THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2020-000266

Commission Docket No. 2017-292-WS

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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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a rate case filed by Carolina Water Service, Inc. ("CWS") with the South Carolina Public Service Commission ("Commission") in November 2017. The application was assigned Docket No. 2017-292-WS. On May 17, 2018 the Commission entered Order No. 2018-345 ruling on the issues presented in Docket No. 2017-292-WS. Among the issues decided by the Commission was that CWS should be allowed to recover in rates several categories of litigation expenses including expenses to defend litigation brought against it in federal court by the Congaree Riverkeeper ("Riverkeeper Litigation").

Following issuance of Order No. 2018-345, the Office of Regulatory Staff ("ORS") filed a petition for rehearing or reconsideration asking that the Commission reconsider a number of issues, including the recoverability of litigation expenses. The Commission granted rehearing in Order No. 2018-494 issued on July 11, 2018 and ordered the parties to address several issues including the treatment of litigation expenses from five separate legal proceedings: two administrative proceedings before the Administrative Law Court; the Riverkeeper Litigation; another federal proceeding in which CWS brought an action against the Environmental Protection Agency ("CWS v. EPA"); and the defense of a condemnation action brought by the Town of Lexington. Order No. 2018-494 (R. __); Order No. 2018-802, p. 24 (R.__).

The rehearing was held on September 6, 2018 and the Commission issued Order No. 2018-802 on January 25, 2019 ruling on the issues presented on rehearing. In Order No. 2018-802 the Commission revised its previous rulings on the treatment of litigation expenses for the five different proceedings as follows: the Commission deferred ruling on recoverability of expenses for the ALC and condemnation cases ($395,426); allowed recovery of litigation expenses for the CWS v. EPA case ($146,420); and denied any recovery of the expenses of defending the Riverkeeper Litigation ($416,093). Order No. 2018-802, p. 24 (R. __).

CWS sought reconsideration of the Commission's decision regarding the recoverability of the Riverkeeper Litigation expenses. After briefing and oral argument, on January 21, 2020 the Commission issued Order No. 2020-57 in which it denied the CWS request for reconsideration. CWS filed its notice of appeal on February 19, 2020.

STATEMENT OF FACTS

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. In 1994 CWS was issued a permit by the South Carolina Department of Health and Environmental Control ("DHEC") 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 closed and connected to a permanent, regional treatment facility when such a connection was "constructed and available." The provision requiring closure of the I-20 facility and connection to a regional facility was included in the permit in furtherance of a policy goal of the CWA to eliminate small treatment facilities in favor of larger, regional facilities owned and operated by public entities. See 33 U.S.C.A. §1288, 33 U.S.C.A. §1281.

The only feasible connection to eliminate the CWS I-20 treatment facility was with a regional system operated by the Town of Lexington. Beginning in the late 1990s, CWS began efforts to interconnect its system with that of Lexington, but despite the efforts of CWS, DHEC, the Central Midlands Council of Governments and various other entities, the issue was not resolved until February 2018 when the I-20 facility was taken over by Lexington as a part of a condemnation action that it brought. See Rehearing Tr., at pp. 167-171.

South Carolina Precedent on Consolidation of Smaller Treatment Facilities into Regional Facilities.[1]

The difficult issues associated with closing smaller facilities and connecting them to regional facilities have been presented to this Court in two cases that provide important background for this appeal. In *City of Columbia v. Board of Health and Environmental Control*,

[1] In this appeal, discussion of these reported decisions is appropriate in the Statement of Facts because they are important to assessing the actions of CWS in defending the Riverkeeper litigation.

292 S.C. 199, 355 S.E.2d 536 (1987) this 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, this 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) this 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.

DHEC Administrative Proceedings 1999-2004.

On March 15, 2004 the DHEC Board ruled on three consolidated appeals from administrative proceedings relating to the CWS I-20 facility and the status of its NPDES permit. Rehearing Ex. 12 (R. __). The appeals heard by the Board were from an order by Administrative Law Judge Ralph King Anderson III who reviewed various issues relating to the I-20 permit. Among other things Judge Anderson ruled that CWS should negotiate an interconnection agreement with Lexington and then submit the proposed interconnection agreement to the Public Service Commission for approval. Judge Anderson's order provided a schedule for making the

connection and closing the I-20 plant if the Commission approved the interconnection agreement and provided that if the Commission disapproved the agreement the permit would expire in 180 days. Rehearing Ex. 12, p. 3 (R.__).

CWS and DHEC appealed Judge Anderson's order to the DHEC Board. While those appeals were pending, CWS and Lexington negotiated an interconnection agreement and submitted it to the Commission for approval. Rehearing Ex. 12, p. 3 (R.__). By the time that the DHEC Board decided the appeals, the Commission had rejected the proposed interconnection agreement. Accordingly, the Board addressed the provision in Judge Anderson's order that terminated the CWS permit 180 days after rejection of the interconnection agreement by the Commission.

> All parties have further agreed that the provision in the ALJ's written decision which orders that Carolina Water Service's permit shall expire 180 days after the PSC denies Carolina Water Service's connection agreement is an error of law. This provision is an error of law not only because Carolina Water Service's permit had already expired at the time that the ALJ issued his Order, but also because the permitting regulations for discharge permits in effect at the time of this case allowed Carolina Water Service to continue operating its facility under an expired permit since the company submitted a timely application for renewal of the permit to the Department.

Rehearing Ex. 12, p. 4 (R.__).

In its ruling, the DHEC Board, after reversing portions of Judge Anderson's order, adopted new provisions that allowed CWS to continue to operate the I-20 treatment plant, required continued efforts to negotiate an interconnection agreement with Lexington and required any such agreement to be submitted to the Commission for approval. Rehearing Ex. 12, p. 5 (R.__).

Commission 2003 Disapproval of Interconnection Agreement.

As referenced in the DHEC Board decision of March 2004, CWS negotiated an interconnection agreement with Lexington and submitted it to the Commission for approval. See Commission Order No. 2003-10 issued in Docket No. 2002-147-S. After reviewing the tortuous

history of the CWS I-20 permit, the Commission refused to approve the interconnection agreement with Lexington because of the effect it would have on CWS customers.

> The Commission concludes that the Agreement is not in the public interest and should therefore be denied. If the Agreement was approved, the proposed rate to be charged to individual customers would be excessive and would result in "rate shock" for customers in the I-20 and Watergate service areas.
> ***
> We further conclude that the Agreement, including the proposed rate, to be unfair, unsupportable, and unreasonable because the record demonstrates that the proposed rate contained in the contract is not reflective of the true allocated cost of serving the CWS customers. Under the Agreement and proposed rate of $3.45 per thousand gallons, the customers of CWS would be charged for facilities which are not utilized to provide their service, as well as charged for facilities and capacity for future growth. Importantly, the proposed wholesale rate would require the CWS customers to subsidize the services provided to the Town of Lexington's current and future customers.

Order No. 2003-10, pp. 12-13.

CWS Efforts to Interconnect with the Lexington System.

The following facts relating to efforts by CWS to interconnect with Lexington's regional wastewater collection system were undisputed in the rehearing before the Commission. Notwithstanding Lexington's completion of its regional line in 1999, it entered into an enforcement agreement with DHEC in July 2000 that recognized that the Town did not then have the capacity to take or treat the influent flow from the I-20 System and would not have such capacity for the foreseeable future. Rehearing Tr. p. 169, ll. 10-14, Rehearing Ex. 7 at p. 12 (R.__).

Upon learning that the expansion of the Cayce regional treatment facility was nearing completion such that Town would have adequate treatment capacity available for the I-20 System influent flow, CWS requested a connection of the I-20 System with the Town's regional line on October 5, 2011 but received no response to that request. Rehearing Tr. p 169, ll. 4-7, Rehearing Ex. 7 at p. 10 (R.__). After learning that the expansion of the Cayce treatment facility was completed in the fall of 2012, CWS again requested a connection to Lexington's regional line on

July 22, 2013. On this occasion, Lexington did respond and on July 31, 2013, confirmed that it now had available to it adequate treatment capacity at the Cayce facility, but stated that it lacked pumping capacity in its own facilities to transport the I-20 System flow through its regional line to Cayce for treatment. Rehearing Tr. p. 169, ll. 8-12, Rehearing Ex. 7 at p. 12 (R.__). The Congaree Riverkeeper, Inc. did not give its 60-day notice of intent to bring a citizen suit against CWS under the federal Clean Water Act until November 4, 2013 – several months after CWS had sought and been again denied an interconnection by Lexington. Rehearing Tr. p. 271, ll. 13-17 (R.__). Lexington refused to provide CWS with wholesale service which would have eliminated the Company's discharge from the I-20 System. Rehearing Tr. p. 328, l. 22 – p. 329, l.1; p. 333, l.24 – p. 334, l.1 (R.__).

The Riverkeeper Litigation.

The Riverkeeper Litigation was filed in January 2015 in federal court 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 the 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. Relief sought by the plaintiff Congaree Riverkeeper against CWS included a "shutdown" of the I-20 system, notwithstanding the impact it would have had on customers. Rehearing Tr. p. 337, l.2 – p. 338, l. 20 (R.__).

On March 30, 2017, Judge Margaret Seymour entered an order granting summary judgment against CWS 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. Details of the proceedings before Judge Seymour are

important, particularly Judge Seymour's analysis of the language of the CWS permit requiring the I-20 facility to be "connected" to a regional facility when the regional system became "available."

> The terms in question are "connect" and "available." The court finds that both "connect" and "available" are ambiguous terms with reasonable interpretations by both parties. Therefore, the court will look to extrinsic evidence to determine the meaning of the terms. Additionally, the court considers the permit in regard to the CWA's purpose, which is to eliminate discharges from the nation's waterways. 33 U.S.C. § 1251.

Congaree Riverkeeper, Inc. v. Carolina Water Service, 248 F.Supp.3rd 733, 753 (2017).

The order goes on to reject the reasonable interpretation offered by CWS that "available" means contractually available in favor of the interpretation offered by the plaintiff that "available" meant "physically available." *Congaree Riverkeeper*, *supra* at 754. Based on that choice of interpretations, Judge Seymour found that CWS had violated its permit requirements and was liable under the Clean Water Act. *Congaree Riverkeeper, supra* at 755. The grant of summary judgment against CWS was based on a legal interpretation of ambiguous permit language and was not based on bad faith or other bad conduct by CWS.

Although Judge Seymour imposed a civil penalty of $1.5 million in her summary judgment order, she subsequently vacated that penalty and allowed the parties to engage in discovery on the amount of the penalty. The parties reached a settlement agreement that was approved by Judge Seymour by order entered on March 19, 2019. Ex. 1 to CWS Supplemental Memorandum, (R.__).

STANDARD OF REVIEW

As set forth in S.C. Code Ann. § 1-23-380(5), "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." On appeal,

> the court may reverse or modify the decision 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.

Id. As recently stated by this Court,

> A decision by the commission is arbitrary "if it is without a rational basis, is based ... not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards." *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985) (citing *Hatcher v. S.C. Dist. Council of Assemblies of God, Inc.*, 267 S.C. 107, 117, 226 S.E.2d 253, 258 (1976); *Turbeville v. Morris*, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943)).

Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff, 427 S.C. 458, 463–64, 832 S.E.2d 572, 575 (2019).

ARGUMENTS

The Commission's decision to deny CWS recovery for its expenses in defending the Riverkeeper Litigation was an error of law that should be reversed by this Court. The Commission's treatment of the request by CWS to recover these litigation expenses is a textbook demonstration of arbitrary and capricious decision-making of the type condemned by this Court in *Daufuskie*, as shown by the following:

- the decision ignored long-standing South Carolina precedent that allows utilities to recover their reasonable and prudently incurred expenses;
- the primary case relied upon by the Commission was *State ex rel. Utilities Commission v. Public Staff North Carolina Utilities Commission,* 343 S.E.2d 898 (N.C. 1986) but the Commission's reliance on that North Carolina precedent is misplaced because the Commission misread the case; and
- the Commission's decision regarding recovery of Riverkeeper Litigation expenses is inexplicably inconsistent with its treatment of litigation expenses in the CWS v. EPA case, demonstrating that its treatment of the Riverkeeper Litigation expenses was arbitrary and capricious.

1. The uncontradicted evidence presented to the Commission regarding the Riverkeeper Litigation showed that CWS's defense of that case was prudent, reasonable, unavoidable and a core function of CWS's responsibilities as a public utility. Accordingly, it was an error of law for the Commission to deny recovery of the expenses of such defense.

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. At the rehearing on this issue the ORS offered no argument that the amount of the fees CWS expended defending the Riverkeeper Litigation was unreasonable. Instead the ORS argued, and the Commission agreed, that all of CWS's Riverkeeper Litigation expenses should be disallowed on the ground that Judge Seymour found that CWS had violated its permit by not interconnecting the I-20 facility to the regional system. Rehearing Tr. p. 412, l. 19 – p. 414, l. 16. (R.__); Order No. 2020-57, p. 8 (R.__). That ruling is a clear error of law for the following reasons.

- CWS is a regulated provider of sewer services. Its I-20 facility treated wastewater under a permit issued by DHEC. Operation of that facility – until it could be interconnected with the regional system – was absolutely integral to CWS's ability to meet its obligation to serve its customers. Accordingly, it was the obligation of CWS to respond to and defend any legal action that threatened its ability to operate the I-20 facility until it could be interconnected to the regional system.
- This Court's ruling in *City of Columbia*, *supra*, established that DHEC had the authority to order the regional provider – the City of Columbia in that case; the Town of Lexington in this case – to take responsibility for the elimination of a temporary discharge – the Midlands Utility facility in that case; the CWS I-20 facility in this case. Given that precedent it was reasonable for CWS to believe that it was the primary responsibility of Lexington to negotiate in good faith an interconnection agreement that would be acceptable to the Commission.
- This Court's ruling in the *Midlands Utility*, *supra*, case held that a utility could not be fined for permit violations when the violations were attributable to the failure of the regional provider to take steps to connect with and eliminate the utility's discharge.

- The Commission, in Order No. 2003-10 issued on January 7, 2003, refused to approve an interconnection agreement between CWS and Lexington that would have allowed the I-20 facility to be closed and its discharge eliminated.
- The DHEC Board ruled in March 2004 that, because the Commission had refused to approve the interconnection agreement with Lexington, CWS could continue to operate the I-20 facility while continuing to attempt to negotiate an interconnection agreement with Lexington that could be approved by the Commission.
- CWS did continue to attempt to negotiate an acceptable interconnection agreement with Lexington, making inquiries repeatedly to Lexington as expansions of the Cayce regional treatment facility and Lexington's regional transmission line were completed.
- Judge Seymour's summary judgment ruling found that the language of the CWS permit was ambiguous and that both parties to the action had offered reasonable interpretations. Her ruling was based on her interpretation of the terms "available" and "connect" and she did not rely on any binding precedent from other cases.

It is not possible to reconcile the summary judgment ruling of Judge Seymour with the ruling of this Court in the *City of Columbia* and *Midlands Utility* cases. It is also impossible to reconcile the summary judgment ruling with the March 2004 order of the DHEC Board that allowed CWS to continue to operate the I-20 facility until an acceptable interconnection agreement with Lexington could be negotiated. If Judge Seymour had taken a view of the permit conditions reflected in this Court's rulings in *City of Columbia* and *Midlands Utility* and the DHEC Board's March 2004 order – which was the interpretation argued by CWS in support of its motion for summary judgment – then summary judgment would have been granted to CWS instead of the Congaree Riverkeeper. It is not however, the intent of CWS to persuade this Court to address the question of whether Judge Seymour was correct in her ruling. That is not an issue for this appeal.

What is important and what makes the Commission's ruling clearly erroneous as a matter of law, is that the circumstances in place from 2004 until Judge Seymour's ruling show that CWS not only was reasonable in defending the Riverkeeper Litigation but was obligated to defend the Riverkeeper Litigation.

The leading cases of *Bluefield Waterworks v. Public Service Commission of West Virginia,* 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co*., 320 U.S. 591 (1944) establish that regulated public utilities have a right protected by the due process provisions of the Constitution to have rates set at a level that will both cover their reasonable expenses and an opportunity to earn a reasonable return. It is therefore an error of law for the Commission to exclude from recovery in rates reasonable expenses incurred by a utility in conducting its utility operations. In this case the expenses of $416,093 that CWS incurred for defending the Riverkeeper Litigation were reasonable and necessary to its utility operations and CWS had a legal right to have those costs recovered in its rates. The Commission's exclusion of such costs was contrary to binding precedent and an error of law. That decision should be reversed by this Court.

2. The primary case relied on by the Commission for its decision to disallow recovery of Riverkeeper Litigation expenses does not support the Commission's decision.

In Order No. 2018-802, in addressing the recovery of Riverkeeper Litigation expenses in response to the ORS petition for reconsideration, the Commission stated that "[w]hile we have located no South Carolina case addressing this issue, we are aware of the North Carolina case of *State ex rel. Utilities Commission v. Public Staff, North Carolina Utilities Commission*, 343 S.E.2d 898 (1986), and this case provides guidance on this issue of recovery of litigation expenses." Order No. 2018-802, p. 18 (R.__). In Order No. 2020-57, ruling on the CWS petition for reconsideration, the Commission again cited only *State ex re. Utilities Commission* as authority supporting its

decision to disallow any recovery for Riverkeeper Litigation expenses. Order No. 2020-57, p. 7 (R.__).

The Commission was mistaken in its reliance on *State ex rel. Utilities Commission* because that case is distinguishable from this one in a critical aspect. In the North Carolina case the court was addressing litigation expenses associated with the amount of a penalty to be assessed on admitted environmental violations.

> In the present case, our Commission found that Glendale's legal fees which were incurred in contesting the amount of the administrative penalty were recoverable as part of its operating expenses. The Commission found that the legal fees were "a reasonable and necessary expenditure" of Glendale which was associated with its water service to its customers. Based on the evidence presented, this conclusion is incorrect and constitutes an error of law under N.C.G.S. § 62–94(b)(4). In the first place, these legal fees were not incurred as an expense "associated" with Glendale's task of providing water to its customers. Rather, these legal fees were incurred as a result of Glendale's failure to provide adequate water service. **It is important to note that Glendale did not contest the imposition of the penalty itself, but only disagreed with the amount of the penalty assessed against it.**

State ex rel. Utilities Commission, *supra* at 907. (Emphasis supplied).

As discussed in Argument 1 above, unlike the utility in *State ex rel. Utilities Commission*, CWS vigorously contested the contention that it had violated its permit. In fact, the CWS position was supported by cases decided by this Court and by a decision of the DHEC Board. Although she ultimately rejected it, Judge Seymour's summary judgment order found the CWS position on the critical issue before her to be reasonable (having found that both parties held reasonable interpretations of the terms of the permit). The circumstances giving rise to the Riverkeeper Litigation expenses are dramatically different from the expenses disallowed by the North Carolina Supreme Court in the *State ex rel. Utilities Commission* case in which the utility admitted violations and only contested the amount of the fines to be imposed. In explaining its disallowance of the litigation expenses, the opinion in the *State ex rel. Utilities Commission* emphasized the importance of the utility's admission that it had committed violations. That case is not authority

supporting the Commission's decision to disallow recovery of the expenses CWS incurred in defending the Riverkeeper Litigation in which CWS vigorously and in good faith defended the contention that it had violated its permit.

3. In the proceeding before the Commission, it allowed recovery of expenses from the CWS v. EPA case. Its treatment of those expenses, while correct, is utterly inconsistent with its disallowance of Riverkeeper Litigation expenses demonstrating that its decision on the Riverkeeper Litigation expenses was arbitrary and capricious.

As part of its effort to resolve issues relating to the permit for its I-20 facility and as part of its effort to defend the action brought by the Congaree Riverkeeper, CWS brought an action in federal court against the EPA and the Town of Lexington seeking a determination that it was Lexington's primary obligation to ensure that the I-20 facility was interconnected with the regional treatment facility operated by the City of Cayce. The expenses of CWS associated with that litigation were considered by the Commission in Order No. 2018-802. The Commission allowed recovery of expenses from the CWS v. EPA case based on the following reasoning.

> 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.

Order No. 2018-802, p. 19 (R.__).

The "smart, strategic effort" pursued by CWS in the "difficult to win" CWS v. EPA case was, of course, the exact same theory that CWS pursued in opposing the motion for summary judgment of the Congaree Riverkeeper. The Commission's order does not explain, nor could it, why CWS's expenses defending itself in the Riverkeeper Litigation should be disallowed while its expenses pursuing a difficult to win plaintiff's case against a federal agency should be allowed.

The efforts of CWS in both actions were intended to allow it to meet its obligation to serve its customers and resolve the interconnection stalemate, either by continuing to operate the I-20 facility until interconnection was available on terms that would be acceptable to the Commission, or by requiring Lexington to acquire the I-20 facility.

The decisions by the Commission to allow recovery of expenses in the CWS v. EPA case while disallowing recovery of the Riverkeeper Litigation expenses are flatly inconsistent and cannot be harmonized. It is a clear example of arbitrary and capricious decision-making of the type recently disapproved by this Court in *Daufuskie Island utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 427 S.C. 458, 832 S.E.2d 572 (2019).

> This Court's review is governed by section 1-23-380 of the South Carolina Code (Supp. 2018). We may reverse an order of the commission "if substantial rights of the appellant have been prejudiced because the [commission's] findings, inferences, conclusions, or decisions" are "arbitrary." § 1-23-380(5)(f). A decision by the commission is arbitrary "if it is without a rational basis, is based ... 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."

Daufuskie Island Utility Company, supra at 463-464 (internal citations omitted). There is no "course of reasoning" that can make the Commission's treatment of the expenses of these two proceedings consistent. Its treatment of the CWS v. EPA expenses demonstrates the arbitrary and capricious approach it took to disallow the Riverkeeper Litigation expenses. That treatment was clear error of law and must be reversed.

CONCLUSION

The Commission's decision set out in Order No. 2018-802 and reaffirmed in Order No. 2020-57, to disallow recovery by CWS of any of its Riverkeeper Litigation expenses was a clear error of law. This Court has ample basis to reverse the decision. It was arbitrary and capricious, inconsistent with this Court's precedent and violative of the constitutionally protected right of CWS to recover its reasonable expenses. The record demonstrates not only that the Commission's decision was wrong but—because the amount of the fees was uncontested—that CWS was entitled to recover in rates all of the $419,093 in Riverkeeper Litigation expenses disallowed in the proceeding below. CWS respectfully requests that the Court reverse the Commission and remand the case with instructions to the Commission to allow CWS recovery of the $419,093 in Riverkeeper Litigation expenses.

Respectfully submitted,

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