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October 16, 2009

VIA E-FILING
Charles L.A. Terreni, Esquire
Chief Clerk of the Commission
SC Public Service Commission
P. O. Drawer 11649
Columbia, SC 29211

RE: Review of Avondale Mills, Incorporated's Rates
Approved in Order No. 2009-394
Docket No. 2009-342-WS

Dear Mr. Terreni:

Enclosed please find the Brief filed on behalf of Avondale Mills, Incorporated in the above referenced docket. By copy of this letter, I am serving all parties of record (the Chair has ruled that the members of the Aiken County Legislative Delegation are not parties to this docket and consequently are not being served).

If you have any questions or if I may provide you with any additional information, please do not hesitate to contact me.

Sincerely,

ELLIOTT & ELLIOTT, P.A.

Scott Elliott

SE/mlw

Enclosures

cc: Parties of record w/enclosures

STATE OF SOUTH CAROLINA

BEFORE THE

PUBLIC SERVICE COMMISSION

DOCKET NO. 2009-342-WS

RE: Review of Avondale Mills, Incorporated's Rates Approved in Order No. 2009-394	)))	**BRIEF OF AVONDALE MILLS, INC.**

Avondale Mills, Inc. ("Avondale") renews its Motion to Dismiss the Petition and/or Application in this docket requesting a review of Avondale's rates and to alter, amend or rescind Order No. 2009-394, dated June 18, 2009, in Docket No. 2008-460-WS. In the alternative, Avondale moves for judgment affirming Order No. 2009-394 approving Avondale's schedule of rates and charges.

Docket No. 2009-342-WS was opened by Directive dated August 12, 2009 ("August 12 Directive") by the South Carolina Public Service Commission ("Commission"). The Commission opened the docket in response to the Petition of Senator Shane Massey, Representative J. Roland Smith, and Representative Thomas Young, Jr. ("Petitioners" or "Aiken County Delegation") dated August 4, 2009, requesting the Commission to amend Order No. 2009-394 to reduce Avondale's rates. The Commission has held that even though the Aiken County Delegation petitioned the Commission to open the instant docket, the Aiken County Delegation and its members are not parties to this docket. Instead, the Commission has ruled that the August 12 Directive serves as the application to review Avondale's rates approved in Order 2009-394. The August 12 Directive reads in its pertinent part:

> At the same time, however, I would note that three members of the Aiken County

> Legislative Delegation have filed requests to review Avondale's rates and to alter, amend, or rescind the order which established the rates. The law allows the Commission to take action pursuant to such requests only if it gives advance notice to all interested parties and holds a hearing at which it can receive any new evidence supporting such a change. I believe that we should establish a new docket and hold a hearing in this matter on Tuesday, October 6, 2009. Prefiled direct testimony for all parties shall be due on or before September 1, 2009, and prefiled rebuttal testimony for all parties shall be due on or before September 15, 2009.

The Office of Regulatory Staff ("ORS") is a party to this docket by operation of law. Avondale is a party Respondent. Michael Hunt and Joe A. Taylor, both Avondale customers, intervened in the docket. There are no other parties to this docket.

The Commission did not request that the ORS conduct an inspection, audit or examination of Avondale as authorized by Section 58-3-200. Instead, by notice dated August 14, 2009, the Commission directed the parties to pre-file direct testimony on or before September 1, 2009. Avondale timely pre-filed the testimony and exhibits of Jack R. Altherr, Jr., President and CFO of Avondale. Neither intervenors pre-filed direct testimony. The ORS did not pre-file direct testimony. However, by letter dated August 31, 2009, the ORS advised the Commission:

> In Docket No. 2008-460-WS, "Application of Avondale Mills Incorporated for Approval of a New Schedule of Rates and Charges", ORS performed a thorough examination of Avondale's Application, books and records, facilities and business operations for the test year ending August 29, 2008. As a result of these examinations, ORS made certain adjustments and recommendations which are contained in the Commission's files. ORS is unaware of any significant change in the company's operations or books and records for the test year which would warrant a reexamination by ORS or result in any materially different findings or recommendations.
>
> Additionally, as a complete examination of a utility normally requires several months to complete, ORS is unable to complete an examination and prepare a report of its findings and recommendations in the time provided under the Commission's scheduling order.

No testimony was pre-filed by members of the Aiken County Delegation.

At the request of the Aiken County Delegation, a public hearing was held September 30, 2009, in Graniteville, South Carolina at which a number of Avondale's customers appeared and testified. Again, at the outset of the hearing on the merits held in Columbia, South Carolina, on October 6, 2009, a number of Avondale's customers gave testimony. To be clear, none of these public witnesses pre-filed testimony.

On September 1, 2009, Avondale filed a Motion to Dismiss the Application herein asserting that the members of the Aiken County Delegation lack standing to bring the their Petition in this matter and arguing that the August 4, 2009, Petition of the Aiken County Delegation and August 12 Directive fail to allege facts sufficient to state a cause of action upon which Order No. 2009-394 might be altered, amended or rescinded. By Directive dated September 30, 2009, the Commission denied Avondale's Motion to Dismiss based on the Aiken County Delegation's lack of standing and held Avondale's remaining arguments regarding dismissal in abeyance.

STANDING

Avondale renews its Motion to Dismiss the Petition of the Aiken County Delegation based on the lack of standing of the members of the Aiken County Delegation to petition the Commission to amend Order No. 2009-394 and reduce Avondale's rates.

The Petitioners, Senator Massey, Representative Smith and Representative Young, are members of the Aiken County Delegation to the South Carolina General Assembly, but are not Avondale customers. Section 58-5-270 provides that the "mayor or the president or chairman of the board of trustees or a majority of the council, commission or other legislative body of the city or county or city or town affected" by a rate schedule may apply to the Commission for review of that rate. However, to avoid the exercise of undue influence over the judicial function of the

Commission, or the appearance of undue influence, members of the General Assembly are excluded from the grant of standing to petition the Commission for a reduction in Avondale's rates by Section 58-5-270. Public Service Commissioners are elected by the General Assembly. As a consequence, members of the General Assembly have the capacity to exert undue influence or control over the Commissioners and the decision making process of the Commission. Accordingly the General Assembly has by legislation withheld standing from its members to petition this Commission for rate relief from public utilities. Sections 58-5-270, 8-13-785 and 58-3-142. The prohibition against involvement of members of the General Assembly could not be more clear. No member of the General Assembly may appear in any rate-fixing proceeding as an attorney for a party or for political purposes. Section 58-3-142. To avoid undue influence or the appearance of undue influence, the General Assembly prohibits its members from appearing before the Commission with the express purpose of influencing the outcome of pending matters. Section 8-13-785. The General Assembly has authorized its members to request the scheduling of a public hearing in the exercise of their constituent service.

However, for the reasons set out herein and in argument before the Commission, the Aiken County Delegation has been denied standing by statute, and as a consequence, the Petition of the Aiken County Delegation herein should be dismissed.

FAILURE TO STATE A CAUSE OF ACTION

Neither the Application nor any petition filed in this docket allege facts sufficient to constitute a cause of action to alter, amend or rescind Order No. 2009-394, and accordingly, the Application and petitions in this docket should be dismissed.

The August 12 Directive concludes that Order No. 2009-394 is a valid order. Avondale's customers were given actual notice of the rates requested by Avondale and approved by this

Commission in Order 2009-394 in Docket No. 2008-460-WS. All of Avondale customers were given two opportunities to appear before the Commission and complain about Avondale's rate increase, the first in Graniteville, South Carolina, on May 26, 2009, and the second in Columbia, South Carolina on June 2, 2009. A number of Avondale's customers did appear in Graniteville and in Columbia to complain about the rate increase. Although given notice and the opportunity, none of Avondale's customers intervened in Docket No. 2008-460-WS. The Aiken County Delegation appeared and testified at the May 26, 2009, hearing. The ORS performed a thorough audit and presented testimony in Docket No. 2008-460-WS. Avondale's customers and the Aiken County Delegation were afforded notice and an opportunity to be heard with respect to Avondale's application for increased rates in Docket No. 2008-460-WS. Order No. 2009-394 was clearly issued upon lawful process.

Just as Avondale's customers and the Aiken County Delegation were afforded due process in Docket No. 2008-460-WS, Avondale is entitled to due process here. The Commission ruled at trial that its August 12 Directive constitutes the Application in this docket. However, the Application deprives Avondale of notice of any allegation which would authorize this Commission to alter, amend or rescind Order 2009-394 and the rates approved therein.

Although the Commission has the authority to request the ORS to inspect, audit or examine a public utility within its jurisdiction, the Commission has no authority to open a docket to alter, amend or rescind a valid order without cause or justification. The August 12 Directive alleges no cause or justification for opening this docket. Section 58-5-270 is instructive on this point. Section 58-5-270 provides that any person may "by petition in writing, setting forth any act or thing done, or admitted to be done" apply to the Commission for relief from "any schedule, classification, rate, price, charge, fair, toll, rental, rule, regulation, service, or facility of

such public utility." Neither the Petition of the Aiken County Delegation dated August 4, 2009 nor the August 12 Directive sets forth any act or thing done or omitted to be done by Avondale with respect to any schedule, classification, rate price, charge fare, toll, rental, rule, regulation, service or facility which would justify altering or reducing Avondale's rates approved in Order No. 2009-394. The August 12 Directive offers no reason for opening the docket other than to accommodate the Petition of the Aiken County Delegation. Given the record in this docket, it is as if the Commission determined at random to review its Order of June 18, 2009. As a consequence, there is absolutely no allegation before this Commission that justifies opening this docket to review the rates approved in Order No. 2009-394.

The Petition of the Aiken County Delegation of August 4, 2009, and this Commission's August 12 Directive fail to raise allegations sufficient to authorize the Commission to alter, amend or rescind Order No. 2009-394 and reduce Avondale's rates. Indeed, the ORS correspondence of August 31, 2009 compels the conclusion to uphold Order No. 2009-394. Accordingly, the Petition and/or Application in this docket should be dismissed with prejudice.

EVIDENCE OF RECORD

The evidence of record before this Commission compels the decision to affirm Order No. 2009-394 in every respect.

As stated previously, this Commission has the authority to initiate "inspections, audits, and examinations of all persons or entities subject to its jurisdiction." The Commission must not conduct such inspections, audits or examinations but must request that they be conducted by the ORS pursuant to Section 58-5-50(A) (2). The Commission did not request the ORS to conduct and audit or an examination of Avondale's rates in this docket; nor did the Commission set a pre-filing schedule which would have permitted the ORS adequate time to complete an

audit. Consequently the ORS did not conduct an audit in this Docket. While the ORS did not present testimony, ORS did advise the Commission that the ORS had conducted a thorough audit in Docket No. 2008-460-WS and that it was unaware of any significant change in the Avondale's operations, books and records for the test year which would warrant a reexamination by ORS or result in any materially different findings from those in Docket No. 2008-460-WS.

The Intervenors Taylor and Hunt failed to present testimony. The Aiken County Delegation failed to present testimony. The testimony this docket by the public witnesses, Avondale's customers, and the Aiken County Delegation, raise complaints concerning Avondale's rates identical to those raised in Docket No. 2008-460-WS. No new evidence concerning Avondale's rates have been raised by any party or witness. There is no evidence before this Commission which would justify a collateral attack on Order No. 2009-394.

Testifying before the Commission October 6, 2009, were Jack R. Altherr, Jr. and Jimmy Frederick, Avondale's Water and Wastewater Treatment Manager. The record in this docket is identical in most respects to that in Docket No. 2008-460-WS.

The evidence of record consists of Avondale's Application and testimony in Docket No. 2008-460-WS as well as the testimony and exhibits of the ORS in that docket. Mr. Altherr testified to the efforts that Avondale has made to upgrade its water and wastewater facilities, to improve water pressure and to reduce water loss. Mr. Altherr testified that in reliance upon the additional revenues approved in Order No. 2009-394, Avondale expended considerable costs and resources to upgrade and improve its system and service to its customers as required by the Commission. Mr. Altherr testified that Avondale had installed a variable frequency drive to one of its main pumping stations to provide adequate and consistent water pressure. Mr. Altherr testified that Avondale had installed new water meters for its customers and was to install

additional master meters to identify water loss. Mr. Altherr testified that Avondale will be forced to expend considerable costs to reroute one of its main lines. Mr. Altherr testified that Avondale has had success in reducing its water loss, although Avondale has yet to reduce its water loss to the figure held to be acceptable by this Commission in Order No. 2009-394. ORS water pressure testing in September of 2009 at three (3) different points in Avondale's system reflects that Avondale's water pressure met and exceeded the Commission's rules and regulations regarding water pressure as evidenced by the ORS correspondence of September 23, 2009, to three of Avondale's customers.

Addressing the complaints of rate shock resulting from the rates approved in Order No. 2009-394, Mr. Altherr testified that the evidence of record in Docket No. 2008-460-WS clearly showed that the rates requested and approved by this Commission would increase residential water rates by over 400% and residential sewer rates by 495%. Irrigation rates were anticipated to rise by 700%. The ORS calculated the impact of the rates requested and approved in Order No. 2009-394 and introduced its calculations into the record at the hearing held June 2, 2009, in Docket No. 2008-460-WS. See Exhibit WHM-3 attached to Mr. Altherr's testimony as Exhibit D.

Mr. Altherr testified that during the three year period preceding Order No. 2009-394, Avondale's shareholders had expended in excess of $2.5 million for the operation of Avondale's water and wastewater systems, while the revenue from Avondale's customers was less than $350,000. Mr. Altherr testified that Avondale has approximately 1350 shareholders, of whom approximately 1200 are former employees and customers of Avondale.

Mr. Altherr testified that the issues raised in this docket were raised and considered in Docket No. 2008-460-WS resulting in Order No. 2009-394 issued June 18, 2009. Mr. Altherr

testified public utilities such as Avondale required certainty and consistency of regulatory treatment if they were to be expected to invest to improve their systems.

Mr. Frederick testified that the South Carolina Department of Health and Environmental Control ("DHEC") pressure testing of Avondale's trunk lines also reflected that Avondale's water pressure was in compliance with the standards required if it. Mr. Frederick's testimony was corroborated by the DHEC water pressure results introduced into the record. Mr. Frederick testified that Avondale's installation of a variable frequency drive to a booster pump in July of 2009 contributed in large measure to the improvement in water pressure found by DHEC. Mr. Frederick also addressed certain complaints raised by Avondale's customers concerning new water meters installed by Avondale in September of 2009. Several of Avondale's customers complained that the new meters did not function or function properly. Mr. Frederick testified that Avondale was aware of those instances of defective water meters and had planned to replace the defective water meters Saturday, October 10, 2009, at a time when Avondale was installing additional master meters and when the installation of the residential meters would pose the least inconvenience to its customers.

The August 12 Directive opening this docket holds that Order No. 2009-394 is valid. The record is devoid of any new evidence to justify reducing the rates approved in Order No. 2009-394. This Commission in Order No. 2009-394 urged Avondale to continue its efforts to reduce, if not eliminate, water loss, upgrade its facilities and resolve water pressure issues. Avondale has expended considerable costs and resources in complying with Order No. 2009-394 and has experienced considerable success in improving service to its customers since June 18, 2009. Avondale has performed all that has been asked of it by this Commission. There is no evidence to the contrary. Indeed, there is no evidence of record that would justify a review of

Avondale's rates or a reduction of Avondale's rates. Accordingly, Avondale is entitled to judgment on the merits.

The Aiken County Delegation requests that Avondale's rates be reduced and that the Commission order the rates be increased in steps or phases over a period of months to the level approved in Order No. 2009-394. However, the issue of phasing in Avondale's rate increase was considered by the Commission in Order No. 2009-394 and rejected. In particular, the question was raised by a Commissioner in questioning of Mr. Altherr at the June 2, 2009, hearing (June 2, 2009 Tr. Page 80, Line 3 – Page 81, Line 9). The Commissioner asked Mr. Altherr whether Avondale had considered requesting a "phased-in" rate increase; Mr. Altherr testified that a phased-in approach was considered and rejected. The Commission certainly had the opportunity in June of 2009 to address a phase-in of any rate increase for Avondale and declined to do so. Having been raised and rejected in Docket 2008-460-WS, Order No. 2009-394 is not subject to collateral attack on this issue.

Moreover, there is no evidence of record which would justify reducing Avondale's approved rates and increasing them by phase-in as suggested by the Aiken County Delegation. Even if permitted by the law and the facts in this case, a phase-in of rates would fail to serve any of the interests in the rate making process. First, reducing the rates now four months after the rates were increased would not mitigate any rate shock. Avondale's customers have been billed for their summer usage, the peak time of the year. Second, Avondale's customers, as the record would reflect, have modified their usage patterns to conserve thereby reducing their water and sewer bills. Moreover, any reduction in Avondale's rates must be prospective and may not be retroactive. South Carolina Electric & Gas Company v. Public Service Commission 275 S.C. 487, 272 S.E. 2d 793 (1980) The record both in Docket No. 2008-460-WS and in this docket

compels the conclusion that Avondale requires the revenue generated from the rates approved in Order No. 2009-394 to operate, maintain and improve its water and wastewater systems. In addition, the record reflects that Avondale is upgrading its facilities, reducing its water loss and improving water pressure. There is no evidence of record to suggest that reducing Avondale's revenue would assist Avondale in making improvements to its water and wastewater systems or that Avondale would require a reduction and subsequent phase-in of rates to encourage it to make improvements to its water and wastewater systems. There is simply no justification in the record for altering the rates approved in Order No. 2009-394.

Based on the foregoing as well as those arguments advanced during oral argument and at trial, Avondale moves that the Application herein be dismissed with prejudice, that Order No. 2009-394 be affirmed in all respects and that Avondale be granted judgment in this docket.

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Columbia, SC

October 16, 2009

CERTIFICATE OF SERVICE

The undersigned employee of Elliott & Elliott, P.A. does hereby certify that she has served below listed parties with a copy of the pleading to the persons indicated below by mailing a copy of same to them in the United States mail, by regular mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

RE: Review of Avondale Mills, Incorporated's Rates Approved in Order No. 2009-394

DOCKET NO.: 2009-342-WS

PARTIES SERVED:

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PLEADING: BRIEF OF AVONDALE MILLS, INC.

_____
Jackie C. Livingston, Paralegal

October 16, 2009