

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2006-92-WS – ORDER NO. 2007-140
NOVEMBER 19, 2007

IN RE: Application of Carolina Water Service, Inc.) ORDER DENYING
for Adjustment of Rates and Charges for the) PETITIONS FOR
Provision of Water and Sewer Service.) RECONSIDERATION

INTRODUCTION

This matter comes before the Public Service Commission (“PSC” or “Commission”) on the Petition for Rehearing or Reconsideration filed by Carolina Water Service, Inc. (“CWS” or “Company”) and on the Petition for Reconsideration or Rehearing filed by the South Carolina Office of Regulatory Staff (“ORS”), both of which seek relief from the Commission’s ruling in Order No. 2006-543. The Commission’s order rejected a proposed settlement, agreed to by CWS and ORS, under which CWS would have been permitted to implement rate increases affecting customers of the Company’s water and/or sewer systems located in Aiken, Beaufort, Georgetown, Lexington, Orangeburg, Richland, Sumter, Williamsburg, and York Counties. The proposed rate increases have since been implemented under bond. Having carefully considered both petitions, the Commission hereby denies reconsideration and rehearing and reaffirms its ruling.

The central issue in this case is whether the General Assembly intended Act 175 of 2004 (“Act 175”) to strip the PSC of the authority to independently determine whether

a proposed settlement of a rate case is just and reasonable. In Act 175, which restructured the state's system of utility regulation, the General Assembly constituted the ORS to be the investigator and advocate for the statutorily-defined "public interest"¹ in utilities matters. At the same time, the Act re-cast the Commission as a quasi-judicial decision maker and specified that the Commission would be governed by the Code of Judicial Conduct.²

CWS and ORS argue that Act 175 requires the PSC to summarily approve proposed settlements without any substantive review. The Commission rejects this view and holds that it retains a statutory duty to ensure that any settlement agreement is just and reasonable, and that when the parties refuse to present to the Commission sufficient information to make this determination, the Commission may reject the settlement. In this case, the parties either failed, or refused, to present sufficient evidence to afford the Commission the opportunity to carry out its duty of ensuring that the proposed settlement was just and reasonable. It is possible, and perhaps even likely, that if CWS and the ORS had presented the supporting evidence requested by the Commission, the proposed

¹ Chapter 4 of Title 58, enacted pursuant to Act 175 of 2004, defines "public interest" as a balancing of the following:

- (1) concerns of the using and consuming public with respect to public utility services, regardless of the class of customer;
- (2) economic development and job attraction and retention in South Carolina; and
- (3) preservation of the financial integrity of the state's public utilities and continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.

S.C. Code Ann. §58-4-10(B).

² Under Act 175, S.C. Code Ann. § 58-3-30(B) subjects the Commission to Rule 501 of the South Carolina Appellate Court Rules and charges the State Ethics Commission with its enforcement.

settlement would have been approved. However, because the parties insisted that they had an absolute right to settle this case without independent review and refused to present sufficient evidence to support a finding that the proposed settlement was just and reasonable, the Commission rejected the proposed settlement.

Now, having fully reviewed all of the arguments presented by CWS and ORS in favor of reconsideration or rehearing and found them to be unsupported in the law and evidence, we reject them in their entirety.

RELEVANT PROCEDURAL HISTORY

CWS filed its Application for Adjustment of Rates and Charges on March 27, 2006. Thereafter, at the request of the ORS, and on its own initiative, the Commission scheduled public hearings in several locations around the state to allow members of the public to appear and “express any concerns or comments on the pending application of Carolina Water Service, Inc. for an increase in rates and charges.” See ORS letter requesting public hearings dated April 3, 2006. At the public hearings, customers voiced various concerns about CWS’s rates and quality of service. This testimony at the public hearings raised concerns which prompted the Commissioners to request additional information from the parties. The Commission sought information from the parties in this case on two separate occasions.

First, on June 27, 2006, the Commission asked CWS to supplement its application with specific information regarding the operation of its various subdivisions. The Commission’s June 27th inquiry was made after it heard sworn testimony by the York County Administrator and residents of the River Hills subdivision, alleging that the water and sewer revenues from River Hills were subsidizing other CWS systems. Tr. 16 (Lake

Wylie, York County Public Hearing, June 12, 2006) (Testimony of Al Greene); Tr. 25-26 (Lake Wylie, York County Public Hearing, June 12, 2006) (Testimony of Don Long); Tr. 44-45 (Lake Wylie, York County Public Hearing, June 12, 2006) (Testimony of John Allen). The Commission requested that CWS provide a listing of each subdivision served, the types of services being provided, the number of customers served by each individual system, and complete financial data for its individual systems.³

CWS moved for reconsideration of the Commission's request on June 30, 2006, arguing that the Commission did not have the authority to engage in discovery, and that in any case, Commission rules did not require a party to compile reports or information not readily available. Denying CWS's motion for reconsideration, the Commission explained that its request for information was neither a discovery request nor an order compelling CWS to compile and produce information not ordinarily available. Order No. 2006-458, August 4, 2006. The Commission explained that while CWS could offer evidence and seek to meet its burden of proof however it saw fit, the Commission was within its rights to ask the Company to supplement its application with additional information. Id. The Commission also observed that no party had argued that the information sought by the Commission was not relevant to the case. Id. CWS did not supplement its application with the requested information.

³ Commission Directive of June 27, 2006 (memorialized in Order No. 2006-407, dated July 25, 2006).

The second request was made on September 6, 2006, before the Commission's hearing for review of the proposed Settlement Agreement.⁴ Commission Directive of September 6, 2006. The Commission requested that the parties provide the following information:

1. Financial information regarding CWS's subsystems,
2. Clarification of prefiled testimony in which CWS asserted that the customers of the River Hills subdivision were not subsidizing other parts of the CWS system;
3. Explanation of CWS's assertion that a breakdown of financial information on a subsystem basis would be expensive and burdensome to compile;
4. Explanation of how CWS was able to adjust its rate base data in the middle of the case to account for the transfer of the King's Grant and Teal on Ashley subdivisions to Dorchester County if information regarding subsystems was not available;
5. Information regarding the frequency of sewer backups, the Company's response thereto, and CWS's backup prevention measures;
6. Justification of the Company's proposed flat rate billing scheme for sewerage services;
7. An explanation of the prudence of the Company's proposed rate case expenses;
8. Whether they included any costs associated with the pending appeal of the Commission's previous order in CWS's previous application for a rate increase; and
9. Explanation of ORS's prefiled testimony which asserted that the Company was in compliance with DHEC rules and regulations.

⁴ The 145-page Settlement Agreement submitted by the parties included multiple exhibits comprised in part of written testimony by the following witnesses: Steven M. Lubertozzi, Bruce T. Haas, Sharon G. Scott, Dawn M. Hipp, B.R. Skelton, Ph.D., and Converse A. Chellis, III, C.P.A.

Questions 1-4 above were prompted by the Rebuttal Testimony of CWS witness Steven M. Lubertozi in this case. Lubertozi testified: “The Company has never accounted for the River Hills system except as part of our statewide system.” Settlement Agreement Exhibit D (rebuttal testimony of Steven M. Lubertozi), p. 8. However, Lubertozi also testified that it would be an “inaccurate statement” to assert that the Carolina Water Service customers of the River Hills community in York County are “subsidizing the remainder of the [CWS] water and sewer systems across South Carolina.” *Id.* He also asserted that rates for customers in some newer subdivisions would increase dramatically if the Commission were to depart from uniform billing for the various CWS subsystems. *Id.* The Commission believed that the apparent contradictions in Lubertozi’s testimony reinforced the need for further information on the cross-subsidization issue and whether the uniform rate structure remains just and reasonable. Thus, the Commission posed questions to the Company regarding cross-subsidization issues (Questions 1-4). The Company refused to provide the information.

The Commission’s Questions 5-9 originated from several sources. The testimony of River Hills customers Wanless and O’Brien prompted Question 5 on sewer backups. See Tr. 79 (Lake Wylie, York County Public Hearing, June 12, 2006) (Testimony of Ronald Wanless); Tr. 82 (Lake Wylie, York County Public Hearing, June 12, 2006) (Testimony of Joan O’Brien). Question 6 on “flat rates” originated from the sworn customer testimony of Irmo customers Maleski and Ryan Tr. 21 (Irmo, Lexington County Public Hearing, June 8, 2006) (Testimony of Susan Maleski); Tr. 31 (Irmo, Lexington County Public Hearing, June 8, 2006) (Testimony of John Ryan); and West Columbia witness Brackett Tr. 81-82 (West Columbia, Lexington County Public Hearing, June 15,

2006) (Testimony of Owen Brackett). The origin of Questions 7 and 8 is explained in detail in the Commission's Order. Order No. 2006-543, p. 26.

In Question 8, the Commission asked for a breakdown of the rate case expenses included in the Settlement Agreement, including, among other things, whether these expenses included any legal or other rate case expenses associated with the Company's appeal of the last rate case, and, if so, in what amount. This information was not apparent from the Company's testimony.

Question 9 arose from inconsistencies between the prefiled testimony (and included "Business Compliance Review") of ORS witness Dawn Hipp and the information contained in the reports from the South Carolina Department of Health and Environmental Control ("DHEC") attached as exhibits to her testimony. Hipp's prefiled written testimony states that DHEC standards were being met at the CWS systems according to recent DHEC sanitary survey reports and that general housekeeping items were satisfactory. Settlement Agreement Exhibit B (Testimony of Dawn M. Hipp), p. 6. Hipp also stated that ORS inspections showed that all wastewater collection and treatment systems were operating adequately and in accordance with DHEC rules and regulations. Id. The Business Office Compliance Review attached to her testimony also states that CWS is in compliance with PSC regulations and has filed notices with the Commission of any violation of PSC or DHEC regulations which affect service. Questions regarding Hipp's testimony arise from the reports attached thereto as Exhibit DMH4. The reports show that several systems that were inspected by DHEC were found to be unsatisfactory and that, although customers were mailed notice of a radium sample which had exceeded the Maximum Contaminant Level, the Commission was not notified.

Furthermore, although Hipp's testimony indicated that all sites were operating adequately and in accordance with DHEC rules and regulations, an examination of the DHEC documents shows that not all of CWS's sites were selected for testing. The apparent discrepancies prompted the request for information by this Commission.

At the settlement hearing held on September 7, 2006, the parties failed to present any evidence responsive to the Commission's requests for information, calling two expert witnesses who only testified generally as to the desirability of the settlement. Both experts admitted they had no knowledge pertaining to the matters about which the Commission had requested additional information. Tr. 81-82, 88-89 (Settlement Hearing, September 7, 2006).

The Commission rejected the Settlement Agreement on September 8, 2006, finding that the parties had failed to present the Commission with sufficient evidence that the proposed rates and terms were just and reasonable. Commission Directive (September 8, 2006); Order No. 2006-543 (October 2, 2006). However, the Commission offered to hold a final hearing at which it would hear additional supporting evidence, and at which CWS could elect to seek either the rate relief proposed in its original application or the rate relief proposed in the terms of the settlement. Id.

On September 15, 2006, counsel for CWS informed the Commission that it "would not offer any evidence beyond that already presented to the Commission, and [that] therefore no further hearing is necessary." Letter from John M.S. Hoefler, September 15, 2006. ORS counsel also advised the Commission that no further hearing would be necessary. Letter from Florence Belser, September 15, 2006.

As a result of the correspondence from the parties, the scheduled hearing was cancelled. The Commission denied the rate increase request, citing a lack of information which would have allowed it to find the proposed rates just and reasonable. Order No. 2006-543 (October 2, 2006).

DISCUSSION OF SPECIFIC ISSUES

- I. When presented with a proposed settlement in a rate case, the Commission is entitled to request that the parties provide information it deems necessary to determine whether the terms of the settlement are just and reasonable.

The South Carolina Supreme Court has affirmed the Commission's authority to decide if rates are just and reasonable, and has held that "the Commission has wide latitude to determine its methodology in rate-setting and there is no abuse of discretion where substantial evidence supports the finding of a just and reasonable rate." Kiawah Property Owners Group v. Public Service Comm'n of S.C., 357 S.C. 232, 241 n. 5, 593 S.E.2d 148, 153 n. 5 (2004).⁵

CWS argues that the Commission did not have the authority to issue its two requests for information because of changes in the Commission's authority brought about by Act 175 of 2004, specifically in new subsection S.C. Code Ann. §58-3-60(D), which provides that the ORS shall inspect, audit, and examine public utilities, and in changes to

⁵ The ORS argues that the Kiawah case is distinguishable from the present case because it involved review of an operating margin, not a return on equity or a settlement agreement. This distinction is irrelevant, as the Commission is empowered – indeed required – to review proposed rates for justness and reasonableness. ORS also implies that the Kiawah case is somehow inapplicable because it was decided prior to the enactment of Act 175. This argument is simply incorrect. Nothing in the amended statutes divests the Commission of the authority to independently determine whether a proposed settlement in a rate proceeding is just and reasonable, and the plain language of S.C. Code Ann. §§ 58-3-140 and 58-5-210 is clear that the Commission's duties and powers with regard to such review remain unchanged.

S.C. Code Ann. §58-3-190, which previously had allowed the Commission to propound interrogatories to public utilities, but as amended by Act 175, no longer allows interrogatories from the Commission.⁶ Similarly, the ORS invokes §§58-4-50(A)(2), 58-4-55, and 58-3-200, which provide that while inspections, audits, and investigations may be initiated at the request of the Commission, they must be carried out by the ORS. The statutes referred to by the parties fail to support their argument that the Commission may not request that parties provide information to support a proposed settlement.

The referenced code sections do assign the investigatory and advocacy duties previously carried out by the Commission's staff to the ORS, but they do not strip the PSC of the authority to request information from the parties sufficient to support a proposed settlement of a rate case. While Act 175 divested the Commission's staff of the

⁶ S.C. Code Ann. §58-3-60(D) states:

(D) The commission shall not inspect, audit, or examine public utilities. The inspection, auditing, and examination of public utilities is solely the responsibility of the Office of Regulatory Staff.

S.C. Code Ann. §58-3-60 (Supp. 2006).

Prior to Act 175 of 2004, S.C. Code Ann. §58-3-190 stated, in pertinent part:

All persons or corporations that are included within the definition of a "public utility" . . . shall promptly . . . answer fully all questions and interrogatories which may be propounded by the Commission.

S.C. Code Ann. §58-3-190 (1976) (amended 2005).

The amended statute authorizes the Commission to request that the ORS carry out inspections, audits, or investigations. S.C. Code Ann. §58-3-190 (Supp. 2006). These requests for field investigations are distinct from the questions posed by the Commission during the course of a case.

duties of propounding data requests or other discovery and conducting audits, the Act did not deprive the Commission of the power to ask questions or request information while carrying out its quasi-judicial functions in a rate case. Nowhere in Act 175 did the General Assembly indicate it intended to curtail the Commission's authority to require the applicant for a rate increase to prove that the requested increase is just and reasonable.

Furthermore, in its capacity as the quasi-judicial fact finder in a rate case, the Commission has the authority to ask questions of parties and witnesses. Analogously, the appellate courts of South Carolina have long held that a trial judge is vested with discretion to question a witness or a party to elicit the truth. State v. Gaskins, 284 S.C. 105, 119, 326 S.E.2d 132, 140-41 (1985); Williams v. S.C. Farm Bureau Mut. Ins. Co., 251 S.C. 464, 472, 163 S.E.2d 212, 216 (1968) (a trial judge who exercises his discretion to question witnesses from the bench to elicit the truth should not indicate to the jury the judge's opinion as to the facts of the case or the weight or sufficiency of the evidence). This is particularly so in non-jury cases where there is no danger of the jury inferring the judge's opinion from the questions posed from the bench. S.C.D.S.S. v. Ledford, 357 S.C. 371, 378, 593 S.E.2d 175, 178 (Ct. App. 2004). Where the facts warrant, a trial judge may even call a witness on his own motion. Elletson v. Dixie Home Stores, 231 S.C. 565, 99 S.E.2d 384, 389 (1957). As ORS observed in its own petition for reconsideration, "The Commission now has the responsibility of wearing the robe of an impartial judge and weighing the evidence admitted into the record to reach a decision." ORS Petition, p. 9. It is entirely consistent with this statement that when the evidence in the record is insufficiently complete to warrant approval, the Commission may request

that the party or parties supplement the evidence in the record in an effort to facilitate approval of a settlement.

II. In *Hilton Head Plantation Utilities v. Public Service Commission*, the South Carolina Supreme Court held that the Public Service Commission did not err when it independently reviewed an application for a rate increase and relied upon the testimony of non-party witnesses in denying that application.

CWS argues that the Commission's reliance on Hilton Head Plantation Utilities, Inc. v. Public Service Commission, 312 S.C. 448, 441 S.E.2d 321 (1994) is mistaken in several respects. The Company argues: a) the Commission was mistaken in relying on Hilton Head for the proposition that its "duty to independently review an application has been recognized by the Supreme Court" (Order, pp. 16-17, CWS Petition, p. 23); b) the Commission was mistaken in relying on the case for the proposition that it may rely on the testimony of public witnesses when denying rate relief Id.; c) that the Commission did not seek out information on its own motion in the Hilton Head case. Order, p. 17, CWS Petition, p. 24; and d) the Commission misquoted Hilton Head as stating that "the Commission must review and analyze intercompany dealings to determine their reasonableness" (Order, p.16) and that the case does not indicate that the Commission has such a duty (CWS Petition, p. 24). Each argument is addressed herein.

In Hilton Head, the utility filed an application with the Commission seeking approval of an increased schedule of rates and charges for water and sewer services. The Commission's staff conducted an audit of the utility's books and records and physically inspected its operations and facilities. A public hearing was held on the matter before the Commission. The utility presented a witness to testify about the company's financial condition, its request for rate relief, and the utility's financial exhibits, and another

witness testified about its operations. The Commission's staff presented a witness who testified about his audit of the company's books, and explained the staff accounting report. He did not challenge the reasonableness of any expenses for the test year. Hilton Head, 376 S.C. at 449, 441 S.E.2d at 321.

However, during the hearing, Richard C. Pilsbury, the President of the Property Owners Association of Hilton Head Plantation, who had not intervened and was not a party of record, testified as "a protestant representing many consumer rate payers," and called the Commission's attention to the fact that a substantial portion of the utility's budget was paid to its corporate parent. Hilton Head, 376 S.C. at 449, 441 S.E.2d at 322. Pilsbury "submitted that the expenses were questionable, and in effect invited the Commission to take into account the fact that certain transactions might not have been conducted at arm's length." Id.

The Commission found that Pilsbury's statement raised questions about less-than-arms-length transactions taking place between the utility and its parent. Id. The Commission concluded that these expenses brought into question the entire amount of expenses required by the company as legitimate operation and maintenance expenses which were passed on to the company's ratepayers, and the rates proposed by the company to collect these monies. The Commission also held that the record before it failed to provide the answers to this question. Id. The Commission denied the proposed rates as unjust and unreasonable

The Supreme Court affirmed the Commission on appeal. The utility argued that the evidence before the Commission was insufficient to support its decision to refuse the company's application for the rate increase sought. The Supreme Court disagreed and

held that the utility bears the burden of proof with regard to the reasonableness of expenses incurred. Hilton Head, 312 S.C. at 450, 441 S.E. 2d at 323. The expenses were presumed reasonable when incurred in good faith, but when payments were made to an affiliate, the Court held that a mere showing of the actual payment did not establish a *prima facie* case of reasonableness. Id., 312, S.C. at 450-51, 441 S.E. 2d at 323. The Court also held that charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission, allowance is properly refused. Id., 312, S.C. at 451, 441 S.E. 2d at 323.

The Court declined to substitute its own judgment for that of the Commission. Id. The Court noted that the Commission had, in essence, invited the utility to file a new application and that the utility could conceivably be entitled to some increase, although neither the Commission in the first instance, nor the Circuit Court on review, was in error in refusing the rate increase sought by the utility. The Court said that the matter could either be pursued on remand or by way of new application, but that the most logical way to pursue it was on remand so that the utility could have an ample opportunity to explain its expenditures and justify them. Finally, the Court advised that the Commission could receive any other evidence and that the Commission should establish an operating margin as required by statute. Hilton Head, 312 S.C. at 452, 441 S.E. 2d at 323.

CWS is correct in stating that the Commission did not inquire into CWS's affiliated transactions in the present case as it did in Hilton Head, but this argument misses the point. CWS Petition, p. 24. The Hilton Head holding is significant here

because, in that case, the South Carolina Supreme Court upheld the Commission's decision to reject the utility's request for a rate increase, a decision which was prompted by the complaint of a non party witness. Hilton Head, 312 S.C. at 451, 441 S.E.2d at 323 ("neither the Circuit Court nor the Commission erred in refusing the rate increase sought"). The Supreme Court recognized that if additional information was provided, a rate increase might be justified and remanded the case so that the utility could have the opportunity to justify its expenditures. Hilton Head, 312 S.C. at 452, 441 S.E.d at 321. Similarly, the testimony of non-party, customer witnesses prompted the Commission to inquire into several aspect of CWS' application.

The Commission's rulings in this case, which afforded CWS an opportunity to justify its requested rates, rather than rejecting them outright, is consistent with the Hilton Head holding. First, in Hilton Head, the Supreme Court recognized that a non-party, such as a protestant, may raise an issue before the Commission for investigation. Second, Hilton Head supports the proposition that if the Commission is not satisfied that the record supports a rate increase request in a case, the Commission does not have to grant that rate request, and it may receive additional information in a new application. The Supreme Court recognized that the Commission could receive information in a new application, or within the existing case, and facilitated the receipt of such information by remanding the case so that the utility could provide additional information responsive to the Commission's concerns regarding affiliated transactions. Id.

CWS contends that Hilton Head does not support inquiry by the Commission into the affiliate expenses at issue in that case. According to CWS, the Commission's order in Hilton Head had relied solely upon the utility's application, the staff's report, and the

unsolicited testimony of the protestant witness when it concluded that the expenses should not be allowed. CWS Petition, p. 24. However, CWS's characterization of the case is incorrect. One of the affiliate transactions referred to by the Commission in its Hilton Head order was the payment of \$90,956 for transfer of treated effluent into the Cypress Conservancy. Order No. 92-115, p. 5. The Commission noted that the contract embodying this arrangement had never been filed with the Commission for approval, pursuant to Commission Regulation 103-541, and that it had not reviewed or approved a contract for a rental charge of \$144,000 for land leases which should have been submitted for approval under the same regulation. Order No. 92-115, pp. 5-6. The Commission's order indicated that the contracts for these affiliated transactions had not been approved subject to Commission regulation, and that having the contracts before it would have been helpful in investigating the propriety of the claimed affiliate transactions. Since the company did not submit the appropriate evidence, and the Commission held that affiliate transactions affected the entire amount of operation and maintenance expenses, the rate increase request was denied. However, there was an implicit invitation, as the Supreme Court recognized, for the utility to submit the information. In the case at bar, the invitation to present additional information was explicit, but it was ignored by all parties, with a similar result. Had the parties provided the additional information requested by the Commission in the present case, it is possible that the Settlement Agreement would have been approved, as well as the rate increase.

Finally, the Company is correct in stating that the Commission mistakenly quoted the opinion as stating, "[t]he PSC must review and analyze intercompany dealings and

determine if they are reasonable” used in Order No. 2006-543. CWS Petition, p. 24.

The actual holding of the Court was as follows:

Charges arising out of intercompany relationships between affiliated companies should be scrutinized with care, and if there is an absence of data and information from which the reasonableness and propriety of the services rendered and the reasonable cost of rendering such services can be ascertained by the Commission, allowance is properly refused.

Hilton Head, 312 S.C. at 451, 441 S.E. 2d at 323.

While CWS is correct in pointing out that this sentence was misattributed as a quotation, the error was inadvertent and does not change the Commission’s analysis.

III. Chapter 4 of Title 58 does not give ORS the last word on a settled rate case.

CWS argues that when all parties of record agree to a settlement, the Commission should merely function as a rubber-stamp agency which can perform only the ministerial act of granting approval. According to CWS, only in those cases in which ORS fails or elects not to reach agreement with the utility may the Commission exercise the regulatory authority granted to it under §58-3-140(A). The applicable statutes do not support these contentions.⁷

⁷ Section 58-3-140(A) of the South Carolina Code provides:

Except as otherwise provided in Chapter 9 of this title, the Commission is vested with the power and jurisdiction to supervise and regulate the rates and service of every public utility in this State and to fix just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State.

S.C. Code Ann. §58-3-140(A) (Supp. 2006).

The view expressed by the parties that they now have the ultimate authority to resolve cases by settlement is inconsistent with the plain language of the statutes creating and governing the Office of Regulatory Staff, which charges the new agency with the following duties and responsibilities:

- to “review, investigate, and *make appropriate recommendations to the commission* with respect to the rates charged or proposed to be charged by any public utility;” S.C. Code Ann. §58-4-50(A) (Supp. 2006) (italics added).
- to “make such inspections, audits, or examinations of public utilities as requested by the commission;” *Id.*
- to “review, investigate, and *make appropriate recommendations to the commission* with respect to the service furnished or proposed to be furnished by any public utility;” *Id.*
- to “investigate complaints *affecting the public interest generally* . . . , and where appropriate, *make recommendations to the commission* with respect to these complaints;” *Id.*
- “upon request by the commission, [to] *make studies and recommendations to the commission* with respect to

Similarly, Section 58-5-210 provides:

The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices, and measurements of service to be furnished, imposed, or observed, and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and service of every “public utility” as herein defined.

standards, regulations, practices, or service of any public utility;” Id.

- to “*make recommendations to the commission* with respect to standards, regulations, practices, or service of any public utility.” Id.
- “Subject to the provisions of Section 58-3-260 [proscribing certain ex parte communications between the commission and the parties] and, upon request, the Executive Director of the Office of Regulatory Staff must employ the resources of the regulatory staff to furnish to the commission, or its members, *such information and reports or conduct such investigations and provide other assistance* as may reasonably be required in order to supervise and control the public utilities of the State and to carry out the laws providing for their regulation.” S.C. Code Ann. §58-4-50(B) (Supp. 2006) (italics added).

The plain language of the law contemplates that the ORS, while not supervised by or subordinate to the Commission, is not the ultimate decision maker in a case. Instead, it functions as an investigator, advocate, and advisor. The Commission *may, in exercising its regulatory authority, request that ORS investigate matters* within its jurisdiction and make recommendations based upon its findings, but the Commission is free to accept or reject the recommendations of ORS where it reaches different conclusions.

The ORS has previously acknowledged the Commission’s duty to study and analyze the record and its need for sufficient information to make findings regarding the proposed settlement. In her letter dated July 3, 2006, counsel for ORS stated:

ORS is cognizant of the need for the Commission to have sufficient information in order to make a determination on the issues presented to it. ORS has propounded extensive discovery upon CWS, has audited its books and records, and has inspected its operations. ORS will prepare testimony and exhibits for presentation to the Commission to provide evidence in the record for

the Commission to make a determination as to the reasonableness of the proposed rates.

Letter from C. Lessie Hammonds to Charles L.A. Terreni, July 3, 2006 (emphasis added).

Furthermore, both CWS and ORS, in Paragraph 10 of the Settlement Agreement, acknowledged by implication that the Commission is empowered to decide independently whether the settlement was just and reasonable. The relevant paragraph states:

The Parties agree to advocate that the Commission accept and approve this Settlement Agreement in its entirety as a fair, reasonable and full resolution of the above captioned proceeding and to take no action inconsistent with its adoption by the Commission. The Parties further agree to cooperate in good faith with one another in recommending to the Commission that this Settlement Agreement be accepted and approved by the Commission. The Parties agree to use reasonable efforts to defend and support any Commission order issued approving this Settlement Agreement and the terms and conditions contained herein.

Settlement Agreement, p. 5, para. 10.

The parties further agreed in Paragraph 11 of the same document:

If the Commission should decline to approve the agreement in its entirety, then any Party desiring to do so may withdraw from the Settlement Agreement without penalty or obligation.

Settlement Agreement, p. 5, para. 11.

The inclusion of these provisions in the parties' Settlement Agreement is inconsistent with the position the parties now argue to this Commission. If the parties did not consider the Commission empowered to independently decide whether the settlement was just and reasonable, the provisions of their Settlement Agreement requiring advocacy on behalf of the Agreement as a "fair, reasonable and full resolution" of the case, and

recognizing the Commission's ability to "decline to approve the agreement", would have been unnecessary.

IV. The authority to regulate public utilities in the public interest, delegated to the Commission by the General Assembly, remains vested with the Commission after the enactment of Act 175.

The Commission's authority to consider the public interest in the course of a rate case is derived from the state constitution. The South Carolina Constitution provides that:

The General Assembly shall provide for appropriate regulation of common carriers, publicly owned utilities, and privately owned utilities serving the public as and to the extent required by the public interest.

S.C. Const. Art. IX, §1.

Therefore, all regulation of public utilities must be conducted in a manner consistent with the public interest. The state Supreme Court has recognized this provision as the underlying basis of the Public Service Commission's authority to regulate public utilities. Duke Power Co. v. S.C. Public Service Comm'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985). The Commission's determination of whether a proposed rate increase is just and reasonable is consistent with this mandate.

Both CWS and ORS now argue that the Commission is without authority to make its own determination of the public interest. See CWS Petition, p. 3 ("CWS submits that the Commission has no authority to act in the public interest in this matter..."); ORS Petition, pp. 16-18 (ORS argues that "the Commission has no statutory authority to ascertain, represent, or determine the public interest in water or wastewater rate proceedings....There is no statute which empowers the Commission to make a 'separate

and independent determination’ as to whether approval of the Settlement Agreement would serve or be consistent with the public interest.”). The parties argue that ORS is now “empowered to act as a regulator”⁸ and that Act 175 implicitly repealed the Commission’s regulatory authority to determine whether the public interest would be served by a settlement.⁹ Both CWS and ORS, without citing any support for their position, state that the determination of whether the public interest would be served is “exclusively” within the statutory authority of ORS.¹⁰ We disagree.

In this case, the parties have attempted to distinguish the Commission’s statutory authority to determine just and reasonable rates from the authority to authorize rates that are consistent with the public interest. The distinction is illusory, because the determinations as to whether rates are just and reasonable and as to whether they are in the public interest are inextricably related. Utility rates must be consistent with the public interest to be deemed just and reasonable, and vice versa.

⁸ See CWS Petition for Rehearing or Reconsideration, p. 40.

⁹ *Id.*; ORS Petition for Reconsideration or Rehearing, p. 16. We note that South Carolina law does not support repeal by implication except where conflicting statutes cannot be reconciled or harmonized. It is well established that:

The repeal of a statute by implication is not favored, and is to be resorted to only in the event of an irreconcilable conflict between the provisions of two statutes,” and “[i]f the provisions of the two statutes can be construed so that both can stand, this Court will so construe them.

Eagle Container Co., LLC v. County of Newberry 366 S.C. 611, 628, 622 S.E.2d 733,741 - 742 (Ct.App. 2005) citing In the Interest of Shaw, 274 S.C. 534, 539, 265 S.E.2d 522, 524 (1980) (citing City of Spartanburg v. Blalock, 223 S.C. 252, 75 S.E.2d 361 (1953)).

¹⁰ *Id.*

In Citizens Action Coalition of Indiana, Inc. v. PSI Energy, Inc., 664 N.E.2d 401 (Ind. App. 1996), the Indiana Court of Appeals heard arguments remarkably similar to those presented by the parties in this case. There, the appellants sought reversal of the Indiana Utility Regulatory Commission's decision rejecting a proposed settlement which had been agreed to by the parties to the case, including the Office of the Utility Consumer Counselor ("OUCC"), the state agency designated by statute as the representative of the public interest. On appeal, the intervenor Citizens Action Coalition ("CAC") argued that "the commission exceeded its authority by rejecting a reasonable settlement agreement and by entering an order that is contrary to law," Citizens Action 664 N.E.2d at 404, and that "the commission deserted its role as an impartial fact-finder and, while purporting to protect the interests of the ratepayers, rejected an agreement which had been accepted by the statutory representative of the rate paying public." Citizens Action 664 N.E.2d at 405. The Court of Appeals summarized:

Essentially, CAC's position is that the commission acts merely in a ministerial manner and must accord a settlement reached by the CAC and the OUCC a strong presumption of approval. Although we recognize the strong public policy favoring settlement agreements, we reject the notion that the commission must accept an agreement endorsed by the OUCC without determining whether the public interest will be served by the agreement.

Id.

In upholding the Indiana Commission's rejection of the settlement, the Court of Appeals distinguished the role of the commission from that of a civil trial court:

We note at the outset that "settlement" carries a different connotation in administrative law and practice from the meaning usually ascribed to settlement of civil actions in a court. See Pennsylvania Gas & Water Co. v. Federal Power

Com'n, 463 F.2d 1242, 1246 (D.C.Cir.1972). While trial courts perform a more passive role and allow the litigants to play out the contest, regulatory agencies are charged with a duty to move on their own initiative where and when they deem appropriate. Id. Any agreement that must be filed and approved by an agency loses its status as a strictly private contract and takes on a public interest gloss. Cajun Elec. Power Coop., Inc. v. F.E.R.C., 924 F.2d 1132, 1135 (D.C.Cir.1991). Indeed, an agency may not accept a settlement merely because the private parties are satisfied; rather, an agency must consider whether the public interest will be served by accepting the settlement. C. Koch, Administrative Law and Practice § 5.81 (Supp.1995).

Citizens Action, 664 N.E.2d at 406.

The court was not persuaded that the settlement agreement was due any special deference by virtue of the acquiescence of the Office of the Utility Consumer Counselor. The Indiana Court of Appeals concluded, in relevant part, “[W]e reject the notion that an agency is absolved from considering the public interest . . . when a statutory representative is provided to represent the public interest. The commission still must review the agreement under a reasonableness standard.” Id.

The rationale of Citizens Action applies here. Like the OUCC, the ORS is charged by statute with the duty of representing the public interest in matters before the state utility commission. Like the OUCC, the ORS agreed to a settlement that was later rejected by its state’s utility regulatory commission. Just as the Indiana Court of Appeals found that the Indiana Utility Regulatory Commission was not bound to accept a settlement agreed to by the OUCC in spite of the OUCC’s statutory designation as representative of the public interest, the South Carolina PSC is not bound to accept every settlement agreed to by the ORS.

The fact that ORS was designated by the General Assembly to represent the statutorily-defined public interest in Commission proceedings does not preclude the Commission exercising its own constitutional duty to consider the public interest in making its decision. While ORS must *represent* the public interest as an advocate and make recommendations to the Commission, it cannot unilaterally *determine* whether a proposed rate increase is in the public interest and *impose* a settlement. We agree with the rationale of the Indiana Commission and that state's Court of Appeals, we affirm our prior ruling and reject the parties' arguments to the same effect in the case before us.

V. Neither the Commission's rejection of the settlement agreement nor the form of the Commission's order violates the Administrative Procedures Act.

CWS asserts that the parties of record have an absolute right to dispose of the case by settlement pursuant to the Administrative Procedures Act ("APA") and the Commission regulations. See CWS Petition, pp. 10-11. The parties cite the APA in support of their argument that the law empowers them to settle a rate case as a matter of right. S.C. Code Ann. §1-23-320(f). However, while Section 1-23-320(f) recognizes the right of the parties to reach a settlement, it also recognizes that settlements may not be permitted under certain circumstances. Id. CWS cites to the Commission's regulations for the proposition that parties have an absolute right to settle a rate case, CWS Petition, p. 11,¹¹ but this argument is incorrect. While the Commission's regulations acknowledge

¹¹ The Commission's regulations state in pertinent part:

Final Disposition of Formal Proceedings. Formal proceedings shall be concluded upon the issuance of an order by the Commission or upon a settlement or agreement reached by all parties to the formal proceedings

that parties may reach settlements, they do not foreclose the independent review of a settlement by the Commission. In any case, these arguments are irreconcilable with the parties' acknowledgment, contained in the plain language of the Settlement Agreement, of the Commission's ultimate authority to independently decide whether the settlement would be approved and adopted. See, supra, at pp. 20-21.

CWS and ORS also complain that the Commission's order denying approval of the proposed settlement violates the APA's requirement that the order must contain specific findings of fact and conclusions of law. S.C. Code Ann. §1-23-350. To the contrary, the Commission's order violates neither the letter nor the spirit of Section 1-23-350. The South Carolina Supreme Court has read the APA to require: "An administrative body must make findings which are sufficiently detailed to enable this Court to determine whether the findings are supported by the evidence and whether the law has been applied properly to those findings. . . Where material facts are in dispute, the administrative body must make specific, express findings of fact." Porter v. Public Service Comm'n, 504 S.E.2d 320, 323, 332 SC 93, 98-99 (1998), citing, Hamm v. South Carolina Public Service Comm'n, 309 S.C. 295, 422 S.E.2d 118 (1992); Able Communications, Inc. v. S.C. Public Service Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986). The section is violated in those cases where "[i]t is impossible for an appellate court to review the order for error, since the reasons underlying the decision are left to speculation." Grant v. Grant Textiles, 372 S.C. 196, 202-03, 641 S.E.2d 869, 872 (2007).

and formally acknowledged by the Commission by
issuance of an order.

26 S.C. Code Ann. Regs. 103-817(D). (At the time the Commission heard this case, the same language was found in 26 S.C. Code Ann. Regs. 103-821.)

In this case, the Commission made clear that its basis for denying approval of the proposed settlement was the parties' failure, or refusal, to provide the information requested, which the Commission deemed necessary to its efforts to determine the justness and reasonableness of the proposed settlement. The reasons underlying the decision by the Commission are not "left to speculation," as would be proscribed by the APA. All of the facts material to the Commission's decision are included within Order No. 2006-543.

In addition to the APA, Title 58 of the Code also requires that the Commission make detailed findings of fact. S.C. Code Ann. §58-5-240 requires the Commission to make findings based upon the record; it provides:

The commission's determination of a fair rate of return must be documented fully in its findings of fact and based exclusively on reliable, probative, and substantial evidence on the whole record. The commission shall specify an allowable operating margin in all water and wastewater orders.

S.C. Code Ann. §58-5-240(H).

However, CWS argues that §58-5-240(H) does not apply in the context of a settlement agreement involving all parties of record, because "there would be no appeal." CWS Petition, p. 17. Implicit in this argument is CWS's theory that the Commission has no choice but to approve a settlement agreement. We reject this argument. The law does not exempt the Commission from fulfilling its duty when presented with a settlement. Evidence must be presented to support the conclusions of the Commission. Lacking a record, the Commission cannot approve a rate increase, even if the parties propose it in a settlement.

Therefore, while CWS complains that the Commission's order lacked specific findings, it also argues that S.C. Code §58-5-240(H) is irrelevant to an order acknowledging a settlement. See CWS Petition, p. 38; ORS Petition, p. 17. The parties cannot have it both ways, on the one hand claiming that they should not be required to create a complete record in support of a settlement because settlements cannot be appealed, while on the other hand arguing that the Commission has not given sufficient reasons for denying approval of the settlement.

VI. The Commission's decision to reject the settlement was consistent with the practices embodied in the Commission's Settlement Policy and its regulatory authority.

In an effort to give guidance to the parties it regulates and to inform the public, the Commission issued a written summary of its settlement policies and procedures. To help ensure that the written policy was effective and consistent with applicable law and regulations, the Commission published its proposed policy on March 21, 2006, and invited comments and suggestions from all regulated utilities and interested parties. On June 13, 2006, after giving notice to all regulated entities and interested parties and reviewing comments from the regulatory community, the Commission issued its "Settlement Policies and Procedures".¹² The Settlement Policies and Procedures refer to the Commission's "statutory duty of ensuring that cases brought before it are resolved in a manner consistent with the public interest," and makes clear that proposed settlements will be evaluated by the Commission on the basis of whether they are "just, fair and reasonable, in the public interest, or otherwise in accordance with law or

¹² Attached as Exhibit A and posted on the Commission's website at <http://www.psc.sc.gov/laws/settlement/PSC%20Settlement%20Policies%20revised%206.13.2006.pdf>.

regulatory policy.” Settlement Policies and Procedures, p. 1, Pt. IV. The Settlement Policies and Procedures also specifically provide that when a settlement is proposed, “the Commission may accept the settlement, reject the settlement, or require the further development of an appropriate record in support of a proposed settlement.” *Id.*

Following the issuance of the initial statement of the Commission’s Settlement Policies and Procedures and request for comments on March 21, 2006, ORS responded with a letter supporting the Commission’s efforts, stating, in part:

The Office of Regulatory Staff (“ORS”) has reviewed the proposal and believes these procedures to be fair, reasonable and provide helpful guidance to the parties. ORS appreciates the Commission’s thoroughness, insight, and attention to this matter, and we support the adoption of these policies.

Letter from C. Dukes Scott to Charles L.A. Terreni, April 3, 2006.

Only one other entity, South Carolina Electric & Gas Company, offered comments on the matter. CWS offered no comments, either after the Commission’s initial issuance of the policy, or after the publication of the revised policy on June 13, 2006. Neither CWS nor ORS has ever, prior to filing their motions for reconsideration, contended that the Commission’s Settlement Policies and Procedures were in any way unlawful or improper. To the contrary, CWS and ORS filed the Explanatory Brief and Joint Motion for Settlement Hearing and Adoption of Settlement Agreement pursuant to the June 13, 2006 revised Settlement Policies and Procedures. Explanatory Brief, p. 1.

CWS now argues that the Commission cannot follow the Settlement Policies and Procedures because they were not promulgated as regulations. The Commission has never asserted that the document itself constitutes a regulation, nor does the Commission

believe that it is necessary for it to promulgate a regulation for this purpose. Instead, the document is a statement of the policy employed by the Commission and is intended to provide guidance on how the Commission will evaluate settlements. We believe this Commission has the authority to establish general procedures for the consideration of settlements without promulgating a regulation.

VII. The Commission did not violate either the Code of Judicial Conduct, the South Carolina Constitution, the S.C. Code of Laws, or the South Carolina Rules of Evidence by requesting information from the parties.

As previously discussed, CWS and the ORS contend that Act 175 divested the Commission of the authority to request further information from the Company once a settlement is presented. They base these arguments upon its view that these inquiries violated Canon 3 of the Code of Judicial Conduct, S.C. Code Ann. §58-3-60(D), S.C. Code Ann. §58-3-190, and Rule 614(b) of the South Carolina Rules of Evidence. CWS cites the same provisions arguing that the Commission erred in allowing a public witness, Don Long, to testify at the final hearing in the case. CWS Petition, pp. 6-7¹³. Each argument is addressed below.

A. Canon 3 of the Code of Judicial Conduct does not prohibit the Commission from requesting information from the parties in a rate case.

CWS and the ORS argue that the Commission violated Canon 3 by “seeking evidence outside the record” and conducting an “impermissible independent investigation.” CWS Petition, p. 8; ORS Petition, p. 4. The Code of Judicial Conduct states in applicable part:

¹³ The same arguments were made by CWS when it moved for reconsideration of the Commission’s request for information of July 25, 2006 (Order 2006-407) and were rejected by the Commission in Order No. 2006-458.

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider **ex parte communications**, or consider other communications made to the judge **outside the presence of the parties** concerning a pending or impending proceeding ...

CJC, Rule 501, SCACR, Canon 3B(7) (emphasis added).

The parties have relied in their petitions on the following single sentence in the Commentary to Canon 3, taken out of the context provided by plain language of the Canon itself and the remainder of the Commentary, to support the assertion that the Commission is prohibited from asking for additional information not presented by the parties on their own initiative:

A judge must not independently investigate facts in a case and must consider only the evidence presented.

CJC, Rule 501, SCACR, Commentary to Canon 3.

However, the parties ignore the context provided by the rest of the applicable Commentary, which makes it clear that the prohibitions of Canon3B(7) are directed at *ex parte* communications, not the on the record public inquiries made of the Commission in this case:

The proscription against communications concerning a proceeding **includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding**, except to the limited extent permitted.

To the extent reasonably possible, **all parties or their lawyers shall be included in communications with a judge**.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the

party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.

Certain **ex parte communication** is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage *ex parte* communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all *ex parte* communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

Examples when an **ex parte communication** may be expressly authorized by law include the issuance of a temporary restraining order under certain limited circumstances [Rule 65(b), SCRPC], the issuance of a writ of supersedeas under exigent circumstances [Rule 225(d)(6), SCACR], the determination of fees and expenses for indigent capital defendants [S.C. Code Ann. § 16-3-26 (Supp. 1995)], the issuance of temporary orders related to child custody and support where conditions warrant [S.C. Code Ann. § 20-7-880 (1985)], and the issuance of a seizure order regarding delinquent insurers [S.C. Code Ann. §38-27-220 (Supp. 1995)].

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, **so long as the other parties are apprised of the request** and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, **a copy of**

any written communication or the substance of any oral communication should be provided to all parties.

CJC, Rule 501, SCACR, Commentary to Canon 3(b)(7) (emphasis added).

The plain language of Canon 3B(7) and its Commentary prohibits a judge from *ex parte* consultations with non-participants to a proceeding. It does not prohibit the Commission from making an on-the-record inquiry of the parties in this case. Canon 3 and the applicable Commentary are clear that the prohibition against a judge independently investigating the facts in a case is a prohibition against *ex parte* communications. The Commission did not conduct any *ex parte* investigation in this case. It did not independently investigate facts on its own. In making its requests for information, the Commission gave the parties the opportunity to present evidence pertaining to issues which the Commission believed needed to be addressed more fully and afforded CWS the latitude to address the Commission's concerns the way it saw fit.

B. The cases cited by CWS do not support its argument that the Commission conducted an improper investigation.

CWS cites to five out-of-state cases in support of its argument that the Commission sought to conduct an improper independent investigation in violation of the Code of Judicial Conduct. CWS Petition, p. 8. Each of these cases is distinguishable from the facts at hand, and none of them support the premise that the Commission has violated its ethical duties. The cases are more fully discussed below.

In State v. Dorsey, the Supreme Court of Minnesota, in a 4-3 decision, overturned a criminal conviction because of a trial judge's independent *ex parte* investigation of the facts. The trial judge had directed her law clerk to check court records to independently verify the testimony of a key defense witness in a criminal bench trial. The law clerk's

research, which was only disclosed to the parties after the fact, revealed that the witness had testified inaccurately. State v. Dorsey, 701 N.W.2d 238, 245 (Minn. 2005).

The case of Horton v. Ferrell involved a special master appointed to make findings regarding dissolution of a partnership. The special master “submitted to each side a list of questions to be answered, and used ... unsworn answers in the preparation of his report.” 335 Ark. 366, 368-69, 981 S.W.2d 88 (1988). The master also “consulted a number of third parties and other sources to obtain much of the information utilized in his findings.” Id. The Supreme Court found “Here the master conducted an independent investigation, and obtained evidence in an *ex parte* communication manner clearly in violation of Canon 3(B)(7).” Horton v. Ferrell, 335 Ark. at 371, 981 S.W.2d at 90.

CWS cites to State v. Vanmanivong as “holding it is error for a judge to independently gather evidence in a pending case.” CWS Petition, p. 8, n. 6, citing, 261 Wis.2d 202, 661 N.W.2d 76 (2003). The case involved a judge who failed to follow the required statutory procedures when he held an *in camera* hearing regarding a confidential informant. The judge committed error because he solicited, and relied on, unsigned *ex parte* statements from a detective in conducting his review. State v. Vanmanivong, 261 Wis.2d at 228-229, 661 N.W.2d at 89.

CWS also cites the unpublished opinion of the Tennessee Court of Criminal Appeals, Minor v. State, in which the petitioner alleged that the trial judge had violated the Code of Judicial Conduct in the course of handling a competency hearing and sought recusal. 2001 W.L. 1545498 (Tenn. Ct. Crim. App. Dec. 5, 2001). However, on appeal, the trial judge was found to have engaged in no such misconduct, and no ground for recusal was found. While acknowledging that “the court must generally restrain itself to

consideration of those facts that are before it and may not conduct an independent investigation,” the appellate court held that the judge was entitled to independently review and take judicial notice of the appellant’s civil case files because he put the information on the record and gave the parties an opportunity to object. The court held, “Because the court properly exercised its powers of judicial notice, the references to the civil file did not constitute an improper, *ex parte* investigation, and provide no basis for recusal.” *Id.* at *12 (Tenn. Crim. App. 2001). The Minor case therefore lends no support to CWS’s argument.

The four cases discussed above all involved allegations of impermissible, *ex parte* communications in the course of a case. No such *ex parte* communications took place here. The disputed inquiries took place on the record and were directed at the parties.

Finally, in the case of *In re Richardson*, cited by CWS as “holding that judges are not investigation instrumentalities of other agencies of the government,” the Court of Appeal of New York held that a state law allowing the Governor to appoint a sitting judge to act as a special prosecutor in a public corruption case violated that state’s constitutional prohibition against judges holding other public offices. *In re Richardson*, 247 N.Y. 401, 414, 160 N.E. 655, 659 (1955). The facts of *In re Richardson* are not comparable to the Commission’s deliberations in the case at hand, and the case does not warrant reconsideration of the Commission’s decision.

C. The Commission provided the parties a fair hearing and did not exhibit bias in its conduct of the proceedings.

The ORS argues for the first time on reconsideration: the Commission failed to afford the parties a fair and impartial hearing because members of the audience were

permitted to laugh and applaud during the hearings conducted in the case; and because the Commission did not take enough time to deliberate before issuing its directive.¹⁴ ORS did not raise any objections during the proceedings. Instead, it raises them for the first time on reconsideration. The Commission believes that it afforded the parties a fair hearing in conformity with S.C. Code Ann. §58-3-225. If the ORS thought otherwise, it was incumbent upon it to object. Lipscomb v. Poole, 247 S.C. 425, 435, 147 S.E.2d 692, 697 (1966) (“If the appellant considered the remarks and conduct of the trial judge prejudicial, then he should have made timely objection in order to preserve the right of review, and the failure to do so amounts to a waiver of the alleged error”). In any event, the Commission is confident that it conducted fair and orderly hearings in this case.

VIII. The Commission’s request did not violate the state constitution because the Commission did not act as both prosecutor and adjudicator of this case.

CWS asserts that the Commission’s requests for information violated Article I, Section 22 of the South Carolina Constitution, which states:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Art. I, §22.

CWS argues that by requesting information of the Company, the Commission acted as both a prosecutor and adjudicator in violation of Art I., Sec. 22, and cites to Ross

¹⁴ The ORS also argues for the first time on reconsideration that the Commission erred by allowing Don Long to testify twice. This objection also made by CWS is addressed.

v. Medical Univ., 328 S.C. 51, 492 S.E.2d 62 (1997). The Ross case involved a university vice-president's participation in the termination proceedings of an adjunct professor. In that case, the vice-president independently investigated allegations of misconduct, testified as a witness before the university's grievance board, and thereafter reviewed and concurred in the grievance's committee's findings as part of the university's disciplinary procedure. Ross, 328 S.C. at 70, 492 S.E.2d at 72. The Commission's on-the-record request for information from the parties is not remotely comparable to the dual roles played by the university official in Ross.

IX. The Commission did not "improperly penalize" CWS for failing to create documents responsive to the Commission's requests for information.

CWS alleges that it was improperly penalized by the Commission because it did not create a document to respond to the Commission's September 6, 2006 directive requesting financial information about its subsystems. The Company argues that the Rules of Civil Procedure do not require a party in a case "to create documentation in order to respond to discovery requests." CWS Petition, p. 9. The Commission's request for supplementation of the Company's application was not a discovery request, but was simply an attempt to have the Company furnish further information on an issue which concerned the Commission. The Commission merely chose to inform the parties of certain issues which had been raised by customers and to request that the parties address those concerns. Unfortunately, the Commission's attempt to advise the parties of its concerns and to elicit additional information was unsuccessful, and the settlement was rejected. The Commission requested the information in order to fulfill its duty to ensure that the proposed rate increase was "just and reasonable." S.C. Code Ann. 58-2-210

(Supp. 2006). CWS was only “penalized” in the sense that it failed to persuade the Commission to approve the settlement.

In denying reconsideration of its request for supplemental information regarding CWS’s subsystem, the Commission explained “the Commission did not order CWS to compile any information. CWS is free to respond to the Commission as it sees fit.” Order No. 2006-458 (August 4, 2006). In his Rebuttal Testimony, Steven Lubertozi stated that the Company did not maintain documents which would be responsive to the Commission’s request and that the data would be difficult and burdensome to compile. Settlement Agreement Exhibit D (rebuttal testimony of Steven M. Lubertozi), pp. 8-11. As discussed above, in spite of his claims that the Company did not keep records which could allow the Commission to determine whether the customers of the River Hills community were subsidizing CWS’s other systems across the state, and that the data could not be easily compiled, Lubertozi testified that the revenue generated from the River Hills customers did not subsidize service to other customers elsewhere in the state. Settlement Agreement Exhibit D (rebuttal testimony of Steven M. Lubertozi), p. 8. Because of this obvious inconsistency in Lubertozi’s testimony, the Commission inquired further on September 6, 2006. CWS refused to provide any responsive information to the Commission’s query. As a result, the Commission ultimately denied the requested rate increase based, in part, on the absence of information concerning the cross-subsidization issue in the entire record.

Utilities seeking rate increases before the Commission must bear the burden of proving their entitlement to relief:

In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue.

Leventis v. South Carolina Dept. of Health and Environmental Control, 340 S.C. 118, 133, 530 S.E.2d 643, 651 (2000).

CWS's effort to recast the Commission's ruling as a sanction for its refusal to respond to the Commission's first request for financial information misrepresents the Commission's ruling. The Commission did not rule against CWS for failing to respond to its request for financial information in Order 2006-407. It ruled against CWS because it did not meet its burden of proof.

X. CWS failed to maintain its accounting records in accordance with applicable South Carolina law and regulations.

South Carolina regulations governing water and sewer service providers require compliance with the NARUC Uniform System of Accounts. 26 S.C. Code Ann. Regs. 103-517 and 103-719. CWS argues that the NARUC Uniform System of Accounts does not require CWS to compile or maintain financial information on a system or subdivision basis, and that the Commission's denial of rate relief therefore unfairly penalizes the Company for keeping its records in a manner consistent with applicable regulations. This argument is simply incorrect. The NARUC System of Accounts for water and wastewater utilities does require that a utility maintain financial information below the system-wide level. With respect to water utilities, the NARUC system of accounts states:

Each utility shall keep its books of accounts, and all other books, records, and memoranda which support the entries in such books of accounts so as to be able to furnish readily full information as to any item included in any account. Each entry shall be supported by such detailed information as will permit a ready identification, analysis, and verification of all facts thereto.

Uniform System of Accounts for Class A Water Utilities (NARUC 1996) at 14.

The NARUC system of accounts also provides:

Separate records shall be maintained by utility plant accounts of the book cost of each plant owned including additions by the utility to plant leased from others and of the cost of operating and maintaining each plant owned or operated.

Uniform System of Accounts for Class A Water Utilities (NARUC 1996) at 18.¹⁵

Substantially the same information is required of wastewater utilities. See Uniform System of Accounts for Class A Wastewater Utilities (NARUC 1996), pp. 15, 19. While the NARUC chart of accounts requires this information to be maintained on a “plant” basis, it should be relatively simple to assemble this information according to subsystem. Therefore, the Commission requested data which CWS should have maintained.

On May 8, 2006, the Office of Regulatory Staff submitted a petition to the Commission signed by the members of the York County legislative delegation. Letter of C. Lessie Hammonds, dated May 8, 2006 (with enclosed petition). The petition requested that “The Office of Regulatory Staff...advise the Public Service Commission that Carolina Water Service failed to provide the following information despite repeated requests, including Detailed and Analytical Financial Statements, Assets and Liability

¹⁵ attached as Exhibit B.

Statement for each individual system and current Profit and Loss Statements.” The petition also requested that the Commission deny any rate increase until such information was received. No objection was raised by CWS at the time, nor did it raise this ground when it sought reconsideration of the Commission’s request for information issued on June 27, 2006. In any case, the Commission decided to request information about CWS’s subsystems of its own volition after hearing the sworn testimony of CWS customers in public hearings. CWS complains that the Commission’s requests for additional financial information broken down by subsystem were substantially similar to one made by the York County legislative delegation. The fact that legislators raised similar questions does not invalidate the Commissioners’ own interest in this information.

XI. The Supreme Court’s *August Kohn* decision does not authorize water companies to only maintain their accounting records on a statewide basis.

In its Order of October 2, 2006, the Commission stated: “The Commission alerted the Parties to unanswered questions in the record regarding: 1) the fairness of the proposed uniform rate structure...” Order, p. 4. In its Petition, CWS argues that “There is no evidence in the record of ‘special facts and circumstances’ which would warrant a departure from the Company’s previously authorized uniform rate structure as is required under August Kohn ...”. Petition, p. 6. CWS is incorrect for several reasons.

CWS argues that it maintains its accounting records for ratemaking purposes on a statewide, and not on a subdivision basis, in accordance with the Supreme Court’s opinion in August Kohn and Co., Inc. v. Public Service Commission and Carolina Water Service, 281 S.C. 28, 313 S.E.2d 630 (1984). It cites the August Kohn decision for the proposition that the burden of proof is on the party challenging a uniform rate structure,

and agrees the Commission shifted the burden of proof by asking for information about its individual subsystems. CWS Petition, p. 6. The Commission rejects this argument for several reasons.

As we stated in Order No. 2006-543, August Kohn does not stand for the proposition that a uniform rate structure is the only appropriate rate structure for CWS. See Order No. 2006-543, pp. 21-22. Moreover, the basic premise of the August Kohn decision was that a uniform rate structure is generally favored for an “interconnected” water system.¹⁶

The Court explained:

In the law of utilities regulation, particularly in the context of water service, the rule appears to be as follows: Normally, the unit for rate-making purposes would be the **entire interconnected operating property used and useful for the convenience of the public in the territory served**, without regard to particular groups of consumers of local subdivisions; but conditions may be such as to require or permit the fixing of a smaller unit. 94 C.J.S. Waters Section 293, p. 182; also Section 297. Exceptions to the above rule are not frequent and are generally the product of special facts and circumstances.

313 S.E.2d at 631, 281 S.C. at 30. (emphasis added).

CWS argues that there is no evidence in the record that its system is not interconnected.

CWS Petition, p. 28. In fact, CWS operates water and/or sewer systems in several far-

¹⁶ CWS claims that it does not operate “subsystems.” Yet, it is undisputed that the company operates a number of systems around the state which were acquired at various times in several separate transactions, which are physically separated, not interconnected, and serve distinct geographic areas. Regardless of the semantic distinction CWS is attempting to make, the clear meaning of the Commission’s request was to ask CWS to give certain information broken down by location, but CWS refused to provide the requested data.

flung locations around the state,¹⁷ and the Company's subsystems are clearly not interconnected; therefore, it was appropriate for the Commission to seek information from the Company on a subsystem rather than a statewide basis.

Notwithstanding CWS's claim that it does not keep records separated by subsystem and its implication that it would be difficult or impossible to separate the data by subsystem, the Company has historically treated the residents of various neighborhoods differently from those in the rest of its subsystems around the state. For example, CWS's own witness, Steven Lubertozi, testified in some detail about the contentious history of the Company's dealings with the residents of the River Hills subdivision in York County and the various concessions CWS has made them as a result of numerous complaints. Settlement Agreement Exhibit D (rebuttal testimony of Steven M. Lubertozi), pp. 2-5.

Lubertozi testified that in 1992, CWS entered into a bulk water and sewer service agreement with York County which resulted in different service rates for the CWS customers in the area due to the interconnection of that subdivision's system with the York County system, and that subsequently, in 1997, the Commission ordered a 10,500-gallon cap on sewer charges for residential customers in River Hills. *Id.* at 4. Lubertozi testified that in 1999, to settle then-pending appeals of the Commission's orders imposing the sewer rate cap, CWS waived plant impact and connection fees for River Hills customers who agreed to install irrigation meters. *Id.* Lubertozi testified that the net result for customers who availed themselves of the opportunity to install the new meters was dramatically reduced sewer bills. *Id.* at 5. The inescapable conclusion

¹⁷ As noted above, the Company operates systems in nine counties.

drawn from Lubertozzi's own testimony is that CWS can, and indeed has, been able to separate customers by locality for purposes of setting rates and charges. CWS's argument that it would be unduly expensive or otherwise impracticable to base its sewer charges upon anything other than its current system of uniform rates is not supported by the testimony of Lubertozzi about CWS's history of dealings with the residents of River Hills subdivision.

The Commission's past orders show that individual subdivisions within CWS's service territory have been broken out and assigned different rates and charges from other subdivisions included in the same rate proceeding throughout CWS's history of doing business in South Carolina. See, e.g., In re Carolina Water Service, Docket No. 93-738-WS, Order No. 94-484 (1994) (withdrawing River Hills Subdivision from consideration in rate case); In re Carolina Water Service, Docket No. 91-641-WS, Order No. 93-402 (1993)(excluding expenses attributable to Oakatee and Black Horse Run Subdivisions and setting different rates for Glen Village, Oak Grove, Heatherwood, Idlewood, and Calvin Acres Subdivisions); In re Carolina Water Service, Docket No. 89-610-WS, Order No. 90-694 (1990)(excluding revenues attributable to Hollywood Hills, Green Springs, Hillcrest, Wrenwood, and Sharpe's Road Subdivisions); In re Carolina Water Service, Docket No. 85-169-WS, Order No. 85-969 (1985)(rejecting certain requested rate and fee increases for residents of Hollywood Hills, Meadowlake Hills, Lands End, Black Horse Run, and Glenn Village Subdivisions based upon customer testimony concerning poor water quality, problems with sewer service, and inadequate response to complaints, but approving requested increases in other subdivisions). The Company's rate history does

not support its contention that its South Carolina operations comprise a unitary system which cannot be separated by subdivision or subsystem.

As discussed above, the August Kohn opinion is premised on the appropriateness of a uniform rate structure for an “interconnected system.” 281 S.C. at 30, 313 S.E.2d at 631. As the Commission and the parties know, CWS’s system is not interconnected. Therefore, if the Commission were to decide that a departure from a uniform rate structure was warranted, there would be no need for it to find “special facts and circumstances” to justify its decision. Furthermore, even if a finding of special facts and circumstances warranting a departure from the uniform rate structure were required of the Commission, that information might have been present in the information about individual subsystems that CWS refused to provide. Without such information, or any explanation of why it could not be compiled, the Commission rightly concluded “that it has not received enough information to meaningfully evaluate the uniform rate structure proposed by the parties.” Order, p. 21.

The Commission did not shift the burden of proof in this case. As explained above, CWS is not entitled to any presumption that the uniform rate structure is appropriate for its non-interconnected system. The Commission requested information which would allow it to consider the issue, and the applicant chose not to respond. The applicant bears the burden of proof of showing that its proposed rates are just and reasonable. Unable to evaluate this issue due to a lack of information, the Commission denied the requested rate increase because in this and in other issues the applicant failed to show that its requested rates were just and reasonable.

XII. CWS's uniform rate structure is not entitled to a presumption of justness and reasonableness.

CWS also cites Hamm v. South Carolina Public Service Comm'n, 315 S.C. 119, 432 S.E.2d 454 (1993), as authority for the proposition that the justness and reasonableness of its previously approved uniform rate structure must be presumed. In that case, the South Carolina Supreme Court actually reversed the portion of a Commission decision approving the application of Carolina Water Service for imposition of an environmental impact surcharge. The Court found that the surcharge was not supported by the evidence and therefore the Commission's order contained no justification for the amount approved.

CWS relies on Hamm to argue that a utility rate, once found just and reasonable by the Commission, is presumed valid and should remain unchanged.¹⁸ Actually, in Hamm, the Commission found that the Consumer Advocate had not submitted sufficient evidence to challenge the validity of the previously approved plant impact fees and, absent a challenge supported by the evidence, the plant impact fees were "presumptively correct." Hamm, 432 315 S.C. 124-125 S.E.2d at 457-458. This holding does not mean that the Commission may not inquire on its own initiative into the appropriateness of a utility's rate structure, nor does the holding mean that a utility may thwart inquiring into its rates by refusing to provide information and then benefit from its refusal by relying on Hamm for the proposition that its rates are not subject to challenge. In any case, Hamm involved a challenge to a fee that had been previously approved. In this case, the Commission denied new rates; it did not alter CWS's previously approved rates.

¹⁸ See CWS Petition, p. 32.

In the present case, public witnesses testified that they were displeased with CWS's quality of service and believed CWS's flat-rate billing to be unfair. The Commission deemed the concerns of the public witnesses to be important and requested evidence relating to the concerns they had raised. CWS and ORS, however, declined to provide the requested information, and the Commission was left with little choice but to reject the Settlement Agreement between them because they failed to prove their case.

XIII. The Commission did not improperly depart from precedent when it inquired whether the uniform rate structure remained just and reasonable.

CWS argues that the Commission arbitrarily departed from precedents established in the Commission's prior orders that specifically "concluded not only that a uniform rate structure for CWS was desirable and appropriate, but that the lack of a uniform rate structure resulted in the Company's York County customers being subsidized by CWS's other customers." CWS Petition, p. 5.

Relying on 330 Concord Street Neighborhood Ass'n v. Campsen, 309 S.C. 514, 424 S.E. 2d 538 (Ct. App. 1992), CWS argues that the Commission would arbitrarily depart from its prior decisions if it were to revisit CWS's uniform rate structure. CWS Petition, p. 5. CWS argues that once the Commission has approved a uniform rate structure, it cannot revisit the issue unless specifically asked to do so by the company. However, the Court of Appeals' opinion in 330 Concord Street does not prevent the Commission from ever reconsidering the appropriateness of CWS's uniform rate structure; the case only prevents an arbitrary departure from prior decisions. Such a rule would prevent the Commission from ever departing from regulatory approaches taken in previous cases unless asked to do so by a regulated utility. In addition, CWS's position is

inconsistent with Hamm v. S.C. Public Service Commission, 309 S.C. 282, 289, 422 S.E.2d 110, 114 (1992), which precludes the Commission from reliance upon its past practices as a sole basis for Commission action.

XIV. The Commission's rejection of the settlement was not arbitrary and capricious, and was based on the record of this case.

CWS also cites the Commission's decision in In re Application of Tega Cay Water Service, Inc., Docket No. 2006-97-WS, Order No. 2006-582 (2006), as evidence that the Commission's action in this case was arbitrary and capricious. In that case, Tega Cay Water Service, Inc. ("TCWS") also refused to present the Commission with requested evidence, but a proposed settlement of that case was nevertheless approved. A review of this Commission's rationale for accepting the settlement in the Tega Cay case demonstrates that the Commission did not exercise its decision-making authority in an arbitrary manner. Contrary to the situation in the present case, in Tega Cay, the Commission found that its particular concerns could be adequately addressed outside the rate case docket. Order No. 2006-582, p. 11. The fact that this case and Tega Cay were decided under somewhat similar circumstances but yielded different results does not demonstrate arbitrariness or capriciousness. An administrative decision is arbitrary if it is without rational basis, is based alone on one's will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Converse Power Corp. v. South Carolina Department of Health and Environmental Control, 350 S.C. 39, 564 S.E.2d 341, (Ct.App. 2002), quoting Deese v. State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct.App. 1985).

There are significant distinctions between this case and Tega Cay. First, although there was evidence of water loss in Tega Cay, an ORS witness testified that the water losses presented only a potential indirect effect on customers' bills. Accordingly, we held that this issue may be dealt with administratively and should not prevent the Commission from approving the Settlement Agreement. See Order No. 2006-582, pp. 10-11. Second, although there were some customer complaints, the Commission was convinced that these could also be addressed administratively through such means as reports and inspections pursuant to S.C. Code Ann. Sections 58-3-190 and 58-3-200 (Supp. 2006). Id., p. 11. Third, fewer overall complaints existed with TCWS than with CWS, and the terms of the proposed settlement were more favorable to all who would be impacted by a rate increase. The Commission's decisions in the Tega Cay rate case and the present case are each based on the particular facts before it.

XV. The Commission's requests for information were reasonable and appropriate.

A. The Commission's request for information on the frequency of sewer backups and the Company's response to these incidents was appropriate.

During the public hearings, the Commission heard testimony relating to sewer backups. To meet its statutory duties, the Commission requested information relating to sewer problems in its directive of September 6, 2006. CWS argues that the Commission erred in considering its failure to provide requested information regarding sewer backups as a basis for denying rate relief. CWS also complains that Order No. 2006-543 does not cite any customer testimony regarding the number, location or cause of sewer backups, and other details. CWS Petition, p. 31. CWS apparently takes the position that

customer complaints of sewer problems cannot prompt Commission inquiries unless the complaints include very specific details. We reject this argument.

After hearing public testimony complaining of sewer backups and the Company's response to these problems, the Commission asked the Company how many complaints of sewer backups were received within the test year and how these were resolved. Tr. 79 (Vol. 2) (Testimony of Ronald Wanless); Tr. 82 (Vol. 2) (Testimony of Joan O'Brien). If the Commission were not permitted to follow up on issues raised in public testimony in this manner, public testimony would be rendered largely worthless. We find no error in these inquiries.

The Commission also posed questions regarding the efforts by CWS to prevent sewer backups, what measures the Company employed to prevent sewer problems, and how they compare to industry standards. These questions were proper whether in response to comments from the public or not. Sewer backups are a common concern of utility customers and, therefore, a legitimate source of inquiry in these proceedings. If CWS does not have a high incidence of backups or of problems responding to them, as it implies in its petition, this could be a factor that would actually support its request for higher rates. These questions are a legitimate line of inquiry, given the Commission's charge to consider the quality of a company's service when considering an increase to its rates and charges. See, Patton v. Public Service Comm'n, 280 S.C. 288, 312 SE 2d 257 (1984).

CWS alleges that Order No. 2006-543 ignores the stipulated testimony offered in the Settlement Agreement with respect to the adequacy of CWS's service, including the report of ORS with respect to customer complaints. CWS Petition, p. 31. However, the

stipulated testimony failed to provide any of the requested information about sewer backups. This example, along with the others already mentioned, illustrates why the Commission denied CWS's rate increase for the Company's failure to prove its case.

B. The Commission appropriately considered the fairness of CWS's flat fee tariff for sewerage service.

On September 6, 2006, the Commission requested that the parties explain why the Commission should find that their proposed flat rate sewerage billing scheme was just and reasonable, and why it was superior to one based on individual usage. Order No. 2006-543, p. 25. The parties failed to provide any information in response to these questions. CWS argues it was improper for the Commission to inquire whether a flat rate billing structure was improper. It argues that the Commission failed to recognize that its rates are presumptively valid and that they were not challenged by a party of record. The Commission disagrees.

The Commission did not discuss whether CWS's rates are presumptively valid in its Order. However, as discussed above, a presumption of validity does not mean that the Commission cannot question the fairness of the Company's rate structure, which is the essence of CWS's argument. Rather, that presumption would be considered as part of the Commission's deliberation. This process was thwarted by CWS's absolute refusal to address the issue of flat rate billing at all.

The Commission has already discussed its reasons for rejecting the argument that it is not entitled to consider an issue which has not been raised by a party in the case. However, CWS acknowledges that some of its customers questioned the fairness of the flat rate billing arrangement. The Commission was well within its rights to consider it.

CWS also states that since only three of 12,000 sewer customers have expressed a concern with respect to the Company's flat rate sewer billing structure, Order No. 2006-543 was inconsistent with the Heater Utilities case, particularly in light of ORS's endorsement of the flat rate sewer structure. First, the Commission only requested information on the issue of flat rate billing. The Commission did not change the flat rate billing structure. Second, the Commission's request for information from parties is different from the Commission's denial of a rate increase in Heater, which was based exclusively on testimony from customers of the utility regarding quality of service. Third, the Commission is entitled to consider the fairness of the utility's rate structure, regardless of the number of customers who may complain about it.

The Commission noted that the flat rate billing structure concerned several of CWS's customers, and this initially prompted its consideration of the issue. However, issues such as the fairness of a rate structure need not be raised by a certain percentage of the Company's customers to be worthy of consideration. As the Commission noted, there are divergent opinions among various jurisdictions about the desirability of flat rate designs. Order No. 2006-543, p. 25. It was entirely appropriate for the Commission to consider this issue, and CWS's motion to reconsider this ground for its decision is denied.

C. The Commission appropriately scrutinized \$385,497 in rate case expenses.

CWS also takes issue with the Commission's holding that CWS had failed to present sufficient evidence to support its claimed amount of \$385,497 in rate case expenses. The Commission held that this "severely limited the Commission's ability to make its independent determination" regarding the rate case expenses claimed. Order No. 2006-543, p. 28. CWS argues that this is legal error. ORS further argues that the

Commission acted in contravention of Order Nos. 2006-283 and 2006-284 by failing to award expenses that agency incurred in retaining its expert witness and in conducting a management review audit. We disagree.

CWS states that the Order fails to acknowledge that non-affiliate expenses of a utility are presumed to be reasonable and incurred in good faith, and that the Commission's order "impermissibly shifts to CWS the burden..." CWS Petition, p. 34. However, the burden of proof in a rate case is on the proponent. As stated in Order No. 2006-543, there was not enough evidence presented to determine whether the rate case expenses were reasonable and prudently incurred.

Regardless of any presumption that may exist, a company must still prove its case before an administrative tribunal. Simply stating the numbers without more evidence is insufficient. Due to the Company's refusal to furnish information regarding these expenses and other matters as described herein, the Commission simply did not have enough information to approve the Settlement Agreement. Accordingly, the Commission had no choice but to reject both the Settlement Agreement, and, ultimately, the request for rate relief.

The Company alleges error in the Commission's reliance upon Porter v. S.C. Public Service Commission, 328 S.C. 222, 493 S.E.2d 92 (1997) for the proposition that "[t]he reasonableness of rate case expenses has long been debated before this Commission and before the courts." CWS argues that Porter did not address the reasonableness of rate case expenses. CWS Petition, p. 34. The Commission cited this case to illustrate that the handling of rate case expenses has been a recurring item of controversy. This was clear from the Commission's discussion which explained the

holding in Porter as not “allowing the recovery of an unamortized rate case expense incurred in connection with a prior rate case”. Order, p. 26. The Commission also noted that the inclusion of unamortized rate case expenses could be viewed as unreasonable. Id.

One of the Commission’s stated concerns in this case was whether unamortized expenses from a prior rate case – still under appeal – had been included in CWS’s request. Order, p. 27. At page 34 of its petition, CWS asserts that Order No. 2006-543 (at pp. 26-28) does not acknowledge that the \$100,277 in unamortized rate case expenses has already been determined by the Commission to be reasonable. However, the Commission’s order explicitly referred to these expenses stating: “The Company also proposed to continue to amortize the \$100,277 of rate case expenses from Docket No. 2004-357-WS.” Order, p. 26. Order No. 2006-543 does not disallow the continued amortization of such expenses. The rates set in Docket No. 2004-357-WS provided for recovery of those expenses, and the Commission is not attempting to reduce those rates.

CWS complains that the Order does not acknowledge that ORS has conducted an audit of the Company’s current rate case expenses and has found them to be reasonable and that no party has challenged the expenses. In its petition for reconsideration, ORS also argues that the expenses were entitled to a presumption of reasonableness absent a challenge from a party to the case. ORS Petition, p. 12.

ORS may have audited these expenses, and the existing parties may have settled that portion of the case, but the parties failed to give any specific breakdown on the expenses in the material given to the Commission. The Commission had no way of knowing what portion of the claimed expenses was for attorney’s fees, experts, or whether part of the expenses, if any, was being sought in connection with the unresolved

appeal of the Commission's prior order (inclusion of these expenses would be improper under rate case principles). The Commission was only provided with the bald assertion that the parties had agreed that the expenses were reasonable.

CWS further argues that the Commission's discussion of Condon v. State of South Carolina, 354 S.C. 634, 583 S.E. 2d 430 (2003) in Order No. 2006-543 was in error. The Commission cited Rule 407, S.C.A.C.R. and the Condon case for the proposition that attorney's fee awards are to be evaluated based upon a set of factors prescribed by the state supreme court:¹⁹

[T]he court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services.

Jackson v. Speed, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997); *accord*, EFCO Corp. v. Renaissance on Charleston Harbor, L.L.C. 370 S.C. 612, 621, 635 S.E.2d 922, 926 - 927 (Ct. App. 2006).

Implying that these factors somehow are inapplicable to a determination of attorney's fees as allowable rate case expenses, CWS also repeated its position that a determination of the appropriateness of attorney's fees and legal expenses was solely within the province of the ORS to decide and that the Commission had no power to inquire as to whether the claimed legal expenses were reasonable. CWS Petition, p. 35. The Company asserts that, because ORS and CWS came to an agreement on rate case

¹⁹ The Commission did not, and does not, suspect CWS's counsel of unethical billing practices. However, this does not absolve the Commission of the duty to determine whether claimed rate case expenses are reasonable and prudently incurred.

expenses, and because ORS audited the proposed rate case expenses and determined that said expenses were reasonable and prudently incurred, that the Commission should blindly accept the parties' assertions and adopt their conclusions, without the benefit of any underlying detail. To this day, there is nothing in the record that would tell the Commission, or the utility's customers, what part of the \$385,497 in new rate case expenses contained in the Settlement Agreement is being paid for attorney's fees, let alone the terms on which those fees were earned. The Commission is entitled to, and should, evaluate the reasonableness of attorney's fees, especially when their expense will be borne by the public or the utility's consumers. The Commission was justified in requesting additional detail and in declining to approve the settlement when the parties refused to provide it.

We also find ORS's complaint that it relied to its detriment on Order Nos. 2006-283 and 2006-284 when it retained Dr. Woolridge and conducted a Management Review Audit of CWS's parent company to be without merit. There is nothing in the record of this case that would have shown the Commission that Dr. Woolridge, or the Management Review Audit, were to be funded in the settlement or how much was set aside to pay for them. The ORS cannot refuse to detail its settled rate case expenses and subsequently complain that these specific items were not approved on reconsideration.

D. The Commission appropriately requested information regarding CWS's DHEC violations.

Commission Regulations 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C require water and wastewater utilities to provide notice to the Commission of any violation of PSC or DHEC rules which affect the service provided to its customers. CWS complains that the Commission erred in requesting information concerning the Company's compliance with the Commission's reporting requirements. We discern no error.

Despite specific testimony in the record as to the adequacy of operations of the Company's facilities and to the effect that the Company's systems were operating in accordance with DHEC rules and regulations, certain CWS system site reports attached to the testimony of an ORS witness showed that several systems inspected by DHEC were found to be unsatisfactory. See discussion supra pp. 7-8, and Order No. 2006-543, pp. 28-29. Several systems inspected by ORS were found to be unsatisfactory by DHEC, but the ORS nevertheless reported that DHEC standards were being met. Order, p. 28. The Commission posed additional questions regarding DHEC compliance to the Company. The parties failed to answer the Commission's inquiries or to call any witnesses at the settlement hearing to address the Commission's concerns.

The Company's assertions that the Commission erred by inquiring as to CWS's DHEC compliance are without merit. First, the Company argues that under 26 S.C. Code Ann. Regs. 103-514.C and 103-714.C, it was not required to report the DHEC violations in question to the Commission because they did not affect service to customers. Under the regulations, a company must make the initial determination that service has been

affected by a DHEC violation and make the required report. However, according to CWS, the Commission does not have the authority to verify that the required self-reporting has taken place. We reject this reading of the regulation. While the regulation does place the primary reporting responsibility on the company, whether a violation triggers a reporting obligation is subject to verification by the ORS or the Commission.

This Commission may also consider a company's DHEC compliance record regardless of whether Commission regulations require the routine reporting of these incidents. The Company states that the only proper concern to the Commission is when a DHEC violation results in inadequate service to customers. CWS alleges that there was no evidence to show that CWS's service is inadequate. However, CWS also asserts the exclusive right to unilaterally decide which violations affect customer service and has declined to share the basis for its determinations for the Commission. Therefore, while CWS argues that the record is devoid of proof of inadequate customer service, it at the same time declines to answer questions or provide information about the adequacy of its customer service.

Three of CWS's wastewater systems received an unsatisfactory rating in their most recent DHEC compliance audits,²⁰ but the Company contends that this fact is not a relevant consideration regarding the Company's quality of service. CWS argues that the record contained no testimony about the compliance audits and no customer complaints. CWS further argues that the ORS found the Company to be operating in accordance with DHEC regulations. Order, p. 37. However, a company's record of DHEC infractions

²⁰ See Exhibit DMH-4, included with the Settlement Agreement filed on or about August 30, 2006.

may be considered in the context of a rate increase, and the Commission rejects CWS's argument that the ORS should have the last word on the subject of its compliance with DHEC regulations. Without more information, the Commission could not adequately consider the quality of service provided by the Company. Our ability to consider the implications of the unsatisfactory DHEC ratings in this case is severely hampered by the parties' failure to cooperate in this matter by furnishing the requested information.

In Order No. 2006-543, at page 29, the Commission refers to a water sample in which the Maximum Contaminant Level for radium was exceeded. The Company dismisses the significance of this fact by stating DHEC regulations merely require customers to be notified of such contamination. It concludes no report to the Commission was necessary, in spite of the Commission's own reporting regulation. The fact that DHEC regulations require customers to be notified raises a substantial question as to whether this is a violation that affects service to those very customers. As such, the Commission had legitimate questions as to the possible adverse effects of the radium on the system's customers. CWS provided no information related to this issue. If the radium had no effect on the Company's service to its customers, the Company should have at least said so and answered the Commission's questions. This example is yet another instance where the Commission requested valid information and was simply ignored.

XVI. The Commission properly allowed customers to testify regarding CWS's application and proposed settlement.

CWS claims that Order No. 2006-543 "misinterprets CWS's objection, which has two components": a) customer testimony "raises complaint issues outside the statutory

and regulatory process...on due process and statutory grounds”; b) the customer testimony received and relied on by this Commission was not supported by “objective, quantifiable data that would demonstrate that CWS’s service is not adequate.”²¹ CWS Petition, p. 16. For the reasons explained below, the Commission finds all of these grounds of the objection to be without merit.

A. The Commission did not violate CWS’s due process rights by hearing customer testimony regarding quality of service.

CWS alleges that “Order No. 2006-543 erroneously limits the scope of the due process protections to which it is entitled” because it was issued after the Commission heard customer testimony regarding the quality of its service. The Commission’s practice of hearing from the public in rate case proceedings is well established and has been recognized by the state Supreme Court.²² CWS contends that its opportunity to file

²¹ CWS’s objection to customer testimony was as follows:

The purpose of this letter is to state ...the Applicant’s objection to the Commission’s receipt of any customer testimony consisting of unsubstantiated complaints regarding customer service, quality of service, or customer relations. The basis for this objection is that the receipt and reliance upon such testimony would deny the Applicant due process of law, permit customers to circumvent complaint procedures established under law and Commission regulation for the determination of such matters, and is an inappropriate basis for the determination of just and reasonable rates.

Letter of CWS counsel dated June 6, 2006.

²² see e.g., Patton v. South Carolina Public Service Commission, 280 S.C. at 292-293, 312 S.E.2d at 260 (“The record indicates that a substantial amount of testimony was presented to the Commission by the customers of PPR & M as well as testimony presented by the Director of Appalachian--3 District of DHEC concerning complaints about the quality of service rendered by PPR & M to its customers in the Linville Hills

responses to its customers' testimony and to cross-examine public witnesses was insufficient to protect its right to due process. CWS Petition, p. 11. CWS argues that its procedural rights were inadequate in light of the fact that "CWS's 'complaining' customers were not required to adhere to the obligations of a party in a contested case." Id. "Nor were any of these customers subject to discovery by CWS..." Id. According to CWS, a disparity was created, resulting in a due process violation. This proposition is rejected and is discussed in Order No. 2006-543, beginning at page 7. The Commission gave CWS the opportunity to investigate the testimony of all public witnesses and to respond to their testimony in later filings.

The parameters of due process are expounded upon in Leventis v. South Carolina Dept. of Health and Environmental Control:

Due process is flexible and calls for such procedural protections as the particular situation demands. Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct.App.1998) (quoting Stono River Env'tl. Protection Ass'n v. South Carolina Dep't of Health and Env'tl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)). The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. Ogburn-Matthews, 332 S.C. at 562, 505 S.E.2d at 603; see also S.C. Const. art. 1, § 22. To prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process. Ogburn-Matthews, 332 S.C. at

Subdivision."); Hamm v. Public Service Commission, 309 S.C. at 302., 422 S.E.2d at 122 ("As to the effect of the proposed price on customers, the PSC found that the increased rates were reasonable In addition, the PSC noted that it had received only five letters opposing a rate increase."); Hilton Head Plantation Utilities v. Public Service Comm'n, 312 S.C. at 449, 441 S.E.2d at 322 ("Thereafter Richard C. Pilsbury (Pilsbury), President of the Property Owner's Association of Hilton Head Plantation, a protestant representing many consumer rate payers, called the Commission's attention to the fact that a substantial portion of the Utility's budget was paid to its corporate parent.").

561, 505 S.E.2d at 603 (citing Palmetto Alliance, Inc. v. South Carolina Public Service Comm'n, 282 S.C. 430, 319 S.E.2d 695 (1984)).

340 S.C. at 131-132, 530 S.E.2d at 650.

CWS fails to show that it was either substantially prejudiced by the admission of customer testimony or that it was not allowed the opportunity to be heard in a meaningful way. Not only did CWS benefit from representation of counsel while its customers did not, it also enjoyed the ability to cross-examine these witnesses, file responses to their testimony, and prefile written rebuttal testimony. Tr. 17-19, 34 (Vol. 1); Tr. 20-22, 58-59, 65-66, 90-91 (Vol. 2); Tr. 19-22, 42-43, 50-51 (Vol. 4); Tr. 27-52, 64, 71-73, 76-78 (Vol. 5); CWS Letter (dated August 23, 2006); 26 S.C. Code Ann. Regs. 103-852 (1976).

CWS has also participated in a number of evening public hearings over many years and is thoroughly familiar with the type of testimony that sometimes appears during the efforts of this Commission to obtain information on quality of service of the Company. CWS was also allowed to investigate and respond to customer testimony after the public hearings, and it did so. In contrast, the general ratepayer is much less sophisticated about rate proceedings and formal hearings than the Company. If any disparity existed, it was in favor of CWS.

B. The Commission did not circumvent customer complaint procedures by hearing testimony from customers regarding CWS's quality of service, because these procedures are not the exclusive means of bringing customer service issues to the attention of the Commission in a rate case.

CWS argues that the Commission “allowing customers to circumvent the established method of resolving complaints exceeded the powers conferred upon the Commission by the South Carolina General Assembly” and therefore the Commission

erred in overruling its objections to public testimony regarding quality of service. CWS Petition, p. 12.

CWS does not cite to any customer complaint statute or regulation supporting its claim that formal complaints are the exclusive vehicles for airing of customer complaints. Statutory law does provide for the imposition of fines if a water or sewer utility fails to provide “adequate and proper service to its customers.” S.C. Code Ann. §58-5-710. Also the law provides: “Individual consumer complaints must be filed with the Office of Regulatory Staff, which has the responsibility of mediating consumer complaints under the provisions of Articles 1, 3, and 5. If a complaint is not resolved to the satisfaction of the complainant, the complainant may request a hearing before the commission.” S.C. Code Ann §58-5-270. However, the PSC’s “established customer complaint process” is not found in a statute; it is found in the Commission’s regulations.

Customer complaint regulations for water service are found at 26 S.C. Code Ann. Regs. 103-716 and 103-738. These regulations provide:

Complaints by customers concerning the charges, practices, facilities, or services of the utility shall be investigated promptly and thoroughly. Each utility shall keep a record of all such complaints received, which record shall show the name and address of the complainant, the date and character of the complaint, and the adjustment or disposal made thereof.

26 S.C. Code Ann. Regs. 103-716; and:

A. Complaints concerning the charges, practices, facilities, or service of the utility shall be investigated promptly and thoroughly. The utility shall keep records of customer complaints as will enable it and the Commission to review and analyze its procedures and actions. All customer complaints shall be processed by the utility pursuant to 103-716 and 103-730.F.

B. When the Commission has notified the utility that a complaint has been received concerning a specific account and the Commission has received notice of the complaint before service is terminated, the utility shall not discontinue the service of that account until the Commission's investigation is completed and the results have been received by the utility.

26 S.C. Code Ann. Regs. 103-738.

Substantially similar regulations for customer complaints against wastewater utilities are found at 26 S.C. Code Ann. Regs. 103-516 and 103-538. Nothing in these regulations indicates that the complaint procedures contained therein are the exclusive means for the Commission's consideration of customer service issues. The process set forth in these statutes and regulations is meant to provide a vehicle for the resolution of individual customer complaints. There is no evidence that either the Commission or the General Assembly intended to foreclose the consideration by the Commission of customer service issues in rate cases nor is the Commission limited to considering service complaints brought under its individual complaint procedures. Such a reading of these statutes and regulations would lead to an absurd result. Under CWS's interpretation, if a utility received repeated customer service complaints that were resolved through the investigation and mediation of the Office of Regulatory Staff, these issues could not be subsequently considered by the Commission when considering a rate increase. This tortured construction of the law and regulations is incorrect and inconsistent with the Supreme Court's decision in Patton.

- C. CWS's contention that the Commission cannot properly consider what CWS calls "customer testimony consisting of unsubstantiated complaints" runs counter to the broad statutory authority of the Commission and the longstanding recognition of public testimony as a valuable component of the ratemaking process.

The Public Service Commission is within its statutory authority to hold public hearings and consider public testimony. This authority is derived from the General Assembly's broad mandate for the Commission to ascertain and fix just and reasonable standards, classifications, regulations, practices, and *measurements of service* necessary to supervise and regulate the rates and service as well as determine a fair rate of return for public utilities. S.C. Code Ann. §§58-3-140 and 58-5-210 (1976). While the General Assembly granted these express powers, it declined to instruct the Commission on how to apply them, leaving the means to exercise them to the Commission's discretion. Testimony by nonparty public witnesses has been recognized by the South Carolina Supreme Court. See Hilton Head supra.

- D. The Commission correctly interpreted the Supreme Court's holding in *Patton v. Public Service Commission* as supporting its consideration of CWS's quality of service.

CWS contends that *Patton v. Public Service Commission* "does not speak to whether quality of service is a proper consideration in determining a reasonable rate of return or a just and reasonable operating margin." CWS Petition, p. 13. CWS argues that *Patton* only allows the Commission to "impose 'reasonable requirements' to insure that adequate and proper service will be rendered to customers." CWS further argues that *Patton* only holds that withholding an increase until deficiencies are corrected "is a proper means by which the Commission may discharge its authority." CWS Petition, p. 13. CWS's reading of *Patton* is unduly restrictive. The *Patton* Court expressly recognized

quality of service as a factor that must be considered, stating “[t]he record in this proceeding indicates that the Commission, **in determining the just and reasonable operating margin** for [the applicant],²³ examined the relationship between the Company’s expenses, revenues and investment in an historic test period **as well as the quality of service provided to its customers.**” 312 S.E.2d at 259 (emphasis added).

CWS argues that, in Patton, “1) customer complaints alone were not held to be sufficient to support the denial of rate relief, 2) objective testimony from a DHEC witness that the utility’s facility in that subdivision failed to meet DHEC standards was provided, and 3) only a delay in the availability of otherwise allowable rate relief for service to customers in one subdivision resulted.” CWS Petition, p. 14. However, Patton does not limit the Commission to conditioning prospective rate relief, as CWS suggests. Instead, the case acknowledges that quality of service is a factor for the Commission to consider when setting rates. Patton does not foreclose the possibility that certain circumstances may warrant the denial of a rate increase due to a utility’s failure to prove that it offers adequate customer service. Patton, 280 S.C. at 293, 312 S.E.2d at 260 (“**In this instance**, rather than reduce the rates and charges found reasonable for sewerage service because of the poor quality of service, the Commission chose to give the utility company the opportunity and incentive to upgrade the system.”) (emphasis added).

²³ The ORS also takes issue with the applicability of Patton to the facts of this case, asserting that quality of service was deemed in Patton to be a valid basis upon which to fix rates, but not operating margin. Not only is this distinction irrelevant; it is also a misstatement, inasmuch as the Court’s holding in Patton acknowledged quality of service to be a consideration both in determining the just and reasonable operating margin. (280 S.C. at 291, 312 S.E.2d at 259), and in fixing just and reasonable rates, (280 S.C. at 293, 312 S.E.2d at 260).

CWS also argues that the Commission's consideration of "quality of service" is inconsistent with its prior orders evaluating the "adequacy" of a utility's service. The distinction between "quality of service" and "adequacy of service" is a matter of semantics. The Commission's orders all focus on the question of whether customers are receiving the service they deserve.

CWS complains that the Commission denies it rate relief in all of CWS's ninety-six subdivisions based solely on the testimony of customers in seven subdivisions. CWS Petition, p. 13. However, the basis for our decision not to approve the parties' Settlement Agreement was the parties' failure to prove that the proposed rates were just and reasonable. The fact that some of the Commission's concerns arose after hearing public testimony from customers in seven subdivisions renders them no less valid and certainly provides no basis upon which CWS is entitled to a different result. In Patton, the Commission was able to condition a rate increase on the Company's compliance with DHEC regulations. Patton, 312 S.E.2d at 260. In the present case, the Commission lacked the necessary information to grant conditional relief of the type granted in Patton.

CWS states that there is no quantifiable objective data or scientific criteria in the record to support a finding that CWS's service is not adequate. CWS further argues that the testimony offered by the public witnesses as to inadequacy of service therefore must be disregarded. CWS Petition, p. 15. This assertion by CWS is a misstatement of the law, based largely upon CWS's misreading of an unpublished memorandum opinion issued by the South Carolina Supreme Court in 1995 and an ensuing Circuit Court opinion. See Heater Utilities Inc. v. Public Service Commission of South Carolina, Op. No. 95-MO-365 (S.C. S.Ct. filed December 8, 1995), cited in Tega Cay Water Service,

Inc. v. South Carolina Public Service Comm'n, Case No. 97-CP-40-923 (Richland County Court of Common Pleas, 1998) (“TCWS”). In TCWS, the Commission granted the applicant a low rate of return (0.23%), which the Commission claimed was justified by evidence of poor quality of service. Citing to Heater, the Court of Common Pleas reversed the Commission’s decision, finding that the only evidence of poor service was the testimony of six customers out of a customer base of about 1,500 and that these six customer complaints, standing alone, were insufficient to support the rate of return issued by the Commission.²⁴

Heater and TCWS are clearly distinguishable from the case at hand. In Heater, the PSC based its denial of the rate increase *entirely* on a finding of poor water quality. The PSC had based its finding of poor quality on the anecdotal testimony of fourteen customers, despite a study conducted by its own staff which found the water to be clear and odorless in the subdivisions about which the customers complained. Similarly, in TCWS, the PSC based a finding of poor service quality solely upon six customer complaints. In both Heater and TCWS, the reviewing courts found that the Commission’s rulings were not supported by substantial evidence.

In the present case, the Commission declined to approve the settlement because CWS had failed to prove the requested rates to be fair and reasonable based upon many factors, only one of which is quality of service, consistent with the South Carolina Supreme Court’s decision in Patton. The Commission heard testimony which gave it cause for concern about quality of service issues, and it inquired about them. Just as the Patton case was one in which certain objective, quantifiable criteria set by DHEC were

²⁴ We discussed the TCWS case in greater detail in Order No. 2006-543, pp. 10-11.

not met, the applicant in this case also failed to meet some DHEC standards. Additionally, the records and testimony offered by the ORS raised legitimate concerns about compliance with Commission regulations. Nevertheless, the parties refused to provide information which would address these discrepancies in the reports which they submitted. The Commission's decision to deny a rate increase in these proceedings was ultimately based as much on the absence of information pertaining to CWS's quality of service as on the testimony of complaining customers.

The Commission's actions in the instant case were based upon much more evidence than existed in Heater, in which this Commission acted solely upon its finding of poor water quality, for which there was far less evidence than in this case. Here, while the ORS may have concluded that CWS offered adequate service, the Commission found evidence in customer testimony and in the parties' own submissions to suggest otherwise. While the Commission relies upon the ORS to conduct audits and investigations and present its findings to the Commission as an aid to the Commission in making regulatory decisions, it is not obligated to accept ORS's conclusions as a matter of course where other evidence might lead to a different result. It is within ORS's purview to represent the public interest before the Commission, but it is the Commission's authority to deliberate and then judge whether public interest standards are met.

- E. CWS's arguments that the Commission should reconsider its decision to hear testimony from Mr. Hershey, Mr. Long, and Mrs. Bryant at the September 7, 2006 hearing are incorrect, and in some cases were not timely raised.

CWS argues that the Commission erred in overruling its objections to certain customer testimony. The Commission has carefully examined the characterizations,

contained in CWS's Petition of its objections with regard to the testimony of witnesses Hershey, Long, and Bryant. A comparison of the Petition to the actual September 7, 2006 transcript reveals that in some instances CWS has attempted to revise its objections on reconsideration, broadening the scope of its objections to include grounds not stated at the hearing. These inconsistencies are detailed where applicable below. For the reasons set forth herein, the Commission finds these objections to have been properly overruled.

1. CWS's stated objection to testimony of Paul Hershey was properly overruled because he did not cede his time to another witness, Don Long.

CWS argues that the Commission erred in overruling its objection to the testimony of Paul Hershey. CWS objected to Hershey's testimony on the grounds that he had ceded the time reserved for his testimony to another public witness – Don Long. The Commission found that Mr. Hershey had not ceded his time to Long, a finding challenged by CWS.

At the September 7, 2006 hearing, CWS made the following objection to Hershey's testimony:

MR. HOEFER: I just have a brief matter to take up. I would object to Mr. Hershey's testimony on these grounds. In the Notice of Filing issued in this case, individuals and entities were directed to give the Commission notice of their intent to testify and present evidence. **Mr. Hershey did so. He said he was doing it on behalf of the River Hills Community Association. Within the last ten days he communicated to the Hearing Officer in this case that he was ceding his time to testify on behalf of the River Hills Community Association to Mr. Don Long.** Mr. Don Long has already testified. I just want to make that objection for the record, Mr. Chairman.

Tr. 67 (Settlement Hearing, September 7, 2006) (emphasis added).

The issue of whether Hershey ceded his time to Long arose from a confusing series of communications between Hershey, the Commission, and the parties. A Hearing Officer's Directive dealing with Hershey's testimony explains the sequence of events as follows:

On August 24, 2006, the Commission was contacted by email by a Mr. Paul Hershey who requested that time be set aside during the final hearings in the above captioned case on September 6 and 7, 2006, for the purpose of receiving certain testimony from Mr. Don Long. Carolina Water Service, acting through its attorney, John M.S. Hoefer, objected to this request and to Mr. Long's right to present testimony at the hearing. On the afternoon of August 25, 2006, as hearing officer in this case, I issued a ruling allowing Mr. Long to testify under certain conditions. [footnote omitted] This ruling was premised on the mistaken belief that Mr. Hershey was relaying a request to the Commission on behalf of Mr. Long with his knowledge and consent.²

Footnote ²: My ruling of August 25, 2006, was made **without my knowledge** of a letter dated April 24, 2006, from Mr. Hershey in which he requested that time be set aside at the final hearing in the case for testimony from members of the River Hills Community Association. This request was apparently addressed to the Office of Regulatory Staff, and was not received by the Public Service Commission. Indeed, the Commission still does not have a copy of this letter, but was informed of its existence and contents today. CWS asserts that Mr. Hershey was writing in order to cede some of the time requested for the RHCA to Mr. Long.

Hearing Officer Directive, August 29, 2006. (emphasis added).

CWS, through its counsel, only furnished a copy of Hershey's misaddressed letter to the Commission by email on August 29th. Neither Hershey's letter of April 24, 2006, nor his email request of August 24th, stated that he sought to cede his right to testify to Long. Instead, Hershey's letter of April 24, 2006, requested one and a half hours for the

River Hills Community Association to testify at the Commission's final hearing in Columbia. It did not mention Long.

While Hershey's email correspondence of August 24, 2006, does request that the Commission schedule time for Long to testify at the final hearing and seems to contemplate that he do so during the time allotted to the association, it does not say that Long would be its only witness ('we are requesting to be heard the morning of the 7th of Sept 2006. ...We will be able to present at both hearings...'). The Hearing Officer subsequently determined that Hershey's request was made without Long's knowledge and that Long was planning to appear and testify at the hearing regardless of any involvement by Hershey. Hearing Officer's Directive, August 29, 2006. Furthermore, Hershey directed his correspondence to the Office of Regulatory Staff and counsel for CWS, but did not make his request to the Commission. By the time the Commission was furnished with a copy of this letter, Long had already informed the Hearing Officer that he was unaware of Hershey's request, and that he, independent from the River Hills Community Association, intended to speak at the hearing. The Commission still finds that Hershey did not cede his time to Long and that even if he had done so, it was in the Commission's discretion to allow both witnesses to testify.

2. CWS incorrectly argues a) that the Commission solicited Mr. Long to give testimony at the September 7th hearing for a second time, and b) that it was error to allow a public witness to testify after the parties of record had reached a settlement.²⁵

With regard to the testimony of Don Long, CWS first claims that the Commission failed to address the substance of the objection made at the June 12, 2006, evening public hearing “with respect to the propriety of the Commission *soliciting further testimony* from Long at the ‘merits’ hearing in this docket.” CWS Petition, p. 19 (italics added).²⁶ CWS raised this “solicitation” objection at the June 12, 2006, evening hearing. However, a review of the full objection made by CWS as to Mr. Long at the September 7, 2006, settlement hearing shows that CWS did not preserve its “solicitation” argument at that hearing:

MR. HOEFER: I would like to at this time renew the objection I made at the night hearing in River Hills at the Community Church **regarding Mr. Long being allowed to testify twice in the case.** I would also like to add an **additional new objection and that would be that because the parties of record in this case have settled the matter, there’s not a contested matter before the Commission,** and therefore his testimony should not be allowed. I just wanted to make that objection for the record, Mr. Chairman.

Tr. 7-8 (Settlement Hearing, September 7, 2006) (emphasis added).

²⁵ In its Petition for Reconsideration, CWS also raises several of these same arguments in regard to the testimony of Bryant and/or Hershey. The Commission’s rulings on the applicability of these arguments to Bryant’s and Hershey’s testimony are noted where necessary in the following discussion.

²⁶ The ORS also raises this ground for the first time in its Petition for Reconsideration even though it did not object to Long’s testimony at the hearing. The ORS’s objection is not timely raised.

The stated objections that *were actually made* at that hearing were addressed in this Commission's October 2, 2006, order.²⁷

Although it did not preserve its "solicitation" objection when Mr. Long testified at the settlement hearing, CWS now raises this argument upon reconsideration. The Commission did not improperly solicit Long's testimony when it allowed him to present additional testimony. No Commissioner requested Long's testimony, and no objection was made on that basis. It was Long who requested to be allowed to continue his testimony at the merits hearing in Columbia, and who was allowed to do so by the Chairman.²⁸ In any event, the argument is largely academic because the data presented

²⁷ As originally stated by the Commission in regard to both Mr. Long's and Ms. Bryant's testimony, the Commission has the discretion to allow witnesses to testify more than once. See Order No. 2006-357, pp. 13-15. That section of our original order also addresses the second stated objection, i.e., that the parties of record settled the matter, leaving nothing for a public witness to testify about.

²⁸ The pertinent parts of the record of the proceedings in Lake Wylie reads as follows:

MR. LONG: Since our analysis, despite several requests, was done without benefit of any meaningful assistance from the ORS, we believe we're entitled to know whether there is agreement from the ORS and the PSC with our conclusions. If there is not agreement, then we believe we're entitled to know in detail why there's not agreement **and to have additional time to analyze and comment on those conclusions before any rate increase is approved.** [Applause]

Tr. 34 (Lake Wylie, York County Public Hearing, June 12, 2006) (emphasis added).

....

COMMISSIONER FLEMING: I don't have a question, but what I wanted to request, if possible. Mr. Long had a lot of substantive information and figures in his report. **He asked to have a chance to come back** if other sources came up with different figures. We normally say that that person cannot

testify again, but would he be – would it be possible for him to be in the hearing to answer questions or rebut any other information that was there. I think that would be very important. (emphasis added).

CHAIRMAN MITCHELL: Yes, sir?

MR. LONG: I can certainly try.

CHAIRMAN MITCHELL: We'll at least allow a response to whatever else is being presented. We did need to know a little bit more in detail how you came to some of the numbers that you were quoting there.

MR. LONG: I'll try to provide that.

CHAIRMAN MITCHELL: Yes, sir, if you could, you know, the exhibits that we've asked you to provide to us – very specific how you arrived on certain numbers, we certainly need that.

MR. LONG: I can do that, sir.

CHAIRMAN MITCHELL: Any other questions?
Commissioner Howard.

MR. HOEFER: Mr. Chairman, please before Commissioner Howard asks his questions, I need to interpose an objection.

[Laughter from audience]

CHAIRMAN MITCHELL: Please, we do have to listen and have this on tape, please. We certainly honor all of your responses, but certainly we do have to take this and have it all on record.

Mr. Hoefer.

MR. HOEFER: Thank you, Mr. Chairman. I think Mr. Terreni very clearly stated at the outset of this proceeding if someone testified tonight, they would not be allowed to come to Columbia and testify.

[Someone from audience speaks-inaudible]

MR. HOEFER: Did you hear that, Mr. Chairman? I will – I think it was very clearly stated by Mr. Terreni at the beginning of the hearing tonight that anyone who testifies tonight would not be allowed to testify in Columbia. So, we would object to it on that basis.

Additionally, we would object to it on the basis of Rule 501, the South Carolina Appellate Court Rules, Canon 3. We would also object on the basis of Rule 614(b) of the South Carolina Rules of Evidence. These people are [inaudible], I'm happy to say, but to have documentation, additional testimony elicited on behalf of the judicial officers of the proceeding; we think is inappropriate, and we would object.

Thank you, Mr. Chairman.

by Mr. Long on September 7th was incomplete, largely speculative, and did not form the basis of the Commission's order. The Commission's ruling on this objection would not have affected the final determination of CWS's petition.

CWS also moves the Commission to reconsider its ruling on the Company's objection to Long's testimony on the grounds that Long was not a party to its Settlement Agreement with the ORS and that non-parties should not be heard on a settled case. CWS Petition, p. 20. Although CWS claims to have made this same objection as to the testimony of Mr. Hershey and Ms. Bryant,²⁹ the record reflects otherwise. CWS's objections to Ms. Bryant only related to the Commission's decision to allow her to testify both in an evening public hearing and at the merits hearing in Columbia. (Tr. 113 (Settlement Hearing, September 7, 2006)).³⁰ Similarly, CWS did not object to Hershey's testimony on the grounds that he was not a party; it only objected on the grounds that he

CHAIRMAN MITCHELL: Okay. Mr. Hoefler, for the record, we understand what you've said. But, however, we had a Commissioner to specifically request a change in our [inaudible] and because of that, we're going to allow what we've already told Mr. Long, that he can come and testify, and I'm going to rule that 501 [inaudible] of that procedure. Tr. 38 (Lake Wylie, York County Public Hearing, June 12, 2006).

²⁹ See CWS Petition, p. 20, fn. 11.

³⁰ CWS's objection to Ms. Bryant's testimony stated:

MR. HOEFER: Thank you. Before the witness takes the stand, I'd like to state an objection. She testified at the night hearing at the Baptist Church near Oak Grove, and I would just to state for the record an objection to her testifying twice. We just wanted to get that on the record, Mr. Chairman.

had relinquished his allotted time to Long. (Tr. 67 (Settlement Hearing, September 7, 2006)).³¹

In any event, CWS's objection that Long was not a party to the Settlement Agreement and that non-parties should not be heard on a settled case is directly at odds with the position that it took before the Commission just one week before the September 7th hearing. On August 30, 2006, CWS and the ORS filed a motion requesting a settlement hearing and adoption of their Settlement Agreement with the Commission. Explanatory Brief and Joint Motion for Settlement Hearing and Adoption of Settlement Agreement, filed by CWS and ORS, August 30, 2006. In their motion, CWS and the ORS requested "the Commission to commence a hearing as scheduled on September 7, 2006, **to permit any public witnesses an opportunity to testify and allow the parties to publish a summary of the proposed settlement agreement.**" *Id.*, p. 2. (emphasis added). Now, CWS complains that the Commission held the hearing and allowed testimony by public witnesses who were not parties to the case.

³¹ CWS's objection to Mr. Hershey's testimony stated:

MR. HOEFER: I just have a brief matter to take up. I would object to Mr. Hershey's testimony on these grounds. In the Notice of Filing issued in this case, individuals and entities were directed to give the Commission notice of their intent to testify and present evidence. Mr. Hershey did so. He said he was doing it on behalf of the River Hills Community Association. Within the last ten days he communicated to the Hearing Officer in this case that he was ceding his time to testify on behalf of the River Hills Community Association to Mr. Don Long. Mr. Don Long has already testified. I just want to make that objection for the record, Mr. Chairman.

CWS's argument is also inconsistent with its motion of August 30th, which explicitly requested that public testimony be taken on September 7th and "that a hearing on the merits of the proposed settlement, if deemed necessary by the Commission, be scheduled at a later date." *Id.* CWS only adopted this contrary position when the Commission made its request for information on September 6th, when it became clear that the Commission intended to give meaningful scrutiny to, and not merely "acknowledge", the Settlement Agreement.

CWS states that "only parties in a case are entitled to object to a settlement agreement" CWS Petition, p. 20 (emphasis added). To the contrary, the public is entitled to be heard regarding the agreement. Public testimony is important because it affords customers of companies such as CWS a voice before the Commission in an environment where the company operates a monopoly and the individual customer has little or no power. Public testimony provides a check to this discrepancy in power and provides a means of preventing an abuse of this power that might otherwise result. *See* CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES THEORY AND PRACTICE* 60 (3rd ed. 1993) (stating "The regulation of public utilities has been justified... to control the social and/or political power of monopolists controlling essential products and services."). Its argument that public testimony is a violation of due process is inaccurate. These principles do not change merely because the parties have filed a Settlement Agreement.

CONCLUSION

Both the Petitions from Carolina Water Service, Inc. and the Office of Regulatory Staff are denied. The Commission has reviewed each and every allegation of error contained in each petition seeking rehearing and reconsideration filed by the parties, and

has concluded that the order complained of contains no error warranting a different result. To the extent that any party has alleged errors not specifically addressed here, they have been fully considered and rejected. We reiterate that if the parties had provided the requested evidence to support the proposed settlement of this rate case, it is possible and perhaps even probable, that the compromised rates would have been approved. Because the parties chose not to respond to the Commission's inquiries, the Commission had no choice but to reject the settlement and the Company's application based on the lack of evidence presented.

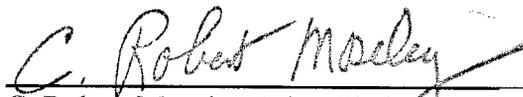
This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



G. O'Neal Hamilton, Chairman

ATTEST:



C. Robert Moseley, Vice Chairman

(SEAL)

Public Service Commission of South Carolina
Settlement Policies and Procedures
Revised 6/13/2006

The Public Service Commission of South Carolina (PSC) has had a significant number of settlements presented to it in the past year. To assist the parties and the Commission in efficiently and fairly dealing with settlements, to the end that the Commission is able to carry out its statutory duty of assuring that cases brought before it are resolved in a manner consistent with the public interest, the PSC has developed this policy. The following policies and procedures will be followed by the Commission in evaluating the settlements and stipulations presented by parties appearing before the PSC.

I. SETTLEMENTS TO BE ENCOURAGED

The Commission encourages the resolution of matters brought before it through the use of stipulations and settlements. Settlements must be supported by probative evidence.

II. CONSIDERATION OF SETTLEMENTS

When a settlement is presented to the Commission, the Commission will prescribe procedures appropriate to the nature of the settlement for the Commission's consideration of the settlement. For example, the Commission may summarily accept settlement of an essentially private dispute that has no significant implications for regulatory law or policy or for other utilities or customers upon the written request of the affected parties. On the other hand, when the settlement presents issues of significant implication for other utilities, customers or the public interest, the Commission will convene an evidentiary hearing to consider the reasonableness of the settlement and whether acceptance of the settlement is just, fair, and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. Approval of such settlements shall be based upon substantial evidence in the record.

III. BURDENS OF PROOF

Proponents of a proposed settlement carry the burden of showing that the settlement is reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. Proponents of the settlement should be prepared to call witnesses and argue in favor of the settlement. The Commission may require the further development of an appropriate record in support of a proposed settlement as a condition of accepting or rejecting the settlement.

IV. SETTLEMENT NOT BINDING ON THE COMMISSION

The Commission is not bound by settlements. It will independently review any settlement proposed to it to determine whether the settlement is just, fair and reasonable, in the public interest, or otherwise in accordance with law or regulatory policy. When a settlement is filed, the Commission may accept the settlement, reject the settlement, or require the further development of an appropriate record in support of a proposed settlement. A settlement which fully or partially resolves a proceeding before the Commission shall have no precedential effect on future proceedings. If the Commission rejects the settlement, the matter shall continue, as though no settlement had been presented, and neither the settlement nor its terms shall be admitted in the hearing on the merits.

V. SETTLEMENT PROCEDURES

When all parties to a proceeding reach agreement with regard to all issues in the form of a settlement signed by all parties or their representatives, the following procedures shall be followed:

1. Notice to Commission

Upon the execution of a settlement, the parties shall promptly notify the Commission of the existence of the settlement.

2. Timing of Filing

Parties may file a settlement at any time after the deadline has passed for filing interventions, and are encouraged to file any settlements as soon as possible thereafter.

3. Filing and Scheduling of Hearing

A settlement hearing may be scheduled by the Commission upon the parties' filing of the following:

a. Copies of any document, pre-filed testimony, financial analysis, or exhibit which support the settlement, and

b. An explanatory brief and joint motion for the scheduling of a settlement hearing, which shall include a list of proposed witnesses to be presented to support the settlement.

Upon the filing of a complete settlement, executed by all parties, the Commission or an appointed Hearing Officer may, at their discretion, order a continuance of any previously established procedural schedule in the proceeding. If the settlement is filed in sufficient time before the originally scheduled hearing date, that date will generally be used as the date for the settlement hearing. However, in order to allow the Commission adequate time to evaluate the terms of the settlement and the documentation provided in support thereof, if a settlement (including supporting documentation for the settlement) is filed with the Commission less than seven calendar days prior to the originally scheduled hearing date, the Commission reserves the right to postpone the hearing date.

Alternatively, the Commission may elect to commence the settlement hearing on the original hearing date to allow public witnesses to offer testimony and to allow the parties to present evidence supporting the settlement, but thereafter, in order to have sufficient time to review the settlement terms and supporting documents, the Commission may elect to recess the hearing to be reconvened on a subsequent date, at which time witnesses are subject to recall. In no event shall parties wait until time of hearing to announce settlements if they have been executed prior to the day of the hearing. Hearings of matters in which any such settlements are announced at the time of hearing are likewise subject to postponement.

4. Procedure at a Settlement Hearing

At a settlement hearing, the parties shall call witnesses to support the settlement, and shall introduce into evidence the signed settlement document, as well as the supporting documentation and an explanation of the underlying rationale for the settlement. The Commission may require evidence of any facts stipulated, notwithstanding the stipulation of the parties.

If the Commission finds that the record lacks substantial evidence to support the settlement, the Commission may establish procedures for the purpose of receiving additional evidence upon which a decision on the proposed settlement may reasonably be based.

UNIFORM SYSTEM OF ACCOUNTS

FOR

CLASS A

WATER UTILITIES



1996

NATIONAL ASSOCIATION
OF
REGULATORY UTILITY COMMISSIONERS

UNIFORM SYSTEM OF ACCOUNTS

FOR

CLASS A

WASTEWATER UTILITIES



1996

NATIONAL ASSOCIATION
OF
REGULATORY UTILITY COMMISSIONERS

WATER → ACCOUNTING INSTRUCTIONS

not relieve the utility from the responsibility of providing a distribution of the costs of labor or from being able to substantiate its labor charged with sufficient source documents.

12. General - Operating Reserves

Accretions to operating reserve accounts made by charges to operating expenses shall not exceed a reasonable provision for the expense. Material balances in such reserve accounts shall not be diverted from the purpose for which provided, unless the permission of the Commission is first obtained.

13. General - Records for Each Plant

Separate records shall be maintained by utility plant accounts of the book cost of each plant owned including additions by the utility to plant leased from others and of the cost of operating and maintaining each plant owned or operated.

14. General - Accounting for Other Departments

If the utility also operates other utility departments, such as electric, wastewater, gas, etc., it shall keep such accounts for the other departments as may be prescribed by proper authority and in the absence of prescribed accounts, it shall keep such accounts as are proper or necessary to reflect the results of operating each other department.

15. General - Transactions with Associated Companies

Each utility shall keep its accounts and records so as to be able to furnish accurately and expeditiously statements of all transactions with associated companies. The statements may be required to show the general nature of the transactions, the amounts involved therein and the amounts included in each account prescribed herein with respect to such transactions. Transactions with associated companies shall be recorded in the appropriate accounts for transactions of the same nature. Nothing herein contained, however, shall be construed as restraining the utility from subdividing accounts for the purposes of recording separately transactions with associated companies.

16. General - Contingent Assets and Liabilities

Contingent assets represent a possible source of value to the utility contingent upon the fulfillment of conditions regarded as uncertain. Contingent liabilities include items which may under certain conditions become obligations of the utility but which are

WATER → ACCOUNTING INSTRUCTIONS

1. General - Classification of Utilities

A. For the purpose of applying the system of accounts prescribed by the Commission, water utilities are divided into three classes, as follows:

Class A - Utilities having annual water operating revenues of \$1,000,000 or more.

Class B - Utilities having annual water operating revenues of \$200,000 or more but less than \$1,000,000.

Class C - Utilities having annual water operating revenues of less than \$200,000.

B. This system of accounts applies to Class A utilities. The system of accounts applicable to Class B and C utilities are issued separately.

C. The class to which any utility belongs shall originally be determined by the average of its annual water operating revenues for the last three consecutive years. Subsequent changes in classification shall be made when the average annual water operating revenues for the three immediately preceding years exceed the upper limit or are less than the lower limit, of the annual water operating revenues of the classification previously applicable to the utility. For a utility with both water and wastewater operations, the classification shall be based on the operation with the highest annual revenues.

2. General - Records

A. Each utility shall keep its books of account, and all other books, records, and memoranda which support the entries in such books of accounts so as to be able to furnish readily full information as to any item included in any account. Each entry shall be supported by such detailed information as will permit a ready identification, analysis, and verification of all facts relevant thereto.

B. The books and records referred to herein include not only accounting records in a limited technical sense, but all other records, such as minute books, stock books, reports, correspondence, memoranda, etc., which may be useful in developing the history of, or facts regarding, any transaction.

C. No utility shall destroy any such books or records unless the destruction thereof is permitted by rules and regulations of the Commission.

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