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S.C. SUPREME COURT

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

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

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT

The Respondent's brief submitted by the Office of Regulatory Staff ("ORS") makes several different arguments that each boils down to a single premise: Carolina Water Service ("CWS") lost a summary judgment motion in the action brought by the Congaree Riverkeeper and therefore it may not recover its reasonable expenses incurred in defending that action.[1] That argument is wrong on the law, unsupported by any precedent and inconsistent with other rulings the Commission made in the very orders on appeal. These points were made by CWS in its Appellant's brief, but ORS essentially declined to address them. This reply will briefly address the reasons why the ORS position should be rejected, and the Commission's orders should be reversed.

Recovery of Riverkeeper Litigation Expenses Depends on Whether Those Expenses were Prudently and Reasonably Incurred

The leading case in South Carolina on a utility's right to recover expenses incurred in operating its business is *Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 422 S.E.2d 110 (1992). In that case this Court provided the following guidance for assessing whether a utility's expenses would be allowed for recovery in rates:

> Although 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. … This presumption does not shift the burden of persuasion but shifts the burden of production on to the Commission or other contesting party to demonstrate a tenable basis for raising the specter of imprudence.

Hamm, id p.113 (internal citations removed). The key terms used by this Court in *Hamm* are "reasonable" and "prudent." In the present case the question presented by the CWS appeal is whether the Commission committed error of law by focusing on the summary judgment ruling

[1] ORS concedes the reasonableness of the amount of the legal fees incurred by CWS in defending the Riverkeeper Litigation.

instead of the question of whether CWS was reasonable and prudent in defending the Riverkeeper Litigation.[2]

CWS Made Reasonable and Prudent Attempts to Eliminate the Discharge from Its I-20 Plant

There was no evidence in the record to support a finding that CWS was unreasonable or imprudent in defending the Riverkeeper Litigation. The focus of that case was the elimination of the Saluda River discharge of the CWS I-20 wastewater treatment plant by connecting the CWS sewer collection system into a regional system owned by the Town of Lexington. As set out in CWS's Appellant's brief, CWS had attempted for years to negotiate an interconnection agreement with Lexington. Appellant's brief, pp. 5-8. Those efforts were unsuccessful, but the record is clear that CWS made repeated, good faith attempts to interconnect, including the negotiation of an agreement that was rejected by the Public Service Commission. The efforts to interconnect were reasonable and prudent and provided a strong basis for CWS to defend itself from the claims asserted in the Riverkeeper Litigation.

The ORS addressed this argument in its Respondent's brief and its response is telling. ORS concedes that CWS presented evidence to the Commission that showed that it had communicated with the Town of Lexington in attempting to arrange for an interconnection agreement. Respondent's brief, p. 7, footnote 3. ORS dismisses these attempts to negotiate by CWS because "the Clean Water Act is a strict liability statute" and the "reasonableness or bona fides of an alleged violator's efforts to comply with its permit is not relevant in determining whether a violator is liable under the Act." Respondent's brief, p. 7, footnote 3, citing *Congaree Riverkeeper v.*

[2] It is not surprising that the Commission's orders No. 2018-802 and No. 2020-57 make the same mistake that ORS made in its brief of focusing on the federal court summary judgment decision. In those orders the Commission essentially adopted the position advocated by the ORS.

Carolina Water Service, 248 F.Supp.3d 733 (D.S.C. 2017). This argument by ORS shows the error of law that it and the Commission made in addressing the recovery by CWS of its litigation expenses: under *Hamm, supra,* recovery depends on the reasonableness and prudence of CWS in defending the Riverkeeper Litigation, not whether the federal judge determined that there was a violation of the Clean Water Act. That analysis by the ORS and the Commission is inconsistent with this Court's precedent and is an error of law.

Cases Decided by This Court Demonstrate the Reasonableness of CWS's Defense of the Riverkeeper Litigation

The essential question presented by the Riverkeeper Litigation was how the impasse over the interconnection of the I-20 plant would be resolved and what entity had the primary responsibility for resolving it. In the related cases of *City of Columbia v. Board of Health and Environmental Control,* 292 S.C. 199, 355 S.E.2d 536 (1987) and *Midlands Utility, Inc. v. S.C. Department of Health and Environmental Control,* 313 S.C. 210, 437 S.E.2d 120 (1993) this Court answered the question of what entity would have the primary responsibility for resolving the type of interconnection issue that CWS faced with the I-20 plant. The *City of Columbia* case involved a similar impasse between a private sewer utility like CWS and a regional provider of treatment service like Lexington. In that case this Court held that the Department of Health and Environmental Control ("DHEC") had the authority to order Columbia, as the regional provider, to resolve the impasse by either acquiring the sewer treatment plants of the private utility or allowing them to be interconnected. The related *Midlands Utility* case, decided several years after the *City of Columbia* case, held that the utility in the position of CWS could not be fined for violating its discharge permit where the violations were caused by the failure of the regional provider to either acquire the systems or allow them to be interconnected.

These two cases are critical to evaluating the prudence and reasonableness of CWS decisions regarding its response to the Riverkeeper Litigation. Based on these rulings, it was reasonable for CWS to believe that it was the responsibility of the Town of Lexington to break the impasse and either acquire the I-20 system or allow it to be interconnected to Lexington's system. There was every reason to expect that the holding of this Court in *City of Columbia* and *Midlands Utility* would be applied in the Riverkeeper Litigation. If that reasoning had been followed, then Lexington would have been ordered to break the impasse and CWS would not have been held to have violated the Clean Water Act. The defense by CWS of the claims in the Riverkeeper Litigation was well founded on long-standing precedent from this Court. It was reasonable and prudent for CWS to defend the Riverkeeper Litigation as it did.

The Summary Judgment Order Itself Demonstrates that CWS was Reasonable and Prudent in Defending the Riverkeeper Litigation

In her order granting summary judgment to the Riverkeeper, Judge Seymour determined that the critical question of whether CWS had violated the conditions of its Clean Water Act permit turned on the meaning of two terms.

> 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.

Congaree Riverkeeper v. Carolina Water Service, 248 F.Supp.3d 733, 753 (D.S.C. 2017) (emphasis supplied). After finding that both parties had offered reasonable interpretations of the ambiguous terms, the order found that CWS violated its permit by failing to connect to the Lexington system in 1999 "in any manner possible" when that system became physically available, notwithstanding the lack of an agreement for interconnection that could be approved by the Commission. *Congaree Riverkeeper, Id.* at 755.

In assessing the question presented by this appeal – the reasonableness and prudence of CWS's defense – two things from the ruling are critically important. The first is the order's acknowledgment that CWS had offered, in its motion for summary judgment, a reasonable interpretation of the ambiguous language in its permit. Had Judge Seymour chosen to adopt that reasonable interpretation she would have found that CWS had not violated the Clean Water Act. The second significant aspect of this ruling is that it was not based on any precedent addressing a similar issue. The order interpreted the obligations of CWS under its permit as a matter of first impression. If the position taken by CWS in the Riverkeeper Litigation had been at odds with precedent, then that might provide a basis for a finding that its defense of the case was unreasonable. No such precedent as cited, and, as discussed above, there was precedent from this Court supporting the position taken by CWS. Thus, the summary judgment order, although decided against CWS, supports the conclusion that CWS's defense of the Riverkeeper Litigation was reasonable and prudent.

The North Carolina Case Relied on by the ORS and the Commission Does Not Support Disallowance of the Riverkeeper Litigation Expenses

The primary case relied on by the Commission in its orders on appeal was *State ex rel. Utilities Commission v. Public Staff North Carolina Utilities Commission,* 343 S.E.2d 898 (N.C. 1986). CWS explained in its Appellant's brief why the Commission's reliance on that case was misplaced. See Appellant's brief, pp. 14-16. In its brief ORS argues that *State ex rel. Utilities Commission* does support the Commission's decision to disallow recovery of the Riverkeeper Litigation expenses. See Respondent's brief at pp. 14-16. However, the ORS brief never addresses the argument made by CWS as to why the case does not support disallowance.

The *State ex rel. Utilities Commission* case presented the question of whether the utility could recover the costs of defending the amount of an environmental fine imposed on the company.

In disallowing recovery, the North Carolina Supreme Court pointed out that "[i]t 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, Id*. p. 907. Since the Riverkeeper Litigation expenses incurred by CWS were incurred while contesting any finding of a permit violation and the imposition of any fine, this distinction made by the *State ex rel. Utilities Commission* opinion is critically important. The ORS brief does not attempt to explain why it was appropriate for the Commission to disregard the distinction made by the North Carolina court. The clear implication of the distinction made in that decision between contesting the imposition of a fine versus the amount of the fine is that recovery of expenses incurred in defending imposition of a fine would be treated differently. The *State ex rel. Utilities Commission* decision does not support the Commission's decision to disallow recovery of the Riverkeeper Litigation expenses.

The ORS Brief Fails to Provide a Persuasive Explanation of the Commission's Inconsistent Rulings in the Orders on Appeal

In its Appellant's brief CWS argued that the Commission's treatment of litigation expenses from a different but related case demonstrate that its treatment of the Riverkeeper Litigation expenses was arbitrary and capricious. Appellant's brief, pp. 16-17. The related case was an action by CWS against the EPA and Town of Lexington seeking a declaration that it was the obligation of Lexington to ensure that the I-20 plant was interconnected. The question presented in that action was the same question presented in the Riverkeeper Litigation and that case was dismissed. The Commission's decision to allow CWS to recover its litigation expenses from the case against the EPA was correct, but it is not possible to reconcile that decision with the Commission's refusal to allow recovery of the Riverkeeper Litigation expenses. The ORS brief at pp. 26-27 makes a half-hearted attempt to distinguish the two actions by pointing out that, in the case against the EPA, there was "no finding of a violation of federal law" thereby once again confusing the

environmental issues being litigated in the underlying cases with the separate utility law question of whether reasonable and prudent expenses can be recovered in rates.

CONCLUSION

The ORS brief, like the Commission's orders on appeal, commits a fundamental error of law by equating the ruling on summary judgment against CWS with a determination of whether CWS can recover its expenses incurred in defending the case. That approach is not supported by this Court's precedent and does not address the correct question: were the Riverkeeper Litigation expenses reasonably and prudently incurred by CWS as part of its utility operations. It is overwhelmingly clear that CWS was reasonable and acted prudently in its defense of the Riverkeeper Litigation and that the Commission disallowed recovery because it committed an error of law by applying the wrong standard of review of the CWS expenses. Accordingly, CWS requests that this Court reverse the Commission's orders and remand the case with instructions to the Commission to allow CWS to revise its rates to include recovery of the disallowed Riverkeeper Litigation expenses.

Respectfully submitted,

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