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April 23, 2020

Ms. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1220 Senate Street
P.O. Box 11629
Columbia, SC 29211

RE: Michael and Nancy Halwig and Stephen and Beverly Noller v. Daufuskie Island Utility Company, Inc.
Appellate Case No. 2019-001354
SC Public Service Commission Docket No.: 2018-364-WS
NMRS File Nos.: 54041/09000 and 055561/09000

Dear Ms. Kitchings:

Enclosed please find Appellants' Reply Brief and Appellants' Supplemental Designation of Matter in the above-referenced matter. By copy of this letter to counsel of record, we are serving them with a copy of the enclosed documents.

If you have any questions concerning this request, please give me a call at the telephone number listed above. I appreciate your assistance in this matter.

With best regards, I am

Very truly yours,

Newman Jackson Smith

NJS:jl
Encls.
cc: Thomas Gressette, Esq. (w/encls.)
Andrew M. Bateman, Esq. (w/encls.)
Jeffrey M. Nelson, Esq. (w/encls.)
Joseph M. Melchers, Esq. (w/encls.)
Jocelyn Boyd, Clerk, Public Service Commission of SC (w/encls.)

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Appellate Case No. 2019-001354

Stephen and Beverly Noller and Michael and Nancy Halwig, ...Appellants,

v.

Daufuskie Island Utility Company, Incorporated and South Carolina Office of Regulatory Staff, ... Respondents.

APPELLANTS' REPLY BRIEF TO INITIAL BRIEF OF RESPONDENT SOUTH CAROLINA OFFICE OF REGULATORY STAFF

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Appellants file this Reply Brief in opposition to the Initial Brief of Respondent South Carolina Office of Regulatory Staff ("Respondent ORS"), which was filed on March 24, 2020.

THE COMMISSION IMPROPERLY DENIED JURISDICTION OVER THE APPELLANTS' COMPLAINT BY FAILING TO COMPLY WITH ITS STATUTORY DUTY AND MISCHARACTERIZING PART OF THE RELIEF REQUESTED AS MONETARY DAMAGES

The arguments presented by Respondent ORS in its Initial Brief are based on its mischaracterization of Appellants' request as solely for monetary damages and ORS' position that the Public Service Commission (the "Commission") does not have the authority to award monetary damages. This is the same position taken by the Commission in its four (4) sentence Order of June 12, 2019. First, Respondent ORS argues that the Commission properly declined to assert jurisdiction over the Appellants' Complaint in the absence of legislation specifically authorizing the Commission to award monetary damages. Second, Respondent ORS argues that the Commission did not commit reversible error by failing to address the fact that Respondent Daufuskie Island Utility Company, Incorporated ("DIUC") did not properly present the Customer Service Agreement ("Agreement") for review and approval by the Commission as required by statute based again on its mischaracterization that the relief requested in Appellants' Complaint was solely for monetary damages. Respondent ORS' arguments mischaracterize the relief requested by Appellants in their Complaint and do not support or substantively explain the Commission's failure to assert jurisdiction over the Complaint, or why the ORS itself failed to require the review and approval of the Agreement in violation of the regulations. See SC Code Reg. 103-541 and -743. Jurisdiction over the Agreement is clear, and no explanation of why the Agreement should not be void from the failure to have it approved. The Commission exercised its jurisdiction to require service to Appellants be maintained "during the pendency of

this contractual dispute." Order at page 1. Why neither the ORS or Commission have jurisdiction over the Agreement is completely missing.

THE COMMISSION AND OFFICE OF REGULATORY STAFF DID NOT PROVIDE ANY SUBSTANTIAL EVIDENCE TO SUPPORT THE DECISION TO DENY JURISDICTION OVER APPELLANTS' COMPLAINT

Substantial evidence on the issue of jurisdiction cannot be present here because neither the ORS or Commission rely on any evidence in their position that the Commission does not have jurisdiction to require a regulated utility to pay for its equipment and reimburse customers for the value of the equipment it received. Damages are not part of the Complaint; the extortion of Appellants is the complaint. Facts are not disputed by the ORS: Respondent DIUC would not restore service until Appellants signed the Agreement it proffered that, among other things, would release it from and prevent any claims from Appellants being made against it over the issues raised in the Complaint. Nowhere does the ORS explain, nor did the Commission explain how damages are at issue under the facts in evidence. The determination of whether there is jurisdiction is a legal one.

As set forth in the Appellants' Initial Brief, Appellants maintain that the Commission could have provided all of the relief requested in the Complaint. However, even if the Commission did not believe that it could offer all of the relief requested, the Commission should have granted jurisdiction to review the claims that DIUC violated state regulations and forced Appellants into an illegal contract. The Complaint requested appropriate relief from the Commission, both in the form of a reimbursement of expenses forced upon Complainants and any further or other relief the Commission may grant. See Complaint p. 1 and Cont. of Complaint p. 5. Counsel for Appellants explained the relief requested by Appellants in the Oral Argument before the Commission on March 20, 2019. See Transcript of Oral Argument,

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Hearing #19-11763, March 20, 2019. Counsel for Appellants clarified that Appellants seek more than just reimbursement of costs for the replacement water and sewer equipment, specifically that Appellants seek that the Commission hold that the Customer Service Agreement was in violation of the Commission's regulations. Tr. at 8:15-9:1, 12:14-17, 13:14-23, 18:8-19:15. See also Complainants' Brief Confirming Jurisdiction filed with the Commission prior to the Oral Argument. Appellants maintain that the Commission has the authority to provide the reimbursement requested, but, even if the Commission did not have such authority, the Appellants were entitled to the Commission's review of the claims that DIUC violated the Commission's regulations and forced Appellants into an illegal contract. The Complaint sought appropriate relief, which includes a determination that DIUC violated state regulations to the detriment of Appellants and that the Customer Service Agreement was void as a result. Damages were not sought, as claimed by the ORS and Commission, in a private contractual dispute. Rather the duty for the utility to pay for its equipment and not extort its customers to do so, at the risk of continued loss of use of their beachfront homes, under a regulated contract that was not in fact regulated, i.e., submitted or approved as required is the issue. No substantial evidence or explanation of any sort is offered by the ORS on the determination that instead this is a claim for damages under a contract not approved by the Commission as required by the statute.

S.C. Code Reg. 103-541 and -743 required DIUC to obtain the Commission approval of the Customer Service Agreement prior to execution. DIUC did not do so. As a result, DIUC violated the Commission's regulations to the injury and detriment of Appellants. The Commission could and should have reviewed the allegation that DIUC violated the Commission's regulations. The Commission has the authority to determine that DIUC violated these regulations, which resulted in an illegal contract. The Commission has the authority to determine

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that the Agreement was void. While Appellants maintain that the Commission also has the authority to require DIUC to reimburse Appellants directly or in the form of abatement of future rates, the Commission should have at a minimum reviewed Appellants claim that the Agreement was illegal as a result of DIUC's violation of the relevant regulations.

ORS attempts to mislead this Court by stating that the request for monetary damages was the relief sought in the Complaint and omitting reference to the other relief requested by the Complaint. ORS mischaracterizes the request for a refund or reimbursement of illegal expenses in the Complaint as a request for monetary damages. ORS Brief p. 2. As set forth in Appellants' Initial Brief, a request for a refund or reimbursement is distinguishable from a request for monetary damages. App. Brief pp. 16-17. ORS also omits any reference to the other relief requested and, thus, implies that the request for refund was the only relief sought. ORS Brief p. 2. As set forth above, the Complaint requested appropriate relief. Such request would allow the Commission to determine that DIUC violated the Commission's regulations resulting in an illegal contract that should be declared void. More importantly, neither the ORS in its Initial Brief nor the Commission in its Order provide any substantive arguments or basis that this Court can review and merely provide the bald statement that the Commission has no jurisdiction. "We have repeatedly emphasized the need for specificity in administrative orders. The need is particularly great when complex issues are involved, such as those generally found in utility rate setting cases. Administrative agencies are afforded wide latitude in making decisions, as shown in the deferential standard of appellate review. However, the writing of orders without sufficient detail or analysis, coupled with this standard of review, can make their decisions as a practical matter unassailable on appeal." *Heater of Seabrook, Inc. v. Public Service Com'n of South Carolina*, 332 S.C. 20, 503 S.E.2d 739 (1998), p. 27, 742.

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ORS states that the Commission's approval under S.C. Code Regs. 103-541 and 103-743 is irrelevant and unrelated to the issue of jurisdiction. ORS Brief p. 10. If the initial Agreement had been provided to the Commission for approval prior to execution, the Commission would have seen that DIUC was requiring Appellants to install facilities and equipment, which are required to be installed by the utility by state regulations. See S.C. Code Reg. 103-740 and -540. The Commission would have had an opportunity to prevent DIUC from violating these regulations and withholding service from Appellants for more than two years and to prevent Appellants from incurring unnecessary costs. The Agreement Addendum presented to Appellants requiring the release and payment of taxes was not signed, was included in the Complaint but never submitted to or approved by the Commission. Nevertheless, the Commission did not assert its clear jurisdiction over the Agreement Addendum either. The Commission should have granted jurisdiction to Appellants claims to remedy these wrongs. No substantial evidence or rationale is given supporting the Commission's decision on jurisdiction. The substantial rights of the Appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are in excess of its statutory authority, unsupported by any evidence and a clear error of law.

Respondent ORS acknowledges that service to the Appellants' residences was ordered by the Commission at ORS' request only as a result of Appellants' Complaint and only for the duration of "these contractual disputes." ORS Brief p. 11. The Commission's failure to take jurisdiction of Appellants' Complaint may well result in DIUC discontinuing service to Appellants again.

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CONCLUSION

To hold that the Commission did not have jurisdiction over Appellants' Complaint would allow any public utility with damaged or destroyed equipment to force its customers to install replacement facilities and equipment at their own expense in violation of the state regulations that require the utility to install and maintain its facilities and equipment, or face the loss the use of their property. For the reasons set forth above and in Appellants' Initial Brief, Appellants request that this Court reverse the denial of jurisdiction of the Commission in this matter, find that the Agreement and Addendum must be found to be void and direct that the Commission direct that the cost of installation paid to DIUC by Appellants under the Agreement be reimbursed to Appellants.

Respectfully submitted,

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SUPPLEMENTAL DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellants proposes the following also be included in the Record on Appeal:

1. Transcript of Oral Argument, Hearing #19-11763, March 20, 2019;
2. Complainants' Brief Confirming Jurisdiction filed March 6, 2019.

I certify that this Designation contains no matter which is irrelevant to this appeal.

April 23, 2020

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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellants Stephen and Beverly Noller and Michael and Nancy Halwig, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: **Appellants' Reply Brief to Initial Brief of Respondent South Carolina Office of Regulatory Staff**

Supplemental Designation of Matter to be included in the Record on Appeal

Served: Thomas P. Gressette, Jr., Esquire
Walker Gressette Freeman & Linton, LLC
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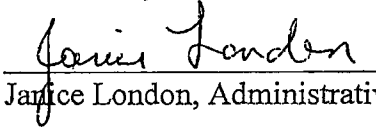

Janice London, Administrative Assistant

April 23 2020