

RECEIVED

Oct 12 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

**In Re: Application of Blue Granite Water Company
for Approval to Adjust Rate Schedules and Increase Rates Appellant.**

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001283

REPLY TO RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Blue Granite Water Company (the “Company”), Appellant, files this reply to the return filed by the South Carolina Department of Consumer Affairs (the “Consumer Advocate”) on October 8, 2020 (“Return”) to the Company’s Petition for Writ of Supersedeas (the “Petition”). The Petition seeks a writ of supersedeas from this Court suspending the Commission’s unlawful stay of the Company’s implementation of rates under bond pursuant to S.C. Code Ann. § 58-5-240(D) (the “Bond Provision”). While the Commission’s stay is in effect, the Company must forego the increased revenues it is entitled to by the Bond Provision and suffer from degraded cash liquidity. Further, the Consumer Advocate’s Return fails to explain how the Commission is statutorily authorized to stay the implementation of rates under bond given the plain language of the Bond Provision and the Commission’s consistent mode of interpreting the Bond Provision.

A. The Petition is ripe for this Court’s consideration.

While the request for reconsideration filed with the Commission was not styled as a petition for supersedeas, the process before the Commission complied with Rule 241. Consistent with Rule 241, the Company sought an order lifting the stay in its request for reconsideration of the stay

filed with the Commission. The Consumer Advocate and other parties had an opportunity to file a response, and the Commission denied the Company's request on September 16, 2020, two weeks after the Company's request was filed. The Company's request for rehearing is attached hereto as Exhibit A, and a certified copy of the Commission's denial of reconsideration was attached to the Petition as Exhibit H.

The Return notes that S.C.A.C.R. 241 permits an aggrieved party to seek judicial review of an administrative tribunal's "decision" to support its position that the Commission's stay is not ripe for this Court's review. It is indisputable that the Commission has issued a decision as to whether it should lift its stay—the Commission's unanimous "decision" is memorialized in the directive attached to the Petition as Exhibit H. The Commission's lack of authority to stay the implementation of rates under bond is ripe for this Court's consideration.

B. The Commission does not have authority to approve or not approve the rates under bond.

The Consumer Advocate's argument that the Court's grant of the Petition would permit the Company to implement rates not approved by the Commission demonstrates the Consumer Advocate's fundamental misunderstanding of the Bond Provision and the Commission's authority. Neither the Bond Provision, nor any other statutory provision, requires or permits the Commission's review of the rates to be implemented under bond. The whole purpose of the Bond Provision is to allow a utility to implement rates not approved by the Commission while that utility appeals the rates that the Commission did approve. As explained in the Petition—and as repeatedly held by the Commission—the limited role of the Commission as related to rates under bond is to review the amount of the bond and the surety, both of which the Commission has already approved in this case.¹

¹ While not relevant to the Petition, the Return incorrectly asserts that the Company has

Contrary to the Consumer Advocate’s apparent misunderstanding, the Commission has never asserted authority over a utility’s rates under bond, because it does not have the requisite authority. As explained in the Petition, the Commission has repeatedly found that it does not have authority over the rates a utility implements under bond. See, for example, the directive issued in this proceeding on July 15, 2020 attached as Exhibit C to the Petition, as well as the several prior orders attached as Exhibit J to the Petition. While the Bond Provision is not ambiguous, to the extent the Consumer Advocate would argue that there is ambiguity in how the Bond Provision should be interpreted, the Commission’s prior orders show a “consistent mode of applying a statute” expressing a lack of discretion as to the rates implemented under bond, a mode of interpretation that should be “given considerable judicial deference.” *Bunch v. Cobb*, 273 S.C. 445, 452 (1979). The protection for customers, in place of the Commission’s review of the rates under bond, is the bond, and the ultimate true-up that occurs at the conclusion of the appeal with twelve percent interest paid to customers on any amount determined to be subject to refund.

C. The Consumer Advocate misses the point as related to the prohibition on retroactive ratemaking; the deferral granted by the Commission is inadequate.

The cases cited by the Consumer Advocate related to its position on retroactive ratemaking do not support the proposition that the Company is guaranteed to recover the revenues unlawfully stayed by the Commission or the lost time value of those revenues, and neither of the cases elucidates a remedy for the Company’s degraded liquidity in the meantime.² The deferral request

not filed its rate schedules on reconsideration. For clarity, and for the Consumer Advocate’s reference, the Company made this filing—and served it on the Consumer Advocate—on June 8, 2020 following the Commission’s directive on reconsideration.

² The opinions cited by the Consumer Advocate, *Hamm v. S.C. Pub. Serv. Comm’n*, 294 S.C. 320 (1988) and *Porter v. S.C. Pub. Serv. Comm’n*, 328 SC 222, (1997), reference the deferred recovery of carrying costs and the amortization of rate case expenses, not the implementation of rates under bond, much less the unprecedented and unlawful stay applied in this case.

the Company was forced to file with the Commission in this case was a necessary but incomplete remedy to avoid a taking from the Commission. The only complete remedy is that which is provided by the Bond Provision: the implementation of rates under bond.

As for the Company's representation in its deferral request that the deferral would enable it to have continued access to capital, there are gradations of access to capital and liquidity along a spectrum. Certainly the preferred option, which provides immediate liquidity in the form of increased billed revenues, is that which is plainly provided for in the Bond Provision, i.e., the immediate implementation of higher rates under bond. Anything short of implementing rates under bond results in decreased liquidity and access to capital (i.e., irreparable harm to the Company). Secondary to implementing rates under bond is a deferral for which future recovery is probable, which can be properly accounted for as a regulatory asset and can support, to some degree, the Company's cash flow through credit, which has its own costs and shortcomings. A deferral for which future recovery is not probable cannot be accounted for as a regulatory asset, cannot be borrowed against, and cannot support the Company's cash flow through credit. For these reasons, these gradations of accounting treatment (immediate revenue, regulatory asset, no regulatory asset) impact how the Company obtains cash and on what terms, and demonstrate the inadequacy of a deferral as compared to the relief authorized by the Bond Provision.

The Return misrepresents the recoverability risk for the Company of deferrals. While the Consumer Advocate states that the nature of the future review of the deferral will be limited to its "numerical value," as explained in the Petition, the Commission has granted deferrals and then later denied their recovery, including in the instant underlying case as explained in the Petition and, in other cases, permitted recovery of deferred costs but denied recovery of the associated time value or financing costs. *See, e.g.,* Order No. 2019-323, Docket No. 2018-319-E (May 21, 2019) (denying Duke Energy Carolinas, LLC recovery of carrying costs on properly deferred costs);

Order No. 2019-341, Docket No. 2018-318-E (May 21, 2019) (denying Duke Energy Progress, LLC recovery of carrying costs on properly deferred costs). Further, as explained in the Petition, the Commission’s directive states that the granting of the deferral “will not prejudice the right of any party to address or challenge *the recovery of these costs* in a subsequent rate proceeding.” Exhibit F to the Petition (Aug. 31, 2020 Directive, Docket No. 2019-290-WS) (emphasis added). Based upon this language, it is clear that the future consideration of recovery will not be limited to the “numerical value” or whether the amounts were “accurately recorded,” but rather “recovery” *in toto*. It is clear that the contingent approval of a deferral is not an adequate remedy for the Commission’s unlawful stay of the Company’s implementation of rates under bond.

D. The Commission acted *ultra vires* when it ignored the Bond Provision and stayed the implementation of rates under bond.

The Consumer Advocate grasps at a number of statutes—S.C. Code Ann. §§ 58-5-210, 58-5-290, 58-5-300, and 58-5-320—to attempt to support its argument that the Commission has authority to stay the Company’s implementation of rates under bond. The plain language of the Bond Provision, however, is that a utility may implement rates under bond as long as the bond is “in a reasonable amount approved by the Commission, with sureties approved by the Commission.” The Commission has provided such approval, and confirmed in the associated directive precisely this extent of its authority. As explained in the Petition, the Bond Provision also permits substitutions “for the bond” but, by its plain language, the Bond Provision does not authorize the Commission to create novel arrangements that eliminate a utility’s access to increased revenues during the pendency of the appeal. The Commission is a creature of statute and has only those powers granted to it by the General Assembly. Administrative agencies “must follow statutory established standards and not their ideas of what would be charitable or equitable, and may not ignore or transgress the statutory limitations on their power, even to

accomplish what they may deem to be laudable ends, such as service of the public interest.” 73
C.J.S. Public Administrative Law and Procedure § 163 (2020).

CONCLUSION

The Company believes that the requested supersedeas is warranted and necessary in this case to correct the unlawful decision-making by the Commission that has daily and ongoing punitive effects on the Company. The Company appreciates the Court’s consideration of its request.

Respectfully submitted,



Frank R. Ellerbe, III, Esquire
Samuel J. Wellborn, Esquire
Robinson Gray Stepp & Laffitte, LLC
1310 Gadsden Street
Columbia, South Carolina 29201
803.929.1400

Attorneys for Appellant

Columbia, South Carolina
October 12, 2020