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2014 MAR 21 PM 12:57

SC PUBLIC SERVICE  
COMMISSION

March 21, 2014

Hon. Jocelyn Boyd  
Chief Clerk/Administrator  
Public Service Commission of South Carolina  
101 Executive Center Drive, Suite 100  
Columbia, SC 29210

COPY  
Posted: lod  
Dept: SA  
Date: 3/21/14  
Time: 3:31

**RE: Application of Palmetto Utilities, Inc. for Adjustment of Rates  
and Charges for Sewer Service  
Docket No. 2013-42-S**

Dear Ms. Boyd:

Enclosed please find for filing the original and one (1) copy of the Petition for Writ of Supersedeas and/or Equitable Stay in connection with the above-referenced matter. Kindly acknowledge your receipt by clocking the extra copy enclosed and returning same to me via my courier. By copy of this letter, I am serving a copy of same on all parties of record to this proceeding.

If you should have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely yours,

Kathleen M. McDaniel

KMM:kam  
Enclosures  
cc: (w/ encl.) Jeffrey M. Nelson, Esquire  
John M.S. Hoefler, Esquire  
Mr. George Sensor  
Mr. Mike Pippen  
Mr. Robert Valdes

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STATE OF SOUTH CAROLINA )

(Caption of Case)

Application of Palmetto Utilities, Inc. for adjustment of rates and charges for, and modification to certain terms and conditions related to the provisions of sewer service.

BEFORE THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

COVER SHEET

DOCKET NUMBER: 2013 - 42 - S

(Please type or print)

Submitted by: D. Reece Williams, III, Esquire

SC Bar Number: 06120

Address: P.O. Box 1390 Columbia, SC 29202

Telephone: 803-404-6900

Fax: 803-404-6902

Other:

Email: receewilliams@callisontighe.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for use by the Public Service Commission of South Carolina for the purpose of docketing and must be filled out completely.

DOCKETING INFORMATION (Check all that apply)

Emergency Relief demanded in petition

Request for item to be placed on Commission's Agenda expeditiously

Other:

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Table with 2 columns: INDUSTRY (Check one) and NATURE OF ACTION (Check all that apply). Includes checkboxes for Electric, Gas, Sewer, Affidavit, Agreement, Petition, etc.

Print Form

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the pendency of the appeal that Palmetto bill the Intervenors for monthly sewer service at the same rate as they were billed in February of 2013. In the case of Sensor, this amount was \$401.52, and for J-Ray this amount was \$806.86.

### **FACTUAL BACKGROUND**

On March 13, 2013, Palmetto filed an Application for adjustment of rate and charges for and modification to certain terms and conditions related to the provision of sewer service. As part of its Application, Palmetto proposed to charge commercial customers a rate of \$39.00 per Single Family Equivalent (“SFE”). Palmetto proposed to utilize the South Carolina Department of Health and Environmental Control’s Guidelines for Unit Contributory Loading for Domestic Wastewater Treatment Facilities, 25 S.C. Code Ann. Regs. 61-67 Appendix A (Supp. 2010), as the basis for calculating the number of SFEs attributable to each commercial customer.

Sensor and J-Ray intervened in this rate case. Both Intervenors own McDonald’s restaurants within Palmetto’s service area. Mike Pippin, Director of Operations for Sensor, testified at the hearing on behalf of Sensor. Chris Valdes, Supervisor for J-Ray, testified on behalf of J-Ray. Mr. Pippin and Mr. Valdes testified that prior to the filing of this most recent Application by Palmetto, Sensor and J-Ray consistently received sewer charges from Palmetto of approximately \$401.52 per month and \$806.86 per month, respectively. Under the rate plan originally proposed by Palmetto, Sensor and J-Ray faced sewer charges of \$5,266.80 per month and \$5,065 per month, respectively, which equated to increases of 1,311% and 627%. Under the rates in Palmetto’s Application, both Intervenors would have paid an increased amount of more than \$50,000.00 per year for sewer service.

Prior to the hearing before the PSC, Palmetto and ORS entered into a Settlement Agreement. The Intervenors were not parties to the Settlement Agreement. Pursuant to the terms

of the Settlement Agreement, Palmetto agreed to reduce the number of SFEs attributable to each car at a drive-thru restaurant from 40 gallons per car to 10 gallons per car.

Because the manner in which Palmetto proposed to charge the Intervenor was based in part upon the number of drive-thru cars per day, Mr. Pippin and Mr. Valdes also provided testimony regarding the number of cars that utilize the drive-thru at each of their stores. Mr. Pippin testified that the actual number of cars served per day at the Sensor store is 1,035. Palmetto originally estimated the number of cars at the Sensor store at 1,400 per day. Fred Melcher testified that Palmetto subsequently reduced its estimate of the number of cars for the Sensor store to 1,225 but that this number included a multiplier of 120%. Mr. Valdes testified that the actual number of cars served per day at the J-Ray store is 1,141. Palmetto originally estimated the number of cars at the J-Ray store at 1,400 per day. Fred Melcher testified that Palmetto subsequently increased its estimate of the number of cars for the J-Ray store to 1,635, which also included a multiplier of 120%.

Sensor and J-Ray retained David Russell as an expert witness to testify regarding the reasonableness of the rates proposed by Palmetto and to propose alternate methods of assessing sewer rates for Sensor and J-Ray. Mr. Russell testified that even under the Settlement Agreement, the increase in rates proposed to be charged to the Intervenor were unjust and unreasonable. Mr. Russell further testified that the PSC should approve one of two alternate methods:

1. Palmetto to assess sewer rates based upon the water usage or
2. Palmetto to decrease number of SFEs attributable to each car to 2.

Following the hearing on the Application, the PSC issued its Order, which in pertinent part rejected the Intervenor's proposals for alternate methods of assessing sewer rates and approved the Settlement Agreement reached between Palmetto and ORS. The Intervenor filed a Petition for

Rehearing, which was denied by Commission Directive, Order No. 2013-771, dated October 23, 2013. The Intervenors timely filed the current appeal pending before the Supreme Court of South Carolina.

**POINTS AND AUTHORITIES IN SUPPORT OF  
WRIT OF SUPERSEDEAS AND/OR EQUITABLE STAY**

As a general rule, the filing of a notice of appeal in a civil matter will serve to automatically stay matters decided in the lower court or tribunal. Rule 241(a), SCACR. However, an exception to this general rule is that appeals from administrative tribunals do not act as an automatic stay. Rule 241(b)(11), SCACR. In addition, the Rules of Procedure for the PSC provide that an appeal from an order of the South Carolina Public Service Commission does not automatically “stay or suspend operation of the Order of the Commission.” S.C. Code Ann. Regs. § 103-856. An order not automatically stayed is enforceable during the pendency of an appeal unless a party seeks a stay. *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003).

To seek a stay of enforcement of an order of PSC, a party may file a petition for supersedeas pursuant to Rule 241(c), SCACR, which provides that in determining whether to grant or deny supersedeas, the tribunal should “consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot.” Our Court of Appeals has held that the purpose of supersedeas is to “stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal . . . and to preserve to the appellant the fruits of a meritorious appeal where they might otherwise be lost to him.” *Graham v. Graham*, 310 S.C. 128, 130, 390 S.E.2d 469, 470 (Ct. App. 1990) (citing 4A C.J.S. *Appeal and Error* § 662 at 494-95 (1957) (cited in *Dean v. S.C. Law Enforcement Div.*, 2011 WL 7119217 (2011 S.C. A.L.C)).

In *Dean*, the Administrative Law Court further considered the meaning of status quo and the possibility of an equitable stay.

The status quo is defined in Black's Law Dictionary as, "the existing state of things at any given date." Further, "an equitable stay may be invoked if justified by the circumstances which outweigh any potential harm to the party against whom it is operative. In making this determination, the court 'must weigh competing interests and maintain an even balance.'"

*Dean*, 2011 WL 7119217 at 2 (quoting *Merritt Bros., Inc. v. Marine Midland Realty Corp.*, 307 S.C. 213, 216, 414, S.E.2d 167, 169 (1992)).

Refund of overpayments following a successful appeal by a utility customer does not appear to be addressed by statute. This is contrary to the situation where a utility appeals from a decision of the PSC, in which case the following statute expressly provides for the payment of refunds to customers:

If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities, respectively, entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested. During any period in which a utility shall charge increased rates under bond, it shall provide records or other evidence of payments made by its subscribers or patrons under the rate or rates which the utility has put into operation in excess of the rate or rates in effect immediately prior to the filing of the schedule.

All increases in rates put into effect under the provisions of this section which are not approved and for which a refund is required shall bear interest at a rate of twelve percent per annum.

The interest shall commence on the date the disallowed increase is paid and continue until the date the refund is made.

In all cases in which a refund is due, the Commission shall order a total refund of the difference between the amount collected under bond and the amount finally approved.

S.C. Code Ann. § 58-5-240. Unfortunately, the statute is silent as to refunds when a rate increase is approved by the PSC, challenged by a customer, and reversed on appeal. Hence, the Intervenor asserts that in the interest of protecting themselves from being refused a refund if they prevail on appeal, the PSC should grant this Petition and maintain the pre-Application status quo.

In this case, the status quo prior to the issuance of the the PSC's Order was the pre-Application sewer billing amounts of \$401.52 for Sensor and \$806.86 for J-Ray.<sup>1</sup> If the Intervenor is required to pay the significantly higher sewer bills yet prevail on their appeal, a portion of the "fruits of a meritorious appeal" will be lost to them. In addition, because the money will have already been paid to Palmetto, Sensor and J-Ray's appeal will be moot as to the amounts paid during the pendency of the appeal, even if they prevail.

An equitable stay is also appropriate in this case. When weighing the competing interests, the potential harm to Sensor and J-Ray is greater than that to Palmetto. If the supersedeas is granted, it does not act to reverse the PSC's Order, but only to stay its enforcement. Rule 241(c)(4), SCACR. Thus, if Palmetto prevails in the appeal, Sensor and J-Ray will be required to pay the difference between the "status quo" billing rates and settlement billing rates for the months during the pendency of this appeal. In that case, there will be no harm to Palmetto. In contrast, if this Petition is not granted and Sensor and J-Ray prevail on their appeal, there is no certainty that their overpayments made during the pendency of the appeal would be refunded. Thus, the potential harm to Sensor and J-Ray if this Petition not granted outweighs the potential harm to Palmetto if the Petition is granted. Hence, the balance of the equities weighs in favor of granting this Petition.

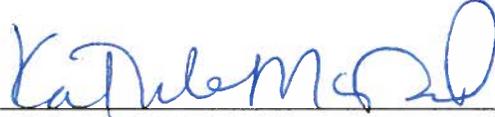
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<sup>1</sup> At the hearing before the PSC, Edward Wallace testified that even though Palmetto billed the Intervenor in amounts greater than \$401.52 and \$806.86 prior to filing its Application, Palmetto knew that these greater amounts were unfair and that Palmetto merely sent the higher bills in an effort to elicit a response to the rate increase from its customers. (Tr. of Hrg., Aug. 13, 2013, 97:7-98:4.)

**CONCLUSION**

Based upon the foregoing, Sensor and J-Ray respectfully request that the PSC issue an order directing Palmetto that, during the pendency of the subject appeal, it shall bill the Intervenors for monthly sewer service at the pre-application rate of \$401.52 for Sensor and \$806.86 for J-Ray.

CALLISON TIGHE & ROBINSON, LLC



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**ATTORNEYS FOR SENSOR ENTERPRISES,  
INC. AND J-RAY, INC.**

March 21, 2014

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION OF**  
**SOUTH CAROLINA**  
**DOCKET NO. 2013-42-S**

IN RE:           Application of Palmetto Utilities, Inc.,           )  
                  For adjustment of rates and charges for, and    )  
                  Modification to Certain Terms and                )   **PROOF OF SERVICE**  
                  Conditions Related to, the Provision of         )  
                  Sewer Service.   )  
\_\_\_\_\_)

I certify that I have served a copy of the **PETITION FOR WRIT OF SUPERSEDEAS AND/OR EQUITABLE STAY** on the following parties by causing a copy to be placed in the United States Mail, first-class postage affixed, addressed as follows, on March 20, 2014:

**PALMETTO UTILITIES, INC.**  
John M. S. Hoefler, Esquire  
Willoughby & Hoefler, P.A.  
930 Richland Street  
Columbia, SC 29201

**SOUTH CAROLINA OFFICE OF  
REGULATORY STAFF**  
Jeffrey M. Nelson, Esquire  
1401 Main Street, Suite 900  
Columbia, SC 29201

\_\_\_\_\_  
D. Reece Williams, III  
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**ATTORNEYS FOR SENSOR  
ENTERPRISES, INC. AND J-RAY, INC.**

March 21, 2014  
Columbia, South Carolina

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COMMISSION