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.

FINAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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STATEMENT OF THE CASE

The Appellants filed a Complaint with the South Carolina Public Service Commission ("Commission") on November 16, 2018, in Docket No. 2018-364-WS. On March 20, 2019, the Commission held a hearing solely on the issue of its jurisdiction.[1] After hearing arguments from the Appellants and Respondent Daufuskie Island Utility Company, Incorporated (individually known as "Respondent DIUC", and together with Appellants, collectively known as "Parties"), the Commission issued Order No. 2019-424.

The Commission dismissed the case due to not having the required statutory authority to grant monetary damages, which is the relief Appellants requested through their filed Complaint. The Commission also advised Respondent DIUC not to disconnect service to either of the Appellants' homes during the pendency of this contractual dispute.[2]

The Appellants filed a Petition for Rehearing or Reconsideration on June 21, 2019, which was denied by the Commission in Order No. 2019-523. In this Order the Commission states, "The Commission does have authority under -710[3] 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 services." In this matter, the Appellants' services were restored in December 2018, by Respondent DIUC once it was safe to do so.

On August 15, 2019, the Appellants filed their Notice of Appeal ("Appeal") in this matter.

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[1] Respondent South Carolina Office of Regulatory Staff ("ORS") did not participate in the March 20, 2019 Commission hearing on the issue of its jurisdiction.
[2] See Commission's Order No. 2019-424.
[3] S.C. Code Ann. § 58-5-710.

STANDARD OF REVIEW

The standard of review for orders of the Commission is governed by the Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-380(A)(5), which provides:

> The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions or fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
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> a) in violation of constitutional or statutory provisions;
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> b) in excess of the statutory authority of the agency;
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> c) made upon unlawful procedure;
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> d) affected by other error of law;
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> e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or
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> f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The South Carolina Supreme Court ("Court") has held, "We will not substitute our judgement for that of the PSC where there is room for a difference of intelligent opinion." *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff,* 392 S.C. 96, 103, 708 S.E.2d 755, 759 (2011). *Kiawah Property Owners Group v. Public Service Comm'n of S.C.*, 357 S.C. 232, 237, 593 S.E.2d 148, 151 (2004). The Court's prior opinions further clarify this standard of review. The Court "employs a deferential standard of review when reviewing a decision of the Public Service Commission. If there is substantial evidence to support a decision by the PSC, the Court will affirm the decision." *Heater of Seabrook, Inc. v. Pub. Serv. Comm'n,* 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996).

The Commission stated in its Order No. 2019-424, "We dismiss the case, as the Public Service Commission does not have the statutory authority to grant monetary awards." The Parties argued the jurisdictional threshold issues before the Commission in March 2019, resulting in the Commission's decision to dismiss the case. The Commission reviewed the substantial evidence and properly found that the Appellants' requests for the Commission to grant monetary damages was outside of their jurisdictional authority. The Appellants are the parties challenging the Orders of the Commission; as a result the burden of proof rests upon them to demonstrate that the Orders of the Commission are unsupported by substantial evidence, and that the Commission's decision is clearly erroneous in view of the substantial evidence on the whole record. *Patton v. Public Service Comm'n.,* 280 S.C. 288, 291, 312 S.E.2d 257, 259 (SC 1984).

Orders of the Commission are entitled to deference by the courts and 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). In Commission Order No. 2019-523, the Commission stated, "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 acknowledged in its Order that it has the authority to levy a fine or penalty against a regulated utility if the utility is failing to show cause as to why it is not providing adequate service. In this matter, water and sewer services to the Appellants were restored prior to the Commission's

hearing. The Commission's Orders reflect that the evidence presented at the hearing by the Parties was taken into proper consideration.

A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question. *Allison v. WL Gore & Assocs.*, 394 S.C. 185, 714 S.E.2d 547 (2011). The Commission determined it does not have the jurisdiction authority to award the Appellants the requested monetary damages; and furthermore, any fines or penalties levied by the Commission would go into the State General Fund, not to the Appellants.

FACTS

In 2014 the roadway and water and sewer infrastructure servicing the Appellants' properties in Melrose Plantation ("Melrose") on Daufuskie Island ("Daufuskie") was seriously damaged by Hurricane Arthur. Subsequently, the Melrose Property Owners Association ("MPOA") met and decided to rebuild the area of Driftwood Cottage Lane that was washed out. Respondent DIUC re-installed its infrastructure and service was restored to the Appellants. [4]

In October 2016, Hurricane Matthew ("Matthew") struck Daufuskie. The Appellants, Mr. and Mrs. Noller's ("Nollers") property at 36 Driftwood Cottage Lane, and Mr. and Mrs. Halwig's ("Halwigs") property at 46 Driftwood Cottage Lane again received significant storm damage. A portion of Driftwood Cottage Lane was washed out and Respondent DIUC's main service lines for that area of Melrose were destroyed. Notably, the residents on the south side of the wash-out never lost their water and sewer services.

After Matthew, the MPOA determined it was too risky to rebuild this area of Driftwood Cottage Lane since it was the same area of roadway that was rebuilt in the aftermath of the 2014 hurricane. A short time after Matthew, the Appellants inquired to Respondent DIUC when they

[4] See DIUC's Answer (page 1) in Docket No. 2018-364-WS.

could expect for their water and sewer services to resume. Respondent DIUC replied that as Matthew had destroyed the entire right-of-way servicing the Appellants' properties, that Respondent DIUC was left without a safe and proper way to re-install their services.[5]

On November 8, 2016, the Halwigs filed a consumer complaint with the Respondent ORS[6] regarding the interruptions of their water and sewer services. On the same day of receiving the Halwigs' complaint, Respondent ORS's Consumer Services Department, pursuant to S.C. Code Ann. § 58-4-50 (2019)[7] began its investigation by contacting, via email, the Respondent DIUC, and requesting responses to be provided for the following questions: 1) Specific details on the work required to restore water and sewer service to 46 Driftwood Cottage Lane and 36 Driftwood Cottage Lane; and 2) Estimated date for restoration of water and sewer service.[8]

On December 2, 2016, Respondent ORS's Consumer Services Department replied, via written correspondence,[9] to the Halwigs regarding their complaint against Respondent DIUC. In its December 2, 2016 correspondence, Respondent ORS advised the Halwigs that according to Respondent DIUC Matthew destroyed the company's water and sewer main lines, and the aftermath of Matthew caused severe erosion, with the erosion causing a wash out of the road and surrounding areas, making the water and sewer mains unusable. Respondent DIUC also stated that the washed-out road and surrounding area needed to be restored and adequately protected from future erosion before the water and sewer mains could be reconstructed to provide services to the Appellants' properties. Respondent DIUC further replied that it was exploring other means of

[5] See page 1 of the Reply Brief on Jurisdictional Matters by Respondent Daufuskie Island Utility Co., Inc. With Consent for Decision on the Issue Without Oral Argument in Docket No. 2018-364-WS.
[6] See Exhibit DMH-1 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.
[7] See S.C. Code Ann. § 58-4-50 (2019).
[8] See Exhibit DMH-2, page 16 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.
[9] See Exhibit DMH-3, page 18 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.

access to serve the Appellants' properties and could not provide a specific date for restoration of services.[10]

The Respondent ORS ended its correspondence to the Halwigs by stating, "Based on ORS's review, the Public Service Commission of South Carolina's rules and regulations do not identify a specific time period for water and sewer service restoration."[11] It also stated, "If you are not satisfied with the response from the ORS's investigation, you have the right to file your complaint with the PSC."[12] No appeal or further request for action by Respondent ORS or the Commission was pursued by the Halwigs at that time.

From December 2016 through March 2017, Respondent DIUC provided Respondent ORS with updates regarding its efforts to restore water and sewer services to Driftwood Cottage Lane. On January 27, 2017, via written correspondence, Respondent DIUC provided the Halwigs with a progress update. From the correspondence updates provided, by Respondent DIUC to Respondent ORS, it appeared to Respondent ORS that the Parties were working in a cooperative manner to facilitate access to the Appellants' properties by means of a new right-of-way.[13]

However, the Appellants asserted that due to Respondent DIUC's decision not to install new "mains and utilities, they were required to find an alternate route for mains to replace the one disconnected at the wash out of Driftwood Cottage Lane to the remainder of the mains under Driftwood Cottage Lane."[14] The Appellants were eventually successful at receiving an easement, from the owner of the Melrose Golf Course, for the installation of lines near the golf course's 17th hole. Upon receipt of the easement, the Appellants coordinated/managed the installment of the

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[10] *Id.*
[11] See Exhibit DHM-3, page 19, of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.
[12] *Id.*
[13] See Dawn Hipp's direct testimony, page 6, ll. 9-14 in Docket No. 2018-364-WS.
[14] See Complaint, page 6 in Docket No. 2018-364-WS.

new water and sewer mains and the infrastructure connecting their homes to Respondent DIUC's system. The Appellants summarized the above actions by stating in its Complaint, "(A)ll costs of engineering, permitting and installation were paid by [the] customers to the engineers and contractors and agencies for the replacement mains."[15]

Under the terms and conditions of the Customer Service Agreement ("CSA") that the Appellants entered into with Respondent DIUC, the Appellants were to install the mains at their own expense.[16] Respondent DIUC provided Respondent ORS an unexecuted copy of the CSA on January 31, 2018 and an executed copy of the CSA on August 5, 2018.[17] And, according to the Appellants' complaint filed with the Commission, by the end of September 2018 the installation of the replacement mains was completed and accepted by an engineer.[18]

After the installation was completed, the Respondent DIUC would not provide service to the Appellants' homes until the Appellants agreed to sign an Addendum ("Addendum") to their already executed CSA.[19] The Addendum proposed that the Appellants were required to pay the Respondent DIUC's additional tax obligation of $37,545.93 for the donation of the new lines to Respondent DIUC, which had resulted from a change in the treatment of Contributions in Aid of Construction ("CIAC") under the Federal Tax Cuts and Jobs Act of 2017.[20] The Addendum also required that the Appellants pay Respondent DIUC's attorney fees relating to this matter, and required the Appellants to withdrawal and release any and all claims and complaints the Appellants may have asserted against Respondent DIUC.[21]

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[15] See Complaint, page 3 in Docket No. 2018-364-WS
[16] See Complaint, page 7, in Docket No. 2018-364-WS
[17] See page 6, ll.17-19 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.
[18] See Complaint, page 7 in Docket No. 2018-364-WS.
[19] See Complaint pages 16-18 in Docket No. 2018-364-WS.
[20] *Id.*
[21] See Complaint, page 8, in Docket No. 2018-364-WS.

Respondent ORS received a telephone call on August 3, 2018 from the Appellants' counsel with regards to how Respondent DIUC had the authority to refuse services to the Appellants' homes due to a dispute between the parties relating to the payment of the CIAC tax obligations and attorney's fees. The telephone call to Respondent ORS was followed up by written correspondence from the Appellants' counsel, which provided additional details as well as to whether the Respondent ORS had to approve restoration of water and sewer service. Respondent ORS replied on August 6, 2018 by advising that questions regarding tax liability relating to the CIAC was an issue pending before the Commission in Docket No. 2017-381-A, and that Respondent ORS did not have to approve restoration of water and sewer service.[22] During the months of September and October 2018, additional correspondence was exchanged between the Appellants and the Respondents.

On November 16, 2018, the Counsel for the Appellants filed a Complaint with the Commission.[23] The Appellants' Complaint included a section titled "Relief Requested."[24] In this section the Appellants requested that "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."[25] On December 18, 2018 Respondent ORS offered to informally mediate the dispute between Appellants and Respondent DIUC with neither of the Parties accepting Respondent ORS's offer to mediate.[26]

In the effort to aide in the restoration of services to Appellants pending resolution of their dispute with Respondent DIUC, Respondent ORS filed on December 21, 2018, with the

[22] See page 7, ll. 7-13 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.
[23] See Complaint filed in Docket No. 2018-364-WS.
[24] See page 5 of Complaint filed in Docket No. 2018.364-WS.
[25] *Id.*
[26] See page 8, ll. 18-20 of Dawn Hipp's direct testimony in Docket No. 2018-364-WS.

Commission, written correspondence requesting that the Commission order Respondent DIUC to immediately restore service to Appellants' properties. Five days later on December 26, 2018, Counsel for Respondent DIUC informed the Commission, Counsel for Respondent ORS, and the Appellants that services had been restored to their properties.

ARGUMENT

I. THE COMMISSION PROPERLY DECLINED TO ASSERT JURISDICTION OVER THE APPELLANTS' COMPLAINT REQUESTING THE COMMISSION TO AWARD MONETARY DAMAGES AND TO ORDER RESTORATION OF SERVICE.

The Commission was not required or compelled to address Respondent DIUC's alleged failure to comply with a Commission regulation in its determination that it lacked jurisdiction to award the monetary relief requested by the Appellants. The issue of whether Respondent DIUC was or should have been required to file the CSA for the Commission's approval under the provisions of S.C. Code Regs. 103-541 and 103-743[27] remains irrelevant and unrelated to the core issue of jurisdiction and the Commission's ability to provide the requested monetary relief.

Prior to the Appellants filing this case, Respondent ORS filed written correspondence with the Commission on December 21, 2018 which stated, "that DIUC has the capability to safely restore services to the Complainants immediately."[28] A few days later the Appellants' services were restored. At the March 20, 2019 Company's Motion to Dismiss hearing, the Appellants sought a Commission order directing the restoration of service. The Appellants' services, at the time of the hearing, had been restored three (3) months earlier making the Appellants' request for the Commission to issue a directive order on restoration of services a moot issue.

[27] See S.C. Code Regs 103-541 and 103-743.
[28] See Respondent ORS's Written Correspondences filed stamped December 21, 2018.

However, on June 12, 2019, the Commission issued Order No. 2019-424, which specifically prohibited "any disconnection of service for the residences in question while these contractual disputes are pending."[29] The Commission provided an extra layer of protection by issuing Order No. 2019-523 on July 17, 2019, reiterating that Respondent DIUC could not further disconnect the Appellants' services while contractual disputes were pending. The Commission also specifically recognized in this Order that "service has been and is continuing to be rendered to the Complainants."

The Appellants also sought relief, in their Complaint, by requesting the Commission to "compel DIUC to refund the full costs paid by the customers for the replacement lines."[30] Simply stated, the Appellants requested that the Commission award them monetary damages in the amount which they had paid to install the new water and sewer lines providing regulated services to their properties. However, there is no provision in the relevant statutes or Commission regulations governing the regulation of water or wastewater utilities authorizing the Commission to award monetary damages to a customer in a complaint against their utility. "The PSC is a government agency of limited power and jurisdiction, which is conferred either expressly or implicitly by the General Assembly." *Kiawah Property Owners Group v. Public Service Comm.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004).

The Commission's jurisdictional authority does not include the awarding of monetary damages or resolution of private contract disputes involving public utilities; rather, it is "to supervise and regulate the rates and services 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

[29] See Commission's Order No. 2019-424 in Docket No. 2018-364-WS.
[30] See "Relief Request" section of Complaint filed in Docket No. 2018-364-WS.

Ann. § 58-3-140(A) (2015). "The Public Service Commission is hereby, **to the extent granted**, vested with power and jurisdiction to supervise and regulate the rates and services of every public utility in this State...." S.C. Code Ann. § 58-5-210 (2015) *emphasis added.*

As the Commission properly determined in Order No. 2019-523, its statutory authority permits it to order a water or sewer utility to provide "adequate" service to its customers. It has no additional statutory authority to award damages for a utility's alleged failure to provide "adequate" service. Commission Order No. 2019-523 holds, "The Commission does have authority under [58-5]-710 to levy a fine or penalty against a regulated utility if the utility is failing to show cause 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 Complainants. Even if that weren't the case, any fines or penalties levied by this Commission go into the General Fund of the State, not to the Complainants."

The Appellants have the right to be heard regarding the enforcement of the CSA; however, any claims for damages resulting from the conduct of Respondent DIUC in this matter rests in the civil courts and not in an action for monetary damages before the Commission.

II. THE COMMISSION DID NOT COMMIT REVERSIBLE ERROR IN NOT ADDRESSING APPELLANTS' 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.

The relief sought in the Appellants' Complaint filed with the Commission requested that the Commission order the restoration of service and the award of monetary damages. The Appellants are now asserting that irrespective of the Commission's inability to award damages, it should have included in its Orders a statement or finding addressing Respondent DIUC's failure

to file and seek approval of the CSA by the Commission. While there may be a disagreement between Respondent DIUC and the Appellants regarding the applicability of the Commission's regulations to the CSA, such a finding would not have altered nor influenced the dismissal of their Complaint by the Commission. The fact remains that the Commission lacks jurisdiction to award monetary damages which were sought by the Appellants in their Complaint.

Any complaints regarding the adequacy of service provided by a water or wastewater utility are addressed in S.C. Code Ann. § 58-5-710. The statute provides that the Commission may hear complaints alleging that a utility is not providing adequate and proper service and may order any offending utility to "take steps as are necessary to the provision of the service within a reasonable time as prescribed by the Commission." The provisions of this act are only applicable to water and sewer utilities that are *currently* out of compliance with the requirement that they provide adequate service.

As a matter of law under the standard of review established in S.C. Code Ann. § 1-23-380(A)(5), the Commission would have committed reversible error if it *had* attempted to grant the monetary relief requested by the Appellants. That statute specifically provides, "The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decision are (b) **in excess of the statutory authority of the agency**." (*emphasis added*). In the present case, the Commission simply lacks the required statutory authority to award Appellants monetary damages. It was unnecessary for the Commission to have made a finding or commented in the Orders on whether the Respondent DIUC had violated a provision of the law regarding administrative filings. The Orders of the Commission in this case do not prejudice the Appellants' rights to allege a nexus between

Respondent DIUC's failure to file a copy of the CSA with the Commission and their seeking damages in a civil action.

Even if the Commission had made a finding that the CSA should or shouldn't have been filed, such a statement would be no more than an advisory opinion or mere dicta. The Parties remain free to argue the applicability of the regulations in a civil suit. "It is, of course, axiomatic that the violation of a statute (here an ordinance—interpolated), while negligence per se, will not support a recovery for damages unless such violation proximately caused or contributed to the injury complained of." *Wright v. South Carolina Power Co.*, 205 S.C. 327, 31 S.E.2d 904, 905 (1944) citing *Locklear v. Southeastern Stages*, 193 S.C. 309, 8 S.E.2d 321, 324 (1940). This principle is also applicable to regulations, such as those at issue here. "Regulations are interpreted using the same rules of construction as statutes." *Murphy v. S.C. Dep't of Health and Envtl. Control,* 396 S.C. 633, 639, 723 S.E.2d 191, 195 (2012); *see S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n,* 389 S.C. 380, 389, 699 S.E.2d 146, 151 (2010).

The Commission properly applied the rules of statutory construction in interpreting Regulations 103-541 and 103-743, and S.C. Code Ann. § 58-5-710, as none of these regulations or statutes provide for or authorize the Commission to award damages.[31] "When interpreting a regulation, we look for the plain and ordinary meaning of the words of the regulation, without resort to subtle or forced construction to limit or expand [its] operation." *Murphy,* 396 S.C. at 639–40, 723 S.E.2d at 195 quoting *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control,* 350 S.C. 39, 47, 564 S.E.2d 341, 346 (Ct. App .2002). While the Commission does have limited authority under S.C. Code Ann. § 58-5-710 to levy fines or penalties against a utility which fails

[31] See S.C. Code Regs 103-541 and 103-743;
and S.C. Code Ann. § 58-5-710.

to provide adequate water or sewer service, the express terms of the regulation specifically prohibit any such fines or penalties being awarded to any party as "Any fine or penalty so imposed by the commission shall go into the general fund of the State, unless otherwise provided by law." *Id.*

The Court should give proper deference to the Commission's ruling that it lacks subject matter jurisdiction to hear a dispute where one of the parties is seeking a monetary award based on a contractual issue. "We give deference to the interpretation of a regulation by the agency charged with it [sic] enforcement." *Murphy,* at 640, 723 S.E.2d at 195, *see also, Sloan v. S.C. Bd. of Physical Therapy Exam'rs,* 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006). ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.") No party is better suited to interpret the regulations of the Commission than the Commission itself. "The Public Service Commission has been given authority to supervise and regulate the service of public utilities and to fix just and reasonable standards and regulations. It's reasonable rules and regulations when properly filed and published have the power and effect of law...." *Woody v. South Carolina Power Co.*, 202 S.C. 73, 24 S.E.2d 121 at 123 (1943).

Appellants are not prejudiced by the Orders of the Commission in their efforts to challenge the terms and conditions of the CSA or to obtain monetary damages in a civil action against Respondent DIUC. The Commission was not required to address the underlying claim of Respondent DIUC's compliance with Commission statutes and regulations in not filing for approval a copy of the CSA. Even if the Appellants had raised the issue before the Commission, and the Commission had ruled that Respondent DIUC was in violation of the applicable statutes and regulations in not filing for approval, the Commission still could not have awarded damages.

Regulatory compliance has no bearing on the Commission's inability to award damages or order restoration of service when service was previously restored.

The underlying monetary damages claim of the Appellants could create a possible improper result that the Commission would order, through increased rates, that other customers of Respondent DIUC pay for the restoration of service to Appellants homes if those residences were severely damaged by a hurricane.

Pursuant to S.C. Code Ann. § 58-5-710, a water and sewer utility does have a duty to provide "adequate and proper service to its customers." However, the statute, as well as the regulations, do not provide for awarding damages to a customer for the utility's alleged failure to provide adequate service and remain completely silent as to the timeframe in which service must be provided or restored. If the statute or regulation "is silent or ambiguous with respect to the specific issue," the court then must give deference to the agency's interpretation of the statute or regulation. *Kiawah Development Partners, II v. South Carolina Dept. of Health and Environmental Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014).

There is and was no issue as to a lack of service provided to the Appellants' residences at the time the Commission ruled on this case, as their service was previously restored in December 2018. Due to the Appellants' water and sewer services being restored, that issue was moot prior to the time the Commission made its ruling in this case.

The remaining issues and claims are ones in which the Commission does not have the required jurisdiction. The fact that a contract was not timely filed with the Commission (there is no specific time requirement in the Regulation) cannot and does not confer jurisdiction on the Appellants' demand for monetary damages. Even if the Commission's regulations required it to address the Appellants' complaint regarding Respondent DIUC's alleged failure to file the CSA,

the Commission could, on Respondent DIUC's Motion, waive the contract approval requirement provided in Regulation 103-743, based upon the underlying facts addressing claims for monetary damages. The proper forum for Respondent DIUC and Appellants' rights and obligations under the CSA remain in the Court of Common Pleas, not before the Commission.

The Commission was not required to address the issue of restoration of service for two substantial reasons: (1) service had already been restored by the time the case reached the Commission, therefore making the issue moot, and (2) the issue of a contract being filed with the Commission had no impact on the areas that the Commission does have jurisdiction– namely the actual provision of service. The Commission did not need to address the issue of the propriety of the terms of the CSA between the Appellants and Respondent DIUC not being filed with the Commission, as it has no statutory authority to award the monetary damages sought by the Appellants in their Complaint. There is no specific statutory relief fine or other regulatory action which the Commission is authorized to impose on a utility for failure to file a contract with the Commission.

Fines and penalties may only be imposed under restricted circumstances under S.C. Code Ann. § 58-5-710 based on a finding of the Commission that the utility failed to provide "adequate and proper service" to its customers. The only other remaining possible remedies include the revocation of the utility's certificate of public convenience and necessity or a change in the utilities rates. An action to revoke the certificate of a sewer utility and appoint a receiver under S.C. Code Ann. § 58-5-730 requires that the Commission first make a determination that the utility has "willfully failed to provide adequate and sufficient service for an unreasonable length of time." In reference to the Petition of the Office of Regulatory Staff, 2016 WL 3054859 (SCPSC May 24, 2016),"unreasonable length of time" is not a defined term, but it reasonably appears from the facts

presented in this case that Respondent DIUC did not "willfully" act to stop providing service to the Appellants. The discontinuation of service resulted from a force majeure beyond the control of Respondent DIUC or the Commission. As this was the second time that a storm caused the washout of the Driftwood Cottage Lane and the water and sewer lines servicing the Appellants' residences, neither the MPOA or Respondent DIUC were willing to undertake and be responsible for the new additional costs of rebuilding the lines to the Appellants' property. While Respondent DIUC may have acted in a manner that the Appellants believed was not in their best interest, they did act in manner which reasonably protected the remainder of Respondent DIUC customer base from being forced to pay for the restoration of service to individual customers whose property remained under the continuing threat of costs related to frequent storm damage and erosion.

Appellants cite *Hamm v. Central States Health and Life Co. of Omaha* for the proposition that the Commission has implicit authority to rule on the issues presented in their Complaint. *Hamm* involved a rate increase for insurance which was collected in a fund during the pendency of an appeal. *Hamm v. Central States Health and Life Co. of Omaha,* 299 S.C. 500, 386 S.E.2d250 (1989). After determining that the proposed rate was excessive and thus *unlawful,* the Court held that disbursal of the accumulated fund was warranted. *Id.* Conversely, the situation here directly involves a question of the specific jurisdiction granted to the Commission by the General Assembly. See, *Kiawah Property Owners Group v. Public Service Comm.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004). There is no provision in the statutes cited herein or by the Appellants which even hints or suggests that the Commission has even implied authority to award damages to an individual customer or party. In addition, facts in the present case do not present the existence of an accrued fund from which the Commission could direct disbursal.

The CSA at issue in the present case is one between two customers and the utility. In entering this CSA, Respondent DIUC sought to prevent the costs of installing new lines to serve these two customers from being passed on to the rest of its ratepayers. The CSA terms in question did not impact, pertain to or effect the utility's general fitness, willingness or ability to provide sewerage of water service to any other, or all, of its customers. The CSA only affected the utility's provision of service to these two specifics customers' residences. It remains a private contractual dispute which should be tried before a court of competent jurisdiction, and not before the Commission.

CONCLUSION

The Commission properly found it had no authority to preside over the subject matter jurisdiction of a customer's complaint seeking an award of damages. The Commission committed no error in its interpretation of the rules and regulations vested in it by the South Carolina General Assembly. It is not necessary for the Commission to address the issue raised by the Appellants on Appeal on the matter of Respondent DIUC's alleged failure to comply with a statutory provision to seek approval of the CSA from the Commission. The Commission does not possess the authority to award monetary damages. If the Commission were to authorize any awards for monetary fines or penalties, those funds would go into the general fund of the State, not to the Appellants.

For the reasons stated herein, the Respondent ORS respectfully requests that the Court Affirm the Orders of the Commission which dismissed the Appellants' Complaints on the grounds that the Commission lacked subject matter jurisdiction.

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Respectfully submitted,

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July 13, 2020

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.

CERTIFICATE OF COUNSEL

The undersigned certified that Respondent South Carolina Office of Regulatory Staff's Final Brief complies with Rule 211(b), SCACR.

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