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June 9, 2006

VIA HAND DEVLIERY
The Honorable Charles L.A. Terreni
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

RE: Application of United Utility Companies, Inc. for adjustment of rates and charges and modifications to certain terms and conditions for the provision of water and sewer service; Docket No. 2006-107-WS

Dear Mr. Terreni:

Enclosed for filing please find the original and ten (10) copies of Applicant's Answer to Petition to Intervene of Greenville Timberline SC, LLC and Motion to Dismiss Petition to Intervene in the above-referenced matter.

By copy of this letter, I am serving counsel for all parties of record with a copy of same and enclose a certificate of service to that effect.

I would appreciate your acknowledging receipt of this document by date-stamping the extra copy that is enclosed and returning it to me via my courier. If you have any questions or if you need any additional information, please do not hesitate to contact us.

Sincerely,

WILLOUGHBY & HOEFER, P.A.

Benjamin P. Mustian

BPM/amw
Enclosures
cc: Shannon B. Hudson, Esquire
Nanette S. Edwards, Esquire
Duke K. McCall, Jr., Esquire
Newton Horr
Jacqueline H. Patterson, Esquire

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2006-107-WS

IN RE:	)	
	)	
Application of United Utility Companies, Inc. for adjustment of rates and charges and modifications to certain terms and conditions for the provision of water and sewer service.	)	**CERTIFICATE OF SERVICE**

This is to certify that I have caused to be served this day one (1) copy of **Applicant's Answer to Petition to Intervene of Greenville Timberline SC, LLC and Motion to Dismiss Petition to Intervene** 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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Nanette S. Edwards, Esquire
Office of Regulatory Staff
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Columbia, South Carolina 29201

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Newton Horr
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Pelzer, SC 29669

Andrea M Wright
Andrea M. Wright

Columbia, South Carolina
This 9th day of June, 2006.

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2006-107-W/S

IN RE: Application of United Utility Companies, Inc. for adjustment of rates and charges and modification to certain terms and conditions for the provision of water and sewer service.	))))))))	**APPLICANT'S MOTION TO DISMISS PETITION TO INTERVENE**

Applicant, United Utility Companies, Inc. ("UUC" or "Company"), pursuant to 26 S.C. Code Ann. Regs. R. 103-840 (1976), moves that the Commission dismiss the Petition of Greenville Timberline SC, LLC to Intervene ("Petition"). In support of its Motion, UUC would respectfully show unto this Honorable Commission as follows:

INTRODUCTION

The instant docket involves UUC's current application for rate relief pursuant to S.C. Code Ann. § 58-5-240 (Supp. 2005). Greenville Timberline SC, LLC ("GTSC") has failed to assert in its Petition that it has a sufficient interest to intervene in this matter. Additionally, the Petition primarily relates to issues previously adjudicated by the Commission in an earlier docket involving an application for rate relief by UUC, namely Docket No. 2000-210-W/S. For the reasons discussed hereinbelow, GTSC's Petition should be dismissed:

FACTUAL AND PROCEDURAL BACKGROUND

In May of 2001, UUC was contacted by Mr. Cal Caldarella of MDC Corporation regarding the potential expansion of UUC's sewer service area to include the Tigerville, South Carolina campus of North Greenville University ("NGU")[1] and certain adjoining real property developed by GTSC for residential use. (February 20, 2004 Affidavit of John Rick Bryant, Exhibit "A" to UUC Return in Opposition to Petition to Intervene of North Greenville College, Docket No. 2000-210-W/S, copy attached as Exhibit "A"). As part of the potential arrangement, it was proposed that UUC would acquire and operate a wastewater treatment plant ("WWTP") owned by NGU and then serving its campus and GTSC's adjacent property upon which it planned a home development. (Exhibit A, Bryan Aff., ¶ 3.)

As a result of these negotiations, UUC, NGU and GTSC entered into a July 9, 2001, contract whereby UUC agreed to acquire and operate the WWTP subject to receipt of PSC approval for the expansion of UUC's service area to incorporate the campus and adjoining property and the acquisition of the WWTP. (Exhibit A, Bryan Aff., ¶ 5; and Ex. B.) The contract provides that "[w]astewater usage charges and service fees shall be rendered by Utility in accordance with Utility's rates, rules and regulations and conditions of service **from time to time on file with the [Public Service] Commission and then in effect."** (Exhibit A, Bryan Aff., Ex. B at 5, ¶ 7(a) (Emphasis supplied)).

In accordance with the terms of the contract, UUC filed an application with the PSC on

[1] UUC is informed and believes that North Greenville University, was known as and represented itself as "North Greenville College" at the time UUC began providing service to the same and during previous actions before this Commission specifically in Docket 2000-210-W/S. For the purposes of this filing, UUC will reference North Greenville University for consistency.

August 8, 2001, requesting that it be permitted to expand its service area to include the territory of NGU and GTSC's development. (Exhibit A, Bryan Aff., ¶ 5, Ex. C.) Thereafter, on September 24, 2001, UUC filed an application in Docket No. 2000-0210-W/S requesting that it be permitted to increase the rates and charges it was authorized to impose upon customers. As part of the application for the expansion of service, which was assigned Docket No. 2001-355-S, UUC requested authority from the PSC to impose in the proposed expanded service area the "rates and charges set forth in its existing rate schedule, **as may be changed from time to time as a result of any rate proceedings that might be brought before the Commission by [UUC], including those in Docket No. 2000--0210-W/S."** (Exhibit A, Bryan Aff. Ex. C at 2-3, ¶ 5. (Emphasis supplied)).

On September 21, 2001, UUC filed an application with the Commission in Docket No. 2000-210-W/S requesting that it be permitted to increase the rates and charges it was authorized to impose upon customers. On November 21, 2001, by its Order No. 2001-1070, the Commission approved UUC's application for expansion of its service area to include NGU's campus and the adjoining property being developed by GTSC. In December 2001, UUC began providing wastewater treatment service to NGU at the rates then in effect and approved by the PSC. Subsequent thereto, UUC has imposed upon NGU and other customers only the lawful rates authorized by the Commission in Docket No. 2000-210-W/S.

On March 22, 2002, the PSC entered an order granting UUC's request for a rate increase *in part*. [See Order No. 2002-214, Docket No. 2000-210-W/S.] UUC unsuccessfully sought reconsideration of Order No. 2002-214 [see Order No. 2002-751, October 23, 2002, Docket No. 2000-210-W/S] and on November 7, 2002, UUC petitioned the court of common pleas for Richland County ("Circuit Court") for judicial review of these Commission orders. UUC thereafter placed

rates in effect under bond pursuant to S.C. Code Ann. §58-5-240 (D) and Commission Order No. 2002-494 and began imposing those rates on NGU and other customers. GTSC has been paying this rate since October 2004.

On January 21, 2004, NGU moved to intervene in the judicial review proceeding. In response, UUC filed with the Circuit Court a return in opposition, a memorandum detailing the history of the contractual negotiations, and the February 20, 2004, affidavit of its employee John Rick Bryan, attached hereto and incorporated herein by reference as Exhibit A. The Circuit Court, thereafter, in orders dated April 8 and April 19, 2004, denied NGU's Petition to Intervene and remanded the underlying rate case to the Commission to give effect to a settlement reached by the parties of record. While the matter was pending on remand before this Commission, NGU filed a Petition to Intervene in Docket No. 2000-210-W/S. Among its asserted grounds for intervention, NGU claimed that UUC had contractually agreed to a rate different from that included in the settlement. UUC filed an Answer in Opposition, which incorporated Mr. Bryan's affidavit, and NGU's petition to intervene was denied in Commission Order No. 2004-253 dated May 19, 2004. Therein, the Commission specifically rejected NGU's allegation that it was contractually entitled to a service rate different than that specified in UUC's authorized rate schedule as it may be approved by this Commission and in effect from time to time. Order No. 2004-253 at 8. NGU did not appeal Commission Order No. 2004-253. Also on May 19, 2004, the Commission issued its Order No. 2004-254, authorizing UUC to place new rates into effect, which rates UUC is currently charging thirty-four customers in this service area including NGU, GTSC and thirty individual property owners in the GTSC development.

ISSUES

GTSC seeks to justify its intervention based upon various assertions relating to its July 9, 2001, contract with UUC. [See Petition, paragraphs 6, 10, 11 and 12.] The central issues raised by the instant Motion are whether GTSC has sufficiently established and asserted facts upon which its interests to intervene in this matter can be determined and set forth clear and concise grounds of the proposed intervention. Additionally, UUC questions whether GTSC should be permitted to litigate these assertions in the instant docket.

ARGUMENT

I. GTSC's Petition Should be Dismissed as it Lacks Sufficient Interest to Intervene in this Action

Commission Regulation 26 S.C. Code Ann. Regs R. 103-836(A)(3) states:

> A Petition to Intervene in a formal proceeding before the Commission **shall set forth clearly and concisely**:
>
> (a) The facts from which the nature of the petitioner's alleged right or interest can be determined;
> (b) The grounds of the proposed intervention;
> (c) The position of the petitioner in the proceeding.

[Emphasis supplied.] GTSC's Petition fails to meet the regulatory criteria required to properly intervene in an action before the Commission. GTSC asserts that "due to its ownership of the 100 acre tract of property any rate increase will affect [GTSC and its] future customers." The Petition fails to provide any distinct or persuasive statements of fact or contentions as to how the proposed rates will affect GTSC directly. Further, GTSC improperly assumes the rights of future assignees of its developed property to establish its grounds for participation in this matter.

GTSC bases its Petition in large part upon an argument that the proposed rate increases will negatively impact future property holders in this area; however, it fails to substantiate its claim that it has the legal authority to speak for these hypothetical group or that it is has the representative capacity to speak on their behalf. GTSC merely contends that its has a business interest in the rate increases charged by United Utility due to the large volume of business, but neglects to expound upon or elucidate this line of reasoning. The Petition apodictically does not demonstrate that the proposed rates will in any way impact its ability to sell the developed property and, therefore, fails to persuasively argue that it has a sufficient interest in this matter so as to step into the shoes of these potential purchasers of the developed property.

GTSC has further failed to basically demonstrate that the property it currently owns is the subject of the relevant contract and that it's presently owned property is within the service area of UUC. Rather, GTSC purports that the Commission accept this ipse dixit contention. Assuming the developed property will be served by UUC, GTSC has not presented sufficient facts for this Commission to determine how GTSC will be impacted or affected after it has sold the property in question. GTSC merely supposes that due to its property potentially being served by UUC at some point in the future that this alone grants it sufficient interest to intervene in this action – such an allegation is incorrect.

II. A Portion of GTSC's Petition Should be Dismissed as Barred by the Doctrine of *Res Judicata*

Should the Commission find that GTSC does have sufficient grounds to intervene in this matter, UUC submits that GTSC's assertions regarding its contractual entitlement to a rate different

than that approved by the Commission from time to time is barred by the doctrine of *res judicata*. "*Res judicata* is shown if (1) the identities of the parties is the same as in prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." Johnson v. Greenwood Mills, 317 S.C. 248 452 S.E.2d 832, 834 quoting Reidman Corporation v. Greenville Steel Structures, Inc., 308 S.C. 467, 468-69, 419 S.E.2d 217, 218 (1992). "[U]nder the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Bennett v. South Carolina Dep't of Corrections, 305 S.C. 310, ___, 408 S.E.2d 230, 231 (1991). A person is precluded from denying facts adjudicated by a court of competent jurisdiction. Watson v. Goldsmith, 205 S.C. 215, 223, 31 S.E.2d 317, 320 (1944) citing 19 Am. Jur., 601.

After the Circuit Court remanded to the Commission to give effect to the parties' settlement in Docket No. 2000-210-W/S, NGU submitted a Petition to Intervene Out of Time which contended UUC had agreed in its July 9, 2001, contract with NGU to charge a different rate than that applied for by UUC or approved by the Commission. In denying NGU's petition, the Commission repeatedly and consistently rejected this contention.[2] NGU has already litigated the question of whether UUC had contractually agreed to charge NGU a rate different than that imposed upon other

[2]"The contract ... contemplate[s] that NGC would be charged such rates as this Commission might approve and place into effect from time to time." Order No. 2004-253 (dated May 19, 2004) in Docket No. 2000-210-W/S, at. 6. "We also conclude that NGC will not suffer any prejudice since, on its face, the July 9, 2001, contract it entered into with United contemplates that **the rates to be charged by United will be those set by the Commission and in effect from time to time.**" Id. at 8. (Emphasis supplied.) "NGC has not asserted any substantive basis upon which it would challenge the rates requested other than its contention that its contract with [UUC} contemplates a specific rate different than that approved for [UUC's} other customers. **Because we find that the contract specifically contemplates the exact opposite,** denial of the petition to intervene does not work any prejudice on NGC." Id. (emphasis supplied.)

customers and the Commission unambiguously ruled in favor of UUC. GTSC now seeks to assert the same claim which was emphatically dismissed by the Commission.

GTSC should be precluded from litigating this issue as it is in sufficient privity with NGU. "It is a fundamental principle of jurisprudence that material facts or questions which were directly in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties **or their privies**, regardless of the form that the issue may take in the subsequent action." Laughon v. O'Braitis, 360 S.C. 520,527, 602 S.E. 2d 108, 112 (Ct. App. 2004) quoting 46 Am. Jur. 2d Judgments § 539 (1994). [Emphasis supplied.] "In general, it may be said that such privity involves a person so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." First Nat'l Bank v. United States Fidelity & Guaranty Co., 207 S.C. 15, 26-27, 35 S.E.2d 47, 58 (1945).

The contract between GTSC, NGU and UUC explicitly identifies that GTSC and NGU are "owners of or are duly authorized to act on behalf of owners of the Property and Facilities." Therefore, their rights and interests in enforcing their contractual rights regarding UUC's services and charges are indistinct. Any purported agreement with NGU would logically also relate to GTSC as co-owner of the property and wastewater treatment facility. NGU's contention that the contract required UUC to provide service at a specific rate is identical to the argument currently being made by GTSC. Consequently, due to NGU setting forth its arguments based upon interpretations of that contract's provisions, the Commission's finding that the contract does not preclude UUC from

requesting rate relief and charging approved rates, prevents GTSC from asserting otherwise.[3] GTSC is now attempting to relitigate this issue. The Commission should find that GTSC is in sufficient privity with NGU such that its attempt to assert a contractual entitlement to rates are barred by the doctrine of *res judicata* and should dismiss those portions of the GTSC's Petition to Intervene.

III. GTSC has Failed to Timely Object to the Rates Currently Charged by UUC

In addition to the previous adjudication of this matter, GTSC has slept on its rights, if any, to assert that the rates charged pursuant to the Commission's authorization in Order No. 2004-254 are not fair and reasonable; therefore, its claims are barred by the doctrine of laches. "Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). The party seeking to establish laches must show (1) delay, (2) that was unreasonable under the circumstances, and (3) prejudice. Brown v. Butler, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001).

UUC has charged GTSC the rates currently authorized by Order No. 2004-254 since October 2004; yet, GTSC chose not to object until UUC filed the instant application for rate adjustments. Customers of a public utility are statutorily endowed with the right to challenge the utility's rate structure or otherwise complaint about the utility's service. S.C. Code Ann. Section 58-5-270 provides "complaints may be made by any corporation, public or private, person ... by petition or complaint in writing...with respect to which, under the provisions of Articles 1, 3 and 5 of this

[3] Moreover, if GTSC were permitted to attack the Commission's prior determination on this point, UUC's other customers could be exposed to higher rates since any determination that GTSC is required to provide service at the rate alleged by GTSC would necessarily cause UUC's revenue requirement to be spread unevenly among customers. Such a

chapter, the Commission has jurisdiction or is alleged to have jurisdiction." This authority expressly granted GTSC the ability and the right to file a complaint with the Commission alleging the rates charged were inappropriate; however, GTSC complacently abided by the imposed charges for over eighteen months. GTSC has ignored this issue and, upon UUC's filing of its application, opted to interject a well-settled matter in the context of a rate case. Such contentions result in unnecessary hardship to both UUC and its customers and should not be allowed by the Commission. The rates GTSC and other UUC customers are entitled to be charged were authorized by the Commission in Docket No. 2000-210-W/S. As this final Order was not challenged, the current rate schedule is the law of the case. Therefore, any allegations contained in GTSC's Petition to Intervene concerning such a contractual dispute with CWS should be dismissed for failure to raise this issue in a timely manner.

IV. No Claim to Rates other than Commission Approved Rates is Stated

Even if the assertions of GTSC's Petition pertaining to the July 9, 2001, contract are not barred from consideration by the Commission by the doctrine of *res judicata*, there is no claim stated which will support these assertions. GTSC stated that it attached a copy of the July 9, 2001, contract with UUC as an exhibit to its Petition. While the Petition served upon UUC did not contain a copy of the contract, the description of Exhibit A specifies that it is "an agreement [entered into by GTSC] on or about July 9, 2001 with North Greenville University ... and United Utility Companies, Inc...." and that, pursuant to the agreement, GTSC "along with [NGU] conveyed to United Utility the wastewater treatment plant in Tigerville, South Carolina." The only contract pertaining to the

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result would be unjust.

conveyance of a wastewater treatment facility in Tigerville, SC to UUC is the contract identified in Exhibit A to this Motion. As such, UUC assumes this is the contract that is to be incorporated into the GTSC Petition.

The contract clearly states that "[w]astewater usage charges and service fees shall be rendered by Utility **in accordance with Utility's rates, rules and regulations and conditions of service from time to time on file with the [Public Service] Commission and then in effect.**" NGU Petition Exhibit A at 5, ¶7(a) (emphasis supplied). A motion for judgment on the pleadings pursuant to SCRCP 12(c) will be sustained where the pleadings are so defective that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated. Rosenthal v. Unarco Indus., Inc., 278 S.C. 420, 297 S.E.2d 638 (1982); Diminich v. 2001 Enters., Inc., 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987).

Based upon the four corners of the document, the applicable rates are those approved by the Commission and in effect from time to time and not the rates in effect when the contract was executed. The language is clear and unambiguous, and any attempt by GTSC to introduce parole evidence regarding the contract "is inadmissible since extrinsic evidence is to be admitted to resolve ambiguities, not create them." Kirven v. Bartell, 266 S.C. 385, 223 S.E.2d 597, 599 (1967).[4] Therefore, GTSC's Petition to Intervene based upon its assertions of contractual entitlement to rates other than those approved by the Commission should be dismissed as the assertions of its Petition are so defective in view of the plain contractual language that they fail to assert a proper claim. Rosenthal, Diminich, *supra.*

[4] Further, UUC would note that it has previously submitted an affidavit to the Circuit Court and this Commission disputing NGU's contention regarding this provision of the contract. GTSC has failed to present any evidence to the contrary in the form of an affidavit or other documentation.

V. The Scope of NGU's Intervention Should be Limited and Evidence Pertaining to the Contractual Issue it Seeks to Raise Should be Excluded

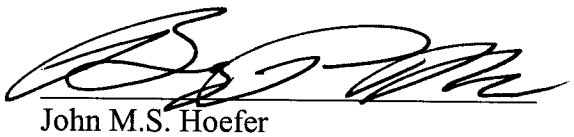
The Commission should not allow GTSC to introduce evidence supporting its contentions that the contract provides for a rate in opposition to the authorized rates authorized. As noted above, the Commission has already found that this contract allows the Company to charge NGU Commission approved rates as may be in effect from time to time. As GTSC and NGU are in sufficient privity that their legal assertions are the same on this matter, any attempt to introduce evidence suggesting otherwise would be irrelevant and immaterial. "For evidence to be admissible, there must be a logical or rational connection between the fact sought to be presented and a matter of fact in issue at trial." Butler v. Gamma Nu Chapter of Sigma Chi, 314 S.C. 477, ___, 445 S.E.2d 46, 470 (Ct. App. 1994). The contractual issue sought to be raised by GTSC has been litigated and decided and any attempt to present evidence in support of this issue should be denied. The only issue to be determined in this matter is the reasonableness of the rates proposed to be implemented by UUC and the Commission should limit GTSC's ability to do otherwise.

CONCLUSION

Having fully set forth its motion, UUC respectfully requests that GTSC's Petition to Intervene be dismissed. In the alternative, UUC moves that GTSC's Petition be dismissed to the extent that it claims that it is contractually entitled to a rate other than Commission approved rates on the grounds that such claims are barred by the doctrine of *res judicata* and that such assertions are so defectively stated that they fail to give rise to a claim pursuant to SCRCP 12(c). UUC also moves

that, should GTSC be permitted to intervene in this action, the Commission preclude GTSC from attempting to introduce evidence into the record of this case in furtherance of its effort to litigate issues relevant to its contract with UUC and limit the scope of GTSC's intervention to like extent.

WILLOUGHBY & HOEFER, P.A.



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Columbia, South Carolina
This 9th day of June, 2006.