THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM
THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001354

Stephen and Beverly Noller and
Michael and Nancy Halwig,……Appellants,

v.

Daufuskie Island Utility Company, Incorporated, and
South Carolina Office of Regulatory Staff,……Respondents.

INITIAL BRIEF OF RESPONDENT DAUFUSKIE ISLAND UTILITY COMPANY, INC.

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II. DID THE PUBLIC SERVICE COMMISSION COMMIT REVERSIBLE ERROR IN NOT ADDRESSING APPELLANTS' CLAIM THAT A UTILITY DID NOT PROPERLY FILE A COPY OF A CONTRACT WITH THE PUBLIC SERVICE COMMISSION WHEN THE FUNDAMENTAL RELIEF SOUGHT BY APPELLANTS WAS AN AWARD OF MONETARY DAMAGES FOR WHICH THE PUBLIC SERVICE COMMISSION HAD NO STATUTORY AUTHORITY TO GRANT TO APPELLANTS?

[1] Pursuant to Rule 208, SCACR, Respondent Daufuskie Island Utility Company, Inc. joins in and adopts the Statement of Issues on Appeal as presented by the Brief of Respondent South Carolina Office of Regulatory Staff.

STATEMENT OF THE CASE

Appellants Stephen and Beverly Noller and Michael and Nancy Halwig initiated this matter on or about November 26, 2018, by filing Individual Complaint Forms with the South Carolina Public Service Commission ("Commission"). The matter was assigned Commission Docket No. 2018-364-WS. Appellants sought an award of monetary damages of approximately $120,000 to compensate Appellants for costs they incurred.

DIUC filed an initial response letter followed by its Answer. (DIUC Response 11/19/18, DIUC Answer 12/17/18) In accordance with a schedule setting the matter for hearing on February 28, 2019, the parties participated in discovery and then the parties prefiled testimony and exhibits.

Via Order No. 2019-22-H, the scheduled hearing was continued and the parties were asked to brief the Commission on matters of jurisdiction. (Order 2019-22-H) Appellants and Respondent DIUC submitted briefs on jurisdiction. (Appellants' Brief and DIUC's Brief, 3-6-2019) The South Carolina Office of Regulatory Staff ("ORS") filed a letter with the Commission. (ORS Letter, 3-6-2019) On March 20, 2019, the Commission convened a hearing wherein Appellants and Respondent DIUC presented their positions and addressed questions regarding jurisdictional issues from the Commission. (Transcript of Proceedings)

On June 12, 2019, upon the motion of Commissioner Ervin, the Commission issued Order No. 2019-424 ruling "the Public Service Commission does not have the statutory authority to grant monetary damages, which is the relief requested in the pleadings." (Order 2019-424 p.1) Accordingly, the matter was dismissed for lack of subject matter jurisdiction.

On June 21, 2019, Appellants filed a Motion for Reconsideration, which was denied by the Commission on July 17, 2019. (Order 2019-523)

On August 15, 2019, Appellants filed their Notice of Appeal initiating this appeal.

STANDARD OF REVIEW

South Carolina appellate courts employ a deferential standard when reviewing a decision of the Public Service Commission. Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 21, 507 S.E.2d 328, 332 (1998). The Court is to reverse or modify the decision of the Commission only if "if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions" are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-380.

The party challenging a Commission order "bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence on the whole record." Duke Power Co. v. PSC of S.C., 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001) (citing Porter v. S.C. Pub. Serv. Comm'n, 333 S.C. 12, 507 S.E.2d 328 (1998) and S.C. Code Ann. § 1-23-380(A)(6) (Supp. 1999)). After completing review, this Court "may affirm the decision of the [Commission] or remand the case for further proceedings." S.C. Code Ann. § 1-23-380.

The Commission determined in Order 2019-424 that it lacked "subject matter jurisdiction to hear this dispute where the parties are seeking a monetary award based on a contract issue."

(Order 2019-424 p.1) "The question of subject matter jurisdiction is a question of law." Gantt v. Selph, 423 S.C. 333, 337–38, 814 S.E.2d 523, 525–26 (2018), reh'g denied (June 27, 2018).

A decision of the Commission should only be found to be "arbitrary if it is without a rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." Deese v. S.C. State Bd. of Dentistry, 286 S.C. 182, 184-5, 332 S.E.2d 539, 541 (Ct. App. 1985). Further, reversal for abuse of discretion is suitable only for the limited circumstances when there is "an error of law or where the Court's order is based on factual conclusions without evidentiary support." Smith v. S.C. Ret. System, 336 S.C. 505, 523, 520 S.E.2d 339, 349 (Ct. App.1999).

Orders of the Commission are entitled to deference by the courts and should be affirmed if supported by substantial evidence. S.C. Energy Users Comm. V. S.C. Public Service Comm'n, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010), Total Envtl. Solutions, Inc. v. South Carolina Pub. Serv. Comm'n, 351 S.C. 175, 568 S.E.2d 365 (2002). Substantial evidence has been defined by the Court as "relevant evidence that, when considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." Porter v. S.C. Public Service Comm'n, 333 S.C. 12, 20, 507 S.E.2d 148, 151 (1998).

STATEMENT OF FACTS

Appellants in this matter are Beverly and Stephen Noller, the owners of 36 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina, and John and Nancy Halwig, the owners of 46 Driftwood Cottage Lane, Daufuskie Island, Beaufort County, South Carolina.

As indicated in the image below, Driftwood Cottage Lane runs parallel to the Atlantic Ocean and although Driftwood Cottage Lane was originally built with one row of residential lots between the Lane and the ocean, erosion has washed away beachfront lots as well as a large portion of Driftwood Cottage Lane itself, leaving the Appellants' properties at #36 and #46 disconnected and inaccessible from the rest of Driftwood Cottage Lane. (Surrebuttal Testimony of J.Guastella, p. 8, ll.9-15; Surrebuttal Testimony M.Guastella, p.1 l.13 to 2 l.3; Exhibit JFG 5 at Photos #1-6; Exhibit JFG 6 p.6; and Answer p.6 (below, with emphasis added)

Driftwood Cottage Lane (#36 Noller and #46 Halwig)
(Answer at p. 6 , R. p. ___)

DIUC provided uninterrupted water and sewer services to Appellants at 36 and 46 Driftwood Cottage Lane until a 2014 hurricane washed away Driftwood Cottage Lane and destroyed the DIUC pipes and other infrastructure servicing the Appellants' properties. After the hurricane, the on-island property owners association, Melrose Property Owners Association ("MPOA"), rebuilt Driftwood Cottage Lane thereby reconnecting Appellants' properties to the Lane. In conjunction with MPOA's reconstruction of the roadway, DIUC re-installed the infrastructure necessary to resume water and sewer service to the Appellants' dwellings on the other side of the repaired washout. The DIUC pipes were re-installed in the easement adjacent to the newly repaired Driftwood Cottage Lane.

Two years later, in 2016, Hurricane Matthew washed out Driftwood Cottage Lane again and for a second time destroyed the DIUC infrastructure in the utility easement adjacent to the roadway. This time, however, MPOA determined it was too risky to rebuild the roadway again. The decision provided to DIUC via email from MPOA President stated:

> The Melrose POA has made extensive efforts to protect and repair Driftwood Cottage Lane. Unfortunately the Atlantic Ocean has proved to be a force we cannot compete with. At this time, most of the road right of way and easement owned by the MPOA no longer exists – it is under water. The MPOA has utilized every reasonable option available to protect Driftwood Lane…. [I]in the spring of 2015 we spent over $60,000. installing heavy duty Geo sandbags and dumping tons of sand backfill to protect the road. The king tides of October 2015 washed most of that away and successive storms have completed the destruction and caused even further erosion. The MPOA cannot reconstruct or protect Driftwood Cottage Lane….

(Answer p.1-2)(quoting email, December 19, 2016)

Because Driftwood Cottage Lane would not be rebuilt following Hurricane Matthew, in order to connect service to the Noller and Halwig houses, a new utility easement would need to be acquired to access the properties from another location on the Island that would not threatened by

erosion. Michael Guastella is the Vice President of Operations for Guastella Associates, Inc., which manages DIUC. Mr. Guastella testified:

> First, it is important to understand the geography of the area at issue. The Complaint implies by stating "all lots on Driftwood Cottage Lane" that there are other affected residents on Driftwood Cottage Lane. That is not true. Of the four homes impacted, two have already been abandoned and they appear to be falling into the sea. Only the Complainants' homes remain. […] Second, the water and sewer infrastructure was not the only thing destroyed by Hurricane Matthew. After the hurricane there was no Driftwood Cottage Lane to access the Complainants' homes. The road washed into the sea. And this was, in fact, the second time Driftwood Cottage Lane was destroyed by erosion.

(M.Guastella Reb. Testimony p.2, l .19 to p.3, l .5) The dwellings at 29 Driftwood Cottage Lane and 33 Driftwood Cottage Lane (pictured below) are the last two homes before the Appellants' dwellings and both have been abandoned, as Mr. Guastella testified. (Id.) (Photo from DIUC Answer, p. 5, R. p. __)

Image 5: Abandoned Properties Immediate South of Noller Residence (formerly 29 and 33 Driftwood Cottage Lane)

The only option for connecting Appellants' dwellings would involve designing, permitting, then installing infrastructure through a private golf course; this would be a costly endeavor to benefit only two ratepayers whose service use was considered to be very short term give the ongoing erosion of the properties from the ocean. Any easement(s) through the golf course would also have to be identified, negotiated, surveyed, and obtained/purchased to allow placement of the infrastructure under the golf course and across the nearest fairway.

There were also safety issues presented by the condition of the area and the Appellants' properties. Michael Guastella identified some major risks to re-connecting service of Appellants' dwellings:

1. DIUC was obligated to prevent any extraordinary inflow of ocean water into its sewer system because that could affect the treatment process of collected wastewater.

2. The lots on DCL [Driftwood Cottage Lane] presented a real danger for the inflow of ocean water due to the constant assault of the tides, wind, and erosion.

3. Also, DIUC was concerned about any possible loss of pressure due to damage of 6 its water distribution system because of erosion by ocean. Losing water pressure was a risk to DIUC's ability to provide safe and adequate service to all its customers.

4. The lift station located just outside the 46 DCL property, as shown on the attached Exhibit MJG-3, posed a risk of electrocution during high tides. The risk of a high tides damaging the lift station's control panels with water and/or debris threatened a spill event involving the discharge of sewage into the ocean.

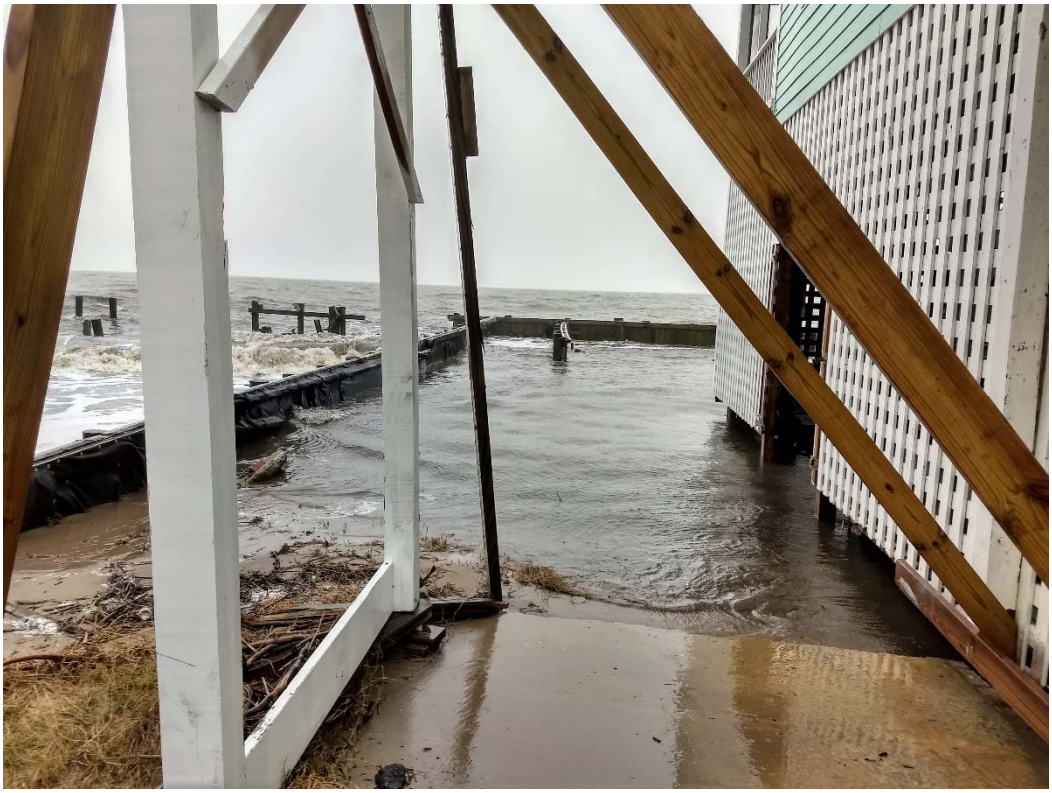
5. These dangers had to be avoided. In order to protect the environment, DIUC personnel, as well as DIUC's other customers.

(M. Guastella Testimony, p.15 ll.1-14)

The following images of the Appellants' dwellings illustrate DIUC's concerns over erosion and other safety risks at the dwellings.

Image 1(above) Halwig Residence, South Side. Image 2(below): Halwig Residence, North Side

Image 3(above): Noller Residence South Side. Image 4(below): Noller Residence North Side.



(Photos from Answer, pp.3-5, R. pp. ___)

DIUC also provided six additional photographs of the dwellings as Exhibit JFG-5 and another map as Exhibit JFG-6. (Sur. Test.J.Guastella at p.3, l.13 to p.5 l.22) and Surrebuttal Testimony of M. Guastella at p. 1, l.13 to p.2, l.3) These additional photographs taken December 9, 2018, further demonstrate the unique circumstances at issue and the reasons a responsible utility would proceed cautiously with any expenditure for these at-risk properties.

One of the photographs appears below.

Looking North at 29, 33 and 36 Driftwood Cottage Lane

Exhibit JFG 5 (1 of 6)

(Exhibit JFG-5, p.1, R.p.__)

Beyond the safety considerations, DIUC conferred with ORS to determine it ORS preferred DIUC to refrain from the safety and financial risk inherent in this unique situation. Mr. Michael Guastella explained:

> DIUC had communications with members of the Office of Regulatory Staff (ORS), our (DIUC) wastewater compliance inspector with DHEC, Penny Cornett, and phone conversations with Ken Crow. In these communications various aspects of the erosion situation and its impact on water and sewer mains were discussed. DIUC was attempting to find a resolution that it could complete within the limitations imposed upon it by law, cost, and feasibility. Following these communications DIUC provided a letter to Rene Josey, dated December 10, 2015, explaining DIUC's position, based on all the input provided.

(Rebut. Test. M.Guastella p.9, ll.1-10)(citing DIUC's Responses to Office of Regulatory Staff's First and Continuing Audit Information Request at DIUC 0019). Mr. Guastella testified as follows:

Q. Can you discuss the history of your communications with ORS regarding this matter?

A. Yes. Following Hurricane Matthew in October 2016, DIUC consulted with staff at ORS regarding DIUC's provision of water and sewer services to the Complainants' properties. I participated in multiple telephone calls and exchanged emails with members of ORS staff. […]

Q. How would you characterize your interactions with ORS regarding this situation?

A. I have always found the members of ORS to be helpful and I believe we have a mutual respect for each other and a cordial working relationship. DIUC and ORS approached the situation cooperatively and freely exchanged information in an effort to address the unique circumstances involved.

(Rebut. Test. p.13, l.8 to 14 l.1)

Upon DIUC's inquiry, ORS did not take the position that DIUC was obligated to incur these construction and other expenses, and ORS did not agree DIUC could pass such costs on to its other ratepayers. (Testimony of M. Gustella pp.12, ll. 25 to p. 15, ll.14); (see also Rebut. Test. of M.Guastella at 16, ll.1-4) ("At no time in any of the telephone conversations or email exchanges did any ORS staff member state or suggest that DIUC was obligated to purchase additional

easements to install for a third time infrastructure to serve the Appellants. DIUC concluded that, "Unless the road and surrounding area is restored and adequately protected from any future erosion, it would not be possible to reinstall the main at that location." (M.Guastella Rebut. Test. p. 11, ll.12 to 15)

DIUC considered the washout of its infrastructure and the roadway easement that protected it as well as the many factors a responsible utility should consider when evaluating a proposed capital project that will really only benefit two customers. John F. Guastella, President of Guastella Associates, Inc., explained:

Q. Why was DIUC unable to continue to provide water and sewer service to the Appellants through the mains that had been installed for that purpose?

A. While DIUC had previously made every effort to avoid service disruptions and restore service to customers along Driftwood Cottage Lane after unavoidable outages … the destruction of the roadway in which mains were located eliminated any possibility of replacing the mains and safely providing continuous utility service to the remaining customers along Driftwood Cottage Lane. The [only] two remaining customers are the Appellants herein (Halwig and Noller). […]

Q. What was the alternative to providing water and sewer service to the Appellants?

A. Without the Driftwood Cottage Lane roadway, it became the responsibility of the Appellants to enter into a main or service extension agreement with DIUC and arrange for the construction of new mains that would connect to DIUC's nearest existing mains. Pursuant to state regulations, a utility can charge a Customer Main Extension Fee, which S.C. Reg. § 103-502.3 defines as "A fee paid by a customer under a contract entered into by and between the utility and its customer providing terms for the extension of the utility's mains to service the customer."

(Rebut. Test. J.Guastella, p.2 l.12 to p. 3 l.13)

DIUC determined that any expense to re-install for a second time infrastructure to the Appellants two dwellings would improperly assign the cost of construction and the risk of another loss to all DIUC customers when only two would benefit. Mr. Guastella explained:

> To proceed otherwise by volunteering to construct and/or absorb costs for the construction and equipment (as sought by the Appellants) would result in unjust and unreasonable rates as to its other customers. Additionally, that result would violate the rate setting principle of equitable treatment among customers.

(J. Guastella Rebuttal Testimony, p. 4, ll.174-20)

It would not have been safe or financially prudent for DIUC to voluntarily install lines to these two rapidly eroding properties and then attempt in its next rate proceeding to make all the other DIUC ratepayers absorb the cost. (Answer p. 6) In further support of this position, Michael Guastella prepared and prefiled Exhibit MJG-3, which he identified as a map downloaded from the Beaufort County GIS system with some added information about the location of the DIUC mains, including former mains and other equipment. (M. Guastella Rebut. p. 15 ll.16-17 and Exhibit MJG-3)

The Appellants disagreed with DIUC's conclusion.

Mr. Halwig initiated a complaint with the South Carolina Office of Regulatory Staff regarding re-installation of service to his dwelling, which had again been separated from the DIUC system by a washout of Driftwood Cottage Lane. (Complaint at 12, Copy of CSA) ORS opened a file (ORS File 2016-W-1682) then responded to Mr. Halwig's complaint. (See Compls. 0053 to 0054, December 2, 2016., Letter from ORS to Halwig). The letter outlined ORS's investigation and factfinding efforts an included the following notice:

> **If you are not satisfied with the response from the ORS's investigation, you have the right to file your complaint with the PSC.** To file a complaint with the PSC, you must complete the PSC's complaint form available online at www.psc.sc.gov. The completed form must then be mailed to the PSC at 101 Executive Center Drive, Suite 100, Columbia, S.C. 29210.

(Compls. p. 0054)(emphasis added) Appellant did not further pursue complaint 2016-W-1682. Instead, Appellants abandoned the assistance of ORS and the Commission and proceeded with their own plan to install all new infrastructure across the golf course adjacent to their homes.

Appellants also sought an agreement with DIUC defining how the process would work and which parties would bear the costs of installing the lines and infrastructure to connect service to 36 and 46 Driftwood Cottage. To that end, Appellants and DIUC entered into a Customer Service Agreement ("CSA"), dated January 30, 2018. (Complaint at 12, Copy of CSA) Pursuant to the CSA, the Appellants could construct infrastructure that would become part of the DIUC system after DIUC inspection and all DHEC approvals. DIUC would then serve the Appellants as long as it could (pending impacts of the ongoing erosion at their dwellings) using the new lines. Some of the installed items would be on the Appellants' property and would remain under the Appellants'' ownership and care.

The CSA contains the following relevant provisions:

1. **In order to protect other customers from sharing in the cost responsibility, it would be the responsibility of the affected Customers to have the Project Mains installed.**

5. **Upon Completion of the Project Main, Customers will provide DIUC with an acknowledged bill of sale transferring them to DIUC, and they shall be and remain the property of DIUC and its heirs and successors, and will be treated as contributed for rate setting purposes.**

(Complaint at 12, Copy of CSA) The purpose of Paragraph 1 is to prevent DIUC's other customers from being forced to subsidize a third installation of infrastructure to the Appellants' property. That includes construction as well as other costs directly attributable to the effort to connect these two dwellings to the system. Paragraph 5 specifically explains that the Appellants and DIUC are agreeing the Project Mains will become the property of DIUC and the new infrastructure will be booked by DIUC as contributions in aid of construction. When a utility treats items "as contributed for rate setting purposes," the utility incurs taxes. (Answer p.7 and Rebut. Test. J.Guastella Rebut. p.7, l. 21 to p.9 l.17)

Pursuant to the Tax Cuts and Jobs Act ("TCJA"), DIUC will be required to pay taxes for

the contributions in aid of construction related to the Appellants' contributions to the DIUC system. Specifically, DIUC will incur a tax liability at a rate of $33.24 for every $100.00 of the amount booked as contributions in aid of construction. (Answer pp. 7-8) The amount taxed will include costs for the infrastructure as well as associated engineering and labor costs. (Id.) The TCJA was in effect when the CSA was executed on January 30, 2018. (Id.)

DIUC asserts Appellants are required to pay those taxes per Paragraph 5 of the CSA; otherwise, DIUC's other customers would not be protected from sharing in the cost responsibility of the cost to reconnect service to just two dwellings. DIUC has explained its position on more than one occasion, stating:

> DIUC cannot charge its other customers for the $3,900.00 for legal costs and $37,545.93 for taxes DIUC will incur for the Contributions in Aid of Construction. In order to protect other customers from sharing in the cost responsibility, as set forth in the CSA, the Halwigs and Nollers must bear that cost.

(Complaint at 12, Copy of CSA) As Appellants neared the end of their construction, it became clear that the parties disagreed about the terms of the CSA, specifically what should be paid by the Appellants to DIUC to ensure no costs were passed on to the other DIUC customers. Despite signing the CSA, Appellants did not want to pay anything at all per the CSA and, instead, demanded DIUC approve all their installation and immediately provide service via the new lines. The Complaint requested a monetary award and order that DIUC pay to Appellants "the full costs paid by the customers for the replacement lines." (Compl. at 1) (see also Compl. at 6 requesting "that DIUC reimburse the Halwigs and the Nollers for all costs paid to replace the mains serving the portion of Driftwood Cottage Lane above the road wash out for and such other and further relief as the PSC may deem just and proper.")

Appellants have now returned to the Commission in a new proceeding to demand a monetary award for the costs they voluntarily incurred. Notably, in the new complaint Appellants

also claim they were somehow coerced or under duress at the time they entered the CSA with DIUC. (Rebuttal Testimony of M. Halwig "We did not breach the agreement, which we were forced into. It was not voluntary.")(see also Appellants' Brief at p. 15 describing the CSA as a "forced Agreement")

Instead of appealing to the Commission following ORS's response to the first complaint filed immediately after Hurricane Matthew in 2016, Appellants took matters into their own hands and now they seek an order from the Commission requiring DIUC to pay for the costs the Appellants incurred voluntarily and in conjunction with the CSA. (Complaint) ***Ultimately, via the underlying complaint Appellants are asking the Commission to order DIUC to pay the Appellants $120,000 and to find that the Appellants are not responsible for approximately $37,000 in taxes that DIUC will incur by incorporating the infrastructure the Appellants installed to get service to 36 and 46 Driftwood Cottage Lane.*** Appellants also claim that the CSA is invalid because it was not approved by the Commission.

Again, in its Answer, DIUC explained its position:

> Based upon the terms of the CSA and all the information available to date, the Customers are obligated to pay the tax obligation of $37,545.93, which is equal to 33.24% of $112,954.07, that DIUC must pay in taxes, plus reimbursement for DIUC legal fees in the amount of $3,900.
>
> As indicated in DIUC's communications with the Customers' counsel and filings in this matter, DIUC remains willing to cooperate with the Customers and to assist as it is able. However, DIUC is not at this time authorized to pass on to its ratepayers these costs attributable solely to the installation of the Project Mains for the Customers. To ensure its collection of these costs and to prevent DIUC's other customers from bearing the burden of the same, DIUC requires remittance per the CSA prior to activating service for the Customers.

(Answer pp.8-9)

After the parties exchanged discovery and prefiled witness testimonies for a hearing, the Commission determined the issue of jurisdiction should be examined. The Hearing Officer entered

Directive Order No. 2019-22-H which set a schedule for the parties to brief the Commission on "matters of jurisdiction." (Order 2019-22-H) Appellants and Respondent DIUC submitted briefs. (Appellants' Brief and DIUC's Brief, 3-6-2019) ORS filed a letter with the Commission. (Letter, 3-6-2019)

On March 20, 2019, the Commission convened a hearing wherein Appellants and Respondent DIUC presented their positions and addressed questions from the Commission.

On June 12, 2019, upon the motion of Commissioner Ervin, the Commission issued Order No. 2019-424 finding:

> 1. …the Public Service Commission does not have the statutory authority to grant monetary damages, which is the relief requested in the pleadings.
>
> 2. … to the extent that it is within our jurisdictional authority, I move that we stay any disconnection of service for the residences in question, while these contractual disputes are pending.

(Order 2019-424 at 1)

On June 21, 2019, Appellants filed a Motion for Reconsideration, which was denied on July 17, 2019. In denying the Motion for Reconsideration the Commission found:

> 1. DIUC began providing water and sewer service to the homeowners in December of 2018. This issue has long-since been rendered moot.[2]
>
> 2. The Commission does not have "jurisdiction to hear this matter in order to remedy the failure of DIUC to submit the Customer Service Agreement for approval (pursuant to S.C. Code Reg. 103-541 and 103-743) before it was entered into with Homeowners. While it is true that this Commission has broad authority over approval of contracts entered into by regulated entities, even if the Commission were to find such actions were violative of properly promulgated regulations, that would still not grant the Commission an ability it does not possess, i.e., we cannot grant monetary damages under an allegedly invalid contract, and in this Petition the Appellants are seeking monetary damages, and that would be for a court of competent jurisdiction, not a proper matter for the South Carolina Public Service Commission."

[2] Nothing remains to be "ordered" regarding provision of service; service was restored to both dwellings in December 2018. See Order 2019-424 (requiring a stay of any discontinuation of service "while these contract disputes are pending.")

3. The Appellants believe the Commission has the ability to provide monetary damages to the Appellants. In fact, the Appellants cite S.C. Code Ann. Section 58-5-270 and Section 58-5-710.

   Under -270, the Commission certainly does have the jurisdictional authority to hear complaints properly brought before it. However, in this case, monetary damages are being sought – and the Commission simply does not have the authority to grant such an award.

   The Commission does have authority under -710 to levy a fine or penalty against a regulated utility if the utility is failing to show cause as to why it is not taking steps to provide adequate water and sewer service. As I mentioned earlier, service has been and is continuing to be rendered to the Appellants. Even if that weren't that case, any fines or penalties levied by this Commission go into the General Fund of the State, not to the Appellants.

(Order 2019-523 at p. 1)

On August 15, 2019, Appellants filed their Notice of Appeal.

ARGUMENTS

I. THE COMMISSION PROPERLY DECLINED TO ASSERT JURISDICTION OVER APPELLANTS' COMPLAINT REQUESTING THE COMMISSION AWARD MONETARY DAMAGES.

Subject matter jurisdiction is "the power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237–38, 442 S.E.2d 598, 600 (1994). "The question of subject matter jurisdiction is a question of law." Gantt v. Selph, 423 S.C. 333, 337–38, 814 S.E.2d 523, 525–26 (2018), *reh'g denied* (June 27, 2018). The importance of addressing jurisdictional questions accurately and early in a proceeding is necessitated by the fact that "lack of subject matter jurisdiction may be raised at any time, and may [even] be raised for the first time on appeal." Linda Mc Co., Inc. v. Shore, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010).

It is well established that the Public Service Commission of South Carolina ("the Commission") is a body of limited jurisdiction and has only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted." Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n, 238 S.C. 282, 292, 120 S.E.2d 6, 11 (1961) (citing Beard-Laney, Inc. v. Darby, 213 S.C. 380, 49 S.E.2d 564 (1948) and Piedmont & Northern Railroad Co. v. Scott et al., 202 S.C. 207, 24 S.E.2d 353 (1943)).

The limitations upon the Commission's jurisdiction are not treated lightly by the Commission or by South Carolina courts. In fact, when faced with a controversy that does not fall clearly within the confines of its prescribed jurisdiction, this Court has held that the Commission is required to abstain from exercising any power over the controversy:

> Such bodies, [including specifically the South Carolina Public Service Commission], being unknown to the common law, and deriving their authority wholly from constitutional statutory provisions, will be held to possess only such powers as are conferred expressly or by reasonably necessary implication, or such

> as are merely incidental to the powers expressly granted. See 51 C.J. 36, 37, where among other things it is said: "Any reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power."

S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n, 275 S.C. 487, 489–90, 272 S.E.2d 793, 794–95 (1980). Furthermore, in Piedmont & Northern Railway Co. v. Scott the South Carolina Supreme Court cautioned that "the Supreme Court of the United States has pointed out that asserted powers [of regulating commissions] are not to be derived from mere inference. They must be founded upon language in the enabling acts… ." Piedmont & Northern Railway Co. v. Scott, 202 S.C. at 223-224, 24 S.E.2d at 360 (1943) (citing Siler v. Louisville & Northern Railway Co., 213 U.S. 175, 29 S.Ct. 451 (1909) [regarding state commissions] and Interstate Commerce Commission v. Cincinnati, etc., R. Co., 167 U.S. 479, 17 S.Ct. 896 (1897) [regarding federal commissions]).

Determining whether the Commission has jurisdiction, then, requires review of the Commission's enabling statute(s) (ie, the Commission's authority) to determine if the General Assembly intended to provide the Commission jurisdiction over the specific claims raised in the matter. See Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n, 238 S.C. 282, 120 S.E.2d 6 (1961) (South Carolina Supreme Court analyzing the Commission's enabling statutes, the purpose of those statutes, and then determining if the Commission has jurisdiction to act in matter).

The sources of the Commission's authority and power potentially relevant to the matter raised below are set forth below.

> **S.C. Code Ann. § 58-3-140(A)**
> [T]he commission is vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State."

S.C. Code Ann. § 58-5-210
The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every 'public utility' as herein defined.

S.C. Code Ann. § 58-5-10(4)
The term "public utility" includes "every corporation and person furnishing or supplying in any manner … water, sewerage collection, sewerage disposal … to the public, or any portion thereof, for compensation…."

S.C. Code Ann. § 58-5-270
Applications may be made by any corporation, public or private, person … by petition in writing, setting forth any act or thing done, or omitted to be done, with respect to which, under the provisions of Articles 1, 3, and 5 of this chapter, the commission has jurisdiction or is alleged to have jurisdiction. Individual consumer complaints must be filed with the Office of Regulatory Staff…. The commission has jurisdiction to hear complaints regarding the reasonableness of any rates or charges that affect the general body of ratepayers; but the commission may at its discretion refuse to entertain a petition as to the reasonableness of any rates or charges…."

S.C. Code Ann. § 58-5-710
The Public Service Commission, upon petition by any interested party, shall have the right to require any person or corporation, as defined in Section 58-5-10, operating a water or sewer utility system … to appear before the commission on proper notice and show cause why that utility should not be required to take steps as are necessary to provide adequate and proper service to its customers. If the commission upon hearing determines that the service is not being provided, it shall issue an order requiring the utility to take steps as are necessary to the provision of the service within a reasonable time as prescribed by the commission. […]

S.C. Code Ann. Sections 53-3-140, 58-5-210, 58-5-10(4), 58-5-270, and 58-5-710.

The "relief requested" by the Appellants was two-fold: "The customers Halwig and Noller request the Commission require DIUC to immediately restore service through the replacement lines and to compel DIUC to refund the full costs paid by the customers for the replacement lines." (Complaint pp. 3, 4, and 5)

Shortly after filing of the second complaint, ORS requested that DIUC restore service to

the Appellants' dwellings "with the understanding that restoration of service does not waive any position that any party may take in this matter." (Letter, 12-21-2018, Bateman to Boyd) DIUC immediately restored service to the dwellings.[3] Because DIUC currently provides service to the Appellants' dwellings the Appellants have obtained their first requested relief. As such, the claim is moot. See Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 478 (2006) (holding that once FOIA documents produced there is no claim for FOIA violation). Nothing remains to be "ordered" for DIUC to do regarding provision of service; service has been restored and the Commission should not further consider the request. See Byrd v. Irmo High School, 321 S.C. 426, 430, 468 S.E.2d 861, 864 (1996); see also Leventis v. South Carolina Dept. of Health and Environmental Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (2000) (party seeking administrative relief bears the burden of establishing that required conditions of eligibility have been met).

Appellants also asked for a monetary award – specifically, for the Commission "to compel DIUC to refund the full costs paid by the customers for the replacement lines." (Complaint at 3, 4, and 5); see also Complaint at 11 ("The PSC should require that DIUC reimburse the Halwigs and the Nollers for all costs paid to replace the mains serving the portion of Driftwood Cottage Lane above the road wash out."). To be clear, Appellants asked the Commission to order that DIUC reimburse the Appellants approximately $120,000 for costs the Appellants voluntarily paid before signing the CSA wherein they agreed, "In order to protect other customers from sharing in the cost responsibility, it would be the responsibility of the affected Customers to have the Project Mains installed in accordance with the plans they solicited from Thomas & Hutton, at their cost."

[3] Order 2019-424 confirms service to Appellants shall continue while the Appellants' "contractual disputes are pending."

(Complaint at 12, Copy of CSA (discussed, supra, highlighting the Complaint's admission that "The Customer Service Agreement provides that the Halwigs and Nollers were to install the mains at their own expense.")

Appellants brought a claim to undo a contract they admit they signed and that they admit obligates them to pay for the facilities they installed. Had the hearing proceeded, Appellants actually intended to ask the Commission to make a determination that they entered into the CSA contract under duress and that therefore the Commission should enter an order voiding the contract and awarding the Appellants' monetary damages. (Rebuttal Testimonies of M. Halwig at 6, N. Halwig at 6, and B. Noller at 6) All three of the Appellants have stated that "the costs of installation were agreed to be paid by" the Appellants per the CSA but that the CSA was made "under duress with no other alternative but to abandon our home." (Id.) Appellants clearly and specifically asked for a Commission ruling that the Appellants "did not breach the agreement, which [they] were forced into. It was not voluntary, it was extortion." (Id.)

Not only was the request entirely unreasonable and contrary to contract law, it is far beyond the bounds of the Commission's jurisdiction.

Nowhere in the authorizing legislation of the Commission is there a grant of jurisdiction to hear a claim like this -- a contract claim seeking an award of monetary damages. This claim has nothing to do with regulation of rates under S.C. Code Ann. § 58-3-140(A). The relief is not covered by the authorization of this Commission to set utility rates pursuant to S.C. Code Ann. § 58-5-210. Additionally, even though this matter is before the Commission via what has been characterized as a customer complaint, the claims are not "regarding the reasonableness of any rates or charges that affect the general body of ratepayers," as authorized for Commission jurisdiction by S.C. Code § 58-5-270. The fact that there is a customer-utility relationship among

the parties cannot create Commission jurisdiction where there is none. The Commission dismissed the underlying action for lack of jurisdiction.

The Commission ruling below is also in accord with previous rulings of the South Carolina appellate courts. For example, in Lindler v. Baker, 280 S.C. 130, 131–32, 311 S.E.2d 99, 100 (Ct. App. 1984), the South Carolina Court of Appeals found the court of common pleas, not the Commission, has jurisdiction to hear contractual disputes, even if one of the benefits allegedly bargained for in the contract involves provision of sewer services. That is because the matter at issue was –as it is here-- a party's request for interpretation of a contract, not rate setting. The Court in *Lindler* held:

> The question here does not involve the reasonableness of a sewer service rate [*see* Carolina Water Service, Inc. v. S.C. Public Service Commission, 272 S.C. 81, 248 S.E.2d 924 (1978)]; rather it concerns who, because of the lease agreement and purchase contract, must bear the expense of sewer service fees regardless of the amount. Certainly the court of common pleas has jurisdiction to enforce the appellants' alleged contractual right to cost-free sewer service.

Lindler v. Baker, 280 S.C. 130, 131–32, 311 S.E.2d 99, 100 (Ct. App. 1984). Reversing the trial court, the Court of Appeals ruled that the lower court erred in viewing the complaint as one that raised the narrow question of "the reasonableness of a rate charged by a public utility, which, under Section 58–5–210 of the South Carolina Code of Laws (1976)" would have properly been within the Commission's jurisdiction. Id.

In making its decision in *Lindler*, the Court of Appeals cited to Martin v. Carolina Water Services, Inc., 273 S.C. 43, 254 S.E.2d 52 (1979), wherein this Court addressed another contract between a utility and a ratepayer. Despite the contract's involvement of a ratepayer and a utility, the Court found awarding a payment under the contract was not within the Commission's jurisdiction:

> We are of the opinion that the real issue involved in this action is not whether the court of common pleas has jurisdiction to determine rates, but rather whether it has jurisdiction to enforce the payment of the compensation defendant agreed to pay for the property it bought. [Later regulation of one of the parties by the Public Service Commission] would not divest the plaintiff of his right to collect the consideration which the defendant contracted to pay. A part of that consideration was cost free tap-on connections.

Martin v. Carolina Water Servs., Inc., 273 S.C. 43, 46, 254 S.E.2d 52, 53 (1979). Similarly, here, again, the matter at issue is Appellants' request for a monetary award based on a contract issue. The court of common pleas is the proper forum for such a claim, not the Commission.

In addition to the jurisdictional defects recognized by the commission, fundamental fairness and constitutional access to the courts are also both implicated in the Appellants' attempt to litigate this matter before the Commission. If Appellants are permitted to bring this claim for a monetary award to the Commission under the guise of a regulatory matter, Appellants would defeat DIUC's right to a jury trial on the matter and Appellants can avoid defending counterclaims, because neither of these rights of DIUC can be protected by the Commission. To rule in Appellants favor this Court would be inherently finding that DIUC has no right to a jury trial before being subject to a potential monetary award in excess of $100,000 and that DIUC has no right to the counterclaims it could bring if this case was litigated in the proper forum.

If this matter proceeds before the Commission then DIUC faces defending a claim against it without the possibility of counterclaims, without the right to a jury trial, and without access to other relief like an award of fees or costs. Counsel for DIUC explained at the Commission hearing:

> The other problem with proceeding before the Commission in this circumstance is: Not only is the Commission … not empowered by statute to provide the relief requested, it's also not empowered to provide complete relief among the parties. Daufuskie has been required to spend tens of thousands of dollars for me and other folks to put together responses to this complicated Complaint. If successful, in our defense, this Commission is not going to order [Appellants] to pay … any costs. The Commission's not even going to consider the various ways and whether I'm entitled to them. But, if this case is proceeding in State court where it belongs, the

> utility would be permitted to plead fraud, negligent misrepresentation — in other words, they'd be able to defend and say, "Look, you people knew what you were doing. You set all this up, and now you want us to pay for it. That's not right." And we'd be entitled to have someone determine whether we should get that relief or not.

(Hearing Tr. 25, l.19 to 26, l. 14) Thus, in addition to the statutory and jurisdictional problems with the Commission hearing this matter, the forum is deficient in that the Commission cannot adequately and fairly resolve the questions at issue.

The Commission properly considered its jurisdictional grant first and correctly ruled the Commission lacks "subject-matter jurisdiction to hear this dispute where the parties are seeking a monetary award based on a contract issue." The Order should be affirmed.

II. THE COMMISSION DID NOT COMMIT REVERSIBLE ERROR IN NOT ADDRESSING APPLELLANTS' CLAIM THAT RESPONDENT DIUC HAD FAILED TO PROVIDE ADEQUATE AND PROPER WATER AND SEWER SERVICE TO APPELLANTS IN ITS ORDERS DISMISSING APPELLANTS' CLAIM FOR MONETARY DAMAGES.

Pursuant to Rule 208 of the South Carolina Appellate Court Rules, Respondent Daufuskie Island Utility Company, Inc. joins in and adopts **ARGUMENT II** as presented by the Brief of Respondent South Carolina Office of Regulatory Staff.

Additionally, the Commission's properly complied with this Court's rulings by abstaining from exercising jurisdiction over this matter. See discussion, supra, at pages 20-21 ("Any reasonable doubt of the existence in the Commission of any particular power should ordinarily be resolved against its exercise of the power.")

CONCLUSION

For the reasons stated herein, Respondent DIUC respectfully requests that the Court AFFIRM the Orders of the Public Service Commission.

Respectfully submitted,

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April 27, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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Apr 27 2020
SC Court of Appeals

APPEAL FROM
THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001354

Stephen and Beverly Noller and
Michael and Nancy Halwig,.....Appellants,

v.

Daufuskie Island Utility Company, Incorporated, and
South Carolina Office of Regulatory Staff,.....Respondents.

PROOF OF SERVICE

I, Kim H. Weldin, a paralegal with Walker Gressette Freeman & Linton, LLC, hereby certify that I have served this 27th day of April 2020, Respondent Daufuskie Island Utility Company, Incorporated's Initial Brief and Designation of Matter on counsel of record, by placing same in the United States Mail, first class postage prepaid and/or via electronic mail to the following:

Newman Jackson Smith, Esquire Nelson Mullins Riley & Scarborough LLP Post Office Box 1806 Charleston, SC 29401 Counsel for Jack.smith@nelsonmullins.com *Counsel for Appellants Noller and Halwig*	Andrew Bateman, Esquire Jeffrey M. Nelson, Esquire Office of Regulatory Staff 1401 Main Street, Suite 900 Columbia, SC 29201 jnelson@ors.sc.gov abateman@ors.sc.gov *Counsel for ORS*

Kim H. Weldin

April 27, 2020
Charleston, South Carolina

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April 27, 2020

Via US Mail
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Stephen and Beverly Noller and Michael and Nancy Halwig, Appellants v. Daufuskie Island Utility Company, Inc. and South Carolina Office of Regulatory Staff, Respondents,
Appellate Case No. 2019-001354

Dear Ms. Kitchings:

Enclosed please find one (1) copy of the Initial Brief of Respondent Daufuskie Island Utility Company. Inc., Designation of Matter, and Proof of Service. These documents were also submitted electronically to the Court of Appeals for filing on April 27, 2020, via the link at https://sccourt-my.sharepoint.com.

If I may answer any questions or provide additional information, please contact me at 843-727-2249 or Gressette@WGFLLAW.com.

By copy of this letter, I am serving all counsel of record with the documents as set forth in the enclosed Proof of Service.

Sincerely,

/s/
Thomas P. Gressette, Jr.

Encl.

cc: Newman Jackson Smith
Andrew M. Bateman
Jeffrey M. Nelson