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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM
THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

Appellate Case No. 2020-001283
Public Service Commission Docket No. 2019-290-WS

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

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FINAL BRIEF OF RESPONDENT SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS

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STATEMENT OF THE CASE

On October 2, 2019, Blue Granite Water Company (Blue Granite or the "Company") filed its Application for Approval to Adjust Its Rate Schedules and Increase Rates ("Application"). The Public Service Commission ("Commission") assigned Docket Number 2019-290-WS. The Department of Consumer Affairs ("Department") filed its Petition to Intervene and Notice of Appearance of Counsel on November 25, 2019. The Commission granted the request on December 10, 2019.

Six public night hearings were held between January 27 and March 5, 2020 during which over 160 customers testified.[1] The evidentiary hearing was held from February 26, 2020 through March 2, 2020, during which all parties presented testimony. The Department presented testimony on the Company's revenue requirement, proposed rates, and cost of capital.

On April 9, 2020, the Commission issued Order No. 2020-306 regarding the Company's Application. Therein, the Commission denied Blue Granite a portion of their requested relief and authorized a return on equity ("ROE") of 7.46%. In response, Blue Granite filed a Petition for Rehearing or Reconsideration on April 29, 2020, and on May 28, 2020 the Commission issued a Directive increasing the revenue requirement, but otherwise making only minor adjustments to the original order.

On June 8, 2020, Blue Granite filed a Motion for Approval of Bond pursuant to S.C. Code Ann. §58-5-240(D), requesting an additional $2,179,211 in annual revenue ($31,371,085 total revenue) to be implemented under bond pending its appeal. On July 15, 2020, the Commission issued a Directive granting the bond request.

[1] The Commission has also received over 200 Letters of Protest/Comments to date.

On August 7, 2020, the Department filed a letter seeking clarification from the Commission regarding the bond, effect of the Commission Directive, and schedule for the proposed rate increases. The letter urged Blue Granite and the Commission to consider the impacts of implementing the increased rates under the proposed bond during a pandemic and suggested the implementation could be delayed either voluntarily by the Company or by the Commission pursuant to its inherent authority under S.C. Code Ann. §§ 58-5-320 and 58-5-290.

On August 13, 2020, Blue Granite filed a response to the Department's letter and executed their surety bond on August 17, 2020. On August 18, 2020, the Commission issued Order 2020-549, scheduling oral arguments to address the issues raised by the Department and staying the implementation of the bond until further notice. On August 24, 2020, Blue Granite filed a Conditional Petition for Approval of an Accounting Order ("Accounting Order Petition") which would allow it to defer the difference in revenue authorized by the Order on Reconsideration and those it proposed to collect under bond.

Oral arguments were held on August 27, 2020, and on August 31, 2020, the Commission issued a Directive staying the implementation of rates under bond through December 31, 2020. The Directive also granted Blue Granite's request for an accounting order to defer the revenue difference until December 31, 2020.

On September 1, 2020, Blue Granite implemented the rates authorized by the Commission via its May 28, 2020 Directive. On September 4, 2020, Blue Granite filed a Petition for Reconsideration of Order No. 2020-549 pertaining to the stay of the bond. The Commission issued a Directive on September 16, 2020, denying reconsideration for Order No. 2020-549. Then on September 23, 2020, the Commission issued Order No. 2020-641, their final order denying in part, and granting in part, reconsideration of Order No. 2020-306—the Commission's initial order

pertaining to Blue Granite's application. Blue Granite proceeded to file its Notice of Appeal to the Supreme Court on September 25, 2020, and filed a Petition for a Writ of Supersedeas on September 28, 2020, related to the Commission's stay of the Company's request to implement rates under bond. The Petition for Writ of Supersedeas was denied on November 25, 2020.

On November 6, 2020, the Commission formalized its August 31st Directive staying implementation of rates under bond and granting an accounting order in Order No. 2020-758. On November 20, 2020, Blue Granite filed a Petition for Reconsideration of Order 2020-758. Due to procedural issues associated with notifying customers of potential rate changes, the Company's petition requested the accounting order not end on December 31, 2020. On December 9, 2020, the Commission issued a Directive holding in abeyance the December 31, 2020 accounting order end date and requesting the parties submit comments regarding when the accounting order should end. The Directive denied the remaining requests for reconsideration and continued the stay on the implementation of rates under bond.

STATEMENT OF FACTS

The Commission's Orders have authorized a Return on Equity ("ROE") of 7.46%. The Company initially requested a ROE of 10.20% to 10.70%.[2] (R. p. 903, lines 9-12). As is typical in a rate case, ROE witnesses presented testimony reflecting their opinions on investor expectations of marketplace conditions and returns on investments in companies of similar risk to Blue Granite. (R. pp. 906, 970). The experts formulated their opinions by using a variety of models. (R. p. 1016, lines 4-8); See also (R. p. 280). The experts also used "proxy groups" of companies they believe are similar to the Company; however, because differences inevitably exist between the proxy companies and Blue Granite, the experts make adjustments to their model inputs and outputs to reflect an appropriate ROE recommendation for the utility. (R. p. 900, lines 17-22).

Each of the three witnesses in this case agreed that "ratemaking and the cost of capital are prospective in nature, *i.e.*, forward looking." (R. p. 280). "The cost of common equity is forward-looking as it is a function of investor expectations. Likewise, this Commission's ratemaking is forward looking as rates set in this proceeding will be in effect in a future period." (R. p. 916, lines 17-19).

The experts did not rely on any one model to determine a ROE. Additionally, none of the experts used an identical set of models or adjustments to prepare their respective recommendations.[3] However, Blue Granite witness D'Ascendis was the only witness to use a non-utility, non-price regulated proxy group in his models. (R. p. 920, lines 10-13). These companies

[2] Later revised to a range between 9.75% and 10.25%. (R. p. 910, lines 7-9)

[3] "All three ROE witnesses arrived at their recommended rates and ranges of rates by applying common equity models including Constant Growth Discounted Cash Flow ('DCF') and Capital Asset Pricing Model ('CAPM'). Tr. p. 541.2, p. 661.5, p. 1000.3-1000.4. Witness D'Ascendis also utilized Empirical Capital Asset Pricing Model ('ECAPM') and the Risk Premium Model ('RPM'). Tr. p. 541.2. ORS witness Parcell's additional model included the Comparable Earnings Model ('CEM'). Tr. pp. 1000.3-1000.4. Consumer Affairs witness Rothschild included the Non-Constant DCF method as his third approach. Tr. p. 661.5." Order 2020-306 (R. p. 280); See also (R. pp. 900-901, 944, 1070).

included restaurants, auto parts, retail stores, and a tobacco company. (R. pp. 1201-1203, 1205-1207). The use of these companies was criticized by ORS witness Parcell and Department witness Rothschild and was a deciding factor in the Commission's decision. (R. pp. 999-1000; R. p. 1082, lines 12-18); See also (R. p. 283).

At the time of its application, Blue Granite had 28,300 customers and approximately $23.6 million in operating revenue. (R. p. 879, line 18; R. p. 483, "Pro Forma Present" "Total Operating Revenue"). Blue Granite sought a revenue increase of approximately $11.7 million. (R. p. 940, lines 11-14). The Commission's initial order (Order No. 2020-306) granted an operating revenue of $28,733,986, which is an increase of $4,958,848 (21%). (R. p. 279).[4] After Petitions for Reconsideration and Clarification were filed by the Company and the Office of Regulatory Staff ("ORS"), the Commission adjusted the revenue requirement to $29,191,874, an additional $457,888 more than the original order, and an increase of $5,416,736 (approximately 23%) more than Blue Granite's total operating revenue prior to the case.[5]

Prior to the rate case, Blue Granite residential customers who received sewer collection and treatment services from Blue Granite were paying a flat rate of $65.08 per month. (R. p. 1062, lines 19-20).[6] These sewer customers now pay $78.25 per month (a 20.2% increase).[7] Under the bond proposal, the customers would pay $88.01 per month (a 35.2% increase).[8]

Blue Granite also has several territories with different rates for its water customers based on the type of services provided. Depending on the service territory, a 6,000 gallon per month

[4] The increase amount is based on ORS' determination of $23,775,138 in total operating revenue. (R. p. 1089, line 19).
[5] Order No. 2020-641 notes a revenue requirement of $29,191,874, which is an increase of $5,416,736 over ORS' determination of a $23,775,138 total operating revenue. (R. p. 405). See also Order 2020-758 (R. p. 415, footnote 2).
[6] See also (R. p. 474)
[7] Determined using the rates in Attachment A to Blue Granite's June 8, 2020 letter to the Commission. (R. pp. 818).
[8] Exhibit No. 1 to Blue Granite's Motion for Approval of Bond. (R. p. 803)

water user now pays 16.2% to 37.7% more than before the rate case and will pay 20% to 42.3% more than before the rate case if Blue Granite implements rates under bond. [9]

[9] Determined using the rates in Attachment A to Blue Granite's June 8, 2020 letter to the Commission (R. pp. 811-814) and Exhibit No. 1 to Blue Granite's Motion for Approval of Bond (R. pp. 796-798).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act ("APA") is applicable to this Court's review of the Commission decision. Pursuant to the APA, the "court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). And, the court should reverse or modify the Commission's decision only:

> if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. §1-23-380(5).

The Court cannot inject its own opinions into findings of facts, or the Commission's decision, unless it is shown to be arbitrary or capricious as a matter of law, unsupported by evidence. S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978). A decision by the Commission is arbitrary "if it is without a rational basis, is based . . . 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." Daufuskie Island Util. Co. v. S.C. Office of Regulatory Staff, 427 S.C. 458, 464, 832 S.E.2d 572, 575 (2019).

On the other hand, this Court has found "[i]f there is substantial evidence to support a decision by the Commission, the Court will affirm the decision." Heater of Seabrook v. PSC, 324 S.C. 56, 60, 478 S.E.2d 826, 828 (1996). Substantial evidence is relevant evidence that,

considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Porter v. S.C. PSC, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

This Court has stated substantial evidence in the context of administrative agency decisions is:

> [N]ot a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.
> . . .
> [S]uch relevant evidence as a reasonable mind might accept as adequate to support a conclusion… This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Hamm v. S.C. Pub. Serv. Comm'n., 289 S.C. 22, 25, 344 S.E.2d 600, 601 (1986) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-136, 276 S.E.2d 304, 306-307 (1981)).

The "Commission's findings are presumptively correct" and the appellant "bears the burden of convincingly proving the decision is clearly erroneous, or arbitrary or capricious, or an abuse of discretion, in view of the substantial evidence of the record as a whole." S.C. Energy Users Comm. v. S.C. Pub. Serv Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (citing Duke Power Co v. Pub. Serv. Comm'n of S.C., 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001)).

ARGUMENTS

I. THE COMMISSION DETERMINED AN APPROPRIATE RETURN ON EQUITY FOR BLUE GRANITE BASED ON SUBSTANTIAL EVIDENCE AND A REVIEW OF THE WHOLE RECORD AND ARTICULATED A RATIONAL BASIS FOR ITS CONCLUSION.

As the Commission noted in its order –

> It is the responsibility, duty and delegated charge granted by the Legislature for the Commission to weigh the evidence and to draw "the ultimate conclusion therefrom as to what return is necessary to enable a utility to attract capital . . . . It has been said many times that this is so because the Commission is a body of experts 'composed of men [and women] of special knowledge, observation, and experience' in the field of rate regulation."

(R. p. 275). Citing S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978); holding modified by Parker v. S.C. Pub. Serv. Comm'n, 280 S.C. 310,313 S.E.2d 290 (1984).

The Return on Equity ("ROE") is one portion of a utility's revenue requirement. A utility's revenue requirement is the amount of money it must earn in a test year in order to provide adequate service to its customers and a fair return for its shareholders or investors. (R. pp. 1074, line 12-p. 1075, line 11). It is the sum of its expenses (operating, taxes, and depreciation) and return on rate base (rate base x overall rate of return). Id. The overall rate of return includes the cost of debt (e.g., interest rate on money borrowed from a bank) and the cost of equity (also known as the "return on equity" or ROE). Id. The ROE is the amount investors are authorized to earn.

Public utilities are natural monopolies and regulation by the Commission, as opposed to the competitive marketplace, determines the authorized rate of return. (R. p. 897, lines 4-6).

> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties.

Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 692, 43 S. Ct. 675, 679 (1923). The Commission utilizes the principles established in seminal utility rate cases like Bluefield and Federal Power Comm'n v. Hope Natural Gas Co. to establish rates that are fair, just, and reasonable for the company as well as the customers.

The Commission must set "just and reasonable" rates using "fair and enlightened judgment, having regard to all relevant facts." Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 603, 64 S. Ct. 281, 288 (1944) ("The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves the balancing of investor and the consumer interests."); Bluefield Water Works Improvement Co. v. Public Serv. Comm'n, 262 U.S. 679, 692, 43 S. Ct. 675, 679 (1923). Given the Commission's experience in utility rate regulation, the Court has noted it "has neither the expertise nor the authority to fix the rate of return to which a public utility is entitled….[e]ven if [the Court] might have found a different rate of return to be fair and reasonable…" S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978).

Blue Granite, like many other regulated utilities, does not sell shares in the public marketplace; therefore, in order to establish a ROE or range of ROEs that meet these principles, the company and other parties in a rate case present expert witnesses for the Commission to consider. There were three ROE witnesses presented in this Docket: Blue Granite witness D'Ascendis, ORS witness Parcell, and Department witness Rothschild. (R. p. 280). Upon review of the Commission's order in this matter, with regard to the ROE, it is apparent the Commission focused its examination on Department witness Rothschild and Company witness D'Ascendis. Based on its review of the entire record, including each witness' methodologies, critiques of one another, and the past performance of the Company, the Commission rightly adopted a ROE from

witness Rothschild's recommended range of reasonable ROEs and further determined D'Ascendis lacked transparency. Therefore, the Court should uphold the Commission's determination that a 7.46% ROE is just and reasonable.

A. Rothschild presented a ROE range of 7.46% - 8.75%.

The Commission must determine a rate of return, and therefore a ROE, "based exclusively on reliable, probative, and substantial evidence on the whole record." S.C. Code Ann § 58-5-240(H). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." Porter v. S.C. PSC, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

Contrary to the assertions of Blue Granite, the record clearly shows Department witness Rothschild presented a ROE range. As indicated in his testimony and shown in the table below, the high-end results of Rothschild's three ROE (or cost of equity) models range between 6.96% and 9.68%, averaging 8.75%. (R. p. 955). The low-end results of the models range between 5.72% and 8.34%, averaging 7.46%, the ROE chosen by the Commission. (R. p. 954, line 5-p. 955, line 3).

TABLE 4: Cost of Equity Model Results

	Low	High
DCF - CONSTANT GROWTH	8.34%	8.76%
DCF - NON-CONSTANT GROWTH	5.72%	6.96%
CAPM		
Risk Free Rate - 3-Month T Bill	7.76%	9.59%
Risk Free Rate - 30-yr T Bond	8.02%	9.68%
Range	7.46%	8.75%

Source: Schedule ALR 2

In his pre-filed testimony, Rothschild did emphasize an 8.65% ROE for Blue Granite.[10] However, upon questioning by the Commission at the hearing, it was clear he considered the ranges provided by his models to be both reasonable and to satisfy the requirements of Hope and Bluefield. The following is an excerpt of the Commission's questioning of Mr. Rothschild:

> Q: Mr. Rothschild, is there any particular reason that you recommended point estimates for the company's ROE and cost of capital rather than the interval estimate?
>
> A: (ROTHSCHILD) Why did I recommend 8.65 instead of -- instead of a range?
>
> Q: Yeah.
>
> A: (ROTHSCHILD) I have – I've -- sometimes in testimonies, I've provided ranges if that's helpful, and often people have asked for something precise. That -- that is the number that I came up to based on my analysis, and I show the justification. I appreciate your question, because to assume that -- that this exercise is that precise is an excellent question, so I think you generally can't say it's 8.65 or 8.61. **So there are various ranges that I do show in my testimony that I hope would help understand a range that's reasonable.**

(R. p. 1048, lines 1-19) (emphasis added).

In his surrebuttal testimony, Rothschild also explains:

> As with other tools and methodologies we use regularly, option-implied betas are not a silver bullet and should be used in conjunction with other valid approaches to determine ranges of reasonableness for the cost of equity. The more valid tools we use, the more we can narrow down or confirm these ranges of reasonableness to ensure a more accurate result.

(R. p. 1038, lines 6-10).

As detailed above, the ROE range Rothschild presented to the Commission in his direct testimony and during the hearing was 7.46% to 8.75%. Notably, he ends his pre-filed surrebuttal

[10] Based on his modeling results, Rothschild, like many ROE witnesses, included both a recommended range and a specific number within that range as part of his recommendations. ("I chose the upper end of my range. As you can see in the Table 4, the range is between -- well, 746 and 875. And in terms of the average of -- of the -- of that range, it was in the higher end." (R. p. 1046, line 22-p. 1047, line 1)). Similarly, witness Parcell recommended a range and a midpoint. "These results indicate an overall broad range of 6.2 percent to 10.0 percent. I recommend a ROE range of 8.9 percent to 10.0 percent for BGWC. This range includes my DCF result (8.9 percent), and my CE result (10.0 percent). Specifically, I recommend a cost of equity of 9.45 percent for BGWC, the mid-point of this range." (R. p. 1081, lines 5-8).

testimony by stating, "[i]f adopted, my cost recommendations would allow [Blue Granite] to raise the capital it needs to provide safe and reliable service because my recommendations are consistent with investors' return expectations." (R. p. 1045, lines 13-15). Additionally, when providing a summary of his testimony at the hearing, Rothschild stated "[m]y recommendations satisfy the requirements of Hope and Bluefield that regulated utility companies should have an opportunity to earn a return commensurate with returns on investments in other enterprises having corresponding risks." (R. p. 942, line 23-p. 943, line 3).

The Commission sought clarification from Mr. Rothschild regarding his recommendations. Mr. Rothschild found his recommended range (7.46% to 8.75%) reasonable and the Commission, after review of the entire record, determined 7.46% was appropriate for the Company. Therefore, the Court should uphold that determination.

B. The Commission weighed the evidence presented and found the Department's witness to be the most credible and compelling.

The Commission has wide latitude to determine an appropriate rate-setting methodology. Heater of Seabrook, Inc. v. Public Service Comm'n, 324 S.C. 56, 478 S.E.2d 826 (1996). "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts." S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 595 244 S.E.2d 278, 281 (1978), quoting Bluefield, 262 U.S. at 692, 43 S. Ct. at 679 (1923) .

"A trier of fact is not compelled to accept an expert's opinion, but may give it the weight he determines it deserves." Florence Cty. Dep't of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992) (citing to Berkeley case below). "Where the expert's testimony is based upon facts sufficient to form the basis for an opinion, the trier of fact determines its probative value." Berkeley Elec. Coop. v. S.C. Pub. Serv. Com, 304 S.C. 15, 20, 402 S.E.2d 674, 677

(1991). Similarly, the fact finder determines the weight to be given testimony**.** See Davenport v. Walker, 280 S.C. 588, 591, 313 S.E.2d 354, 356 (Ct. App. 1984).

The Commission sits as the fact-finder during the rate case hearing. Like any other fact finder, it must weigh the evidence and credibility of the witnesses. In determining the 7.46% ROE, the Commission noted the "cost of common equity nationally is on the decline" and cited to Rothschild's testimony which discussed then current market conditions, the low risks of regulated water companies, and low interest rates generally. (R. pp. 278-279). See also (R. p. 959). The Commission further found "[a]mongst the three witnesses, Consumer Affairs Rothschild's approach was unique in that he included the use of both historical and forward-looking, market-based data in his analysis." (R. p. 284). Additionally, "Rothschild addressed Blue Granite witness D'Ascendis' criticisms regarding his use of current market data to determine cost of capital by pointing out that witness D'Ascendis relies on non--market based data (Blue Chip consensus interest rate forecasts) in his analysis. Tr. p. 581, ln 25 - p.582, ln 6." (R. p. 282, footnote 13). See also (R. p. 1023, line 6-p. 1045, line 9).

Rothschild offered an in-depth discussion of his three models, including a step by step demonstration of how his calculations were made. (R. p. 972-p. 997, line 11). Further, he provided a detailed critique of D'Ascendis modeling methods and results, including, among other criticisms, that D'Ascendis' recommendation is "above (1) return expectations indicated by market data (e.g. stocks, bonds, options), [and] (2) return expectations published by major financial institutions…" due to his inclusion of non-utility, non-price regulated companies. (R. p. 955, line 7-p. 956, line 1). See also (R. p. 956, line 3-p. 957, line 15).

A key component of the Commission's analysis of D'Ascendis' testimony was his use of 14 non-utility, non-price regulated companies in his proxy group. Some of the non-price regulated

companies D'Ascendis included were AutoZone, Cracker Barrel, Cheesecake Factory, Dollar General, and Philip Morris. (R. pp. 1201-1203, 1205-1207). The Commission rightfully raised this concern with D'Ascendis' modeling efforts as it contradicts the holding in Bluefield that requires a public utility's authorized return be equal to "investments in other business undertakings which are attended by ***corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures***.…" Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n, 262 U.S. 679, 692-93, 43 S. Ct. 675, 679 (1923) (emphasis added).

The Commission found Company Witness D'Ascendis' recommendations to be too high as the 14 non-price regulated companies had "an average unadjusted beta that is twenty-five percent (25%) higher than his Water Proxy Group…" (R. pp. 282-283). See also (R. p. 930, lines 16-19)[11] and (R. pp. 1202-1203, 1206-1207).[12] The Commission further noted Rothschild "applies cost of equity models using water utility companies without the influence of non-utility companies" and "demonstrated flawed ROE calculations based upon non-utility business[es] by Blue Granite witness [D'Ascendis]." (R. p. 279; R. p. 369).

D'Ascendis was the only witness to use a non-price regulated proxy group. (R. p. 920, lines 10-13). Both ORS witness Parcell and Department witness Rothschild criticized this. (R. pp. 999-1000; R. p. 1082, lines 12-18). The Commission summarized its assessment of the ROE witnesses as follows:

[11] "Beta is a measure of the relative volatility (and thus risk) of a particular stock in relation to the overall market. Betas less than 1.0 are considered less risky than the market, whereas betas greater than 1.0 are riskier. Utility stocks traditionally have had betas below 1.0." (R. p. 1079, lines 15-18).

[12] DWD-6 shows the average unadjusted beta for the utility proxy group is 0.48. The average for the non-utility group is 0.6. In other words, compared to the market as a whole, the non-utility group is 25% more risky than the utility group. (R. pp. 1202-1203, 1206-1207).

> We find the methodology and analysis performed by Consumer Affairs witness Rothschild, which clearly and appropriately applied three different equity models to his Water Proxy Group, to be more thorough and compelling in this case. Having considered all evidence presented by the parties, the Commission finds that Consumer Affairs witness Rothschild presented a compelling, reasonable analysis regarding Blue Granite's Cost of Capital and Return on Equity. Tr. pp. 672.3-672.75.
>
> Also, Consumer Affairs witness Rothschild fully rebutted witness D'Ascendis' testimony, offering a more comprehensive and transparent application of his Constant Growth DCF, Non-Constant Growth DCF, and CAPM models to his proxy group.

(R. p. 282). The Commission concluded the "analysis and testimony provided by Consumer Affairs witness Rothschild is credible, compelling, unbiased and without prejudice in balancing the interests of the consumer and the utility by allowing the utility the opportunity to earn a 7.46% return on equity. *See*, Tr. pp. 672.8-672.10." (R. p. 367).

Blue Granite contends "the Commission's finding that only water utilities may be proxy companies in cost of equity analyses is arbitrary and capricious, given its findings in other cases." Initial Brief of Appellant, p. 17. This is a gross mischaracterization of the Commission's findings. The Commission did not find that only water utilities may be a proxy. D'Ascendis very well could have used non-utility companies in his group, if they were comparable in risk to Blue Granite. The Commission only found, as did witnesses Rothschild and Parcell, that the companies are not comparable in risk.

Based on the testimony provided by the three ROE witnesses, the Commission properly found the non-utility companies used in D'Ascendis' models did not possess similar risks and uncertainties to Blue Granite and therefore, were not appropriate for comparison. This factor combined with the testimony provided by Rothschild serve as sufficient bases for the 7.46% ROE, thus this Court should affirm the Commission's ruling.

C. The Commission determined the Company witness lacked transparency/credibility.

Like a judge or jury, the Commission is in the best position to determine the credibility of a witness. S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 598, 244 S.E.2d 278, 282 (1978); *See also* Madden v. Cox, 284 S.C. 574, 583, 328 S.E.2d 108, 114 (Ct. App. 1985) ("This Court cannot judge the credibility or weight of the testimony on appeal."). The Commission is free to determine the importance of various issues, and the Commission, like a jury, decides how much weight should be given to expert testimony. State v. Johnson, 66 S.C. 23, 36, 44 S.E. 58, 63 (1903) ("After expert testimony is admitted by the Court, it is to be considered by the jury just as other evidence, and given such weight as in the opinion of the jury it should receive.") As required by the APA, the Court should "not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact" and should affirm the ROE determination. S.C. Code Ann. § 1-23-380(5).

In addition to finding the testimony of Rothschild to be more thorough and compelling than that of D'Ascendis, the Commission also found D'Ascendis lacked transparency. The Commission noted, "[i]n his Direct, Rebuttal and live hearing testimony, Blue Granite witness D'Ascendis was not transparent regarding the data or methodology he used in applying criteria (iii) and (iv) to his Non-Price Regulated Group …. Tr. pp. 564-584." (R. p. 281). The Commission's determination was based not only on the critiques from witnesses Parcell and Rothschild, but also on D'Ascendis' answers during cross-examination. The Commission found "it was clear on cross examination by the Consumer Advocate Lybarker that witness D'Ascendis erroneously mixed the statistical concepts of simple data distribution and sampling errors. Tr. pp. 564-584." (R. p. 281). The Order further notes D'Ascendis' inability to clarify certain statistical concept discrepancies in his testimony, resulting in the Commission concluding that "the process

used by Blue Granite witness D'Ascendis in this case lacks analytical transparency and statistical coherence." (R. p. 282).

This Court ruled upon a similar matter in S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 244 S.E.2d 278 (1978). In determining the ROE in Southern Bell, the Commission found the company's witnesses unpersuasive and discounted their testimonies entirely. (R. p. 20). This Court upheld the Commission decision, finding the Commission "arrived at its findings and conclusions by discrediting a substantial portion of Southern Bell's evidence." Southern Bell, 270 S.C. 590, 598, 244 S.E.2d 278, 282 (1978). Such reasoning should be applied here as the Commission made the same determination of D'Ascendis' testimony.

In its initial brief, the Company argues the Commission ROE findings are arbitrary and capricious because it did not address "the major disagreements among the cost of equity witnesses, such as: (1) the appropriate weighting for the different ROE methodologies, particularly in the current capital environment; (2) the use of historic and current data versus projected data; (3) the importance of an ECAPM analysis in this capital and market environment; and (4) the importance of company-specific risks such as size." Initial Brief of Appellant, p. 17.

It appears these "major disagreements" are issues the Company believes the Commission should consider, given that its witness was the only one to use ECAPM or to believe the size of Blue Granite should constitute a significant risk compared to other companies.[13] The Commission noted "witness Rothschild fully rebutted witness D'Ascendis' testimony" which as demonstrated by the record, includes the four "major" topics the Company identifies. Rothschild states he does not agree with either D'Ascendis' CAPM or ECAPM analyses which "significantly and inaccurately overstate the Company's cost of equity" because, among other reasons, "[t]he

[13] D'Ascendis increased his ROE 50 basis points (0.5) because in his opinion its smaller size compared to the proxy groups makes it riskier. (R. p. 912, lines 16-18).

arithmetic average return that Mr. D'Ascendis uses overstates the historical risk premium by 300 basis points." (R. p. 1018, line 9-p. 1019, line 10). Rothschild also finds "Mr. D'Ascendis' 0.50% premium adder for the small size of BGWC relative to the average capitalization of the Water Proxy Group is not justifiable." (R. p. 1019, line 11-p. 1020, line 21).[14] As noted previously, the Commission also found "Rothschild addressed Blue Granite witness D'Ascendis' criticisms regarding his use of current market data to determine cost of capital by pointing out that witness D'Ascendis relies on non-market based data (Blue Chip consensus interest rate forecasts) in his analysis. Tr. p. 581, ln 25 - p.582, ln 6." (R. p. 282, footnote 13). See also (R. pp. 1023-1045).

The Commission clearly found the other witnesses discredited D'Ascendis' testimony and that D'Ascendis lacked transparency. Given this, it was unnecessary for the Commission to have addressed each of these issues in a robust discussion as D'Ascendis' opinion was deemed unpersuasive and, again, completely discounted. As the Commission properly exercised its ability to determine the weight of testimony, this Court should uphold the ROE ruling.

D. The 7.46% ROE is not punitive, confiscatory, or arbitrary.

The Court cannot inject its own opinions into findings of facts or the Commission's decision unless it is shown to be arbitrary or capricious as matter of law, unsupported by evidence. S. Bell Tel. & Tel. Co. v. Pub. Serv. Com., 270 S.C. 590, 597, 244 S.E.2d 278, 282 (1978). This Court has found "[i]f there is substantial evidence to support a decision by the PSC, the Court will affirm the decision." Heater of Seabrook, 324 S.C. at 60. Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action. Porter v. S.C. PSC, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

[14] Witness Parcell also criticized D'Ascendis' size adjustment. (R. pp. 1083-1085).

The ROE experts and the Commission must make recommendations and determinations based on conditions that exist at the time of the applications and relevant test years, as well as "known and measurable changes…occurring after the test year, in order that the resulting rates will reflect the actual rate base, net operating income, and cost of capital." Southern Bell, 270 S.C. 590, 602, 244 S.E.2d 278, 284 (1978).

i. The ROE authorized in a different case is irrelevant.

Blue Granite contends the 7.46% ROE is punitive, confiscatory, and arbitrary because it is below the 9.07% ROE allowed by the Commission in an order issued in the Palmetto Utilities rate case on August 20, 2020.[15] Blue Granite also contends the ROE would be the lowest established in any state in over a decade.[16] These contentions are irrelevant, unsupported, and without merit.

The recommended ROEs are based on comparisons and modeling of other utilities and market conditions at the time of the rate case. As noted in Bluefield when the utility also claimed the rate of return was too low and confiscatory, utilities are permitted rates "equal to that generally being made at the same time…in other business undertakings" of similar risks. Bluefield, 262 U.S. 679, 692, 43 S. Ct. 675, 679 (1923). However, no two rate cases are the same.

In Southern Bell, the Commission found a ROE between 8%-11% was reasonable and the utility argued the rate was so low as to be confiscatory and a taking without due process. Southern Bell, 270 S.C. 590, 595, 244 S.E.2d 278, 280-81 (1978). Southern Bell also argued the Commission approved return was lower than those authorized in the last two rate proceedings. (R.

[15] Application of Palmetto Utilities, Inc. for Adjustment of Rates and Charges, PSC Docket No. 2019-281-S. The 9.07% ROE was included among other stipulations between Palmetto Utilities, Inc. and ORS. The stipulations, including the ROE, were largely adopted by the Commission in its final Order No. 2020-561 issued August 20, 2020.
[16] See Initial Brief of Appellant, p. 20. The Company cites to Transcript p. 548.53, ll. 1-3 (R. p. 915) to support its contention that the "ROE is the lowest established in any state in well over a decade." Notably, this portion of the transcript is to a scatter plot of electric and gas company ROEs. (R. p. 914, lines 13-16). While irrelevant, the Company has provided no evidence this ROE is the lowest for a water and sewer company.

p. 15). The Southern Bell Commission noted there is no law, principle, or reason that suggests they must consider previous rulings in setting current rates and furthermore, based on Hope and Bluefield, the Commission must base rates on present circumstances. (R. pp. 15-16). This Court upheld the Commission's Order in that matter. These cases make clear that any market conditions that impacted the Palmetto Utilities case are irrelevant to the determinations made for Blue Granite, which could only be made in light of the conditions and circumstances that existed at the time of its rate case.

Further, the ROE reflects the quality of service of the specific company seeking the rate adjustment.

> It is incumbent upon the PSC to approve rates which are just and reasonable, not only producing revenues and an operating margin within a reasonable range, but which also distribute fairly the revenue requirements, **considering the price at which the company's service is rendered and the quality of that service.**

Seabrook Island Prop. Owners Ass'n v. S.C. Pub. Serv. Comm'n & Utils. Servs., Inc., 303 S.C. 493, 499, 401 S.E.2d 672, 675 (1991) (emphasis added). During rate cases, the Commission schedules public hearings so that a utility's customers may testify regarding the proposals. In this case, much of the customer testimony during the public hearings was related to quality of service issues.[17] The Commission is "required to consider the evidence presented to it on the formal record" and "is entitled to rely on sworn testimony presented by non-party protestants" during the public hearings. Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 111, 708 S.E.2d 755, 763 (2011).

[17] There were 550 pages of public night hearing transcripts in this case. The Department provides the following as examples of customer complaints related to quality of service issues. (R. p. 850, line 14-p. 851, line 21); (R. p. 859, lines 14-18); (R. pp. 860-862); (R. p. 864, line 11-p. 865, line 23); (R. pp. 852-854); (R. p. 855, line 18-p. 857); (R. p. 867, lines 2-18); (R. p. 868, line 3-p. 870, line 11); (R. p. 1064, line 17-p. 1065, line 19); (R. p. 1066, line 15-p. 1067, line 4); (R. p. 1134, line 10-p. 1139, line 18); (R. p. 1140, line 2-p. 1142, line 9); (R. p. 1143, lines 3-5); (R. p. 1144, line 2-p. 1145, line 10); (R. p. 1146, line 23-p. 1147, line 20); (R. p. 1148, line 20-p. 1150, line 5); (R. p. 1151, lines 11-20); (R. pp. 1152-1158); (R. p. 1159, line 3-p. 1160, line 20).

Order No. 2020-306 clearly establishes that witness Rothschild's testimony, modeling and analysis compelled the Commission and influenced the range from which the Commission decided the ROE. However, as required by Seabrook and Utilities Services, the Order also demonstrates that customer complaints about Blue Granite's quality of service issues during public night hearings were an influencing factor in its decision.[18] Discussing the six public night hearings that were held, the Commission Order notes:

> The customers testified about poor service, including poor water quality, unresponsive customer service representatives, inaccurate meter readings, billing errors, and unwarranted service cut-offs, among other problems. The Commission found the customer testimony presented at the night hearings both credible and compelling. It is evident that customer service problems are persistent, widespread, and pervasive throughout Blue Granite's service territories.

(R. p. 256). The Commission further noted the customer testimony was "indicative of persistent, widespread, and pervasive problems consistent with those which have frustrated customers of this utility for many years…" (R. p. 268).

Testimony of this type or magnitude was not presented during the Palmetto Utilities case and serves as another example of the varied testimony and issues that arise during a utility ratemaking proceeding, and thus, must be considered by the Commission. While the testimony of customers regarding Blue Granite's quality of service does not permit "an outright denial of the Company's application for a rate increase," the Commission took these statements into consideration, in conjunction with other items in the record. (R. p. 268). As the Commission properly ruled upon Blue Granite's ROE based on the testimony and evidence presented to it during this case, this Court should uphold the 7.46% determination.

[18] See footnote 17 for examples of customer complaints.

ii. The ROE is comparable to that of the overall market.

The Commission must determine a rate of return, and therefore a ROE, "based exclusively on reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 58-5-240(H). "Substantial evidence is relevant evidence that, considering the record as a whole, a reasonable mind would accept to support an administrative agency's action." Porter v. S.C. PSC, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998).

The record in this matter also shows that a 7.46% ROE is well within the expectations for overall stock market returns and is therefore not confiscatory. Further, the record shows that water companies have less risk exposure than the overall stock market. Witness Rothschild testified that Charles Schwab and J.P. Morgan published return expectations of 5.25%-8.75% for the overall U.S. stock market, which consists of generally riskier companies than Blue Granite. (R. p. 942, lines 19-22; R. p. 957, lines 4-15; R. p. 959, lines 2-15; R. p. 1080, lines 6-8). For riskier companies and investments, investors require higher returns. (R. p. 987, lines 9-10). Public utilities, which are regulated monopolies and provide an essential service are generally considered to be less risky than industrial stocks or other non-regulated business. (R. p. 1084, lines 1-17). This has also been recognized by the U.S. Supreme Court. ("[U]tilities are virtually always public monopolies dealing in an essential service, and so relatively immune to the usual market risks." Duquesne Light Co. v. Barasch, 488 U.S. 299, 315, 109 S. Ct. 609, 619 (1989)). Therefore, as Mr. Rothschild concluded, "[i]t is unlikely that investors would expect to earn a higher return on equity for a cost of service regulated utility company than the overall stock market." (R. p. 957, lines 13-15).

II. THE COMMISSION ACTED WITHIN ITS AUTHORITY WHEN IT STAYED THE IMPLEMENTATION OF RATES UNDER BOND AND INSTEAD AUTHORIZED A DEFERRAL ACCOUNT REQUESTED BY THE COMPANY.

"The Commission is statutorily charged with the authority to supervise and regulate all public utilities and fix just and reasonable rates." Porter v. South Carolina PSC, 328 S.C. 222, 234, 493 S.E.2d 92, 99 (1997), citing S.C. Code Ann. §§ 58-3-140 and 58-5-210. "[T]he Commission exercises quasi-judicial powers in the fulfillment of its responsibility under Section 58-5-290 as the arbiter of the reasonableness of rates charged by public utilities." Carolina Water Service, Inc. v. South Carolina Public Service Com., 272 S.C. 81, 87, 248 S.E.2d 924, 927 (1978).

The COVID-19 pandemic has had an extraordinary financial impact on residents of the state, particularly on renters, the elderly, and service industry employees. As the Department stated during oral arguments at the Commission on August 27, 2020, if ever there were a time for the Commission to find that increasing utility rates is unfair or unjust and to revise a prior decision, it is now. The Commission granted a significant increase to Blue Granite. The Commission considered this increase, and its corresponding rates, to be fair, just, and reasonable. What is at issue in this appeal, is an additional $2,179,211 the Company feels entitled to earn. Blue Granite's Motion for Approval of Bond. (R. p. 794).

In ordering relief the Company itself requested, the Commission acted within its statutory authority and was not arbitrary in its implementation of the deferral account. As such, this Court should uphold the ruling as a means of providing just and reasonable rates both for the Company and its customers.

A. The Commission provided the Company relief it requested.

Courts are clear that "[a] party may not argue one ground at trial and an alternate ground on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). See also McLeod v. Starnes, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012); Dunes W. Golf Club, LLC v. Town of Mt. Pleasant, 401 S.C. 280, 302 n.11, 737 S.E.2d 601, 612 (2013).

It is important to note that the relief the Company contests, is relief it requested, and relief the Commission granted. On August 24th, the Company submitted to the Commission its Accounting Order Petition. The Accounting Order Petition states it would constitute a taking to disallow the implementation of rates under bond; however, it further states:

> There are ***two possible remedies to avoid an unconstitutional taking***. The preferred remedy, which would result in the least customer confusion and future rate impact, is to lift the stay and permit the Company to implement the rates under bond for which the Company's customers are on notice. ***An alternative remedy is to grant the instant deferral request.***

(R. p. 834) (emphasis added). However, its current assertions directly contradict those made by the Company in support of its request for an accounting order from the Commission.

The Company now contends it has been denied due process because it has a property interest in the additional revenues that would come from implementing rates under bond. Initial Brief of Appellant, p. 45. In support of its argument, it cites Grimsley v. S.C. Law Enforcement Div., in which the Court states: "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." Grimsley, 396 S.C. 276, 2884, 721 S.E.2d 423, 427 (2012). The Company further argues "the discretion of the Commission is restricted to approving the amount of the bond and the surety…" Initial Brief of Appellant, p. 47.

In the Accounting Order Petition, the Company states "[a]n accounting order will enable the Company to have continued access to necessary capital during these uncertain and rapidly

changing economic times…" (R. p. 835). The Accounting Order Petition further states the order "will not prejudice the right of any party to address the recovery of these costs in a subsequent rate case proceeding" and "will not preclude the Commission or parties from addressing the recovery of these costs in a future rate case proceeding." (R. p. 830; R. pp. 835-836).

The Commission granted the Company's request and yet the Company now argues it has been denied due process, the accounting order is inadequate, and it must be permitted to implement rates under bond. While the Company implies the additional revenues are a property interest, this is in direct conflict to what it stated to the Commission. In its Accounting Order Petition, the Company specifically tells the Commission that if an accounting order is implemented, the Commission will ***"avoid an unconstitutional taking."*** (R. p. 831) (emphasis added). It is baffling that the Company now argues the exact opposite to this Court. As such, this Court should affirm the substitution of the accounting order for the implementation of rates under bond.

The Company further contends the implementation of rates under bond is its only means of protection. Initial Brief of Appellant, p. 47. This is again in direct conflict with the Company's Accounting Order request. It also believes a bond or other types of guarantees "protect customers by providing a reserve of funds should rates later be reduced and protect the utility by permitting new rates to go into effect." Initial Brief of Appellant, p. 44. However, this ignores the fact that customers would first have to pay these increased rates. Just as it has argued about its "foregone" revenues, the customers would have to forego their earnings to pay these increased rates. Therefore, allowing the bond rates to go into effect would only serve to shift the financial burden to the customers.[19]

[19] The Company made similar arguments in its Petition for Writ of Supersedeas, filed with this Court on September 28, 2020, and denied on November 25, 2020. In it the Company asserts "absent relief, the Company must forego these revenues and suffer from degraded cash liquidity, despite being required to continue its utility operations and investments on an ongoing basis." p. 2.

The Commission recognized this concern when granting the Company's deferral request. The Commission and Company have noted, in a future rate case, parties may address the recovery of the deferred amounts.[20] However, any challenges must be related to determining the amount of the deferral. In other words, parties may challenge whether the Company accurately recorded dollar values in the asset, but not the recoverability itself.[21] Further, if this Court determines the Company was entitled to additional revenues not previously accounted for by the Commission and remands to the Commission for determination of proper rates, then the past revenues would be considered when setting new rates. However, under the Company's request to implement rates under bond, the customers are required to immediately shoulder an additional financial burden regardless of whether the Company prevails on appeal.

As authorized by the Legislature through the statutes discussed below, the Commission, after hearing that the proposed rates were untenable for the Company's customers in light of the current pandemic, found an alternative solution to protect the interests of all parties. The accounting order, which was proposed by the Company, has been "substituted for the bond." S.C. Code Ann. §58-5-240(D). While the Commission may have previously substituted letters of credit or letters of undertaking, that does not prohibit them from now using an accounting order "for the protection of parties interested." Id. Section 58-5-240(D) does not provide an exhaustive list of tools from which to choose from, but rather requires the Commission implement a solution that will protect the interests of all parties. Customers are protected from an additional rate increase during the current public health and financial crisis. Further, the Company is protected and not at

[20] Order No. 2020-758 (R. p. 419).

[21] For example, Commission Order 2020-758 allows deferral of the rate difference, the cost of providing additional notice to customers, and carrying costs on these amounts. If it prevails on appeal, the Company will present these costs to the Commission. A party may challenge the Company's calculation of the costs it is owed, but could not challenge the recovery generally.

risk of suffering an irreparable injury because, as noted above, if it prevails on appeal, the Commission must set new rates to account for any foregone revenues. Therefore, the accounting order and stay should be upheld.

B. The Legislature granted the Commission discretion in carrying out its duties.

The Commission was created by the Legislature and receives its power and authority through its enabling statute and any subsequent statutes for which the agency has been charged with administering and/or enforcing. City of Rock Hill v. S.C. Dep't of Health and Envtl. Control et al., 302 S.C.161, 165, 394 S.E.2d 327, 328 (1990). The powers delineated are either expressly granted by the statutes or inferred from the expressed authority. Id. The words of a statute must be given their plain meaning and consistently construed within the parameters of the statute's purpose and subject. Ga. Carolina Bail Bonds, Inc. v. Cty. of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). When a question regarding statutory construction and applicability exists, the court must strive to gain the Legislature's intent from the plain language of the statute. Burns v. State Farm Mut. Auto Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). Further, the statute must be read as a whole and given a "practical, reasonable and fair interpretation consonant with the purpose, design and policy of the lawmakers." Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 816 (1942).

The Legislature provided the Commission with broad authority to ensure that what is implemented in practice or policy is just and reasonable, including the ability to change its prior decisions to ensure fairness. S.C. Code Ann. § 58-5-290 requires the Commission to reject what is "unjust" and "unreasonable", including unjust or unreasonable rates, rules or practices, "however or whensoever they shall have… been fixed or established" and instead to order what is "just". S.C. Code Ann. § 58-5-300 empowers the Commission to "consider all facts which in its

judgment have a bearing upon a proper determination of the question" even if such facts weren't included in a utility's application. This authority also extends to cases in which the Commission has already ruled and issued an order or decision. Citing S.C. Code Ann. §58-5-290 and §58-5-300 for the proposition that the Commission must correct unjust or unreasonable rates, this Court has stated-"[t]he Commission has the continuing power to prospectively correct or reduce a previously approved charge." Porter v. South Carolina PSC, 328 SC 222, 235, 493 S.E.2d 92, 99 (1997). Further, S.C. Code Ann. § 58-5-320 grants the Commission the ability to "at any time… rescind, alter or amend any order or decision made by it."

Given its broad authority to ensure just and reasonable rates for consumers and utilities, the Commission acted appropriately in staying implementation of increased rates under bond and instead granting the deferral accounting order which the Company requested.[22] The Commission also acted within the discretion provided by the Legislature in S.C. Code Ann. §58-5-240(D) which states "there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested…" As this Court has noted

> Even a governmental body of admittedly limited powers is not in a strait jacket in the administration of the laws under which it operates. Those laws delimit the *field* which the regulations may cover. They may imply or express restricting limitations of public policy. And of course, they may contain express prohibitions. But in the absence of such limiting factors it is not to be doubted that such a body possesses not merely the powers which in terms are conferred upon it, but also such powers as must be inferred or implied in order to enable the agency to effectively exercise the express powers admittedly possessed by it. To say otherwise would be to nullify the statutory direction that the agency shall have power to make rules and regulations governing the exercise of its powers and functions."

Beard-Laney, Inc. v. Darby, 213 S.C. 380, 389, 49 S.E.2d 564, 567 (1948) (emphasis in original).

[22] See Blue Granite's August 24th, 2020 Conditional Petition for Approval of an Accounting Order (R. p. 835) and Order No. 2020-758 (R. p. 422).

The Company cites Calhoun Life Insurance Co. vs Gambrell for the notion that there are statutory limits on an agency's power, and that an agency "must find within the statute warrant for the exercise of any authority which they claim…" Calhoun Life, 245 S.C. 406, 411, 140 S.E.2d 774, 776 (1965). The Company also cites Corpus Juris Secundum for the position that an agency "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." 73A C.J.S. Public Administrative Law and Procedure, § 163 (2020).

However, this is exactly the broad authority granted the Commission by the Legislature when it mandated the Commission only approve rates which are just and reasonable. If it is unjust or unreasonable to charge increased rates under bond during a pandemic, then the Commission must find "other arrangements satisfactory to the Commission for the protection of parties interested." S.C. Code Ann. §58-5-240(D). Certainly, this provision provides power by "reasonably necessary implication" to delay implementation of the bond and instead authorize a deferral account that will ultimately allow the Company to recover any foregone revenue should it prevail on appeal.[23]

The Company further cites Bunch v Cobb, 273 S.C. 445, 257 S.E.2d 225 (1979) for the proposition that the Commission cannot deny the implementation of rates under bond because it has never done so in the past. However, this Court has also found that compelling and cogent reasons may provide a basis for a different interpretation despite what an agency has done in the

[23] Calhoun Life Ins. Co. v. Gambrell, 245 S.C. 406, 411, 140 S.E.2d 774, 776 (1965), citing Piedmont & Northern Ry. Co. v. Scott, 202 S.C. 207, 223, 24 S.E.2d 353, 360 states, "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." (emphasis in original).

past. Emerson Elec. Co. v. Wasson, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986) ("The construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons."); Payne v. Duke Power Co., 304 S.C. 447, 452, 405 S.E.2d 399, 401 (1991) ("Where an administrative agency has consistently over time applied a statute in a particular way, its construction should not be overturned absent cogent reasons.").

Cogent and compelling reasons exist in this case to support the Commission's interpretation of S.C. Code Ann. § 54-5-240(D) that Blue Granite may implement rates under bond "unless the Commission invokes the bond substitution language in the statute." (R. p. 416). The Commission stated these reasons in its Order when it concluded

> the plan…is the best way to protect the interests of all parties in this case in this era of the COVID-19 pandemic. The ratepayers are protected from the increase in rates under bond until December 31, 2020, while Blue Granite has an accounting order, which allows it to book costs into a regulatory asset for consideration of recovery as determined in a future rate case.

(R. p. 420). This Court has noted that statutory provisions should be read together and no one particular provision be given greater weight over another. Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 368, 20 S.E.2d 813, 815-816 (1942). S.C. Code Ann. §§ 58-5-240(D), 58-5-210 and 58-5-290 must be read together to discern what the Commission is charged with and the authority it holds. It is well settled that a utility's rates should be set based on universal principles such as "just and reasonable," and a balancing of the investor and the consumer interests. Hope, 320 U.S. 591, 603, 64 S. Ct. 281, 288 (1944). By these mandates, the Commission is required to take the public interest into account. Neither this Court, the Commission, nor the Legislature has ever intended for rates to be set without considering what is equitable and what is in the public interest. The Commission's granting of a deferral accomplishes that goal by authorizing a

regulatory account for not only the revenue difference between rates, but also additional notice costs, and carrying costs on these amounts. Clearly, the Commission wielded its authority appropriately; therefore, its decision must be upheld.

C. The Company has not been punished and has in fact been granted a significant rate increase compared to other utilities.

The Commission must set rates based "exclusively on reliable, probative, and substantial evidence on the whole record." S.C. Code Ann. § 58-5-240(H). It "is both entitled and required to consider the evidence presented to it on the formal record." Utils. Servs. of S.C. v. S.C. Office of Regulatory Staff, 392 S.C. 96, 111, 708 S.E.2d 755, 763 (2011). The record consists of evidence presented during the rate case. It would be arbitrary for the Commission to base its decisions on evidence presented in another rate case.

The Company has painted itself as a victim in this appeal, claiming it has been "unfairly penalized," treated "below the appropriate standard," and that the rates set are "confiscatory." Initial Brief of Appellant at 24; 47. The Company states the Commission's actions during the pandemic "have been directed against Blue Granite alone." Initial Brief of Appellant, p. 46. In support of its argument, Blue Granite makes numerous references to the Commission's Order 2020-561, issued August 20, 2020 in Docket 2019-281-S. Blue Granite notes in that case the Commission authorized Palmetto Utilities Incorporated, a sewer provider, a 9.07% return on equity and "a significant rate increase." Id. The Company offers this comparison to support its contention that the Commission's "conduct is patently arbitrary and capricious." Id. For the reasons stated below, not only is this comparison without merit to support the victimization of Blue Granite, it actually supports a finding that the Commission has been consistent in its decisions, basing them on what is just and reasonable, independent of determinations in other matters.

Palmetto Utilities, while only providing sewer services, is in many ways comparable to Blue Granite.[24] At the time of its rate case, Palmetto Utilities had 28,082 customers and an operating revenue of approximately $22.6 million. Order No. 2020-561, p. 2; 37. At the time of its application, Blue Granite noted it had 28,300 customers and approximately $23.6 million in operating revenue. (R. p. 879, line 18; R. p. 483, "Pro Forma Present" "Total Operating Revenue"). Palmetto Utilities sought an increase of approximately $6.1 million. Order No. 2020-561, p. 37. Blue Granite sought approximately $11.7 million. (R. p. 940, lines 11-14).

Palmetto Utilities reached a settlement agreement with ORS and the Commission largely adopted its terms. Order No. 2020-561, Exhibit 1. Under the settlement, Palmetto Utilities will receive an additional $3.215 million in revenue (a 14.2% increase); however, the Order in the case noted "reductions in the Company's income tax liability as a result of the [2017 Tax Cuts and Jobs Act], which would be fully returned to customers by way of a decrement rider, [reduced] the Company's authorized annual revenues by $2,032,146." Order No. 2020-561, p. 13.[25] Prior to the case, its customers were paying flat rates for sewer of $52.10. Id. at 2. After the Order, they will pay $54.93 for 12 months (or until the liability associated with the 2017 Tax Cuts and Jobs Act reaches $0). Id. at 32. This is an approximately 5% increase. After that time, they will pay $59.87 per month, approximately 15% more than the pre rate case bills. Id. These rates will remain in effect until August 20, 2023 as Palmetto agreed to a rate freeze until that time. Id. at 46.

By comparison, the Commission authorized a $5,416,736 increase (or approximately 23%) for Blue Granite.[26] Prior to the rate case, Blue Granite residential customers who received sewer

[24] The Department does not contend that both companies are comparable in every aspect or that differences between the companies might warrant different treatment with respect to capital structure, revenues, and rates. However, as Blue Granite raised the treatment of Palmetto Utilities to support its own arguments, the Department believes the Court should consider this information.

[25] The decrement rider lasts approximately 12 months.

[26] Order No. 2020-641, p. 13, notes a revenue requirement of $29,191,874, which is an increase of $5,416,736 over ORS' determination of a $23,775,138 total operating revenue. (R. p. 405); See also (R. p. 415, footnote 2).

collection and treatment services from Blue Granite were paying $65.08 per month. (R. p. 382). Based on the rates submitted by Blue Granite after the Commission's Directive on reconsideration, these sewer customers now pay $78.25 per month (a 20.2% increase).[27] Under the bond proposal, the customers would pay $88.01 per month (a 35.2% increase).[28]

Blue Granite also has two service territories with different rates for its water customers based on the type of services provided. Based on the rates proposed by Blue Granite after the Commission's Directive on reconsideration (formalized in Order No. 2020-641), the rates for a 6,000 gallon per month water user increased anywhere from 16.2% to 37.7%.[29] These rates have already been implemented by Blue Granite. If the company were permitted to implement rates under bond, the increase compared to rates customers paid prior to the current case would range from 20% to 42.3%.[30]

As is apparent from these comparative figures, Blue Granite and Palmetto Utilities received a similar revenue increase; however, the rate increase for Palmetto Utilities' customers is significantly less than that for Blue Granite's customers even before the implementation of the bond. Also, unlike Palmetto Utilities, Blue Granite has not agreed to lock in these rates for any timeframe. The Commission has treated Blue Granite fairly, providing rate increases that are dependent on current facts and circumstances in the record, as it does for each applicant. This Court should reject Blue Granite's contentions that it has been unfairly penalized or otherwise singled out during the pandemic.

[27] Determined using the rates in Attachment A to Blue Granite's June 8, 2020 letter to the Commission. (R. p. 818).
[28] Exhibit No. 1 to Blue Granite's Motion for Approval of Bond (R. p. 803).
[29] ORS witness Sandonato indicated 6,000 gallons per month as the usage of a "typical residential customer." (R. p. 1124, lines 18-19). Percentage increase determined using the rates in Attachment A to Blue Granite's letter submitted to the Commission on June 8, 2020. (R. pp. 811-814).
[30] Determined using the rates in Exhibit No. 1 to Blue Granite's Motion for Approval of Bond. (R. pp. 796-798).

CONCLUSION

The Commission is charged with setting just and reasonable rates both for utilities and their customers, and it has done so here. Based on the substantial evidence in the record, the Commission properly determined the ROE range presented by Department witness Rothschild was just, reasonable, and comparable to other companies of similar risk. The Commission also acted within its statutory authority when it stayed the implementation of rates under bond and granted Blue Granite's request for an accounting order to defer costs associated with the delayed implementation of higher rates during its appeal. The Commission has treated Blue Granite fairly, providing it rate increases that were based on the circumstances of the record, as it does for each applicant. Therefore, the Department of Consumer Affairs requests the Court deny the relief requested by the Appellant and uphold the stay of implementation of rates under bond, as well as the Commission's determinations that a 7.46% return on equity is just and reasonable.

Respectfully submitted,

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