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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

AMICUS CURIAE BRIEF OF CONGAREE RIVERKEEPER, INC.

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STATEMENT OF INTEREST

Congaree Riverkeeper, Inc. is a South Carolina non-profit whose mission is to protect and improve water quality, wildlife habitat, and recreation on the Broad, Lower Saluda, and Congaree Rivers through advocacy, education, and enforcement of environmental laws.

Consistent with this mission, Congaree Riverkeeper routinely monitors pollution issues on the aforementioned rivers. For many years, Congaree Riverkeeper monitored pollution from the Carolina Water Service ("CWS") I-20 facility, a wastewater treatment plant near the Saluda River in Lexington County, South Carolina. When CWS had been out of compliance with its Clean Water Act ("CWA") permit for over fifteen years, and there seemed to be no resolution to the ongoing problems in sight, Congaree Riverkeeper sent a notice of intent to sue as required by the CWA in November of 2013. Congaree Riverkeeper filed suit ("Riverkeeper Environmental Litigation") in the United States District Court for the District of South Carolina in January of 2015 pursuant to section 505 of the CWA, 33 U.S.C. § 1365.

After protracted litigation, on March 30, 2017, the District Court found CWS to be liable for violations of the CWA in (1) failing to connect to the regional sewer system and eliminate its discharge from the Saluda River as its permit required; and (2) violating certain effluent limitations contained in its permit. Congaree Riverkeeper has a strong interest in the instant matter given that a ruling by the Supreme Court could significantly diminish the import of this victory by second-guessing the District Court's sound reasoning, and by allowing CWS to pass on the costs of its failure to comply with the CWA to the utility's ratepayers in contravention of the CWA and its' citizen suit and attorneys' fees' provisions.

STATEMENT OF ISSUES

I. Should CWS be permitted to raise rates to recover attorneys' fees from its ratepayers when doing so would undermine the important ruling in the Riverkeeper Environmental Litigation?

II. Should CWS be permitted to raise rates to recover attorneys' fees from its ratepayers when doing so would undermine the purposes of the CWA and its citizen suit and attorneys' fees provisions?

STATEMENT OF THE CASE

The Appellant CWS is appealing two orders issued by the Public Service Commission of South Carolina: Order No. 2018-802, dated January 25, 2019 and Order No. 2020-57 dated January 21, 2020. The issue on appeal is the Commission's decisions issued in both Orders not allowing CWS to recover, through rates charged to its ratepayers, litigation expenses associated with its unsuccessful defense of the Riverkeeper Environmental Litigation, *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733 (D.S.C. 2017). The District Court granted summary judgment to Congaree Riverkeeper, concluding CWS was liable under the CWA for CWS's ongoing discharge of wastewater and failure to connect its I-20 facility to the regional system in violation of its CWA permit, and CWS's repeated violations of effluent limitations and other provisions of its CWA permit designed to protect water quality. The District Court initially fined CWS $1.5 million for the failure to connect to a regional wastewater treatment facility, and $23,000 for multiple unlawful effluent discharges into the Saluda River. On reconsideration, the District Court only vacated the $1.5 million fine to allow for further discovery, and denied CWS reconsideration of the CWA liability finding and the $23,000 fine. The parties subsequently entered into a settlement agreement.

The Commission concluded CWS should not recover the litigation expenses associated with the Riverkeeper Environmental Litigation, because the expenses were incurred in defending a lawsuit in which CWS was not the prevailing party and was found liable for violating the CWA. The Commission further reasoned it would be improper to impose these expenses on ratepayers when they already pay for CWS to conduct its regulated services in compliance with applicable federal and state laws. CWS now improperly attempts to recover those expenses from ratepayers in contravention of the CWA and its citizen suit and attorneys' fees provisions.

ARGUMENT

CWS's request to recover attorneys' fees from the Riverkeeper Environmental Litigation as part of a rate increase has two important - and detrimental - consequences for the public of South Carolina: (1) the recovery of attorneys' fees from ratepayers would diminish the significance and value of the important CWA victory obtained by Congaree Riverkeeper in its novel federal litigation; and (2) inclusion of the attorneys' fees in the rate increase would punish the utility's ratepayers for legal costs unnecessarily incurred by CWS in its long-running and blatant violations of the CWA. CWS's ratepayers should not be held responsible for the legal expenses CWS incurred in its overly litigious and ill-advised defense of the Riverkeeper Environmental Litigation, litigation which ultimately resulted in a liability ruling against CWS and a final judgment whereby CWS agreed to pay penalties to the federal government, contribute funds to a local water quality efforts, and pay Congaree Riverkeeper's attorneys' fees. CWS's defense of that case was not "prudent, reasonable, unavoidable and a core function of CWS's responsibilities as a public utility." Appellant's Initial Brief, p. 11. The legal fees at issue were not incurred as an expense associated with the task of providing water or wastewater service to its ratepayers, but were incurred as a result of CWS's seventeen-year-long failure to comply with

the CWA. CWS's attempt to recover fees from its ratepayers would diminish the public value of the Court's ruling and the vital purpose of deterrence and punishment envisioned by the CWA citizen suit and attorneys' fees' provisions.

I. The Riverkeeper Environmental Litigation was a Critically Important Victory for the Public Interest.

Prior to Congaree Riverkeeper's lawsuit, CWS had been out of compliance with its CWA permit for over 15 years. Notably, prior to filing suit, Congaree Riverkeeper sent a notice of intent to sue as required by the CWA in November of 2013. Congaree Riverkeeper waited over a year– until January of 2015 – before commencing this litigation. During this time, Congaree Riverkeeper engaged in settlement discussions with CWS to try and resolve this matter without necessitating this resource-intensive federal court litigation.

During the federal court litigation, CWS repeatedly sought to dismiss or stay the Court's resolution of the merits of this dispute, resulting in extensive motions practice by the parties. In early 2015, CWS first moved to dismiss Congaree Riverkeeper's claims, arguing that the Court lacked subject matter jurisdiction under the CWA citizen suit provision, that Congaree Riverkeeper did not have standing, and that Congaree Riverkeeper's claims were barred by the statute of limitations. *Congaree Riverkeeper, Inc. v. Carolina Water Serv., Inc.*, 248 F. Supp. 3d 733 (D.S.C. 2017) (Dkt. 7-1). The Court denied CWS's motion. *Id.* at Dkt. 21. CWS next sought to stay Congaree Riverkeeper's litigation, a motion that was similarly denied. *Id.* at Dkt. 39. The parties then conducted extensive discovery, including numerous requests for production of documents, requests for admission, and interrogatories. Discovery was so contentious that Congaree Riverkeeper had to go to the trouble and expense of filing a motion to compel the production of financial records from CWS's parent company, Utilities, Inc., in the Northern District of Illinois because CWS repeatedly refused to produce relevant financial records in

discovery. *See Congaree Riverkeeper v. Carolina Water Serv.*, C.A. No. 1:16-cv-03512 (N.D. Ill. Mar. 23, 2016).

On March 30, 2017, the Court granted Congaree Riverkeeper's motion for summary judgment and entered judgment in favor of Congaree Riverkeeper. *Congaree Riverkeeper*, 248 F. Supp. 3d at 756-57 The Court enjoined CWS from further discharges to the Saluda River and required CWS to connect to the regional system as of April 1, 2018. *Id.* The Court also imposed civil penalties in the amount of $1.523 million against CWS for its numerous violations of the CWA. *Id.* at 756. In issuing this ruling, the Court ruled in favor of Congaree Riverkeeper on all claims in the litigation and provided Congaree Riverkeeper with all of the relief requested by the Complaint. The Court implicitly noted the magnitude of this case, explaining that, until this litigation, "Defendant has kept its plant open for seventeen years after it was required to connect. While regional connection does require other actors' assistance and approval, Defendant cannot be rewarded for its lack of a good faith effort to engage in negotiations and receive the required approvals." *See id.* at 747; 749 ("Defendant has continued to engage in profitable activity, in violation of its permit, for seventeen years."). The Court explicitly noted that no one had undertaken a federal enforcement action prior to Congaree Riverkeeper's suit. *Id.* at 755.

After this ruling, and given the protracted litigation, Congaree Riverkeeper moved for its attorneys' fees. *Id.* at Dkt. 76. CWS moved for reconsideration, rehashing all of its arguments in full. *Id.* at Dkt. 81. While allowing the parties to present renewed evidence on the issue of the amount of an appropriate penalty, the Court rejected CWS's arguments for a second time, finding that "[t]he court determined that Plaintiff's interpretation of the NDPES permit was correct." *Id.* at Dkt. 105 at 5. Congaree Riverkeeper ultimately settled the remedial phase of this litigation for certain environmental donations and for $385,000 in attorneys' fees, *see id.* at Dkt.

129-1, significantly less than the $416,093 that CWS now seeks to recover by raising rates for its ratepayers. As part of the final settlement and judgment, CWS recognized that the District Court victory was binding precedent and that it could not use the settlement on remedy to seek vacatur of the District Court's order. *Id.* at 8.

Yet CWS now essentially seeks to re-litigate the federal litigation with arguments to this Court that, if accepted, would undermine the crucial public interest implications of the legal victory secured by Congaree Riverkeeper. The arguments CWS raises before this Court have already been resolved by the District Court, and CWS cannot use this Court as one more vehicle to argue that it did nothing wrong in operating in violation of the CWA for over fifteen years.

CWS's claim that the grant of summary judgment against CWS was solely "based on a legal interpretation of ambiguous permit language and was not based on bad faith or other bad conduct by CWS" is incorrect and irrelevant. Appellant's Initial Brief, p. 9. CWS's arguments here, although claiming to have no intent "to persuade this Court to address the question of whether Judge Seymour was correct in her ruling[,]" *id.* at 13, are simply another attempt to undermine Judge Seymour's opinion.[1] CWS's reliance on Judge Seymour's statement that the permit was "ambiguous" is misplaced given her unambiguous finding that CWS was ultimately responsible for securing a connection (and had failed to make one for over 15 years). Judge Seymour soundly noted that while the language of the permit was ambiguous, there were numerous surrounding circumstances that supported Congaree Riverkeeper's ultimately prevailing interpretations. For example, the District Court noted that South Carolina Department of Health and Environmental Control had "repeatedly required Defendant to connect," and that CWS apparently "understood that the onus was on Defendant to connect, as demonstrated by

[1] Obviously this Court cannot overturn the District Court's holding as any appeal would have to have been made to the United States Court of Appeals for the Fourth Circuit. This does not diminish the fact that CWS attempts to relitigate matters already resolved by a federal court, however.

Defendant seeking and receiving a construction permit in 1998 to connect the I-20 Plant." *Congaree Riverkeeper*, 248 F. Supp. 3d at 754.

Moreover, in response to CWS's vociferous arguments that someone else was to blame (the same arguments CWS rehashes here), the District Court found that CWS' discharge was "serious" and that "Defendant failed to undertake any attempt to comply with the 1995 permit between 2002 and 2014." *Id.* at 755. CWS cannot continue to advance the theory that it was "reasonable" 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." Appellant's Initial Brief, p. 12. Whether or not CWS was "reasonable" was clearly resolved in the Riverkeeper Environmental Litigation:

> The Permit puts the onus on Defendant to provide a satisfactory agreement for PSC's approval. The prior denials demonstrate what PSC will find acceptable in a proposed agreement. Further, Defendant has the obligation to contract with Town or take other measures to fulfill the Permit requirements. Defendant has kept its plant open for seventeen years after it was required to connect.

Congaree Riverkeeper, 248 F. Supp. 3d at 747. Moreover, Judge Seymour rejected CWS's claim that reductions to any penalty amount were merited based on good-faith efforts. *Id.* As the Court noted, the CWA 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 [CWA]." *Id.* at 755 (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Servs.*, 890 F.Supp. 470, 496 (D.S.C. 1995)). CWS's repeated arguments here regarding its alleged good faith efforts to comply continue to demonstrate CWS's complete failure to apprehend that, under the CWA's strict liability scheme, its good faith efforts are of no import. Accordingly, CWS was not reasonable to defend a lawsuit where courts have resoundingly found excuses to non-compliance to be irrelevant. Rather, it was a poor choice by

CWS to continue litigating an issue that was never going to be decided in its favor. *See, e.g., Cal. Pub. Interest Research Grp. v. Shell Oil Co.,* 840 F. Supp. 712, 714–15 (N.D. Cal. 1993) (internal quotations, brackets, and citations omitted) ("neither good faith [nor] impossibility . . . are accepted as valid defenses to liability . . . In short, excuses are irrelevant; under the Clean Water Act the party must either achieve the discharge levels it has been allowed, or pay the consequences of its discharge, or stop discharging."); *see also Proffitt v. Lower Bucks Cnty. Joint Mun. Auth.*, No. 86-7220, 1987 WL 16674, at *4 (E.D. Pa. Sept. 1, 1987) ("While the difficulty or impossibility of complying with the Act and the permit issued thereunder may be appropriate considerations in fashioning a remedy for a violation, such matters are irrelevant in determining whether a violation has occurred."); *United States v. City of Hoboken*, 675 F. Supp. 189, 198 (D.N.J. 1987) (impossibility defense is "wholly antithetical" to statutory purpose and "is therefore at war with the Act").CWS has argued this issue regarding the Town of Lexington's responsibility *ad nauseum.* In fact, CWS tried to present this to Judge Seymour *after* her ruling finding CWS to be liable for violations of the CWA. As noted above, the Court denied a Motion for Reconsideration filed by CWS on this issue. *See Congaree Riverkeeper*, 248 F. Supp. 3d 733 (Dkt. 105). CWS also sought – post-liability ruling – to substitute the Town of Lexington as a party or join the Town of Lexington as a necessary party; both of these efforts were soundly rejected. *Id.* Nonetheless, CWS now echoes its theory that the Town of Lexington was ultimately responsible for ensuring the connection – the same theory that CWS had argued in the *CWS v. EPA* case, which was dismissed. Appellant's Initial Brief, p. 16. In denying CWS's request for its ratepayers to pay for its Riverkeeper Environmental Litigation expenses, the Public Service Commission properly noted that the *CWS v. EPA* case was "dismissed and would have been difficult to win[.]" Commission. Order No. 2018-802, p. 19. CWS now again asserts that it

reasonably believed it was never its responsibility to ensure a connection. This argument now made countless times to multiple courts and regulatory bodies is in contravention of Judge Seymour's clear finding that CWS failed to comply with its permit for over seventeen years, made no efforts to comply for twelve years, and "appeared to understand that the onus was on [CWS] to connect[.]" *Congaree Riverkeeper*, 248 F. Supp. 3d at 754-55.

Furthermore, the Riverkeeper Environmental Litigation was significant because it resolved not just the interconnection issue, but also CWS's numerous and repeated violations of the effluent limitations contained in its permit. *Id.* 755-56. The sewage discharges at hand in the litigation were considered "serious," and CWS was penalized accordingly for its failure to comply with the CWA. *Id.* at 755. CWS fails to even mention the numerous effluent limitations violations it was penalized for and how its theory that its "reasonable" belief of bearing no interconnection responsibility justifies having ratepayers foot the bill for these clear and repetitive permit violations.

In sum, Congaree Riverkeeper's litigation against CWS was well-founded and a complete victory for Congaree Riverkeeper and the public interest. The District Court's ruling was unequivocal in finding CWS to be liable for multiple serious violations of the CWA, and was the ultimate reason that the decades-old pollution at issue got remedied. If this Court were to accept CWS's position that this litigation was reasonable and necessary and that CWS should recover its attorneys' fees from its ratepayers, it would diminish the value of a federal court judgment that took Congaree Riverkeeper years to achieve, and that was thoroughly litigated by all parties involved. Accepting CWS's arguments here would also serve to implicitly second-guess the District Court's decided judgment that the onus was on CWS to remedy its violations and that its

failure to do so resulted in liability and the imposition of remedial relief designed to punish the company. The Court should reject CWS's arguments for this reason alone.

II. Allowing CWS to Recover its Litigation Expenses from Ratepayers Would Contravene the Purpose of the Clean Water Act' and its Citizen Suit and Attorneys' Fees' Provision.

Not only would any approval of CWS's request diminish the value of Congaree Riverkeeper's federal court victory, but any such approval would also contravene the goals and purposes of the CWA's citizen suit provision. The CWA was enacted with the broad goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C.A. § 1251. The citizen suit provision supports this broad goal by providing that "any citizen may commence a civil action on his own behalf against any person ... who is alleged to be in violation of an effluent standard or limitation under this chapter." 33 U.S.C. § 1365(a). Courts have noted that the citizen suit provision has the "central purpose of permitting citizens to abate pollution when the government cannot or will not command compliance." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 62, 108 S.Ct. 376 (1987); *See also Lockett v. E.P.A.*, 319 F.3d 678, 684 (5th Cir. 2003) (quoting *N. & S. Rivers Watershed Ass'n, Inc. v. Town of Scituate*, 949 F.2d 552, 555 (1st Cir.1992)) ("Citizen suits thus "enable private parties to assist in enforcement efforts where Federal and State authorities appear unwilling to act.").

Key to the citizen suit provision of the CWA is the availability of attorney's fees for the prevailing party. 33 U.S.C.A. § 1365(d). The purpose of attorney's fees is "to promote citizen enforcement." *Roosevelt Campobello Int'l Park Comm'n v. U.S. E.P.A.*, 711 F.2d 431, 437 (1st Cir. 1983). Furthermore, "[s]tatutory provisions authorizing an award of litigation costs often serve to incentivize the achievement of statutory objectives, and therefore an award is usually

appropriate when a party has advanced the goals of the statute invoked in the litigation." *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 878 (8th Cir. 2013) n. 20 (internal quotations removed). In addition to attorneys' fees, defendants who are found liable for CWA violations also face court-imposed penalties. The penalty provision of the CWA carries the vital purpose of "retribution and deterrence, in addition to restitution[.]" *Tull v. United States*, 481 U.S. 412, 422–23 (1987). The Supreme Court has noted that monetary sanctions in CWA cases:

> [D]o more than promote immediate compliance by limiting the defendant's economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 120 S. Ct. 693, 706 (2000) (internal quotations omitted). The Supreme Court has noted that under the CWA, "a defendant once hit in its pocketbook will surely think twice before polluting again." *Id.* at 707.

CWS' attempt to recover its attorneys' fees from ratepayers undermines the purpose of the citizen suit provision of the CWA and minimizes the economic incentives to comply with the CWA that Congress envisioned. Because Congaree Riverkeeper prevailed in the Riverkeeper Environmental Litigation, it was statutorily-entitled to recover penalties and its litigation costs under the framework of the CWA. As noted above, Congress envisioned this sort of recovery as part of the costs to polluters who refused to comply with the Act.

CWS would minimize this loss by recovering its own attorneys' fees from its ratepayers, effectively punishing them for its decided choices not to comply with federal law. If accepted, CWS's rate increase would turn egregious noncompliance with the law into a course of conducting regular business. Public utilities like CWS could simply refuse to comply with federal mandates, then, if caught doing so, place part of the burden of non-compliance on their

ratepayers who had no involvement in the company's unlawful decision making or behavior. CWS's proposed increase would reward parties, who, like CWS, fail to comply with the law for years, vigorously litigate a case for years (costing the Court and opposing counsel significant time and expense), and are only finally prevented from unlawful conduct by a Court order.

Congress did not envision that the citizens it intended to protect through the CWA would share the economic burden of a violator's noncompliance. Such a notion is inapposite to the CWA's scheme which allows citizen-plaintiffs to recover penalties and the costs of litigation, including attorneys' fees, from violators of the CWA. 33 U.S.C.A. § 1365(d). Congress also did not envision that recalcitrant defendants could turn around and recover the costs of non-compliance from innocent ratepayers who have no agency over CWA compliance. The Commission committed no error of law in holding that CWS is not entitled to recover expenses which it incurred in defending the Riverkeeper Environmental Litigation. Congaree Riverkeeper secured a victory for the public by putting an end to over seventeen years of CWA violations through protracted litigation in which CWS repeatedly sought to shift the blame for its noncompliance and evade monetary sanctions under the CWA. Under the framework of the CWA, the only party entitled to recover litigation expenses in a CWA suit is the prevailing party. Allowing CWS to recover its attorneys' fees from its ratepayers would contravene the clear purposes of deterrence and punishment envisioned by the CWA's citizen suit provision, and would minimize the incentives placed upon utilities like CWS to comply with the CWA. For these reasons, and the others noted herein, CWS's rate increase for attorneys' fees incurred in the Riverkeeper Environmental Litigation should be denied.

CONCLUSION

For the reasons stated herein, Congaree Waterkeeper respectfully requests that the Court affirm Order Nos. 2018-802 and 2020-57 of the Public Service Commission and deny CWS's request to include the attorneys' fees in its rate increase.

Respectfully submitted this 9th day of October, 2020,

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