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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2018-001107

Daufuskie Island Utility Company, Inc.,

Appellant,

v.

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

Respondents.

MOTION FOR LEAVE TO SUBMIT CORRECTED RETURN TO RESPONDENTS' PETITIONS FOR REHEARING

On September 9, 2019, the Appellant, Daufuskie Island Utility Company, Inc., filed its Return to Respondents' Petitions for Rehearing. On September 16, 2019, Respondents each filed a Reply to Appellant's Return to Petition for Rehearing. The Replies allege Appellant's Return included two errors.

Upon review of the Replies, it is evident that two corrections to the DIUC's Return should be made. Accordingly, the undersigned counsel hereby moves this Court for leave to file a Corrected Return to Respondents' Petitions for Hearing that includes the following changes:

Page 4 -- ORS COUNSEL has been changed to COMM'NER FLEMING; and

Page 9 -- The sentence beginning, "It is also significant..." has been deleted.

A copy of the proposed Corrected Return is attached hereto as Exhibit A.

In support of this Motion and for the Court's consideration, the undersigned counsel affirms that the aforementioned errors in the September 9, 2019, Return were inadvertent; there was no intention at any time to mislead the Court or to improperly represent or to mischaracterize the record. Further, the undersigned counsel affirms that prior to filing this Motion he communicated with opposing counsel for both Respondents and attempted in good faith to efficiently resolve this issue by seeking Respondents' consent to a motion for leave to file a corrected return addressing the questions raised by Respondents' Replies. Neither Respondent was able to consent.

WHEREFORE, for the foregoing reasons, the Appellant seeks leave to file a Corrected Return to Respondents' Petitions for Hearing in the form and substance included herewith as Exhibit A.

Respectfully submitted,

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September 24, 2019
Charleston, South Carolina

ATTORNEYS FOR APPELLANT
DAUFUSKIE ISLAND UTILITY CO., INC.

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Respondents.

CERTIFICATE OF SERVICE

I, Kim H. Weldin, an employee of Walker Gressette Freeman & Linton, LLC, hereby certify that I have this 24th day of September 2019, served Appellant's Motion for Leave to Submit Corrected Return to Respondent's Petitions for Rehearing on counsel of record, by placing same in the United States Mail, first class postage prepaid to the following:

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PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA
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PROPERTY OWNER'S ASSOCIATION, INC., and
BLOODY POINT PROPERTY OWNER'S ASSOCIATION

Kim H. Weldin

Kim H. Weldin

PROPOSED CORRECTED PLEADING

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Appellant,

v.

South Carolina Office of Regulatory Staff,
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Melrose Property Owner's Association, Inc.,
Bloody Point Property Owner's Association, and
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Respondents.

APPELLANT'S CORRECTED RETURN TO RESPONDENTS' PETITIONS FOR REHEARING

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ATTORNEYS FOR APPELLANT
DAUFUSKIE ISLAND UTILITY CO., INC.

EXHIBIT A TO APPELLANT'S MOTION FOR LEAVE TO FILE CORRECTED RETURN

COMES NOW the Appellant, Daufuskie Island Utility Company, Inc. ("DIUC") in response to the Petition for Rehearing of Respondent South Carolina Office of Regulatory Staff (filed August 5, 2019) and the Petition for Rehearing of Respondents Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., Bloody Point Property Owner's Association, Inc. (filed August 8. 2019). As demonstrated by the following discussion, this Court did not overlook or misapprehend any points at issue in the Order entered in this matter on July 24, 2019. See Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, No. 2018-001107, 2019 WL 3310477 (S.C. July 24, 2019). Accordingly, both Petitions for Rehearing should be denied.

THE 2015 RATE APPLICATION, COMMISSION ORDER, AND APPEAL

Over four years ago, on June 9, 2015, Daufuskie Island Utility Company, Inc., the sole provider of water and sewer service to a service area that encompasses Daufuskie Island, Beaufort County, South Carolina ("DIUC"), applied to the Public Service Commission ("the Commission" or "PSC") for approval of a new schedule of rates and charges for water and sewer service ("the Application"). (R. pp. 158-230) At the time of filing DIUC had not applied for rate relief since 2010. (Id.)

On July 23, 2015, the Haig Point Club and Community Association, Inc., Melrose Property Owner's Association, Inc., and Bloody Point Property Owner's Association, (collectively "the Intervenors" or "the POAs") filed a Petition to Intervene. (R. pp. 231-234) The Petition was granted and following extensive prehearing discovery among the parties, the Commission scheduled a hearing for October 28, 2015. On the afternoon of October 27, 2015, a few hours before the scheduled hearing, the Intervenors filed a document captioned "Settlement Agreement." (R. p. 241) The only parties to the document submitted as a "Settlement Agreement" were ORS

and the Intervenors. The Settlement Agreement included those parties' agreement on adjustments to the application of DIUC, on DIUC's allowed rate of return and operating margin, and even on the matters that would be admitted into evidence in DIUC's rate hearing. DIUC did not know about, did not consent to, and was not a party to the purported "Settlement Agreement." (R. p. 242 and pp. 1315-16) The Commission adopted the Settlement Agreement and every reduction it recommended for DIUC's rate application. (R. p. 005) One of the ORS adjustments included in the Settlement Agreement (and therefore the Commission's Order Adopting the Settlement Agreement) addressed DIUC's Rate Case Expenses.

Although DIUC originally anticipated it would incur rate case expenses totaling about $380,000 to complete the rate case and hearing process, the Application prepared by DIUC's manager, Guastella Associates ("GA"), sought to include only $191,200 for Rate Case Expenses within the rate structure. Because DIUC's owners were willing to absorb 50% of the anticipated rate case expenses, the proposal presented a significant direct benefit to the ratepayers.

ORS rejected DIUC's Application and proposed the Commission allow only $75,000 for rate case expenses.[1] This $75,000 amount was included in the prefiled testimony that ORS witness Ivana C. Gearheart submitted weeks ahead of the hearing. Gearheart testified about the extensive three-step review and analysis that resulted in her testimony and the ORS position on rate case expenses:

1. ORS "verified that the operating experience and rate base, reported by DIUC in its Application, were supported by DIDC's accounting books and records...."

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

2. ORS "tested the underlying transactions in the books and records for the test year to ensure that the transactions were adequately supported, had a stated business purpose, [and] were allowable for ratemaking purposes...."

3. ORS made adjustments and recommendations as necessary.

(R. p. 1764) Based upon this review of the DIUC Application, its books, records, invoices, and expenses, ORS proposed "current rate case expenses of $75,000" for "the preparation of the application by GA, developing rate models, calculating test year data, filing other rate case documents and legal expenses." (See R. pp. 1769-70) Unequivocally, the ORS position as expressed by Gearheart was that her review of the books, records, and invoices in DIUC's files supported paying GA for work it had completed. She testified specifically about it:

COMM'ER FLEMING: Why are the current rate-case expenses of $75,000 included in the current case exactly the same amount as in the previous case?

GEARHEART: Because ORS felt it appropriate to limit the rate-case expenses to $75,000 for the current rate -- current proceeding.

COMM'ER FLEMING: Okay. I see some unhappy looks over there, compared to what we discussed earlier. Did you examine invoices and other evidence that document the expenditure of $75,000 in the current rate case?

GEARHEART: Yes. The invoices submitted were, I believe, $471,000. From that -- now, I don't know if these are exact numbers, but I believe $120,000 were from GA Associates, and the rest were legal fees from the lawyers.

(R. pp. 1816-1817)

The Commission adopted the ORS adjustment based on Gearheart's testimony:

ORS proposed that rate case expenses total $97,500 and be amortized over five years. (Gearheart, Direct R. p. 494). The $97,500 consists of capped current rate case expenses in the amount of $75,000 for GA's preparation of the Application, developing rate models, calculating test year data, filing other rate case documents and legal expenses. ORS recommended $75,000 as a reasonable amount for rate case expenses in the last rate case. The remaining $22,500 is unamortized rate case expenses from the previous rate case. (Gearheart, Direct R. p. 495).

(R. p. 029)

DIUC appealed the adjustment for rate case expenses and several other adjustments adopted by the Commission in its Order Approving the ORS-POAs Settlement Agreement. (R. p. 322) This Court reversed the Commission's Order for several reasons. First, this Court ruled the ORS-POA Settlement Agreement:

> ... contained no factual evidence or stipulations related to DIUC's revenue increase requests. Moreover, the Settlement Agreement did not resolve any issues before the Commission because DIUC, the applicant seeking rate increases, was not party to the agreement. At most, the Settlement Agreement indicated to the Commission that were it to adopt ORS's recommended adjustments, the POAs would not appeal.

Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 420 S.C. 305, 315, 803 S.E.2d 280, 285–86 (2017) ("DIUC I"). Second, this Court found that in addition to its other flaws, the Commission Order adopting the Settlement Agreement:

> ... contained multiple adjustments which were entirely unsupported by the evidence presented to the Commission. Therefore, we hold the Commission erred in approving and adopting the Settlement Agreement and DIUC is entitled to a new hearing in which the parties may present any additional evidence.

DIUC I, 420 S.C. at 315–16, 803 S.E.2d at 286.

In remanding the matter to the Commission for another hearing as to all issues, this Court addressed three of the appellate issues raised by DIUC. See DIUC I, 420 S.C. at 316, 803 S.E.2d at 286 ("While we are reversing and remanding for a new hearing as to all issues, in order to provide guidance to the Commission on remand, we address three allegations of error raised by DIUC in this appeal.") (emphasis added).

This Court explained:

> 1. PROPERTY TAXES -- The Commission erred by failing to allow DIUC sufficient rates to pay its known and binding tax expenses, including its property taxes. DIUC I, 420 S.C. at 318, 803 S.E.2d at 287.

2. PLANT IN SERVICE -- The Commission improperly excluded a significant amount of equipment from DIUC's rate base. DIUC I, 420 S.C. at 317–18, 803 S.E.2d at 286–87.

3. BAD DEBT -- The Commission's reduction of DIUC's bad debt adjustment from the ORS recommended $108,349 to $30,852 was unsupported by any evidence in the record. DIUC I, 420 S.C. at 319–20, 803 S.E.2d at 287–88 ("Additionally, we are troubled by the fact that this is the only request for which the Commission did not accept ORS's adjustment, especially in light of DIUC's pre-filed testimony agreeing to ORS's recommended $108,349.").

REMAND AND REHEARING

Following remand from this Court pursuant to its decision in DIUC I, but prior to rehearing by the Commission, DIUC filed Applicant's Proposal for Procedure Following Remand and Expedited Hearing. (R. p. 382) DIUC specifically requested an expedited hearing schedule be entered so that the matter could be concluded prior to December 31, 2017. (Id.) DIUC cited the high costs of the original proceeding and appeal, as well as the mounting costs of the rate case following the appeal. (R. p. 387) DIUC asserted the parties had already participated in expensive and broad discovery before the initial hearing wherein DIUC was required to respond to in excess of 150 discovery requests (exclusive of multiple subparts), review the direct testimonies of nine witnesses, prepare rebuttal testimony and surrebuttal testimony, and prepare for the hearing on the Application. (Id.)

After hearing from the parties on DIUC's request, Standing Hearing Officer Butler issued Order 2017-61-H establishing a schedule for hearing and allowing a decision by the Commission prior to December 31, 2017. (R. p. 087) DIUC was, however, required to participate in discovery and respond to additional document production and other discovery requests from both ORS and the POAs.

On remand, ORS made only limited changes to its pre-appeal positions in response to the guidance from this Court in DIUC I. Specifically, as ORS witness Daniel Sullivan explained, "In

order to comply with the Court's guidance, ORS determined that plant-in-service, property taxes and bad debt expense should be adjusted." (R.p. 1012, lines 11-13, Rehearing Testimony of ORS witness Daniel F. Sullivan) On rehearing ORS also advanced for the first time an extraordinary position regarding DIUC's Rate Case Expenses.

Following the 2015 evidentiary hearing, DIUC's rate case expenses continued to increase as DIUC addressed multiple motions and briefings on the necessity of collecting rates under bond in order to pay its bills, the very complex prior appeal, more discovery on remand at the request of ORS and the Intervenors, further bonding costs to collect rates pending rehearing, and a complete second *de novo* rehearing trial. DIUC's actual rate case expenses incurred as of September 30, 2017, including projections to complete the rehearing process for legal and consulting services, totaled $794,201.17, plus $60,781.56 DIUC incurred for the bonds necessary to keep the utility open through the appeals and remand of this case. (R. p. 645, lines 1-12 and Appellant's Brief p. 16) DIUC has maintained that these increased costs were the direct result of the improper ORS-POA Settlement Agreement and the resulting appeal and rehearing.

DIUC could not afford to absorb these staggering rate case expenses. So, in conjunction with the rehearing on remand, DIUC updated its Application to include the $60,781.56 for bond costs and the $794,210 for DIUC's rate case expenses to be amortized over 3 years. (R. p. 1041, lines 15-17) In response, ORS agreed DIUC should be permitted to recover $272,882 of the requested expenses (for legal costs and bonds), but ORS totally reversed its previous position on GA costs and announced for the first time that <u>every single rate case expense for GA's services should be excluded.</u> (See R. p. 442) (Commission Order on Rehearing stating "This allowance [of $272,882] excludes $542,978 of GA billings, based upon ORS's position related to the invoices submitted by DIUC to document the costs.")

ORS's new position at rehearing relied upon the testimony of Dawn Hipp, who testified about applying new criteria to analyzing the GA costs; however, Hipp conceded there was no public notice of these novel "standards," that they were not published standards, and that ORS did not allow DIUC the usual "back and forth with the company, to make sure we thoroughly understand the expenditures for which they're seeking recovery." (R. p. 1087, line 16 – p. 1088, line 10 and Appellant's Brief pp. 18-20) Through its own witnesses ORS explained that it not only treated the GA invoices differently on rehearing, but it also treated DIUC differently than it treats other utilities under similar circumstances.

ORS was clear in its intent to withdraw previous approval of the GA invoices. Ms. Hipp specifically testified in response to a Commissioner's inquiry:

> ... Could you just tell me, with the 273 [of rate case expenses approved by ORS], how much goes to the attorneys and how much goes to Guastella Associates?
>
> [HIPP] Zero goes to Guastella Associates, is the quick and easy answer. They have submitted, roughly, $540,000 worth of invoices that were insufficient, and we removed those. So the remaining balance of what is left for that 272 [allowed by ORS] is going to be legal fees from their legal team, and then the bond premiums and the letter of credit.

(R. pp. 1090-1091) So, despite the fact that it is undisputed that GA prepared DIUC's Rate Application and accompanying schedules, responded to the hundreds of information requests, testified at two Commissions hearings, directed an appeal, and was otherwise integrally involved in the proceedings, ORS insisted that all GA invoices be rejected.

The Order on Rehearing adopted the new ORS position with regard to the exclusion of all GA rate case expenses, thereby reversing its previous Order's approval of expenses "for GA's preparation of the Application, developing rate models, calculating test year data, filing other rate case documents and legal expenses." (R. p. 029) Disallowing all GA invoices for a total exclusion of $542,978, the Order on Rehearing states, "The Commission agrees with ORS that a rate case

expense total of $272,382 is a reasonable amount for this rate case. The evidence shows that a large sum of what DIUC seeks was based on invoices that could not be verified [by the new heightened review standards applied by ORS for the first time on remand]."[2] (R. pp. 130-131)

DIUC filed a timely Petition for Reconsideration and/or Rehearing on February 20, 2018. (R. p. 542) The Petition asked the Commission to reconsider the Order on Rehearing's limitations on DIUC's proposed Rate Case Expenses and Rate Base/Utility Plant In Service. (Id.) DIUC asserted the Commission's disallowance of significant rate case expense and its disallowance of unidentified used and useful assets in Rate Base/Utility Plant In Service were not based upon the reliable, probative, and substantial evidence in the record. Additionally, DIUC explained these rulings are contrary to the evidence and result in a punitive impact upon DIUC.

By Order No. 2018-346 dated May 16, 2018, the Commission denied DIUC's Petition for Reconsideration and/or Rehearing. (R. p. 146) On June 13, 2018, DIUC served its Notice of Appeal of Order No. 2018-68 and Order No. 2018-346. The Office of the Clerk of the Supreme Court assigned this second appeal (the instant Appeal) Appellate Case No. 2018-001107.

In its second appeal DIUC sought review of the Commission's errors following remand from this Court pursuant to DIUC I. Those errors include rejecting DIUC's evidence of Rate Case Expenses and Rate Base/Utility Plant In Service. Appellant's Brief in the second appeal ("DIUC II") asserted:

> 1. The Commission's decision on Utility-Plant-In-Service and Rate Case Expenses is not supported by the reliable, probative, and substantial evidence on the whole record and constitute legal error.

[2] The practical impact on DIUC is unavoidable – DIUC is punished for defending its original rate case then appealing and obtaining an order of reversal.

2. ORS and the Commission improperly applied a different, heightened standard to DIUC on remand in order to justify excluding $542,978 of Rate Case Expenses documented by invoices from Guastella Associates.

3. For efficiency and clarity, Appellant respectfully requests this Court instruct the Commission to correct the erroneous exclusion of $699,631 in Rate Base/Plant In Service and to permit recovery of Rate Case Expenses for GA fees incurred through September 30, 2017, up to a total revenue increase not to exceed the noticed 108.9% increase. Remaining GA fees invoiced could be presented for consideration as part of DIUC's next rate proceeding.

THIS COURT'S DECISION ON THE SECOND APPEAL

On July 24, 2019, this Court issued its decision in DIUC's appeal of the Commission's Order on Rehearing. Summarizing DIUC's appeal regarding rate case expenses, this Court explained:

> DIUC argues ORS and the commission applied a higher standard of scrutiny on remand in retaliation against DIUC for successfully seeking reversal of the commission's initial order. At oral argument on this second appeal, when pressed by the Court to respond to DIUC's "retaliation" argument, appellate counsel for ORS conceded a heightened standard had been employed. Counsel stated, "Was it a higher standard than was previously applied? It certainly was a different standard," and "I don't believe it was a lesser standard, you are correct." Pressed further, counsel stated, "You're right. There is a difference ... [in] the way we handled the methodology ...." Finally, a Justice of the Court challenged counsel, "The reason that [the rate case expenses] were paid the first go around ..., but disallowed the next time, is because of the higher level of scrutiny." Counsel responded, "At the end of the day I think that's a fair characterization."

Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, No. 2018-001107, 2019 WL 3310477, at *1 (S.C. July 24, 2019) ("DIUC II"). After citing these exchanges between ORS counsel and the Court during oral argument, the Order addressed the statutes that mandate ORS's role in utility rate application proceedings:

> They [the statutes] require ORS to act in a fair and unbiased manner to protect the public interest, provide public utilities a fair rate application proceeding, and make appropriate and reliable recommendations to the commission. When ORS fails to meet this responsibility, it necessarily affects the decision-making of the commission. In this case, ORS made recommendations to the commission which the commission accepted. The commission's decision cannot be separated from the

> higher standard of scrutiny ORS now concedes it applied on remand from its unsuccessful first trip to this Court.

DIUC II, 2019 WL 3310477, at *2 . Reversing the decision of the Commission to adopt ORS's recommendation to exclude $542,978 of invoices submitted by Guastella and Associates, this Court remanded the case to the Commission for a second time instructing that "the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the 'objective and measurable framework' the law provides." DIUC II, 2019 WL 3310477, at *3 (quoting Utils. Servs. of S.C., Inc. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 113, 708 S.E.2d 755, 765 (2011)).

Both Respondents have now filed Petitions for Rehearing focused on the issue of DIUC's Rate Case Expenses and, more particularly, this Court's finding that DIUC's evidence "was subjected to a retaliatory, higher standard of scrutiny on remand" and that "this arbitrary, higher standard of scrutiny affected substantial rights of DIUC" thereby requiring this case be reversed and remanded to the Commission for a third hearing. DIUC II, 2019 WL 3310477, at *3.

THE PETITIONS FOR REHEARING SHOULD BE DENIED.

South Carolina Appellate Court Rule 211 permits the filing of petitions for rehearing in limited circumstances. See Rule 221(a), SCACR. "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, Appellate Practice in South Carolina 309 (1999) (citing Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933)). For this reason, a petition for rehearing is rarely necessary and this Court has admonished litigants that the "[m]any hours, uselessly spent [by this Court] in the consideration of petitions for rehearing, could be well spent in disposing of cases pending for decision." Arnold v. Carolina Power & Light

Co., 168 S.C. 163, 167 S.E. 234, 238 (1933). With this framework in mind, a party moving for rehearing must demonstrate this Court overlooked or misapprehended their argument. See Rule 221(a), SCACR (requiring every party seeking rehearing to "state with particularity the points supposed to have been overlooked or misapprehended by the court").

Neither of the Respondents' Petitions for Rehearing demonstrates this Court overlooked or misapprehended arguments of ORS or the POAs. To the contrary, both Petitions merely repeat the same arguments fully considered and, as explained previously herein, addressed by the Court in its July 24, 2019, Order.

In its Petition for Rehearing ORS argues that the GA invoices were properly rejected because many of "the invoices of these rate case expenses had not been paid, contained errors, and/or lacked sufficient detail to properly document work performed." (ORS Petition for Rehearing at 1-2) This is nothing more than a restatement of the ORS position before the Commission and continuing on appeal. The ORS Petition presents no new evidence or issue that the Court misapprehended. Instead, the Petition asks the Court to disregard the ORS admissions that ORS handled the GA invoices differently after remand by applying a higher level of scrutiny. See DIUC II, 2019 WL 3310477, at *3 ("As counsel for ORS conceded, 'The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny.'") The ORS request does not in any way justify rehearing pursuant to Rule 211, SCACR.

The ORS Petition also asserts that ORS recommended and the Commission Order on Rehearing "increased the recoverable rate case expenses to $272,382, which includes additional verified rate case expenses incurred for the hearing on remand." (Id.) That is a correct statement of fact and that fact was not misapprehended by the Court. The Commission did allow DIUC to

recover additional rate case expenses on remand for increased legal costs and bonds. As ORS witness Dawn Hipp testified, on remand ORS did allow an increase in rate case expenses for DIUC's legal and bond fees incurred in the multi-year proceedings, but on remand ORS and the Order on Rehearing unequivocally and specifically rejected every single GA invoice:

> MS. HIPP: Zero goes to Guastella Associates, is the quick and easy answer. They have submitted, roughly, $540,000 worth of invoices that were insufficient, and we removed those. So the remaining balance of what is left for that 272 [allowed by ORS] is going to be legal fees from their legal team, and then the bond premiums and the letter of credit.

(R. pp. 1090 – 1091) Ms. Hipp further testified on re-direct by ORS counsel as follows:

> ORS COUNSEL: Ms. Hipp, both, I believe, Mr. Gressette and Commissioner Fleming had asked you some questions regarding adjustments to the rate-case expenses of Guastella Associates. In particular, I think there was a discussion by Mr. Gressette of - is it $540,000? Is that correct?
>
> MS. HIPP: Five hundred forty-two, nine hundred seventy-eight [$542,978].
>
> ORS COUNSEL: That's very specific. And ORS allowed zero of that; is that correct?
>
> MS HIPP: That's correct.

(R. pp. 1099-1100)

Next, the Commission adopted the ORS position. As the Commission explained in its Order Denying DIUC's Motion for Reconsideration of the Order on Rehearing:

> ORS recommended a rate case expense total of $272,382 ... to remove $542,978 in invoices submitted by Guastella and Associates.... [This Commission's] Order on Rehearing ... agreed with ORS that those particular invoices must be excluded.

(R.p. 0155) There is no misunderstanding. Yes, there were more rate case expenses allowed by the Commission on rehearing but none of those new rate case expenses were for GA invoices. The Commission was very clear on this point when it denied DIUC's Petition for Reconsideration of the Order on Rehearing:

> This Commission recognized in our Order on Rehearing that ORS witness Hipp completed a thorough review of all invoices from Guastella Associates, and found that they "contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid."

(R. p. 155) (citing Rehearing Tr. p. 476, 11. 11-18) Although the Commission Order on Rehearing allowed DIUC to recover new legal fees and bond costs, the Commission rejected all the GA invoices based explicitly upon ORS witness Hipp's new conclusions regarding those invoices – conclusions contrary to the ORS position in the initial proceedings as provided by ORS witness Gearheart.

In a third argument the ORS Petition asserts that rehearing is necessary because when ORS recommended $75,000 in rate case expenses the first time, it was part of ORS's evaluation of the Settlement Agreement, but that in the rehearing posture ORS's review of the GA invoices is distinguishable because ORS was required to apply its non-settlement review process. The Petition summarizes as follows:

> Critically, the $75,000 awarded in the initial hearing was the result of a Settlement Agreement between ORS and the Property Owner's Associations. When it evaluated an amount for rate case expense to be recovered under that Settlement Agreement, ORS utilized its experience and judgement to determine a reasonable amount as a basis for a settlement figure.
>
> ***
>
> There was no Settlement Agreement upon remand. Therefore, the ORS was required to evaluate the new rate case expenses submitted for approval by DIUC using the same methodology consistently applied in contested rate cases.

(ORS Petition for Rehearing at 2) The problem with this assertion is that it is simply not accurate. Weeks before the Settlement Agreement was disclosed, ORS witness Gearheart filed her pre-filed testimony allowing $75,000 for rate case expenses, including an unspecified amount for GA work invoiced to date:

> Adjustment 6(a) - ORS proposes to adjust amortization expense for rate case expenses totaling $97,500 amortized over five (5) years. These expenses include current rate case expenses of $75,000 and unamortized rate case expenses of

> $22,500 from the previous rate case. **Current rate case expenses included the preparation of the application by GA, developing rate models, calculating test year data, filing other rate case documents and legal expenses.**

(R. pp. 1769-70) (October 2, 2015, Prefiled Testimony of Gearheart, emphasis added) Both ORS witnesses (Gearheart and Hipp) reviewed DIUC's submissions, came to a decision, and provided the ORS position on GA invoices long before the Settlement Agreement was at issue. Again, as this Court found, the facts are clear – the two ORS witnesses reviewed the same information and came to different conclusions because the second witness applied a heightened standard of scrutiny to the GA invoices. The Petition's assertion that Gearheart evaluated the GA invoices differently because she did so in the context of the eventual ORS-POA Settlement Agreement is totally unsupported by sworn testimony and the facts; further, it contradicts the sworn testimony of the ORS witnesses.

Likewise, the POA Petition for Rehearing fails to demonstrate any reason for rehearing. All of its assertions are premised upon the same inaccurate notion that the ORS witnesses on remand proceeded differently in their review because the first witness, Ms. Gearheart, was formulating her opinions in conjunction with evaluating the ORS-POA Settlement Agreement. The POAs assert:

> Similarly, the Opinion's conclusion that the Commission scrutinized the invoices at issue more "heavily" and "harshly" on rehearing, as compared to the review applied in the original case, overlooks the different circumstances between the original case and the case on rehearing. As the record demonstrates clearly, the original case involved a settlement agreement (vacated by this Court), and the rehearing was a *de novo* contested case.

POA Petition for Rehearing at 4.

The logic of this argument proposed by both the POAs and ORS leads to a troubling conclusion. The assertion is that Gearheart's 2015 analysis of the GA invoices was completed in the context of a settlement agreement; therefore, this Court should expect a less strict analysis from

Gearheart than from Ms. Hipp, who analyzed the same invoices on remand when there was no settlement agreement in play. Surely the POAs and ORS are not now asserting that when Ms. Gearheart prepared her testimony in early October of 2015 that she already knew about the ORS-POA Settlement Agreement and that her decisions were somehow different because of the ORS-POA Settlement Agreement which was not disclosed until weeks later on October 27, 2015. Surely these Respondents are not suggesting that ORS shaped its original testimony to fit a potential settlement agreement with the POAs that would exclude the Applicant and not be announced until weeks later on the day before the Applicant's hearing.

In a final attempt to recast the facts of the proceedings on remand, the POA Petition for Rehearing points to a single line in the Order on Rehearing that refers to the inclusion of GA costs within the awarded rate case expenses. Referring to the Commission's adoption of the ORS position, the Order states, "The $272,382 [recommended by ORS] consists of capped current rate case expenses in the amount of $75,000 for GA's preparation of the Application developing rate models, calculating test year data, filing other rate case documents and legal expenses. (Rehearing Tr. p. 450, 11. 8-14)." However, the Order's description does not comport with the Transcript cited by the Order. Specifically, Rehearing Transcript page 450, lines 8-14 is the Revised Rehearing Testimony of Daniel F. Sullivan wherein he explained how ORS calculated the recommended $272,382 that was adopted by the Commission:

> Adjustment 6(a) - ORS proposes to adjust amortization expense for rate case expenses totaling $272,382 amortized over five (5) years. These expenses include unamortized rate case expenses of $22,500 from the previous rate case, current rate case expenses of $75,000 as included on Audit Exhibit ICG-4, and additional legal, bond premiums and letter of credit fees associated with the appeal of $174,882. ORS's amortization expense adjustment amounted to $54,476 ($272,382/5 years), less per book amount of $ 92,421, for total adjustment of ($37,945).

(R. p. 1018, lines 8-14) There is no reference or rehearing testimony from any ORS witness that

ORS included anything for GA invoices at rehearing; in fact, the testimony is exactly the opposite. (See R. p. 1090-1091, cited supra, Hipp testifying "Zero goes to Guastella....They have submitted, roughly $540,000 worth of invoices that were insufficient, and we removed those.") By adopting this identical amount of $272,382 from ORS testimony the Commission adopted the ORS calculation, which did not include and payment for work by GA. Further, in Order 2018-346 Denying DIUC's Motion for Reconsideration of the Order on Rehearing, the Commission explained that the $272,382 allowed for DIUC's rate case expenses did not include any payments for GA invoices:

> ORS recommended a rate case expense total of $272,382 to be amortized over 5 years, adjusting the $794,210 amount sought by DIUC to remove $542,978 in invoices submitted by Guastella and Associates and other uncontested items. Order on Rehearing at pp. 36-37. [This Commission's] Order on Rehearing adopted the shorter amortization of rate case expenses proposed by DIUC (3 years instead of 5 years), but agreed with ORS that those particular invoices must be excluded.

(R. p. 155) The Commission clearly rejected all the GA invoices and did so specifically based upon the heightened "standards" and "analysis" presented by Ms. Hipp for the first time on remand, the Commission stated:

> Clearly DIUC bears the burden of proof to justify those expenses that contribute to its revenue requirement. This Commission recognized in our Order on Rehearing that ORS witness Hipp completed a thorough review of all invoices from Guastella Associates, and found that they "contained mathematical errors, lacked sufficient detail, and/or did not appear to be paid."

(R.p. 0155) (citing Rehearing Tr. p. 476, 11. 11-18) Finally, the Commission's option to allow DIUC to re-submit the GA expenses in the future indicates the Commission knew it was not including any of the GA costs within the rate case expenses recovered. (See R. p. 131) (Order 2018-364 stating, "[W]e will allow the Company to request approval of these expenses in its next rate case, if it can provide supporting information for its invoices that satisfy the criteria listed by

ORS witness Hipp presented at the rehearing.") Nothing in either Petition has presented a single new fact or argument that requires the Court to rehear this matter.

CONCLUSION

This Court did not misunderstand these facts, nor did it overlook any issues. ORS (through witness Hipp) applied a higher standard on remand and rejected every single GA invoice despite the fact that ORS had previously (through witness Gearheart) approved GA charges for inclusion in DIUC's rate case expenses. Adopting the ORS testimony, the Commission improperly entered an Order on Rehearing that applied ORS's stricter standard and, as such, this Court reversed the Commission finding:

> The commission's denial of DIUC's rate case expenses it previously permitted was arbitrary because DIUC's evidence was subjected to a retaliatory, higher standard of scrutiny on remand. As counsel for ORS conceded, "The reason that the rate case expenses were paid the first go around, but disallowed the next time, is because of the higher level of scrutiny." This arbitrary, higher standard of scrutiny affected substantial rights of DIUC. The commission's findings of fact and conclusions of law must be reversed.

DIUC II, 2019 WL 3310477, at *3.

When ORS loses on appeal and the case is remanded, ORS should not be allowed to revisit evidence already in the record and reverse its position to the detriment of the Applicant. To allow otherwise, as ORS asserts, would be to allow ORS to punitively respond to an Applicant's successful appeal.

There is no support for the relief requested by the Respondents' Petitions for Rehearing and the same should be denied.

Respectfully submitted,

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