sewer Service Territory. Tr. p. 116, l. 21 – p. 117, l. 5. Mr. Hunter also noted that the rates offered by ORS in its proposed order did not account for changes in cost of service to the service territories but were calculated by applying the percentage of total revenue requirement allocated to each service territory from CWS's Application to the adjusted revenue requirement determined by ORS. Tr. p. 117, l. 21 – p. 118, l. 6.

ORS's Position: In explaining ORS's position on this issue of rate design, witness Hipp acknowledged the Commission has the discretion to establish rates to distribute the revenue requirements in an equitable manner among the Company's customers but explained ORS's concern that the revenue allocation in Order No. 2018-345(A) resulting in an unexpected decrease to a portion of water customers in Service Territory 1 was not transparent or may not be fair to the remaining customers in Service Territory 1 and Service Territory 2. Tr. p. 404, ll. 12-22. At the hearing, Ms. Hipp explained the reason for the reduction was not apparent and ORS raised the objection to have the issue examined in the event the revenue allocation was misallocated or a classification of customer was disadvantaged. Tr. p. 437, ll. 3 – 14.

In her direct pre-filed testimony, Ms. Hipp discussed that CWS in its Application had represented that a rate increase would result for all commercial and residential water customers in Service Territory 1 and Service Territory 2 and the notice of the hearing had reflected these increases. Tr. p. 401, ll. 8 -17. Further witness Hipp explained CWS had presented testimony

indicating a rate increase was necessary for all water customers in both service territories. Tr. p. 401, l. 18 – p. 402, l. 7. Ms. Hipp then explained the proposed order submitted by CWS presented an allocation of the revenue requirement for the water customer in Service Territory 1 which differed from the rates requested in the application and noticed to the Customers. Tr. p. 402, l. 12 – p. 403, l. 2. Specifically, the rate schedule contained in CWS's proposed order deviated from the revenue allocation contained in the Application and CWS's testimony from the hearing by decreasing the base facilities charge ("BFC") and commodity charge from the currently approved rates for all water supply customers in Service Territory 1 and by decreasing the BFC from the currently approved rate for all water distribution customers in Service Territory 1. *Id.* CWS did not provide an explanation of the revenue allocation resulting in a reduction of the BFC for all water supply and distribution customers in Service Territory 1, and a reduction in the commodity rates for all water supply customers in Service Territory 1. Tr. p. 403, l. 12 – p. 404, l. 3.

During its review of the rate case, ORS calculated the percentage of the total revenue requirement attributed to sewer, purchased water and water supply customers within Service Territory 1 and Service Territory 2 to verify the accuracy and fairness of the rates contained in CWS's Application. Tr. p. 405, ll. 1-18. In its proposed order, ORS replicated the revenue allocation based on the rates proposed in the Application and applied as close as practicable the allocation percentage to the proposed revenue requirement to determine the revenue requirement for each customer class. *Id.* ORS then designed rates which kept as close as practicable the revenue allocation proposed in the Application and verified by ORS. *Id.* Witness Hipp offered that ORS was not recommending rates be increased for customers in Service Territory 1, but requested that should the Commission re-evaluate the approved revenues requirement in the context of the

rehearing that the revenue requirement allocation be reviewed to ensure no customer class is disadvantaged. Tr. p. 405, l. 19 – p. 406, l. 3

After reviewing CWS's explanation of the allocation of the revenue requirement contained in the surrebuttal testimony of CWS's witness Hunter, Ms. Hipp acknowledged that ORS more fully understands how the rate schedule was developed. Tr. p. 421, ll. 15 – 20. Further, Ms. Hipp stated that the details and explanation provided through CWS's rebuttal testimony of witness Hunter satisfy ORS's concern with the revenue allocation contained in Commission Order No. 2018-345(A) and that ORS considers the issue resolved. Tr. 441, ll. 11 - 25.

Discussion: Based upon the evidence presented including ORS's acknowledgement that the explanation and details provided by CWS in the rebuttal testimony of CWS witness Hunter alleviate ORS's concern, the Commission finds that the revenue allocation contained in CWS's proposed order and adopted by the Commission in Order No. 2018-345(A) is appropriate and correct. CWS explained the methodology utilized in its revenue allocation, and the Commission finds that the revenue allocation is based upon the cost of service for each service territory taking into account the adjustments adopted by the Commission in the Order which includes the reallocation of property taxes from Water Service Territory 1 to Water Service Territory 1 and the unified Sewer Service Territory. While CWS and ORS approached the calculation of the revenue requirement in different ways, we find the method proposed by CWS and adopted in Order No. 2018-345(A) to be reasonable and appropriate. This method captures the known and measurable adjustments which arose between the Application being filed and the issuance of the proposed order and which were adopted in the Order. Further, ORS agrees that the revenue allocation employed by CWS and adopted in Order No. 2018-345(A) is appropriate.

We would note that ORS has included language in its proposed order which would require CWS to provide a calculation of the amount of refund due to customers to account for the difference in rates being charged pursuant to Order No. 2018-345(A) and this Order. Further, ORS has also stated in its proposed order that CWS should provide a proposed method of refunding or crediting the customers affected by the difference in the rates. Neither ORS, nor any other party, presented any evidence in the record regarding the appropriateness, nor the amount of any refunds resulting from the issuance of this Order on Rehearing. Further, no evidence was presented in the record regarding any proposed method of refunding or crediting the customers. For these reasons, neither refunds nor credits are ordered in this Order. However, this Commission does believe and so holds that, going forward, rate reductions will result as addressed *infra*, because of the revenue decrease resulting from our Order herein.

III. FINDINGS OF FACT

1) CWS is a water and sewer utility providing water and sewer service in its assigned service area in South Carolina. The Commission is vested with authority to regulate rates of every public utility in this state and to ascertain and fix just and reasonable rates for service. S.C. §58-5-210, et. seq. CWS's operations in South Carolina are subject to the jurisdiction of the Commission.

2) The Commission granted rehearing of its Order No. 2018-345(A) on four specific issues: sludge hauling expenses, litigation costs, Friarsgate EQ basin liner project, and rate design.

3) Aside from the four specified issues on which rehearing was granted, all other issues decided in Order No. 2018-345(A) are not subject to review in this rehearing. The Commission accepts the ORS adjustment of (\$96,892) to normalize test year sludge hauling expense.

4) Litigation expenses associated with the *Riverkeeper* federal court case are denied. Such expenses associated with the CWS federal court case against the EPA and the Town of Lexington are granted, and are to be amortized over 66.67 years.

5) Litigation expenses associated with the two ALC cases are to be placed in a regulatory asset, and this regulatory deferral account shall be limited to litigation expenses related to the two ALC proceedings and shall not accrue carrying costs.

6) Litigation expenses associated with the condemnation case are to be placed in a regulatory asset, and this regulatory deferral account shall be limited to litigation expenses related to the condemnation proceeding and shall not accrue carrying costs.

7) For work related to the EQ Basin Liner Project and associated projects, \$1,079,133 shall remain in plant-in-service, and \$2,242 shall be removed from plant-in-service.

8) The Commission approves all fallout adjustments to interest expense, miscellaneous revenue, uncollectible accounts, cash working capital, customer growth, revenue taxes, and state and federal income taxes as a result of the adjustments approved herein.

9) The approved rate base following the adjustments adopted herein is \$55,509,028.

10) The revenue requirement herein is \$111,734 less than the revenue requirement contained in Order No. 2018-345(A).

11) The rate design as contained in Order No. 2018-345(A) is appropriate and shall be continued.

12) Based on the rehearing adjustments adopted in this case, the Company shall lower its Sewer Service Revenue by \$111,990, which will cause the average sewer customer's bill to decrease by about \$0.68 (68 cents) a month. The Company shall calculate a new schedule of rates

and charges to achieve the Company's new revenue requirement, and shall file it with the Commission and serve it on the Office of Regulatory Staff within ten (10) days of receipt of this Order.

13) The resultant Operating Margin will be 13.28%. The return on equity will remain at 10.50% and the Return on Rate Base will remain at 8.62% as previously set by the Commission in Order No. 2018-345(A).

IV. CONCLUSIONS OF LAW

Based upon the discussion, findings of fact, and the record of the instant proceeding, the Commission makes the following Conclusions of Law:

1) CWS is a public utility as defined in S.C. Code § 58-5-10(3) and is subject to the jurisdiction of this Commission.

2) The appropriate test year on which to set rates for CWS is the twelve-month period beginning September 1, 2016, and ending August 31, 2017.

3) Based on the information provided by the parties, the Commission concludes the rate setting methodology to use as a guide in determining the lawfulness of CWS's proposed rates and for fixing just and reasonable rates is return on rate base.

4) For CWS to have the opportunity to earn the 10.5% ROE, found fair and reasonable herein, CWS must be allowed additional revenues of \$2,824,661.

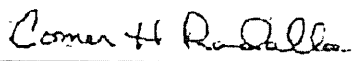
V. ORDERING PROVISIONS

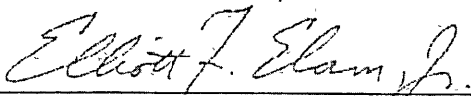
IT IS THEREFORE ORDERED THAT:

1) CWS shall furnish new tariffs reflecting the adjustments described in this Order within ten (10) days of receipt of this Order.

- 2) All other requirements of Order No. 2018-345(A) remain in full force and effect.
- 3) This Order will remain in full force and effect until further order of the Commission.

BY ORDER OF THE COMMISSION:


Comer H. "Randy" Randall, Chairman


Elliott F. Elam, Jr., Vice-Chairman

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

DOCKET NO. 2017-292-WS

In Re: Application of Carolina Water Service, Inc.
for Approval of an Increase in its Rates for
Water and Sewer Services

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have served the **Notice of Appeal** on the parties below by placing a copy of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

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of South Carolina
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Columbia, SC 29210

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James S. Knowlton
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RECEIVED

FEB 25 2019

S.C. SUPREME COURT

Dated this 25th day of February, 2019.

Toni C. Hawkins

B

ELECTRONICALLY FILED - 2019 February 14 2:11 PM - SCPSC - Docket # 2017-292-WS - Page 1 of 18

PETITION FOR REHEARING AND RECONSIDERATION

1

(3) Because the *Riverkeeper* litigation was not finalized at the time that the Commission issued the Order, the Commission should have treated the *Riverkeeper* litigation expenses in the same way that it treated litigation expenses for the ALC cases, by ordering CWS to establish a regulatory asset to be considered in a future rate case when the final outcome of the *Riverkeeper* litigation is known.¹

BACKGROUND

The *Riverkeeper* litigation arose from a complex set of issues arising under the provisions of the Federal Clean Water Act (“CWA”), 33 U.S.C. §§1251 *et seq.* and spawning sporadic litigation for approximately two decades. The background is fully developed in the record of this docket and will be very briefly summarized here. In 1994 CWS was issued a permit pursuant to the National Pollutant Discharge Elimination System (“NPDES”) of the CWA that allowed CWS to discharge treated effluent from its I-20 wastewater treatment plant. That permit included a provision that the I-20 facility be connected to a permanent, regional treatment facility when such a connection was “constructed and available.”

The only feasible possible connection was with a regional system operated by the Town of Lexington (“the Town”). Beginning in the late 1990s, CWS began efforts to interconnect its system with that of the Town, but despite the efforts of CWS, the South Carolina Department of Health and Environmental Control (“DHEC”), the Central Midlands Council of Governments and various other entities, the connection was not completed until February, 2018 when it was taken over by the Town as a part of a condemnation action brought by the Town. See Transcript, at pp. 167-171.

¹ With regard to this ground for rehearing and reconsideration, CWS will ask the Commission to consider facts arising since the issuing of the Order, as permitted by S.C. Code Ann. §58-5-330.

The difficulty of completing the connection is illustrated by the decision made by this Commission in Order No. 2003-10 in Docket No. 2002-147-S. In that case the Commission considered the approval of a wholesale treatment agreement proposed by the Town of Lexington to CWS. The Commission rejected the agreement, finding that it was not in the public interest because it would result in excessive rates to CWS customers and because it would inappropriately require those customers to subsidize capacity for future growth and expansion of the Town's system. Order No. 2003-10 at p. 13.

Following the rejection of the contract there were additional efforts to arrange for interconnection of the I-20 discharge into the regional system but no satisfactory arrangement was finalized and the Town had not yet commenced condemnation proceedings to take the system and complete the interconnection. The *Riverkeeper* case was filed in January 2015 seeking injunctive relief requiring CWS to close the I-20 facility and interconnect its discharge to the regional system. The issues raised in the *Riverkeeper* litigation were the same issues that had proved difficult since the 1990s: whether the Town of Lexington had an obligation to provide wholesale interconnection on terms that would be approved by this Commission; what authority DHEC had to require the Town and CWS to reach agreement; and whether interconnection to the regional treatment facility was "available" as required under the CWS NPDES permit. On March 30, 2017, an order granting summary judgment against CWS was entered in the *Riverkeeper* case. It was this order that was cited by the Commission as the principal basis for its denial of recovery of litigation expenses for the *Riverkeeper* litigation. See Order No. 2018-802, at pp. 13-18.

The order granting summary judgment did not end the *Riverkeeper* litigation and at the time of the Commission's decision remained subject to a potential appeal. Most recently, and subsequent to the rehearing in this docket, the parties have informed the court that they are

conducting settlement negotiations and the court has issued orders staying the proceedings. See attached Exhibits 1 through 4.

GROUND FOR REHEARING AND RECONSIDERATION

1. The Basis for the Commission's Decision to Deny Recovery of *Riverkeeper* Litigation Expenses is Different from the Basis Upon Which Rehearing Was Granted.

In order No. 2018-494 the Commission granted rehearing regarding litigation costs and required the parties to provide disaggregated expense records so that the Commission could "address the reasonableness of the fees in each particular case based on the factors listed in Commission Order 2006-543, page 27." Order No. 2018-494, at p. 1. In Order No. 2006-543 the Commission applied the factors of Rule 1.5, Rule of Professional Conduct, Rule 407 SCACR, citing the application of those factors in *Condon v. State of South Carolina*, 354 S.C. 634, 583 S.E.2d 430 (2003). As Rule 1.5 and the *Condon* case make clear, the seven factors of Rule 1.5 apply to determine the reasonableness of attorneys' fees and not the separate question of whether attorneys' fees can be recovered in utility rates.

The Commission's decision to refuse to allow CWS to recover for litigation expenses from the *Riverkeeper* case was not based on an application of the Rule 1.5 factors. Instead, the Order addresses the *Riverkeeper* expenses in terms of whether the expenses were reasonable and necessary to the provision by CWS of utility services to its customers. See Order No. 2018-802, at pp. 18-19. In support of its decision to refuse to allow recovery for the *Riverkeeper* litigation expenses the Order cites *State ex rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission*, 317 N.C. 26, 343 S.E.2d 898 (1986). That case applied utility rate regulation principles and precedent to the question of whether the utility could recover litigation expenses in

rates charged to its customers. That issue is fundamentally different from the determination of the reasonableness of fees under Rule 1.5

The South Carolina Administrative Procedures Act requires that all parties to a contested case be provided notice of the issues to be determined in such proceeding. S.C. Code Ann. §1-23-320. Article I, Section 22 of the South Carolina Constitution provides that no person may be bound by a decision of an administrative agency “except on due notice and an opportunity to be heard.” The 14th Amendment to the U.S. Constitution also requires that the administrative agencies of the states must provide due process, including notice and an opportunity to be heard. The Order failed to provide CWS the notice required by these statutory and constitutional provisions. Accordingly, it should be vacated and a rehearing should be ordered with appropriate notice of the issues to be considered by the Commission.

2. The Provisions of Order No. 2018-802 Refusing to Allow Recovery of *Riverkeeper* Litigation Expenses Is Wrong as a Matter of Law Because the Record Does Not Provide a Basis to Overcome the Presumption that the Expenses Were Reasonable and Incurred in Good Faith.

Under well-established South Carolina law, “[a]lthough the burden of proof of the reasonableness of all costs incurred which enter into a rate increase request rests with the utility, the utility’s expenses are presumed to be reasonable and incurred in good faith.” *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 266, 422 S.E.2d 110, 112 (1992). The record in this docket does not provide a basis for overcoming the presumption that the Company’s *Riverkeeper* litigation expenses were reasonable and incurred in good faith. Instead, the record shows that CWS was at all times willing to enter into an interconnection agreement with the Town that was consistent with the ruling by this Commission in Order No. 2003-10 in which an interconnection agreement proposed by the Town was rejected because of its negative impact on CWS ratepayers. The efforts of CWS in its negotiations with the Town and in its litigation of the

Riverkeeper case were intended to benefit CWS customers by obtaining interconnection on terms that would be reasonable and appropriate and could be approved by the Commission. Tr. at pp. 167-169.

The efforts by CWS to obtain an interconnection agreement that would be acceptable to this Commission were supported by rulings on similar issues by the South Carolina Supreme Court. In *City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987) the Court addressed a similar impasse between a private sewer company and a municipality. In that case DHEC ordered the City of Columbia to either (1) acquire by condemnation or negotiation certain wastewater treatment facilities owned by the utility, or (2) allow the utility to interconnect its facilities to those of the City. On appeal, the Supreme Court affirmed the authority of DHEC to order Columbia to take those actions.

In the related case of *Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control*, 313 S.C. 210, 437 S.E.2d 120 (1993) the Court considered a series of fines imposed by DHEC on the utility and held that as to certain of them DHEC could not fine the utility for permit violations that occurred during the time that Columbia was appealing the DHEC orders considered in the *City of Columbia* case. The utility made the showing that it had been unable to meet its permit limits without upgrading its facilities and that it had not been allowed to upgrade its facilities while the *City of Columbia* case was being appealed and decided. The Court found that “[b]ecause the City of Columbia, not Midlands, was the primary cause of the continued discharges at the Lincolnshire and Washington Heights systems, we hold the circuit court abused its discretion by assessing a fine against Midlands for these discharges.” *Midlands Utility, supra*, 313 S.C. at 212.

The record in this proceeding shows that CWS consistently pursued an interconnection agreement that would have resulted in rates that were fair to its customers. Its course of action was supported by the Commission decision in Order No. 2003-10 and by the decisions of the Supreme Court in the *City of Columbia* and *Midlands Utility* cases. The summary judgment order in the *Riverkeeper* litigation is clearly inconsistent with these prior authorities relied upon by CWS. Accordingly, recovery of litigation expenses for defending the *Riverkeeper* case is analogous to this Commission's treatment of recovery of GridSouth expenses by jurisdictional electric utilities. In Orders No. 2005-2 and 2010-79 the Commission allowed South Carolina Electric & Gas ("SCE&G") and Duke Energy Carolinas, LLC ("DEC"), to recover their expenses incurred in pursuing the development of a regional transmission organization. The effort was begun in response to policies of the Federal Energy Regulatory Commission ("FERC") and then abandoned when FERC policy changed. See Order No. 2005-2, pp. 14-24 and Order No. 2010, p. 15. The Commission allowed SCE&G and DEC to recover their GridSouth development costs amortized over a period of five years.

In the *Riverkeeper* litigation CWS pursued an interconnection agreement with the Town of Lexington in a way that was consistent with the rulings of this Commission and the South Carolina Supreme Court. The District Court's ruling in the *Riverkeeper* case on summary judgment was inconsistent from the previous authorities that had guided CWS's actions. That change is similar to the FERC change in policy that led to the abandonment of the GridSouth project by SCE&G and DEC. The Commission should treat the CWS *Riverkeeper* litigation expenses in the same fashion as it treated the GridSouth expenses. The record in this proceeding provides no basis for a finding to overcome the presumption that CWS's *Riverkeeper* expenses were reasonable and incurred in good faith.

3. Because the *Riverkeeper* Litigation Was Not Finalized at the Time the Commission Issued the Order the *Riverkeeper* Litigation Expenses Should Have Been Treated as a Regulatory Asset for Consideration at a Later Time.

In the Order, the Commission decided that ratemaking treatment for CWS litigation expenses for the “ALC Cases” should be deferred because the “cases have not yet been concluded, and no final order has been issued.” Order No. 2018-802 at p. 21. CWS submits that the Commission should take the same approach with the *Riverkeeper* litigation expenses since there has not been a final disposition of the *Riverkeeper* litigation and in light of the settlement discussions reflected in Exhibits 1 through 4. Under S.C. Code Ann. §58-5-330 the Commission is expressly authorized, in determining whether to reconsider a previous ruling, to consider all facts “including those arising since the making of the order or decision...” Under the circumstances presented here, it is appropriate for the Commission to reconsider its treatment of the *Riverkeeper* litigation expenses and to treat those expenses in similar fashion to the expenses of the ALC Cases.

CONCLUSION

The Commission should rehear and reconsider those portions of the Order addressing the treatment of the *Riverkeeper* litigation expenses. The Commission’s rulings concerning the *Riverkeeper* litigation expenses are unlawful as specified in this petition. Accordingly, the Commission should rehear and reconsider its decision on such issues and modify its rulings consistent with the grounds stated in this petition.

Dated this 14th day of February, 2019.

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Attorneys for Carolina Water Service, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CONGAREE RIVERKEEPER, INC,)
)
Plaintiff,)
)
v.)
)
CAROLINA WATER SERVICE, INC.,)
)
Defendant.)

C.A. No. 3:15-cv-194-MBS

CONSENT MOTION TO STAY

Defendant Carolina Water Service, Inc., with the consent of Plaintiff Congaree Riverkeeper, Inc., requests that the Court stay all proceedings in this action for 15 days pending resolution of the productive settlement agreement negotiations currently occurring between the parties. A proposed order is attached for the Court's consideration as Exhibit A.

Respectfully submitted, this 8th day of January, 2019.

[Signature page following]

Respectfully submitted,

s/ Rita Bolt Barker

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*Attorneys for Defendant
Carolina Water Service, Inc.*

January 8, 2019
Columbia, South Carolina

From: SCDEfilingstat@scd.uscourts.gov
Sent: Thursday, January 10, 2019 2:15 PM
To: scd_ecf_nef@scd.uscourts.gov
Subject: Activity in Case 3:15-cv-00194-MBS Congaree Riverkeeper Inc v. Carolina Water Service Inc Order on Motion to Stay

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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 1/10/2019 at 2:14 PM EST and filed on 1/10/2019

Case Name: Congaree Riverkeeper Inc v. Carolina Water Service Inc

Case Number: 3:15-cv-00194-MBS

Filer:

WARNING: CASE CLOSED on 03/30/2017

Document Number: 125(No document attached)

Docket Text:

TEXT ORDER granting [124] Motion to Stay proceedings for 15 days. The Court will lift the stay on January 28, 2019, unless notified of need for extension by the parties. Signed by Honorable Margaret B Seymour on 1/10/2019.(mdea)

3:15-cv-00194-MBS Notice has been electronically mailed to:

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3:15-cv-00194-MBS Notice will not be electronically mailed to:

EXHIBIT 3

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

CONGAREE RIVERKEEPER, INC,	)	
	)	
Plaintiff,	)	C.A. No. 3:15-cv-194-MBS
	)	
v.	)	SECOND CONSENT MOTION TO STAY
	)	
CAROLINA WATER SERVICE, INC.,	)	
	)	
Defendant.	)	

Defendant Carolina Water Service, Inc., with the consent of Plaintiff Congaree Riverkeeper, Inc., requests that the Court stay all proceedings in this action for an additional 7 days pending resolution of the productive settlement agreement negotiations currently occurring between the parties. The Court previously stayed the case for 15 days, through January 28, 2019. Dkt. No. 125. The parties respectfully request additional time to complete their negotiations. A proposed order is attached for the Court's consideration as **Exhibit A**.

Respectfully submitted, this 24th day of January, 2019.

[Signature page follows]

Respectfully submitted,

s/ Rita Bolt Barker

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*Attorneys for Defendant
Carolina Water Service, Inc.*

January 24, 2019
Columbia, South Carolina

From: SCDEfilingstat@scd.uscourts.gov
Sent: Friday, January 25, 2019 2:24 PM
To: scd_ecf_nef@scd.uscourts.gov
Subject: Activity in Case 3:15-cv-00194-MBS Congaree Riverkeeper Inc v. Carolina Water Service Inc Order on Motion to Stay

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

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U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 1/25/2019 at 2:24 PM EST and filed on 1/25/2019

Case Name: Congaree Riverkeeper Inc v. Carolina Water Service Inc

Case Number: 3:15-cv-00194-MBS

Filer:

WARNING: CASE CLOSED on 03/30/2017

Document Number: 127

Docket Text:

ORDER granting [126] Motion to Stay proceedings for 7 days. The Court will lift the stay on February 4, 2019, unless notified of need for extension by the parties. Signed by Honorable Margaret B Seymour on 1/25/2019.(mdea)

3:15-cv-00194-MBS Notice has been electronically mailed to:

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3:15-cv-00194-MBS Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1091130295 [Date=1/25/2019] [FileNumber=8856774-0
][c0e34dccc0be7cf10188010dafb56163b4a328384937d9342b3b34248bd75c82898
7a2e5adc4622fc3639a8c60f0acfc8f81d032b0962fe87237b6da77b5f54b]]

**BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2017-292-WS**

In Re: Application of Carolina Water Service, Inc. for Approval of an Increase in its Rates for Water and Sewer Services	))))))	CERTIFICATE OF SERVICE
---	----------------------------	-------------------------------

This is to certify that I, Toni C. Hawkins, paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of **Carolina Water Service, Inc.’s Petition for Rehearing and Reconsideration** in the foregoing matter to the parties listed below by electronic mail:

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Dated this 14th day of February, 2019.

Toni C. Hawkins

C

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

Docket No. 2017-292-WS

IN RE: Application of Carolina Water Service, Inc. for Adjustment of Rates and Charges and Modification to Certain Terms and Conditions for the Provision of Water and Sewer Service	)))))))	MOTION TO DISMISS
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TO: Frank R. Ellerbe, III, Esq., Samuel J. Wellborn, Esq., Charles L.A. Terreni, Esq., Scott Elliott, Esq. and John M. Hoefer, Esquire, all of whom are Counsel for the Applicant, Carolina Water Service, Inc.:

The Office of Regulatory Staff ("ORS") hereby moves before the South Carolina Public Service Commission ("Commission") to Dismiss the Petition for Rehearing or Reconsideration ("Petition") filed by the Applicant Carolina Water Service ("CWS" or "Company") on February 14, 2019 in the above captioned matter.

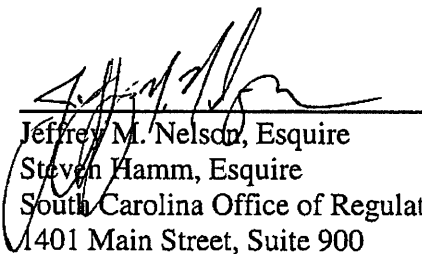
ORS' Motion is based on CWS having filed a Notice of Appeal of Commission Order No. 2018-802 with the South Carolina Supreme Court on February 25, 2019. In accordance with South Carolina Appellate Court Rule 205 "[u]pon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." CWS has filed a Notice of Appeal with the South Carolina Supreme Court and jurisdiction over this case now rests with that Court. The Commission lacks

the proper jurisdiction to entertain the Company Petition for Rehearing or Reconsideration. Until the appeal before the Supreme Court is disposed of, the Commission's lack of jurisdiction over this case dictates that the Petition must be dismissed.

Additionally, ORS believes that Order No. 2018-802 is the Final Order of the Commission in this docket. For the Commission to permit, and rule on, an infinite number of Motions for Reconsideration creates the possibility of an endless series of requests for reconsideration of the Commission's latest order. The Commission has now held two full evidentiary hearings in this docket and issued two Final Orders. If the company disagrees with Commission Order 2018-802 the proper forum to express that disagreement is now with the South Carolina Supreme Court.

In conclusion, ORS prays that the Commission Dismiss the Company Motion for Reconsideration of Order No. 2018-802 based on lack of jurisdiction.

Respectfully submitted and dated this 27th day of February 2019.



Jeffrey M. Nelson, Esquire
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Attorneys for the SC Office of Regulatory Staff

D

ELECTRONICALLY FILED - 2019 March 5 12:47 PM - SCPSC - Docket # 2017-292-WS - Page 1 of 13

response to the ORS petition for reconsideration, the Commission issued Order No. 2018-494 granting rehearing on four of the six issues raised by ORS, including the litigation expense issue which is the subject of the CWS Petition. Following the rehearing, the Commission issued Order No. 2018-802. Among other rulings, Order No. 2018-802 ruled on recovery of litigation expenses differently from the ruling on that issue in Order No. 2018-345(A). CWS filed its Petition seeking rehearing and reconsideration of the ruling on recovery of litigation expenses.

On February 25, 2019 CWS filed a notice of appeal of Order No. 2018-802 with the South Carolina Supreme Court. In its cover letter with the notice CWS explained that it had filed a petition for rehearing and reconsideration and was filing the notice of appeal because of uncertainty as to whether its Petition would toll the time for appeal.² See Exhibit 1. The ORS Motion requests dismissal of the Petition on the grounds that it is not permitted because it follows a previous order granting rehearing and because the notice of appeal divested the Commission of jurisdiction.

Argument

1. The ORS Motion is at Odds with the Plain Language of S.C. Code Ann. §58-5-330.

S.C. Code Ann. §58-5-330 provides for rehearing of matters decided by the Commission in water and sewer cases.

Within twenty days after an order or decision is made by the commission, any party to the action or proceeding may apply for a rehearing as to any matter determined in the action or proceeding and specified in the application for rehearing and a rehearing must be granted if in the judgment of the commission sufficient reason exists. No right of appeal arising out of an order or decision of the commission accrues in any court to any corporation or person unless the corporation or person makes application to the commission for a rehearing within the time specified. The application must set forth specifically the ground on which the applicant considers the decision or order to be unlawful. The determination must be made by the commission within thirty days after it is finally submitted. If, after the hearing and a consideration of all the facts, including those arising since the making of the order or decision, the commission is of the opinion that the original order or decision, or any part of it, is in any respect unjust or unwarranted or should be changed, the

² CWS intends to file a motion with the Supreme Court requesting that its appeal be held in abeyance pending the Commission's ruling on the Petition.

commission may abrogate, change or modify it and, if changed or modified, the modified order must be substituted in the place of the order originally entered and with like force and effect.

There is no qualification in this provision as to what orders or decisions are covered and the language is very clear that there is no right to appeal an order of the Commission unless the party seeking the appeal has first asked the Commission for a rehearing and explained the basis for the request. The ORS Motion asks the Commission to rewrite this statutory provision to limit the circumstances under which a party must ask for rehearing or reconsideration. The Commission has only the authority granted to it by the General Assembly and that grant does not include the power to rewrite statutory provisions. *South Carolina Cable Televisions Assn. v. Public Service Commission*, 313 S.C. 48, 437 S.E.2d 38 (1993).

There is another provision of S.C. Code Ann. §58-5-330 that demonstrates that the ORS argument is incorrect. Section 58-5-330 expressly allows the consideration of matters “arising since the making of the order or decision...” In its Petition CWS cited this provision as authority for one of its grounds supporting its Petition. See Petition, pp. 2, 8. The ORS position that CWS has no right to request rehearing and reconsideration under the circumstances of this proceeding would nullify the statutory provision that allows CWS to base its Petition on matters arising since the hearing in September 2018. This is another reason that the Commission should reject the ORS interpretation of S.C. Code Ann. §58-5-330.

2. The ORS Jurisdictional Argument Conflicts with Recent Precedent.

In its Motion ORS argues that the CWS notice of appeal divests the Commission of jurisdiction over the Petition. The situation presented by the combination of the CWS Petition and Notice of Appeal was also presented in the appeal by the South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (“CCL/SACE”) of orders in Docket 2018-2-E. In that case CCL/SACE filed a notice of appeal after the issuance of a directive denying a petition

for reconsideration but before a formal order was issued. The respondent, South Carolina Electric & Gas, filed a motion with the Supreme Court to dismiss the appeal or alternatively to hold it in abeyance pending a final ruling by the Commission. The Court issued an order denying the motion to dismiss but granting the request to hold the appeal in abeyance. See Order dated August 16, 2018 in Appellate Case no. 2018-001165 (Attached as Exhibit 2).

The quandary faced by CCL/SACE with respect to Docket No. 2018-2-E (and described in a letter to the Commission attached as Exhibit 3) is similar to that faced by CWS in this proceeding: failure to file a timely notice of appeal is jurisdictionally fatal to the appeal but so is failure to file a petition for rehearing or reconsideration. In the CCL/SACE appeal the Supreme Court resolved the dilemma by accepting a notice of appeal and holding it in abeyance while allowing the Commission time to fully address matters for which rehearing or reconsideration was sought. The Court did not hold that the Commission was divested of jurisdiction by the filing of the notice of appeal. The ORS argument to the contrary should be rejected.

3. The ORS Argument that CWS's Petition is a Disallowed "Successive Motion" Is Contrary to South Carolina Cases Applying Rule 59(e) SCRCP.

Rule 59(e) SCRCP is the civil procedure device for asking a trial court to reconsider its rulings. See *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-779 (2004). In *Elam*, the Court reviewed in detail the question of whether and when successive motions for reconsideration would toll the time for filing a notice of appeal. In that case the Department of Transportation ("DOT") had made a post-trial motion that was denied and then filed a Rule 59(e) motion that repeated the arguments made in the post-trial motion. The Court of Appeals dismissed the DOT appeal as untimely on the ground that the Rule 59(e) motion was a successive motion that did not stay the time for appeal. In its discussion explaining its reversal of the Court of Appeals ruling, the Supreme Court described the importance of allowing lower courts and tribunals a full opportunity to address all issues.

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.

Elam, supra, 361 S.C. at 23.

The Court's ruling in *Elam* that the DOT motion for reconsideration should be allowed stressed the importance of allowing a full treatment of issues prior to appellate review. The ORS motion takes a directly contrary position. The CWS Petition is the first time that it has had an opportunity to ask the Commission to reconsider its rulings in Order No. 2018-802. The strong preference expressed in *Elam* for lower courts and tribunals to have a full opportunity to address issues before appeal requires that the Commission deny the ORS Motion and proceed with consideration of the CWS Petition.

Conclusion

The ORS Motion is contrary to the statute that provides for rehearing and reconsideration, the Supreme Court's treatment of a recent similar appeal from the Commission and the Court's treatment of requests for reconsideration in circuit court. The CWS Petition is CWS's first opportunity to ask the Commission to reconsider its rulings in Order No. 2018-802. Both CWS and the Commission deserve an opportunity to have the issues fully addressed. Accordingly, the ORS Motion should be denied.

Dated this 5th day of March 2019.

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[Signatures continue on next page]

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and

s/Frank R. Ellerbe, III
Frank R. Ellerbe, III
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Attorneys for Carolina Water Service, Inc.



ROBINSON
GRAY

Litigation + Business

Exhibit 1

FRANK R. ELLERBE, III

DIRECT 803 227 1112 DIRECT FAX 803 744 1556

fellerbe@sgwllgray.com

February 25, 2019

VIA HAND-DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

**Re: Carolina Water Service, Inc. for Approval of an Increase in its Rates for
Water and Sewer Services - Docket No. 2017-292-WS**

Dear Mr. Shearouse:

Enclosed for filing is a Notice of Appeal and Certificate of Service in the above matter. A check in payment of the \$100 filing fee is also enclosed.

This Appeal is being filed with the Supreme Court pursuant to Rule 203(d)(2). On January 25, 2019, Carolina Water Service, Inc. ("CWS") filed a Petition for Rehearing and Reconsideration ("Petition") of Order No. 2018-802 with the South Carolina Public Service Commission. The Petition was filed pursuant to S.C. Code Ann. §58-5-330. Ordinarily our notice of appeal would not be ripe until the Commission ruled on the Petition. However, in this case Order No. 2018-802 was a ruling arising from a previous petition for rehearing filed by another party. Because of uncertainty as to whether successive petitions for rehearing toll the time for filing a notice of appeal, CWS is filing this notice of appeal today.

Please stamp the extra copy provided and return it with our courier. Should you have any questions, please contact me.

Yours truly,

Frank R. Ellerbe, III

FRE:tch

Enclosures

cc: Public Service Commission of South Carolina (via electronic filing)
Parties of Record in Docket No. 2017-292-WS

The Supreme Court of South Carolina

South Carolina Coastal Conservation League and
Southern Alliance for Clean Energy, Appellants,

v.

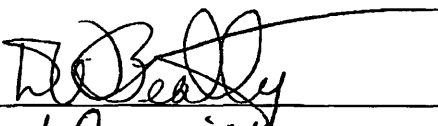
South Carolina Public Service Commission, South
Carolina Electric & Gas, CMC Steel South Carolina,
South Carolina Energy Users Committee, South Carolina
Solar Business Alliance, LLC, Southern Current, LLC
and South Carolina Office of Regulatory Staff,
Respondents.

Appellate Case No. 2018-001165

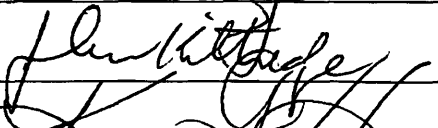
ORDER

Respondent South Carolina Electric & Gas moves for the dismissal of appellants' notice of appeal or, in the alternative, to hold the notice of appeal in abeyance. Appellants oppose the motion to dismiss, but concur with the request to hold the appeal in abeyance pending the anticipated order from the Public Service Commission on the petition(s) for rehearing. The motion to dismiss is denied, but the request to hold the appeal in abeyance is granted, with the right to amend the notice of appeal if necessary following the issuance of the Commission's order. This includes the timelines for briefing pursuant to the South Carolina Appellate Court Rules.

IT IS SO ORDERED.



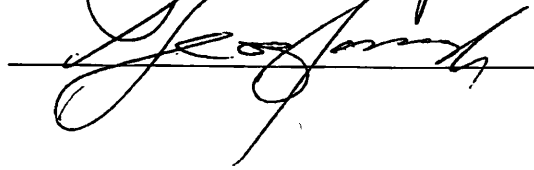
C. J.



J.



J.


J.

J.

Columbia, South Carolina

August 16, 2018

cc:

James Blanding Holman, IV, Esquire

Andrew McClendon Bateman, Esquire

Jenny Rebecca Pittman, Esquire

Alexander George Shissias, Esquire

Timothy F. Rogers, Esquire

Richard Lee Whitt, Esquire

Benjamin Parker Mustian, Esquire

K. Chad Burgess, Esquire

Matthew William Gissendanner, Esquire

Scott A. Elliott, Esquire

Jocelyn Boyd, Esquire

Fred David Butler, Esquire

Mitchell Willoughby, Esquire

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 843-720-5270

463 KING STREET, SUITE B
CHARLESTON, SC 29403-7204

Facsimile 843-414-7039

June 29, 2018

Via Electronic Filing and E-mail

F. David Butler, Esq.
 Hearing Officer
 Public Service Commission of South Carolina
 101 Executive Center Drive
 Columbia, South Carolina 29211
David.Butler@psc.sc.gov

**Re: Annual Review of Base Rates for Fuel Costs for South Carolina Electric
 Gas Company; Docket No. 2018-2-E
 Appellate Case No. 2018-001165**

Dear Mr. Butler:

Thank you for your email clarifying that the Public Service Commission of South Carolina will issue a more full and complete order on rehearing and reconsideration in the 2018 Annual Review of Base Rates for Fuel Costs for South Carolina Electric & Gas Company ("SCE&G"), Commission Docket No. 2018-2-E. We thought it would be helpful to share our clients' position on the timing of the notice of appeal and flag this as a procedural issue that may be worth bringing to the attention of the Commission for future proceedings.

South Carolina Appellate Court Rule 203 requires that all notices of appeal from administrative tribunals must be served within thirty days of receipt of the decision granting or denying any timely petition for rehearing. S.C. App. Ct. R. 203(b)(6). The only instance where this deadline can be extended is where "*a decision indicates* that a more full and complete decision is to follow." *Id.* (emphasis added). In that case, a party "*need not* appeal until receipt of the more complete decision[.]" *Id.* (emphasis added).

Because the May 23 directive in this proceeding did not expressly indicate that a more full and complete decision would follow, Conservation Groups filed their notice of appeal within thirty days from that directive, in order to fully protect their right to appeal.¹ Significantly, the requirement of service of the notice of appeal is jurisdictional. If a party misses the deadline, the appellate court "has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline for service of the notice."

¹ The Conservation Groups appreciate the email clarification regarding the more full and complete order, but note that Appellate Court Rule 203 specifically references the administrative tribunal's "decision." To protect their right to appeal, Conservation Groups relied specifically on the language in the Commission's decision (the directive).

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (citations omitted). This heightens the importance of a timely filed notice of appeal.

Appellate Rule 203 includes language permitting an earlier filing (the parties “*need not* appeal until receipt of the more complete decision”). However, it would still be helpful for parties considering appeal and those responding to such an appeal if the Commission were to provide a clear signal in future directives addressing petitions for rehearing or reconsideration when a more full and complete order is forthcoming. The following phrasing would mirror the language that tolls the appeal deadline in Appellate Rule 203: “A more full and complete order will follow this directive.”

Although it may be possible to infer from the Commission’s directives when a more full and complete order is forthcoming (as suggested by SCE&G in this proceeding), relying on this inference puts the appealing party at risk of an adverse interpretation on appeal. If a directive is misconstrued and the appellate deadline missed, the consequences are severe for the party wishing to appeal.

By copy of this letter, we are serving other parties of record. Thank you for your time and consideration of this matter.

Respectfully submitted this 29th day of June, 2018.

s/ J. Blanding Holman, IV
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Attorneys for Conservation Groups

STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION

DOCKET NO. 2018-2-E

In the Matter of:

Annual Review of Base Rates for
Fuel Costs for South Carolina
Electric & Gas Company

CERTIFICATE OF SERVICE

I hereby certify that the following persons have been served with this letter by electronic mail and/or U.S. First Class Mail at the addresses set forth below:

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Matthew Gissendanner, Esq.
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matthew.gissendanner@scana.com

This 29th day of June, 2018.
s/ A. Rachel Pruzin

E

**PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
COMMISSION DIRECTIVE**

ADMINISTRATIVE MATTER	☐	DATE	<u>March 07, 2019</u>
MOTOR CARRIER MATTER	☐	DOCKET NO.	<u>2017-292-WS</u>
UTILITIES MATTER	☒	ORDER NO.	<u>2019-178</u>

THIS DIRECTIVE SHALL SERVE AS THE COMMISSION'S ORDER ON THIS ISSUE.

SUBJECT:

DOCKET NO. 2017-292-WS - Application of Carolina Water Service, Incorporated for Approval of an Increase in Its Rates for Water and Sewer Services - Staff Presents for Commission Consideration the Office of Regulatory Staff's Motion to Dismiss Carolina Water Service, Incorporated's Petition for Rehearing and Reconsideration of Commission Order No. 2018-802.

COMMISSION ACTION:

As you recall from a reading of the record, Carolina Water Service filed a Notice of Appeal of this Commission's Order No. 2018-802 with the Supreme Court of South Carolina on February 25, 2019.

We have looked at the South Carolina Appellate Court Rules, and Rule 205 reads, in pertinent part, "Upon the service of the Notice of Appeal, the Appellate Court shall have exclusive jurisdiction over the appeal."

Since Carolina Water Service filed a Notice of Appeal with the Supreme Court of South Carolina, jurisdiction over this case now rests with the Supreme Court. Therefore, this Commission lacks jurisdiction to entertain the company's Petition for Rehearing or the company's Petition for Reconsideration.

For these reasons, I move that the Motion for Rehearing and Reconsideration filed by CWS on February 14, 2019, be dismissed for lack of jurisdiction. I also move that the directive recording this Commission's vote today shall constitute the Commission's Order in this matter.

So moved.

PRESIDING: Randall

SESSION: Regular

TIME: 2:00 p.m.

	MOTION	YES	NO	OTHER
BELSER	☐	☐	☐	<u>Recused</u>
ERVIN	☒	☒	☐	
HAMILTON	☐	☒	☐	
HOWARD	☐	☒	☐	
RANDALL	☐	☒	☐	
WHITFIELD	☐	☒	☐	
WILLIAMS	☐	☒	☐	

RECORDED BY: J. Schmieding

(SEAL)



THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-000300

Commission Docket No. 2017-292-WS

In Re: Application of Carolina Water Service, Inc.
for Approval of an Increase in its Rates for
Water and Sewer Services

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have served the **Motion to Remand to the South Carolina Public Service Commission** on the parties below by placing a copy of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

The Public Service Commission of
of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Laura P. Valtorta, Esquire
Valtorta Law Office
903 Calhoun Street
Columbia, SC 29201

Jeffrey M. Nelson, Esquire
Andrew M. Bateman, Esquire
Steven W. Hamm, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201

James S. Knowlton
306 Brookside Drive
Fort Mill, SC 29715

Dated this 22nd day of March, 2019.

