

**THE STATE OF SOUTH CAROLINA**  
**IN THE SUPREME COURT**

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**S.C. SUPREME COURT**

**APPEAL FROM THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**

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**Appellate Case No. 2020-000266**

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**Commission Docket No. 2017-292-WS**

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In Re: Application of Carolina Water Service, Inc.  
(n/k/a Blue Granite Water Company) for Approval  
of an Increase in its Rates for Water and Sewer Services .....Appellant.

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**APPELLANT’S RESPONSE TO AMICUS CURIAE BRIEF**  
**OF CONGAREE RIVERKEEPER, INC.**

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## ARGUMENTS

Appellant Carolina Water Service, Inc. (“CWS”), pursuant to Rule 213 of the South Carolina Rule of Appellate Procedure, submits this Response to the Amicus Curiae brief (“CRK Amicus Brief” or “Amicus Brief”) filed by the Congaree Riverkeeper, Inc. (“CRK”). The issue presented in this rate case appeal is a narrow issue of utility regulation involving the recovery in rates of the expenses of a utility regulated by the South Carolina Public Service Commission (“the Commission”). The expenses at issue in the appeal are the expenses CWS incurred in defending an action (“Riverkeeper Litigation”) brought against it by CRK under the Clean Water Act (“CWA”), 33 U.S.C. §§1351 *et seq.* The CRK Amicus Brief, which does not cite one case involving any utility rate-making issue, treats this appeal as if it is an appeal of an environmental ruling or a matter arising under federal statutes allowing the recovery of attorneys’ fees by a prevailing party. In doing so the CRK Amicus Brief mischaracterizes the arguments advanced by CWS as the basis for its appeal of the Commission’s rulings. This Response will address the CRK mischaracterizations of the CWS arguments.

### **A. CWS Had a Reasonable Basis for Defending the Action Brought by CRK Without Regard to Whether the Clean Water Act is a Strict Liability Statute.**

In its Appellant’s brief and Reply brief CWS argues, as a matter of utility rate-making law, that, because it had a reasonable basis for defending the Riverkeeper Litigation, the Commission committed legal error in refusing to allow it to recover its expenses associated with the defense of the action. In its Amicus Brief CRK mischaracterizes the CWS utility law argument as a misguided attempt to raise an unavailable defense: “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.” CRK Amicus brief, p. 7. This assertion in the CRK brief is wrong: what CRK claims was an attempt to defend the Riverkeeper Litigation with an unavailable defense was actually a well-founded effort by CWS to show that it had not violated the CWA.

The critical issue in the CRK case against CWS was whether CWS had violated its CWA discharge permit by failing to interconnect its I-20 sewage treatment system to a regional system owned and operated by the Town of Lexington. The permit required interconnection when “the regional system is constructed and available.” As noted by Judge Seymour in her order granting summary judgment, CWS contended that it had not violated the permit based on the argument that the ambiguous term “available” in the permit meant physically and contractually available. See *Congaree Riverkeeper, Inc. v. Carolina Water Service*, 248 F.Supp. 3d 733, 754 (D.S.C. 2017).<sup>1</sup> In developing its position in the Riverkeeper Litigation that it had not violated its discharge permit CWS presented the court with evidence showing its efforts to interconnect its I-20 system with the regional system of the Town of Lexington. That evidence supported CWS’s argument that interconnection of the regional system was not “available” and that it had therefore not violated the requirements of the permit. As discussed in the CWS Appellant’s brief (pp. 8-9), Judge Seymour found that the CWS argument was reasonable, although she ultimately rejected it.

The interconnection history that CWS presented as a defense in the Riverkeeper Litigation has a related but different purpose in this appeal, a purpose that is not mentioned or even recognized in the CRK Amicus Brief. Under well established South Carolina precedent, a regulated utility must be allowed an opportunity to recover in its rates its reasonable and prudent

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<sup>1</sup> Although she reached a different conclusion, Judge Seymour’s summary judgment order notes that the South Carolina Administrative Law Court had held that CWS was not in violation of the permit because interconnection was not contractually available. *Id.*, at 754. See also, discussion in Appellant’s brief pp. 5-6.

expenses incurred in the provision of service to the public. See *Southern Bell v. Public Service Commission*, 270 S.C. 590, 244 S.E.2d 278 (1978) citing *Bluefield Waterworks & Improvements Co. v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923) and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). In this appeal CWS has presented the background of its efforts to resolve the interconnection of its I-20 system with the regional system, not as a means of showing that it had a good faith defense to a strict liability statute, but to show that its defense of the Riverkeeper Litigation was reasonable and prudent as a matter of South Carolina law governing the regulation of utilities. The CRK Amicus Brief completely fails to address that issue, which is the issue before the Court in this appeal. Accordingly, the Amicus Brief is not helpful to the Court in addressing this appeal.

**B. The CWS Appeal is not a Collateral Attack on the Summary Judgment Order in the Riverkeeper Litigation.**

In its Amicus Brief CRK repeatedly accuses CWS of relitigating the issues decided by Judge Seymour in the Riverkeeper Litigation. See CRK Amicus Brief pp. 1, 3, 6. The Amicus Brief also suggests that the CWS appeal somehow undercuts the citizen suit and attorneys' fees provisions of the CWA. See CRK brief pp. 10-12. Neither contention has any merit, and both are at odds with the record.

In its Appellant's brief CWS made it clear that it was not asking this Court to address the question of whether Judge Seymour was correct in her interpretation of the CWA or the provisions of the CWS discharge permit. See Appellant's brief p. 13. Under applicable utility law, litigation expenses can be recovered by a utility in rates even if the utility is unsuccessful in the litigation. In fact, in one of the orders that is the subject of this appeal the Commission allowed CWS to recover litigation expenses for an unsuccessful plaintiff's case against the EPA and the Town of

Lexington related to the Riverkeeper litigation. See Order No. 2018-802, p. 19 (R. p. 69). Operation of the I-20 system was an integral part of CWS's provision of wastewater treatment service to its customers. When CRK sued to require CWS to shut down the operation of the system without an alternative interconnection agreement, CWS had no choice but to defend the action. Its litigation expenses were therefore recoverable as a matter of utility law. Recovery in rates of those expenses does not undermine or diminish the requirements of the CWA.

CWS submitted its settlement agreement with the CRK to the Commission. In that settlement CWS agreed to pay \$385,000 to counsel for CRK. (R. pp. 164-174). That payment of attorneys' fees was not submitted to the Commission for recovery in rates and is not part of this appeal. There is nothing about the arguments advanced by CWS in this appeal that undercuts in any way the attorneys' fee provision of the CWS. The argument that this appeal threatens the citizen suit or attorneys' fee provisions of the CWA reflects a fundamental misunderstanding of the regulation of utilities. It provides no reason for this Court to deviate from the utility regulation legal precedents that form the basis of the CWS appeal.

**Conclusion.**

The CRK Amicus Brief fails to address the utility ratemaking issues that are presented in this appeal. CRK apparently believes that by seeking to recover its litigation expenses incurred in defending the Riverkeeper Litigation CWS is in some way undercutting or collaterally attacking the summary judgment order issued in favor of CRK. That is not the case. This appeal presents straightforward issues arising under principles governing the regulation of utilities. The CRK Amicus Brief fails to address those issues and therefore fails to provide any assistance to the Court.

Dated this 14<sup>th</sup> day of December, 2020.

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