

*In Re: Application of Blue Granite Water Company
For Approval to Adjust Rate Schedules and Increase Rates
Appellate Case No.: 2020-001283
Exhibit to Reply to Return to Petition for Writ of Supersedeas*

Exhibit A

Blue Granite Water Company

Request for Rehearing of Commission Order No. 2020-549

I. The Commission lacks authority to stay the implementation of rates under bond.

The Commission lacks the authority to stay the implementation of a utility's rates under bond, and such a stay is therefore an *ultra vires* act. The South Carolina Supreme Court has concluded the following concerning the limits on administrative agencies' authority:

It is elementary law that administrative agencies are creatures of statute and their power is dependent upon statute, so that they must find within the statute warrant for the exercise of any authority which they claim. . . . Such (administrative) bodies, being unknown to the common law, and deriving their authority wholly from constitutional and statutory provisions, will be held to possess only such powers as are conferred, expressly or by reasonably necessary implication, or such as are merely incidental to the powers expressly granted. . . . Any reasonable doubt of the existence in the commission of any particular power should ordinarily be resolved against its exercise of the power.

Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 408 (1965) (internal citations omitted). The narrow ambit of the Commission's authority as related to rates under bond granted by S.C. Code Ann. § 58-5-240(D) (the "Bond Statute") is to consider and approve the reasonableness of the amount of the bond and the adequacy of the surety. As the Commission has repeatedly held, it is "without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond," and that the statute grants utilities the authority to "impose its proposed rates under bond as a matter of right" Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). It is clear from the Bond Statute, and from the Commission's interpretation of the Bond Statute for more than a decade, that the Commission lacks the authority to stay the implementation of rates under bond.

While the Bond Statute provides that "there may be substituted **for the bond** other arrangements satisfactory to the Commission for the protection of parties interested," such does not confer upon the Commission the authority to stay a utility's right to implement rates under

bond. S.C. Code Ann. § 58-5-240(D) (emphasis added). The substitution authorized by the statute is “for the bond,” not for the utility’s statutorily authorized option to implement rates that are secured by a bond or by some other substitute arrangement. *See Nucor Steel v. S.C. Pub. Serv. Comm’n*, 310 S.C. 539, 543 (1992) (“In interpreting a statute, it is imperative that the statute be accorded its clear meaning.”). Previous substitute arrangements have included, for example, letters of credit and letters of undertaking while the utility implemented new rates. *See* Order No. 1982-491, Docket No. 1982-247-W (July 14, 1982); Order No. 1981-176, Docket No. 1981-84-S (Mar. 18, 1981); Order No. 1982-218, Docket No. 1982-111-W (Mar. 31, 1982); Order No. 1980-352, Docket No. 1980-162-WS (June 13, 1980). Such types of guarantees¹—bonds, letters of credit, and letters of undertaking—protect (1) customers by providing a reserve of funds should rates later be reduced and (2) the utility by permitting new rates to go into effect.

A deferral—in contrast to implementing rates protected by a guarantee—provides no certainty of recovery and is therefore not a “substitute” as contemplated and required by the Bond Statute. A deferral is a regulatory accounting mechanism, not a recovery guaranty. Emphasizing the Company’s **lack** of guaranty of recovery, in approving the deferral request, the Commission’s unanimous motion stated that issuance of the accounting order “will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding.” Aug. 31, 2020 Directive, Docket No. 2019-290-WS. Moreover, the deferral mechanism does not, in stark contrast to implementing rates under bond pending an appeal, subject to potential refund requirement, provide any cash liquidity. While deferrals have a role in utility ratemaking, they are an incomplete and inadequate remedy as compared to implementing rates under bond. While customers would be protected by the bond obtained by the Company, there is no similar protection

¹ “Guarantee” is defined as “[s]omething given or existing as security, such as to fulfill a future engagement or a condition subsequent.” *Guarantee*, Black’s Law Dictionary (11th ed. 2019).

for the utility in the approved deferred accounting authority. Further, the prohibition on retroactive ratemaking serves to prevent the Company from retroactively correcting its rates at the conclusion of its appeal. There is, therefore, no substitute for implementation of rates that are secured, whether by a bond, letter of credit, letter of undertaking, or otherwise.

Notwithstanding the adequacy or inadequacy of a regulatory asset as a substitute for implementing rates under bond, the approval of a regulatory asset does not resolve the Commission's simple lack of authority to stay the implementation of rates under bond and its acting beyond the authority granted by the General Assembly in the Bond Statute. "Administrative discretion can be exercised *only . . . in accordance with the standards prescribed by statute or ordinance.*" *Atlantic Coast Line R. Co. v. S.C. Pub. Serv. Comm'n*, 245 S.C. 229, 235 (1965) (emphasis added) (citing *Hodge v. Pollock*, 223 S.C. 342 (1953)). While the Commission has the authority to identify and approve the implementation of a substitute to the bond under the Bond Statute, such does not go so far as to empower the Commission to stay the implementation of rates under bond.

I. The Commission's stay on the implementation of rates under bond violates the Company's substantive due process rights by depriving the Company of a property interest granted by state law, and is itself arbitrary and capricious decision-making.

Because the Commission's stay deprives the Company of a property interest in the revenues obtained from the rates under bond, the stay violates the Company's substantive due process rights. Additionally, the Commission's stay constitutes arbitrary and capricious decision-making.² As explained above, the Commission has routinely and repeatedly held that it is without

² *Deese v. S.C. State Bd. of Dentistry*, 286 S.C. 182, 184, 332 S.E.2d 539, 541 (S.C. Ct. App. 1985)(A decision is deemed arbitrary if it is "without a rational basis, is based alone on one's will and 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.").

discretion to prohibit utilities from imposing rates under bond, and that the statute grants utilities the authority to implement rates under bond “as a matter of right.” Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). Indeed, the Company holds a due process right to implement rates under bond, and the Commission’s action to stay the utility’s implementation of rates under bond arbitrarily and capriciously deprives the Company of this right.

The South Carolina Supreme Court has provided guidance on this issue:

[T]o prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. Thus, parties claiming such violations must first show they have a legitimate property interest.

Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. To determine if the expectation of entitlement is sufficient will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the agency.

Grimsey v. S.C. Law Enforcement Div., 396 S.C. 276, 283-84 (2012) (emphasis added) (internal citations omitted) (*Grimsey*). The Bond Statute provides clear, “mandatory language that restricts the discretion of the agency.” The Company undeniably holds a property interest in the revenues resulting from implementing rates under bond pursuant to the Bond Statute. The discretion of the Commission is extremely narrow in approving the amount of the bond and the surety (which it has done), and the Commission has unwaveringly found that the Bond Statute grants utilities the authority to implement rates under bond “as a matter of right.”

The Commission’s stay is an arbitrary and capricious (and punitive) act against Blue Granite. Never before has the Commission determined that it has discretion or flexibility as related

to a utility's right to implement rates under bond. As noted, the Commission has repeatedly found that it, in fact, "is without discretion to prohibit the utility from imposing its proposed rates under an appropriate bond." Order No. 2008-269 at 3-4, Docket No. 2007-286-WS (Apr. 25, 2008); Order No. 2010-543 at 3-4, Docket No. 2009-479-WS (Aug. 12, 2010); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016); Order No. 2016-156 at 4, Docket No. 2014-346-WS (Mar. 1, 2016). Further, despite its broad finding in the August 31, 2020 directive that the pandemic is causing "troubling effects" for South Carolina utility customers, the Commission's actions have been against Blue Granite alone. On August 20, 2020, the Commission issued Order No. 2020-561, authorizing a significant rate increase for Palmetto Utilities, Inc. to begin on September 20, 2020. Further, although the Commission's very recent actions have been against Blue Granite alone, as far back as May 14, 2020—in Docket No. 2020-106-A, a generic docket applicable to all South Carolina regulated utilities—while thanking the state's utilities "for their work and actions during the COVID-19 State of Emergency," the Commission rescinded the broad-based customer protections it had implemented in March 2020. Order No. 2020-374, Docket No. 2020-106-A (May 14, 2020). Now, nearly four months later, the Commission finds that due to the "troubling effects of the COVID-19 pandemic,"³ Blue Granite's customers should be spared from the rates under bond to which the utility is statutorily entitled. In summary, the Commission overturned more than a decade of its own precedent finding that it had no discretion as related to rates under bond, approved another similarly situated utility's rate increase, and rescinded the broad customer protections it had implemented in March 2020, but will not permit Blue Granite to implement rates under bond. This conduct is patently arbitrary and capricious, and amounts to a violation of the Company's substantive due process rights.

³ Aug. 31, 2020 Directive, Docket No. 2019-290-WS.

As explained in the Company's letter to the Commission dated August 13, 2020, Blue Granite has taken and is taking significant actions to assist customers during the pandemic. First, the Company voluntarily delayed the implementation of increased rates until September 1, 2020, a delay of nearly five months after the Commission's issuance of an order on the Company's application, causing Company to forego approximately \$2 million of revenues from customers to the Company. Additionally, to its knowledge, Blue Granite was the first utility in South Carolina to suspend nonpayment disconnections, an accommodation it initiated on March 10, 2020, several days before Governor McMaster issued Executive Order No. 2020-08 and requested that utilities suspend nonpayment disconnections, and more than a week before the Commission issued Order No. 2020-228 effectuating same. The Company also suspended its collection processes and the assessment of late charges effective March 10, 2020, and reconnected those customers shut off for non-payment back to March 1, 2020. Additionally, the Company has continued its practice of referring customers who are unable to make payment to assistance agencies, as well as continuing to establish long-term payment arrangements for customers who fall behind on bills. Blue Granite should not now be singled out, particularly in light of the actions the Company continues to take for the benefit of customers.

II. Because the Commission has approved by unanimous vote the Company's proposed bond, it must now issue its final order approving the bond or affirm that the bond approval has been granted.

As required by the Bond Statute, the Commission has approved the Company's bond and surety. Such approval was granted by unanimous vote in a business meeting of the Commission on July 15, 2020 and memorialized by a directive issued on the same day, which reads:

I move that the Commission find the proposed bond amount reasonable and Liberty Mutual Insurance Company an acceptable surety to ensure that ratepayers are protected and would be reimbursed with interest in the event Blue Granite's appeal is unsuccessful, and I move that the Commission approve the requested bond.

The Commission should affirm that this unanimous vote constitutes the approval required by the Bond Statute. Should the Commission find that it instead needs to issue a final order, it should do so promptly. The issuance of a final order is ministerial in nature, and “[i]t is the positive duty of the commission to decide matters properly submitted within its jurisdiction without unreasonable delay.” *City of Columbia v. Pearman*, 180 S.C. 296 (1936); *see id.* (“The city is entitled to the writ. The Commission was under a plain ministerial duty to render a decision on the merits. It has expressly refused to decide. Mandamus is the proper remedy.”). Further, for the Commission’s convenience, the Company filed a proposed order approving the bond on August 7, 2020.

Establishment of the regulatory asset authorized by the Commission in the August 31, 2020 directive is an inadequate remedy. As indicated in the Commission’s directive and explained above, unlike implementing rates under bond, future recovery of a regulatory asset is not guaranteed, and it is therefore not a substitute for implementing rates under bond. As explained in the Commission’s August 31, 2020 directive, issuance of the accounting order “will not prejudice the right of any party to address or challenge the recovery of these costs in a subsequent rate proceeding.” While the regulatory asset was necessary to protect the Company’s potential ability to recover the revenues to which it is entitled, there is no adequate substitute for the Commission issuing final approval of the bond and permitting the Company to implement rates under bond.

III. Conclusion

The Commission should reconsider the stay of the Company’s implementation of rates under bond because it has no authority to impose such a stay, and because the stay violates the Company’s substantive due process rights by arbitrarily and capriciously depriving it of a statutorily granted property interest. Further, because the Commission has approved the

Company's proposed bond, it must affirm that it has provided the approval required by S.C. Code Ann. § 58-5-240(D), or issue a final order memorializing same.

Respectfully submitted,

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Columbia, South Carolina
September 4, 2020

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
Docket No. 2019-290-WS

IN RE:)
Application of Blue Granite Water) CERTIFICATE OF SERVICE
Company for Approval to Adjust Rate)
Schedules and Increase Rates)
_____)

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of the **Petition for Reconsideration of Blue Granite Water Company** in the referenced matter to the parties listed below by electronic mail:

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Dated at Columbia, South Carolina, this 4th day of September, 2020.

