

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

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Docket No. 2011-47-WS  
Case Tracking Number 2012-208126

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Carolina Water Service, Inc,.....Appellant

v.

South Carolina Office of Regulatory Staff,  
Forty Love Homeowners' Association, and  
Midlands Utility, Inc..... Respondents

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**FINAL BRIEF OF RESPONDENT**

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January 17, 2013

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## STATEMENT OF ISSUE ON APPEAL

- I. DO THE PSC'S POWERS TO DETERMINE "JUST AND REASONABLE" RATES INCLUDE THE POWER TO DENY A RATE INCREASE WHERE THE PSC DEEMS THE QUALITY OF SERVICE PROVIDED BY THE UTILITY TO BE UNACCEPTABLE?**

### STATEMENT OF THE CASE

By letter dated January 27, 2011, Carolina Water Service, Inc. ("Utility" or "CWS") provided notice, as required by S.C. Code Ann. § 58-5-240(A) (Supp. 2010), to the Public Service Commission of South Carolina ("PSC") of Utility's intent to file an application seeking an increase in rates for the water and sewer services provided to Utility's service areas in South Carolina. Thereafter, on April 15, 2011, Utility filed its application for an increase in rates and charges for water and sewer services.

Pursuant to S.C. Code Ann. § 58-4-10(B) (Supp. 2010), the South Carolina Office of Regulatory Staff ("ORS") was automatically a party of record to the case. Forty Love Point Homeowners' Association ("Forty Love HOA") and Midlands Utility, Inc. ("Midlands") filed petitions to intervene as parties of record in the case.

The PSC scheduled and held three (3) public "night hearings" on July 13, 2011, August 4, 2011, and September 7, 2011. These night hearings, scheduled for venues in Lexington County and York County and in the PSC's hearing room in Columbia, are local public hearings noticed to the customers of Utility and held to provide a forum, at a convenient time and location, for customers of Utility to present their comments regarding the service and rates of Utility. At the Lexington hearing on July 13, 2011, twenty-one (21) public witnesses presented testimony. On August 4, 2011, at the night

hearing in Lake Wylie, twenty-three (23) public witnesses testified. At the September 7, 2011, public night hearing held in the PSC's hearing room eleven (11) public witnesses testified.

On September 7 and 8, 2011, the PSC convened a public hearing in its hearing room located in Columbia. During this hearing, the PSC received evidence from the parties of record to the case. At the outset of the hearing held September 7, 2011, the PSC received testimony from eight (8) public witnesses. On September 19, 2011, the PSC reconvened the hearing for the closing arguments from counsel for the parties. Following the hearing, the parties of record submitted proposed orders to the PSC.

The PSC issued its Order No. 2011-784 on October 24, 2011. By its Order, the PSC denied Utility's request for increased rates and charges. On November 14, 2011, Utility timely filed, pursuant to S.C. Code Ann. § 58-5-330 (Supp. 2010) and 26 S.C. Code Ann Regs. 103-854 (Supp. 2010), a petition for rehearing or reconsideration. As alternative relief, Utility included in its petition for rehearing or reconsideration a request for approval of a bond pursuant to S.C. Code Ann. § 58-5-240(D) (Supp. 2010) which would allow Utility to place rates into effect during the pendency of an appeal.

On January 19, 2012, the PSC issued its Order No. 2012-31 in which it denied Utility's petition for rehearing or reconsideration and approved the bond form submitted by Utility. Utility received written notice of Order No. 2012-31 on January 23, 2012. Following the written notice of the PSC's order, Utility filed the bond on January 31, 2012 and placed rates into effect under that bond. Thereafter, on February 17, 2012, Utility served its Notice of Appeal to this Court.

## STATEMENT OF FACTS

Utility is a public utility providing water and wastewater services to customers within South Carolina and whose operations in this state are subject to the jurisdiction of the PSC. (R. pp. 9-10)(Order No. 2011-784, pp. 7-8.) On April 15, 2011, Utility filed its application seeking an increase in rates and charges. (R. p. 6; Order No. 2011-784, p 4.) Under the application filed, Utility proposed a test year ending September 30, 2010, and sought an increase in rates which would provide additional annual service revenues of \$2,230,000. (R. p. 8; p. 32, ¶ 5; p. 48) (Order No. 2011-784, p. 8; CWS Application, p. 3, ¶ 5 and Schedule B;) Utility, following instructions of the PSC's Docketing Department, provided notice of its application seeking increased rates by publication and by mail to each customer. (R. pp. 6-7)(Order No. 2011-784, p. 4-5.)

ORS conducted compliance, operational and financial audits of Utility and its books and records. (R. p. 1480, lines 9-21; p. 1504, lines 5-10; p. 1535, lines 9-14; pp. 2984-2988; pp. 2989-2990; pp. 2991-3004; pp. 3005-3018; pp. 3019-3043; pp. 3044-3089) (Tr.Vol. 5, p. 1249, lines 9 – 21; p. 1273, lines 5 – 10; p. 1304, lines 9 – 14; Hearing Exhibits, 43, 44, 45, 46, 47, and 48.) In the performance of these audits, ORS made on-site inspections of Utility's facilities, examined Utility's books and records, and gathered detailed information concerning the Utility's operations. *Id.*

The PSC scheduled three (3) public night hearings to provide convenient venues for customers of Utility to present testimony and comments concerning Utility's rate request. Over the course of the three night hearings and the two day public hearing where

the parties presented their cases, sixty-three (63) public witnesses<sup>1</sup> appeared and presented testimony and, in some cases, exhibits. (R. pp. 7-8) (Order No. 2011-784, p. 5-6.) The testimony from the public witnesses and from the three witnesses testifying for Forty Love HOA provided the PSC with the customers' experiences with Utility and Utility's services.

At the public hearing held on September 7 and 8, 2011, where the parties presented evidence, Utility presented the testimony of Pauline M. Ahern (Principal of AUS Consultants), Lisa Sparrow (President and Chief Executive Officer of Utilities, Inc.<sup>2</sup>), Steven M. Lubertozzi (Executive Director of Regulatory Accounting and Affairs at Utilities, Inc.), Kirsten Weeks (Manager of Regulatory Accounting at Utilities, Inc.), Patrick C. Flynn (Regional Director at Utilities, Inc.), Bob Gilroy (Regional Manager for CWS and Utilities, Inc.), and Karen Sasic (Director of Customer Care at Utilities, Inc.). Additionally, the Company presented Mac Mitchell (Regional Manager for CWS and Utilities, Inc.).

Forty Love HOA presented the testimony of Kim Nowell, Frank Rutkowski, and Nancy Williamson concerning service and quality problems experienced by Forty Love homeowners. (R. pp. 621-685)(Tr. Vol. 3, pp. 373 – 437.) Midlands presented the testimony of Keith G. Parnell in support of a Settlement Agreement reached between Utility and Midlands. (R. pp. 686-706)(Tr. Vol. 3, pp. 438 – 458.) The Settlement Agreement was submitted to the PSC during the hearing on September 7, 2011. (R. p. 699, lines 4-7)(Tr. Vol. 3, p. 451, ll. 4 – 7.)

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<sup>1</sup> Of the sixty-three (63) public witnesses who testified during the proceedings, fifty-five (55) were customers of CWS, one (1) was a customer of a private utility owned by the same parent as CWS, and five (5) were elected officials (two of the elected officials testified at two separate hearings).

<sup>2</sup> CWS is a subsidiary of Utilities, Inc.



The ORS prefiled direct and surrebuttal testimonies of Dr. Douglas H. Carlisle Jr. (Economist), Sharon G. Scott (Senior Manager for Rate Cases), Dawn M. Hipp (Director of Telecommunications, Transportation, Water and Waste Water Departments), and Willie J. Morgan, P.E. (Program Manager of Water and Waste Water Department) were stipulated into the record on September 8, 2011 without objection. (R. pp. 1561-1602; pp. 1479-1499; pp. 1501-1531; pp. 1533-1560; pp. 2984-2988; pp. 2989-2990; pp. 2991-3004; pp. 3005-3018; pp. 3019-3043; pp. 3044-3089; pp. 3090-3127; pp. 3128-3136)(Tr. Vol. 5, pp 1330 – 1371; 1248 – 1268; 1270 – 1300; 1302 – 1329; Hearings Exhibits 43, 44, 45, 46, 47, 48, 49, and 50.) Dr. Carlisle’s testimony provides his opinion concerning a fair rate of return on equity of Utility. (R. pp. 1561-1602; pp. 3090-3127; pp. 3128-3136)(Tr. Vol. 5, pp. 1330 – 1371; Hearing Exhibits 49 and 50.) Sharon G. Scott’s direct and surrebuttal testimonies describe ORS’s examinations of the application and Utility’s books and records as well as the subsequent accounting and pro forma adjustments recommended by ORS. (R. pp. 1248-1499; pp. 2991-3004; pp. 3005-3018)(Tr. Vol. 5, pp. 1248 – 1268; Hearing Exhibits 45 and 46.) Mr. Morgan’s direct and surrebuttal testimonies focused on Utility’s compliance with the PSC’s rules and regulations, ORS’s business audit of Utility’s water and wastewater systems, test-year and proposed revenue, and performance bond requirements. (R. pp. 1533-1560; pp. 3019-3043; pp. 3044-3089)(Tr. Vol. 5, pp. 1302 – 1329; Hearing Exhibits 47 and 48.) Ms. Hipp’s direct and surrebuttal testimonies supported ORS’s position on the need for a water audit, the design flaws associated with Customer Care & Billing (“CC&B”) and the resulting billing problems for customers served by purchased water/sewer systems, and ORS’ recommendation to modify Utility’s tariff related to “Charges for Water Distribution

Only” and the “pro-rata” language contained in that section of the tariff. (R. pp. 1501-1531; pp. 2984-2988; pp. 2989-2990)(Tr. Vol. 5, pp. 1270 – 1300; Hearing Exhibits 43 and 44.)

By its application, Utility requested an increase in its annual revenues of \$2,232,408. (R. p. 48)(CWS Application Schedule B.) ORS, following its audit of Utility’s books and records and with ORS’ proposed adjustments, calculated the proposed increase to be \$2,968,522 of which \$1,973,636 is from additional water revenues (an increase of approximately 80%), \$726,254 is from additional sewer revenues (an increase of approximately 14%), and \$269,437 is from miscellaneous revenues. (R. p. 3005)(Hearing Exhibit 46, SGS-1.) At the hearing, Utility agreed with many, but not all, of the proposed accounting adjustments offered by the ORS which resulted in lowering Utility’s rate request to approximately \$1,200,000, or a 20% increase in rates. (R. p. 614, lines 12-19; p. 1120, lines 1-16; pp. 2821-2844)(Tr. Vol. 3, p. 614, ll. 12 – 19; Tr. Vol. 5, p. 889, ll. 1 – 16; Hearing Exhibit 32, Exhibit KEW-1, Schedule B.)

On September 19, 2011, the parties made closing arguments to the PSC. Thereafter, the parties submitted proposed orders. Utility’s proposed order adopted a number of the accounting adjustments proposed by the ORS and recommended that rates be set on a return on equity of 11.50%, an allowable rate base of \$24,005,206, and annual operating expenses of \$6,993,840. (R. p. 79, p. 85, pp. 104-105)(CWS Proposed Order, pp. 8, 14, 33-34.) The proposed rate increase as advocated in Utility’s proposed order would produce additional annual revenues of \$1,268,844 and yield a return on rate base of 9.05%. (R. p. 115)(CWS Proposed Order, p. 44.) ORS’s proposed order recommended the setting of rates on a return of equity of 9.02%, an allowable rate base of \$23,611,206,

annual operating expenses of \$6,433,719 and a return on rate base of 7.80%. (R. p. 168)(ORS Proposed Order, p. 50.) Under ORS' proposed order additional annual revenues of \$501,133 would be needed for Utility to have the opportunity to earn the return on rate base in the order. *Id.*

Midlands did not propose any accounting adjustments in its proposed order. However, Midlands did request the PSC to accept the settlement agreement between Utility and Midlands as being reasonable and in the public interest. (R. p. 185)(Midlands Proposed Order.) Forty Love HOA's proposed order also did not propose any accounting adjustments. By its proposed order, Forty Love HOA recommended that Utility not be allowed to collect additional revenues in South Carolina until Utility met certain conditions, including establishing a service office in South Carolina, provide water and sewer service to the subdivision through bulk service from the City of Columbia, conduct a water audit, individual notification to each customer of the annual water quality report and of quality issues as the issues may arise, and a limitation on future additional revenue to not exceed a return on rate base of 7.8%. (R. pp. 182-184)(Forty Love HOA Proposed Order, pp. 2-4.)

In its Order No. 2011-784 issued October 24, 2011, PSC denied Utility's request for a rate increase in its entirety. In its decision, the PSC stated "[t]his case presents the questions of whether the [PSC's] powers to determine 'just and reasonable' rates include the power to deny a rate increase in its entirety where it deems the quality of service provided by a utility to be unacceptable based upon the evidence of record." (R. p. 3)(Order No. 2011-784, p. 1.) Following issuance of Order No. 2011-784, Utility timely filed a petition for rehearing and reconsideration pursuant to S.C. Code Ann. § 58-5-330

(Supp. 2010). By Order No. 2012-31, the PSC denied Utility's petition for rehearing or reconsideration but approved Utility's bond form allowing Utility to place rates into effect under bond as provided by S.C. Code Ann. § 58-5-240 (Supp. 2010). (R. pp. 28-29)(Order No. 2012-31, pp. 1-2.) Subsequently, Utility placed rates into effect under bond which would generate additional revenues of \$501,133 during the pendency of an appeal, and Utility then timely filed and served its Notice of Appeal.

### **STANDARD OF REVIEW**

The standard of review applicable to decisions of the PSC is set forth in the South Carolina Administrative Procedures Act ("APA"), S.C. Code Ann. § 1-23-310 *et seq.* (Supp. 2011), as interpreted in numerous decisions of South Carolina Appellate Courts.

"This Court employs a deferential standard of review when reviewing a PSC decision and will affirm that decision when substantial evidence supports it." *Porter v. South Carolina Public Service Comm'n*, 333 S.C. 12, 20, 507 S.E.2d 328, 332 (1998). This standard of review, in accordance with S.C. Code Ann. § 1-23-380 of the APA, provides that the Court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp.2011); *Long Cove Home Owners' Ass'n, Inc. v. Beaufort County Tax Equalization Bd.*, 327 S.C. 135, 139, 488 S.E.2d 857, 860 (1997).

Under this substantial evidence standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assoc's., Inc.*, 345 S.C. 594, 603, 550 S.E.2d 287, 292

(2001). “Because the Commission’s findings are presumptively correct, the party challenging a Commission order 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 on the whole record.” *Duke Power Co. v. Public Serv. Comm’n*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001).

“Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion of that the administrative agency reached.” *Robbins v. Walgreens and Broadspire Serv., Inc.*, 375 S.C. 259, 264, 652 S.E.2d 90, 93 (2007). “Substantial evidence is not a mere scintilla of evidence nor evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached.” *Waters v. South Carolina Land Res. Conservation Comm’n*, 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence.” *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999). The test to be applied is not whether the reviewing appellate tribunal might have reached a different conclusion, but, rather, whether the conclusion reached by the agency is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Central Transport, Inc. v. South Carolina Pub. Serv. Comm’n*, 289 S.C. 267, 270, 346 S.E.2d 25, 27 (1986).

## ARGUMENT

### **I. THE PSC’S POWERS TO DETERMINE “JUST AND REASONABLE” RATES INCLUDE THE POWER TO DENY A RATE INCREASE WHERE**

**THE PSC DEEMS THE QUALITY OF SERVICE PROVIDED BY THE UTILITY TO BE UNACCEPTABLE.**

In Order No. 2011-784, the PSC denied Utility's application for an increase in rates based upon "the widespread and pervasive problems with regard to quality of service." (R. p. 23)(Order No. 2011-784, p. 21.) The PSC acknowledged that this case "presents the question of whether the [PSC's] powers to determine 'just and reasonable' rates include the power to deny a rate increase in its entirety where it deems the quality of service provided by the utility to be unacceptable based upon the evidence in the record." (R. p. 3)(Order No. 2011-784, p. 1.) After examining relevant case law, the PSC determined "that quality of service must be considered in setting just and reasonable rates." (R. p. 6)(Order No. 2011-784, p. 4.)

In reaching its decision, the PSC analyzed the recent case of *Utilities Service of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C. 96, 708 S.E.2d 755 (2011) ("*USSC*") and the older case *Patton v. South Carolina Public Service Comm'n*, 280 S.C. 288, 312 S.E.2d 257 (1984). From its analysis of those cases, the PSC concluded that *USSC* did not "explicitly [hold] that [the PSC] is without the power and jurisdiction to issue a complete denial of a rate increase request where the evidence demonstrates that the service delivered by the utility is simply unacceptable." (R. p. 5)(Order No. 2011-784, p. 3.) Citing to the *Patton* case, the PSC concluded that "quality of service must be considered in setting just and reasonable utility rates." (R. p. 6)(Order No. 2011-784, p. 4.)

This Court addressed the role of the PSC and the ORS in *USSC* and reaffirmed that "the PSC retains its fundamental role as fact-finder." 392 S.C. at 100, 708 S.E.2d at

757 (2011). In *USSC*, this Court was presented with the issue, *inter alia*, of whether the PSC could determine whether a regulated utility has met its burden to prove expenditures when the ORS had not challenged the expenditures. The Court reviewed the roles of the PSC and the ORS following enactment of 2004 Act 175. In examining the role of the PSC, this Court determined that the PSC's powers with regard to ratemaking were not eliminated with the enactment of Act 175 and stated

The PSC's powers with regard to ratemaking were not eliminated, however. The PSC retained its powers "to supervise and regulate" rates and service and "to fix just and reasonable standards, classifications, regulations, practices, and measurements of service." *S.C. Code Ann. § 58-3-140(A)* (1976 & Supp. 2010). Pursuant to these powers, the PSC is entitled to create incentives for utilities to improve their business practices. Accordingly, the PSC may determine that some portion of an expense actually incurred by a utility should not be passed on to consumers. (citations omitted).

*USSC*, 392 S.C. 96, 105, 708 S.E.2d 755, 760.

This Court further stated

we hold the PSC is the ultimate fact-finder in a ratemaking application. It has the power to independently determine whether an applicant has met its burden of proof. The PSC is not bound by ORS's determination that an expenditure was reasonable and proper for inclusion in a rate application. The PSC may determine--independent of any party--that an expenditure is suspect and requires further scrutiny.

*USSC*, 392 S.C. 96, 107, 708 S.E.2d 755, 761.

In *USSC*, this Court further clarified that testimony by non-party customers of a utility may be considered by the PSC. *See, USSC*, 392 S.C. at 112, 708 S.E.2d at 764 ("[W]e find the PSC could rely on non-party testimony, or on any other relevant

evidence, to determine that the presumption of reasonableness had been overcome as to a particular expense ... [but] the PSC must determine whether, even excluding any expenses it finds imprudent, Utility's expenses have increased since its last rate application such that it might be entitled to an increase in its rates.")

In Order No. 2011-784, the PSC cited to *Patton* for the premise that in exercising the statutory authority under S.C. Code Ann. § 58-5-210 to supervise and regulate the service of public utilities under its jurisdiction, the PSC "must be allowed the discretion of imposing reasonable requirements on its jurisdictional utilities to insure that adequate and proper service will be rendered to the customers of the utility companies ... The quality of service rendered is, necessarily, a factor to be considered in fixing the 'just and reasonable' rate therefor." (R. p. 4)(Order No. 2011-784, p. 2.)

The above-quoted language from the PSC's Order No. 2012-784 citing from *Patton* includes a quote from the North Carolina case of *State Ex rel. Util. Com'n v. General Tel. Co.*, 285 N.C. 671, 208 S.E. 2d 681 (1974). The PSC further examined that North Carolina case and cited to certain holdings of that case related to consideration of quality of service being rendered by a utility in consideration of a utility rate case.

Utility alleges the PSC's reliance on the North Carolina case to be error because the underlying statutory law in North Carolina differs from that in South Carolina. However, the PSC's citation to and quotation from the North Carolina case, as well as cases from Pennsylvania and New Jersey, provide further support for the holding in *Patton* that quality of service is necessarily a factor to consider in the setting of just and reasonable rates for utility service. In *Patton*, this Court cited to the North Carolina case for the principle that the quality of service is a factor to consider in the setting or fixing of



rates. Given the public testimony provided by Utility's consumers, the PSC in Order No. 2011-784 cited to additional language from that North Carolina case to underscore the general ratemaking principle that quality of service is an important and necessary consideration in establishing just and reasonable rates.

In utility rate cases, the PSC has been recognized "as the 'expert' designated by the legislature to make policy determinations regarding utility rates." *Hamm v. S.C. Public Service Comm'n*, 294 S.C. 320, 322, 364 S.E.2d 455, 456 (1988) (citing *Patton*). In its capacity as ratemaker, the Commission sits as the trier of the facts, akin to a jury of experts. *Id.* The PSC is vested with broad general powers to supervise and regulate the rates and service of every public utility. *Porter v. South Carolina Pub. Serv. Comm'n*, 327 S.C. 220, 489 S.E.2d 467 (1997).

Ratemaking is not an exact science, but a legislative function involving many questions of judgment and discretion. *Parker v. South Carolina Pub. Serv. Comm'n*, 280 S.C. 310, 313 S.E.2d 290 (1984). The PSC's ratemaking decisions are entitled to deference and will be affirmed if supported by substantial evidence. *S.C. Energy Users Comm. v. S.C. Public Service Comm'n*, 388 S.C. 486, 490, 697 S.E.2d 587, 589 (2010).

Relying on the testimony of a number of customer witnesses during the proceedings and from ORS witnesses, the PSC concluded that "the widespread and pervasive problems with regard to quality of service in this case are sufficient to support denial of [Utility's] rate request.' (R. p. 23)(Order No. 2011-784, p. 21.) In reaching that conclusion, the PSC made four specific findings of fact related Utility's service:

...

3. The evidence presented in this case demonstrates that the Applicant failed repeatedly to bill its customers regularly

and accurately for its services. While some improvements have been made, billing and collection problems have persisted.

4. Many customers testified about significant problems with the quality of the water delivered by the Applicant. Their testimony indicated that their water often is discolored, smells bad, tastes bad, and stains clothes and plumbing fixtures. Some customers reported that the water has ruined plumbing fixtures and household appliances. Some customers spend significant funds for water filtration or treatment equipment. Others drink only bottled water.
5. Some customers report sewer problems and inadequate response to service calls seeking remedies.
6. Some customers report generally poor or unresponsive customer service from the Company's out-of-state customer service call centers, and complain of having no customer service personnel physically present in the State of South Carolina.

(R. p. 10)(Order No. 2011-784, p. 8.)

After setting forth these findings of fact detailing the nature and scope of the complaints concerning the service provided by Utility, the PSC then set forth with specificity the evidence of record which it relied upon concerning these findings of fact. Ultimately, the PSC concluded that these accounts of service issues demonstrated "widespread and pervasive problems with regard to quality of service ... sufficient to support a denial of [Utility's] rate request." (R. p. 23)(Order No. 2011-784, p. 21.) The PSC also stated that "[b]ecause the record in this case is replete with evidence of inadequate and unacceptable customer service by the utility, we believe that [Utility] deserves no rate increase, and we therefore deny its request for rate relief on its entirety." (R. p. 3)(Order No. 2011-784, p. 1.)

The recitation of testimony from both customers of Utility and ORS' witnesses cited in Order 2011-784 provides evidence of the problems experienced by the customers

with the Utility's services and the frustrations encountered by the customers with repeated problems. (R. pp. 11-23)(Order No. 2011-784, pp. 9 – 21.) The testimony cited by the PSC related to service quality issues is not isolated or minimal but spans the service provided by Utility and includes problems associated with billing, water quality, sewer issues such as blockages and backups, and problems with the Utility's customer service department. In its brief, Utility attempts to minimize the effect of the customer testimony by repeated reference to the number of customers testifying before the PSC to the total number of customers served by Utility. However, while the number of witnesses may be small when compared to the total number of Utility's customers across the state, the PSC found the testimony from these customer witnesses compelling, and convincing. Upon weighing the evidence of record, the Commission found that the problems testified to by the customers were persistent (R. p. 20)(Order No. 2011-784 at 18) and had persisted at an unacceptable level (R. p. 18)(Order No. 2011-784 at 16) whereupon the PSC, as the fact-finder<sup>3</sup>, concluded that the "widespread and pervasive problems with regard to quality of service in this case are sufficient to support a denial of [Utility's] rate request." (R. p. 23)(Order No. 2001-784, p. 21.)

In reaching its conclusion that Utility's quality of service did not support the rate request, the PSC examined the record and cited to a number of examples of poor service. As to billing problems, the PSC relied upon testimony presented by ORS witness Hipp and a number of customers. ORS witness Hipp testified that Utility had frequently failed to issue timely and accurate bills to its customers. (R. p. 1505, line 13 – p. 1506, line 3) (Tr. Vol. 5, p.1274, line 13-p. 1275, line 3) Among the billing issues noted by ORS in its

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<sup>3</sup> See, *Johnson v. Rent-A-Center, Inc.*, 398 S.C. 595, 602, 730 S.E.2d 857, 860, 2012 S.C. Lexis 144 (2012) (citing *Pinckney v. Warren*, 344 S.C. 382, 393, 544 S.E.2d 620, 627 (2001))(Generally, a trial judge is in the best position to judge the credibility of a witness.)

review and cited to by the PSC were no monthly bill or delayed monthly bill, 60-90 day delay between the service period and bill date, estimated meter readings used in two consecutive billing periods without customer approval, and bills not in compliance with the approved rate schedule. (R. p. 1505, line 20 – p. 1506, line 3)(Tr. Vol. 5, p. 1274, line 20 – p. 1274, line 3) The PSC also cited to ORS testimony as to bill form deficiencies such as no meter readings, no distinct markings identifying estimated bills, no meter number, and no statement that the applicable rate schedule would be furnished upon request. (R. p. 1275, lines 4-12)(Tr. Vol. 5, 1275, lines 4-12) Order No. 2011-784 also cited to Witness Hipp’s testimony that ORS determined that Utility was not making adjustments to customer bills in accordance with PSC regulations in that Utility failed to bill some new customers for service and that in one instance, when the error was discovered, Utility issued a bill for a time period which exceed the six months for adjustment of bills allowed by the PSC’s regulations. (R. p. 1506, Lines 13-23)(Tr. Vol. 5, 1275, lines 13-23).

From the testimony provided by customers, the PSC recounted the evidence from over 20 customers testifying to billing problems. (R. p. 12)(Order No. 2011-1184, p. 10.) The PSC cited to testimony of sporadic billing, including failure of Utility to render bills, of Utility sending “double bills,” and sending more than one bill a month. (R. p. 274, lines 1-8; p. 283, lines 3-20; p. 323, lines 12-19; p. 343, lines 5-14; p. 312, line 19 – p. 313, line 9; p. 328, line 16 – p. 329, line 23; pp. 352-357; p. 377, line 19 – p. 382, line 6)(Tr. Vol. 1, p. 26, lines 1-8; Tr. Vol. 1, p. 35, lines 3-20; Tr. Vol. 1, p. 75, lines 12-19; Tr. Vol. 1, p. 95, lines 5-14; Tr. Vol. 1, p. 64, line 19 – p. 65, line 9; Tr. Vol. 1, p. 80, line 16- p. 81, line 23; Tr. Vol. 1, pp. 104-109; Tr. Vol. 1, p. 129, line 19 – p. 134, line 6) A

number of customers testified to billings reflecting excessive usage or usage when a premises was vacant. (R. p. 478, lines 12-24; p. 509, line 15-p.510, line 22; p. 530, line 1-p. 531, line 18; p. 540, line 2 – p. 541, line 12; pp. 542-548)(Tr. Vol. 2, p. 230, lines 12-24; Tr. Vol. 2, p. 261, line 15 – p. 262, line 22; Tr. Vol. 2, p. 282, line 1- p. 283, line 18; Tr. Vol. 2, p. 292, line 2-p.293, line 12; Tr.Vol. 2, pp. 294-300.) Other customers expressed concern over unexplained increases in rates or bills. (R. p. 426, lines 8-20; p. 458, line 19-p. 459, line 11)(Tr. Vol. 2, p. 178, lines 8-20; Tr. Vol. 2, p. 210, line 19 – p. 211, line 11)

Customers also testified to billing errors where Utility overbilled customers. (R. p. 462, lines 3-14; pp. 466-467; pp. 2398-2403; pp. 490-492)(Tr. Vol. 2, p. 214, lines 3-14; pp. 218-219, Hearing Exhibit 14; Tr. Vol 2, pp. 242 - 244.) One of these overbilling situations involved Utility incorrectly adding a county water supply charge to the Utility's supply charge. In June 2008, when Utility implemented its new billing system, bills for customers in or around Lake Wylie in York County contained an incorrect water supply charge. A York County charge of \$0.15 was added to Utility's \$3.26 supply charge. The York County charge was supposed to have been charged once per month on each bill. Instead, the charge was added to Utility's per thousand gallon water supply charge and was charged for every thousand gallons billed to a customer. According to the customer's testimony, the error was identified in October 2008 but was not corrected until November 2010. Even after the correction was made, Utility's bills did not reflect the separate charges until May 2011 and credits were not issued until August 31, 2011. (R. pp. 490-492; p. 1337, line 23 – p. 1339, line 9; p. 2944)(Tr. Vol. 2, pp. 242-244; Tr. Vol. 5, pp. 1106, p. 23-p. 1108, line 9; Hearing Exhibit 37.)

The PSC also noted a number of complaints concerning water quality issues. Customer testimony relied upon by the PSC in its Order No. 2011-784 included testimony of discolored water, offensive odor from the water, and discolored fixtures and laundry. (R. p. 621, line 25- p. 623, line 3; p. 426, line 21-p. 427, line 3; p. 302, line 1-p. 303, line 17; p. 373, line 13 – p. 375, line 12; p. 387, lines 13-20; p. 392, line 24 – p. 393, line 12)(Tr. Vol. 3, p. 373, line 25 –p. 375, line 3;Tr. Vol. 2, 178, line 21- p. 179, line 3; Tr. Vol. 1, p. 54, line 1-p. 55, line 17; Tr. Vol. 1, 125, line 13-p.127, line 12; Tr. Vol. 1, p. 139, lines 13-20; Tr. Vol. 1,p. 145, line 24 – p. 145, line 12; Tr. Vol. 4, p. 697) The PSC also cited to customer testimony of the need to install filtration systems and the need to replace plumbing fixtures and valves. (R. pp. 623-624; pp. 637-639; p. 426, line 21-p. 427, line 3; p. 366, lines 8-21; p. 387, lines 18-20; p. 272, line 22-p. 273, line 10)(Tr. Vol. 3, pp. 375-376; Tr. Vol. 3, pp. 389-392; Tr. Vol. 2, p. 178, line 21-p. 179, line 3; Tr. Vol. 1, p. 118, lines 8-21; Tr. Vol. 1, p. 139, lines 18-20; Tr. Vol. 1, p. 24, line 22-p. 25, line 10) Several customers expressed concern over ingesting the water supply by Utility, and one customer testified to skin irritations. (R. p. 335, lines 21-24; p. 341, lines 2-6; p. 665, lines 14-20; p. 945, lines 12-17; p. 393, lines 3-12; p. 272, line 18-p. 273, line 10)(Tr. Vol. 1, p. 87, lines 21-24; Tr. Vol. 1, p. 93, lines 2-6; Tr. Vol. 3, p.417, lines 14-20; Tr. Vol. 4, p. 697, lines 12-17; Tr. Vol. 1, p. 145, lines 3-12; Tr. Vol. 1, p. 24, line 18-p. 25, line 10)

Order No. 2011-784 cited to the testimony from two customers who experienced sewer problems. The PSC stated that “CWS customers described their frustrations with blockages in the sewer lines and sewage backups” and then cited to testimony from customers. (R. p. 21)(Order No. 2011-784 at 19.) A customer testified concerning a

blockage that he described as a “catastrophic” and for which Utility’s insurer paid damages resulting from the incident. (R. pp. 411-412)(Tr. Vol. 2, pp. 163-164.) This customer further testified that his experience revealed that Utility does not know the location of its’ own infrastructure which Utility is required to maintain. (R. pp. 410-421;)(Tr. Vol. 2, pp. 162 – 173.) Another witness testified that she had sewerage issues on at least three occasions that she had to deal with at her own expense. (R. pp. 422-427)(Tr. Vol. 2, pp. 174 – 179.)

Issues related to Utility’s customer service operations were also discussed by the PSC. In Order No. 2011-784, the PSC cited to testimony of a customer whose water service was disconnected when her bills were paid on time. (R. p. 427, line 18 – p. 428, line 24)(Tr. Vol. 2, p. 179, line 18 – p. 180, line 24) The PSC also cited to testimonies of customers whose telephone calls were not returned, whose calls were disconnected, or whose requests were not responded to. (R. p. 426, lines 8-20; p. 461, line 6 – p. 462, line 19) (Tr. Vol. 2, p. 178, lines 8-20; Tr. Vol. 2, p. 213, line 6 – p. 214, line 19) The PSC noted testimony revealing frustration because Utility representatives could not provide information regarding issues and questions asked of Utility. (R. p. 461, line 19 – p. 462, line 3) (Tr. Vol. 2, p. 213, line 19- p. 214, line 3) The PSC also recounted a customer’s testimony concerning an incident of a water leak in the street that was not repaired for a three week period even after multiple notifications from customers in the area. (R. p. 511, line 11 – p. 512, line 6)(Tr. Vol. 2, p. 263, line 11 – p. 264, line 6.)

Utility presented testimony, from Utility witnesses Sasic, Flynn, Mitchell, and Gilroy, addressing the testimony of the customers. In weighing the evidence from the customers with the evidence of Utility regarding the multiple billing issues, the PSC

concluded “[U]tility claims to have made improvements in its boiling and collection practices, but we believe the problems have persisted at an unacceptable level.” (R. p. 18)(Order No. 2011-784, p. 16) The PSC further stated with regard to water quality issues that “[w]e are encouraged that the utility has agreed to investigate solutions to these problems, up to and including the possibility of changing water sources for areas with chronic issues such as Forty Love Point. However, the weight of customer testimony indicates to us that problems persist.” (R. p. 20)(Order No. 2011-784, p. 18.) The PSC then ultimately concluded that “widespread and pervasive problems with regard to quality of service in this case are sufficient to support a denial of [Utility’s] rate request.” (R. p. 23)(Order No. 2011-784, p. 21)

After making its findings concerning Utility’s quality of service, the PSC reviewed the returns of Utility under current revenues and after accounting and pro forma adjustments. The PSC examined the calculated returns on rate base and returns on equity as presented in the exhibits of ORS witness Sharon Scott and CWS witness Kirsten Weeks. (R. p. 23)(Order No. 2011-784, p. 21.) ORS witness Scott’s exhibits showed a return on rate base of 6.50% and a return on equity of 6.42% under the current rates and after accounting and pro forma adjustments. (R. p. 23; p. 3018)(Order No. 2011-784, p. 21; Hearing Exhibit 46, Surrebuttal Audit Exhibit SGS-8.) In Utility’s witness Weeks exhibits, Utility’s as adjusted return on rate base is 5.85% and the as adjusted rate of return on equity is 5.09%. (R. p. 23; p. 2825)(Order No. 2011-784, p. 21; Hearing Exhibit 32, Exhibit KEW-1, Schedule C.) Relying upon the evidence of positive rates of returns from ORS Witness Scott and Utility Witness Weeks, the PSC concluded

Because [Utility’s] current rates result in sufficient revenue to generate a positive rate of return sufficient to



service its debt and provide a return to equity holders, the denial of the requested increase cannot be characterized as confiscatory and therefore is not violative of the Fifth and Fourteenth Amendment[s] to the Constitution of the United States.”

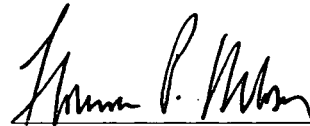
Order No. 2011-784, p. 21. (R. p. 23)

Thus, the PSC examined and considered Utility’s returns and Utility’s level of service in light of the “widespread and pervasive problems with.... quality of service” and determined that Utility’s existing rates are sufficient based on the level of service provided by Utility.

### **CONCLUSION**

For the foregoing reasons, the appeal of Appellant Utility should be dismissed, and the orders of the PSC affirmed.

Respectfully submitted,



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Docket No. 2011-47-WS  
Case Tracking Number 2012-208126

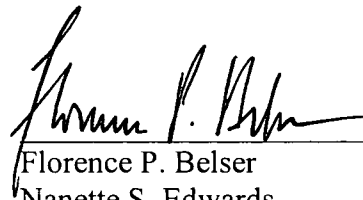
Carolina Water Service, Inc,.....Appellant

v.

South Carolina Office of Regulatory Staff,  
Forty Love Homeowners' Association, and  
Midlands Utility, Inc. .... Respondents

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent Office of Regulatory Staff complies with Rule 211(b), SCACR.



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January 17, 2013

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Carolina Water Service, Inc,.....Appellant

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Forty Love Homeowners' Association, and  
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CERTIFICATE OF SERVICE

This is to certify that I have caused to be served this day one (1) copy of the **Office of Regulatory Staff's Final Brief** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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Pamela J. McMullan

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This 17<sup>th</sup> day of January, 2013