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S.C. SUPREME COURT

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2014-346-WS - ORDER NO. 2022-242

APRIL 11, 2022

IN RE: Application of Daufuskie Island Utility Company, Incorporated for Approval of an Increase for Water and Sewer Rates, Terms and Conditions) ORDER DENYING) REHEARING AND/OR) RECONSIDERATION OF) ORDER NO. 2022-79
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I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (“the Commission”) on Daufuskie Island Utility Company, Inc.’s (“DIUC” or “the Company”) Petition for Reconsideration of Commission Order No. 2022-79. For the reasons stated below, the Petition is denied.

Commission Order No. 2022-79 denied the request of DIUC for the imposition of reparations surcharges on the Company’s customers. The Company’s Petition for Reconsideration stated the following grounds:

- (1) That the Commission should reconsider its decision to deny DIUC’s Request for Reparations and substitute its proposed order in place of Order No. 2022-79 in its entirety, or alternatively, grant the reparations relief requested.

- (2) Imposing the reparations surcharges would not constitute illegal retroactive ratemaking, in that the surcharges would not operate as a retroactive rate.
- (3) DIUC is not collaterally attacking Order No. 2018-68.
- (4) The Commission should reconsider its conclusion that the Initially Approved Rates in Order No. 2015-846 and the Subsequently Approved Rates in Order No. 2018-68 were lawfully established and final rates and could not therefore be adjusted retroactively. (DIUC believes that *Hamm v. Central States* is persuasive authority in this case, which is discussed below.)
- (5) Courts in other States have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking.
- (6) Order No. 2022-79 and Order No. 2021-132 were not final orders, but were intermediate orders.
- (7) That the Commission should reconsider its position that the extraordinary length of the proceeding and the “improper discovery” pursued by ORS were not improper.
- (8) That the Commission should reconsider its position that DIUC may not now collect its proposed reparations charges because it did not pursue rates under bond under S.C. Code Ann. Section 58-5-240 pending resolution of the second appeal.

II. ANALYSIS

First, an analysis of the evidence and law in the case supports a denial of DIUC's Petition for Reconsideration of Order No. 2022-79 in its entirety. There is no authority in South Carolina Code Annotated Title 58 that would allow an award of reparations to a utility. Second, the language of *South Carolina Electric & Gas Company v. The Public Service Commission of South Carolina*, 275 S.C. 487, 272 S.E. 2d 793 (1980) is highly relevant and persuasive: "The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low and that customers would thus pay the difference to the utility." Therefore, it appears that granting reparations after setting a lawful rate would be, by definition, illegal and improper. For these reasons, there are no grounds for substituting DIUC's Proposed Order for Order No. 2022-79, nor for granting the reparations relief sought by DIUC.

Clearly, as proposed by DIUC, the imposition of an additional reparations surcharge after the unopposed and unappealed setting of new rates would be retroactive ratemaking. As stated by the South Carolina Supreme Court in *Porter v. SCPSC*, 328 S.C. 222, 231, 493 S.E.2d 92, 97 (1997), "rate-making is a prospective rather than a retroactive process," which the Commission recognized in Order No. 2022-79. Despite its protestations to the contrary, DIUC's customers would be charged an after-the-fact surcharge for the proposed reparations. It does not matter if the Company kept records on who they believed owed the extra monies and collected the reparations solely from those

customers. The surcharges would still be imposed after the fact, which is illegal retroactive ratemaking.

Also, the South Carolina Supreme Court overruled *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 342 S.E. 2d 403 (1986) in the first DIUC appeal, *Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 420 S.C. 305, 803 S.E. 2d 280 (2017), which previously had prohibited the introduction of new evidence into the record on a hearing on remand in the absence of direct authorization by the Supreme Court. The Court in *Daufuskie Island* held that a remand necessarily grants the parties the opportunity to present additional evidence. On remand, DIUC presented different amounts for expenses, income, rate base, and rate of return, which ultimately resulted in making DIUC “whole.” Accordingly, granting reparations through further surcharges to the Company’s customers would be unjust and unreasonable, and would allow over-recovery by the Company.

Further, DIUC claims that it is not collaterally attacking Order No. 2018-68. DIUC argues that the citation of *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 SC. 511, 517, 623 S.E. 2d 387, 391 (2015) is improper. The case was cited for the proposition that the filed rate doctrine prohibits collateral attacks on previously determined rates, which it does. Order No. 2022-79 at 25. DIUC argues that the case “bars only collateral attacks brought by private parties,” and not direct reviews in ratemaking cases or actions brought by a governmental agency. DIUC Petition at 9. Order No. 2022-79 was not a part of direct review of a ratemaking case but was a ruling on a collateral issue outside the ratemaking process, in that it concerned whether or not reparations surcharges should be assessed at

the request of DIUC after lawful rates had been established. Further, this case was not an action brought by a governmental agency. DIUC is not exempt from the rule against collateral attack of a Commission Order establishing rates. The Commission fairly termed DIUC's actions as a collateral attack on the ratemaking process, supported by the language of the *Edge* case.

With reference to the DIUC objection to the Commission's finding that the Initially Approved Rates in Order No. 2015-846 and the Subsequently Approved Rates in Order No. 2018-68 were lawfully established and final rates and could not therefore be adjusted retroactively, a South Carolina Supreme Court conclusion of law in *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 427 S.C. 458, 832 S.E. 2d 572 (2019) supports the Commission's position. The Court held as follows: "In reversing the commission twice, we do not intend to make any suggestion of our views on the merits. Rather we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the 'objective and measurable framework' the law provides." The Court cited *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 113, 708 S.E. 2d 755, 765 (2011). 427 S.C. at 464, 832 S.E. 2d at 575. Of course, DIUC argues that, since the Commission was reversed twice and remanded twice by the South Carolina Supreme Court, any resulting rates in the original orders were therefore unlawful. The Court, however, appears to indicate otherwise with its statement that it did not intend to make any suggestion of its views on the merits of the case. The South Carolina Supreme Court did not hold that the rates were unlawful; therefore, the rates are lawful. Because of this, the rates could not

thereafter be adjusted retroactively, such as with the imposition of reparations surcharges. We discern no error in our findings in Order No. 2022-79.

Hamm v. Central States Health and Life Co. of Omaha, 299 S.C.500, 386 S.E. 2d 250 (1989), a case noted by DIUC, is therefore not applicable, since its holding is based on the original rates being declared “unlawful,” which was not the case here. Further, the present case is distinguishable from the *Hamm* case, which discussed when refunds could appropriately be made in insurance rate cases. Although the case has been used before to justify refunds in utility rate cases, it is not applicable in the present case, because refunds are not under consideration by the Commission.

With regard to DIUC’s assertion that Courts in other States have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking, We would note that DIUC could not locate any South Carolina cases supporting its position. To support its hypothesis, DIUC cited authorities from other jurisdictions, such as *Railroad Commission of Texas v. High Plains Natural Gas Company*, 628 S.W. 2d 753 (1981) to justify its point. The *Railroad Commission* case is distinguishable, since it is a purchased gas adjustment clause case. This case is irrelevant to the present DIUC water-sewer case. DIUC also cited the North Carolina Supreme Court case *State ex rel. Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 320 S.E. 2d 679 (1984). In this case, the North Carolina Supreme Court interpreted a specific North Carolina statute, G.S. Section 62-94(b), as giving the Court a basis for ordering refunds to ratepayers who have been charged unlawfully high rates. This case is distinguishable from the present one, in that refunds are not the subject of the present case. Finally, the Supreme Court of New

Hampshire case *Appeal of Granite State Electric Company*, 129 N.H. 536, 421 A. 2d 121 (1980) is cited. Again, the principal issue in the case was whether the Commission lacked authority to order the Company to refund revenues collected under rates authorized and approved by the Commission, which also makes the case inapplicable to the DIUC reparations case before the Commission.

The Commission has no need to reconsider the position taken in Order No. 2022-79 that the extraordinary length of the proceeding and the “improper discovery” pursued by ORS were not improper. Order No. 2022-79 addressed these issues in great detail, and we reaffirm those findings.

DIUC argues that Order No. 2022-79 was not a “final” order but was an unappealable “intermediate” order. Although Order No. 2021-132 left open the question of reparations surcharges, Order No. 2022-79 ruled on this matter, thus completing the disposition of all remaining issues in Docket No. 2014-346-WS. Certainly, before appealing Order No. 2022-79, DIUC was required to request rehearing/reconsideration under S.C. Code Ann. Section 58-5-330 before the right of appeal arises, but, subject to that request, Order No. 2022-79 is a “final” order. Further, Commission Order No. 2021-132 was final with respect to the fact that it set rates based on the 2014 test year and resulted in rates for water and wastewater service that are just and reasonable and allowed DIUC to earn a reasonable return on the basis of its 2014 rate application. *See* Order Exhibit 1, page 2, to Order No. 2021-132. This Order addressed the major question in the case, i.e. What are proper rates for the 2014 test year? Certainly, the Order approved a methodology for addressing the request for reparations, but the 2014 rate case was settled. Further, Order

No. 2021-132 was the approval of an all-parties Settlement Agreement, which was also lawful.

With regard to the DIUC position that the Commission should reconsider its position that DIUC may not now collect its proposed reparations charges because it did not pursue rates under bond under S.C. Code Ann. Section 58-5-240 pending resolution of the second appeal, this Commission's holding in Order No. 2022-79 was correct. As argued by the Property Owners Associations ("POAs"), the plain language of S.C. Code Ann. Section 58-5-240 (D) expressly provides the only mechanism for "protecting" rates on appeal, and DIUC did not follow that process when it appealed the Orders on Rehearing. Further, there is no language in S.C. Code Ann. Section 58-5-240 (D) or elsewhere in Title 58 that would allow the relief that DIUC seeks in terms of reparations via surcharges. POAs Brief at p. 9. ORS contends that DIUC is prohibited from collecting a reparations surcharge because the General Assembly created a statutory remedy to protect entities like DIUC by allowing the Company to place rates into effect under bond pending appeal, and DIUC did not avail itself of those protections, pending resolution of the second appeal. The Commission agrees with these assertions and continues to hold that the reparations surcharge is not allowed under the statutory law, and DIUC is limited to the remedies available under the law.

III. FINDINGS OF FACT

1. The Commission need not reconsider its decision to deny DIUC's Request for Reparations and substitute its proposed order in place of Order No. 2022-79 in its entirety, nor alternatively, grant the reparations relief requested.

2. Imposing the reparations surcharges would constitute illegal retroactive ratemaking.

3. Through its actions in this case, DIUC is collaterally attacking Commission Order No. 2018-68.

4. The Commission need not reconsider its conclusion that the Initially Approved Rates in Order No. 2015-846 and the Subsequently Approved Rates in Order No. 2018-68 were lawfully established and final rates and could not therefore be adjusted retroactively. (*Hamm v. Central States* is not persuasive authority in this case.)

5. It is irrelevant that Courts in other States have found that making a prevailing party whole following a successful appeal is not retroactive ratemaking, when no South Carolina cases or other cited cases exist regarding this principle of law.

6. Order No. 2022-79 and Order No. 2021-132 were final orders.

7. The Commission need not reconsider its position that the extraordinary length of the proceeding and the "improper discovery" pursued by ORS were not improper.

8. The Commission need not reconsider its position that DIUC may not now collect its proposed reparations charges because it did not pursue rates under bond under S.C. Code Ann. Section 58-5-240 pending resolution of the second appeal.

9. DIUC was made “whole” in that it presented different amounts for expenses, income, rate base, and rate of return when the case was presented on remands.

IV. CONCLUSIONS OF LAW

1. There is no authority in South Carolina Code Annotated Title 58 for the granting of reparations to a utility.

2. The Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low and that customers would thus pay the difference to the utility.

3. Granting reparations after setting a lawful rate would be illegal, unjust, and unreasonable.

4. The imposition of an additional reparations surcharge after the unopposed and unappealed setting of new rates based on the 2014 test year would be retroactive ratemaking.

5. Ratemaking is a prospective process, not a retroactive one.

6. Collateral attack of a Commission order establishing rates and charges is illegal and improper.

7. The South Carolina Supreme Court did not intend to make any suggestion of its views on the merits of DIUC’s case, therefore, the Commission’s prior orders were not unlawful, but were lawful.

8. The Orders of the Commission in this case were lawful and final.

9. South Carolina Code Ann. Section 58-5-240 (D) expressly provides the only mechanism for “protecting” rates on appeal, and DIUC did not follow that process when it appealed the Commission’s Orders.

10. A request for reparations surcharges was not allowable in the present case, given the statutory remedy provided by the South Carolina General Assembly in S.C. Code Ann. Section 58-5-240 (D).

11. *Parker v. South Carolina Public Service Commission*, 288 S.C. 304, 342 S.E. 2d 403 (1986) was overruled in the first DIUC appeal, *Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff*, 420 S.C. 305, 803 S.E. 2d 280 (2017). Prior to the first DIUC remanded case, the *Parker* case had prohibited the introduction of new evidence into the record on a hearing on remand in the absence of direct authorization by the Supreme Court.

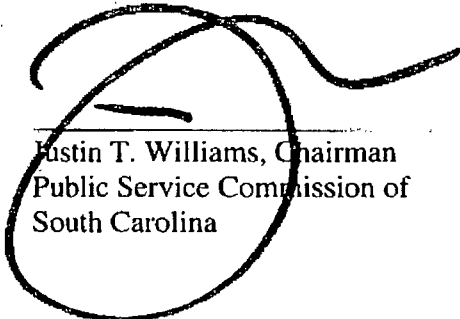
V, ORDERING PARAGRAPHS

1. The Petition for Reconsideration of Order No. 2022-79 filed by Daufuskie Island Utility Company, Incorporated is hereby denied.

2. This Order shall remain in full force and effect until further Order of the Commission

BY ORDER OF THE COMMISSION:




Justin T. Williams, Chairman
Public Service Commission of
South Carolina