THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

Docket No. 2011-47-WS

Case Tracking No. 2012-208126

Carolina Water Service, Inc., ..... Appellant,

v.

South Carolina Office of Regulatory Staff, Forty Love Point Homeowners' Association, and Midlands Utility, Inc., ..... Respondents.

# REPLY BRIEF OF APPELLANT

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## ARGUMENT

**I. The briefs of Respondents ORS and HOA fail to respond to Utility's arguments; therefore, this Court should deem such failure to be a confession by these Respondents that the positions taken by Utility are correct and reverse and remand this matter to the PSC as requested by Utility.**

A failure to respond to arguments presented in an appellant's brief can be deemed to constitute a confession by a respondent that the positions of the appellant are correct. See Jean Hoefer Toal, et al., Appellate Practice in South Carolina 232 (2d ed. 2002) (citing *First Union Nat. Bank v. FCVS Communications*, 321 S.C. 496, 469 S.E.2d 613 (Ct. App. 1996), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997) (providing that if a respondent fails to respond to an issue raised in the appellant's brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct)). *Accord*, *Turner v. S.C. Dept. of Health and Environmental Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. Apps. 2008). For the reasons discussed below, Appellant Carolina Water Service, Inc. ("Utility") submits that the briefs of Respondents Office of Regulatory Staff ("ORS") and Forty Love Point Homeowners Association ("HOA")[1] fail to respond to Utility's arguments and this Court should deem such failure to be a confession by Respondents that Utility's positions are correct. As a result, the orders of the Public Service Commission ("PSC") denying in its entirety Utility's application for rate relief should be reversed and remanded as asserted in Utility's Initial Brief of Appellant.

In its Initial Brief of Appellant, Utility has made three distinct arguments, to wit: (1) the PSC erred in relying upon limited testimony to support its conclusion that the quality of service provided to all customers was "unacceptable" in view of this Court's

[1] Inasmuch as respondent Midlands Utility, Inc. has filed no brief, the substance of the instant Initial Reply Brief is addressed to the briefs of the remaining two respondents.

instructions in *Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff*, 392 S.C 96, 708 S.E.2d 755 (2011) ("*USSC*") and erred in considering quality of service as the sole factor in the establishment of just and reasonable rates in view of the PSC's misinterpretation and misapplication of this Court's holding in *Patton v. South Carolina Public Service Commission*, 280 S.C. 288, 312 S.E.2d 257 (1984) (Initial Brief of Appellant, pp. 16-32); (2) the PSC erred in failing to make findings that Utility's service was inadequate and that it was inadequate under any applicable standard, thereby rendering its determination that the quality of Utility's service was "unacceptable" arbitrary and capricious as well as contrary to provisions of law requiring specific findings and statements of fact supporting its decision (Initial Brief of Appellant, pp. 33-39); and (3) that the PSC's decision was not supported by substantial evidence of record. (Initial Brief of Appellant, pp. 33-46). In their separate briefs, neither ORS nor HOA responds to these arguments.

**A. ORS and HOA do not respond to Utility's argument that the PSC failed to follow *USSC* and misinterpreted and misapplied *Patton*.**

In its brief, Utility asserts that *USSC* instructs the PSC that it must make a determination of just and reasonable rates even where the quality of a utility's service to certain customers is called into question and that the testimony of a customer limited to his/her service experience cannot form the basis for a broader conclusion by the PSC with respect to the quality of Utility's service rendered to other customers. (Initial Brief of Appellant at 17-23.) The Initial Respondent's Brief of ORS does not respond to this argument. Rather, ORS asserts only that *USSC* stands for two propositions that are not at issue in this case: first, that after the enactment of 2004 S.C. Act 175 "'the PSC retains its fundamental role as a fact-finder'" (*see* Initial Brief of ORS at 10) and second, that "testimony by non-party customers of a utility may be considered by the PSC." (*See*

Initial Brief of ORS at 11.) While these are correct statements of two of the Court's holdings in *USSC*, neither assertion addresses Utility's argument based upon *USSC*.[2] Similarly, HOA does not address Utility's argument that the PSC failed to discharge its duty to set just and reasonable rates notwithstanding limited customer complaints pertaining to quality of service as required by *USSC*.[3] Instead, HOA simply recites this

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[2] ORS's brief could be read to implicitly contend that the PSC properly weighed the testimony of the limited number of customers and the testimony of the only ORS witness relied upon in the appealed orders against the testimony of Utility's witnesses and that this addresses the Court's instructions in *USSC*. (*See* Initial Brief of ORS at 14-15.) Without question, *USSC* holds that customer testimony may be weighed by the PSC against other testimony even if the customer testimony is "unsubstantiated by scientific or quantifiable data." *Id.*, 392 S.C. at 111, 708 S.E.2d at 762, n. 13. However, such a contention fails to address the argument of Utility that the PSC orders rely upon limited customer testimony regarding their personal service experience to support the PSC's determination that all customers had received an "unacceptable" quality of service in contravention of this Court's instruction in *USSC*. Further, the testimony of ORS's witness recited in the PSC's order (and in ORS's initial brief) dealt only with billing issues – not quality of utility service issues – and ignores the fact that this witness testified that customer billing complaints arose primarily from service to water distribution and wastewater collection customers (as opposed to water supply and wastewater treatment customers) and had been reduced from 101 in the test year to just 17 in the ten months preceding the rate filing. (*See* Initial Brief of Appellant at 41- 43.) More to the point, under *USSC* the testimony of the ORS witness is insufficient to inform the PSC with respect to the experience of all customers regarding billing, as is evidenced by the testimony of this witness concerning the number of billing complaints. (*See* Initial Brief of Respondent at 21, n.13.) Notably, the testimony of the ORS witness who addressed the issue of the adequacy of Utility's facilities and service that was not discussed in the PSC's orders (*see* Initial Brief of Respondent at 45, n.6) was also not mentioned in ORS's brief to this Court. And, as it must, ORS does not dispute Utility's observation that the outcome below was contrary to ORS's own recommendation to the PSC, which included specific rate base treatment to address the billing issue. (*See, e.g.*, Initial Brief of Appellant at 21.) Although *USSC* makes clear that the PSC is not obligated to accept the recommendations made by ORS (*see Id.*, 392 S.C. at 106, 115, 708 S.E.2d at 761, 765), Utility submits that the Court should nonetheless consider the fact that the PSC has once again ignored the recommendations of ORS proposing some rate relief in favor of allowing no rate relief based upon limited testimony which is legally insufficient under *USSC*.

[3] Understandably, ORS never states in its brief that the PSC has set just and reasonable rates for Utility. To the contrary, in the conclusion of its brief ORS essentially concedes that the PSC did not do so by acknowledging that the PSC "determined that Utility's **existing** rates are sufficient based on the level of service provided by Utility." (*See* Initial Brief of Respondent ORS at 19 (emphasis supplied)). Even if this statement could be read to assert that just and reasonable rates were set by the PSC, such a reading collapses under the weight of the description of the PSC's actions in the preceding paragraph of the ORS brief, which demonstrate that the PSC did not examine and adopt the current revenues and expenses of Utility or determine a reasonable return on equity for Utility. *See id.* Instead, the PSC simply observed that **if** the accounting and *pro forma* adjustments of either ORS or Utility were adopted, it would result in certain returns on equity and rate base. The PSC baldly adopted the Utility's existing rates, disregarding the remainder of the evidence regarding the Utility's expenditures and needed rate of return. No analysis was made by the PSC of specific expense items which, under *USSC*, was required. This deficiency explains the PSC's failure to meet the requirement of S.C. Code Ann. §1-23-350 (2005) for explicit findings of fact to support a determination of just and reasonable rates under S.C. Code Ann. §58-5-210 (1976). Similarly, the PSC's "rel[iance] upon the positive rates of return" that would result from the adoption of either the proposed accounting and *pro forma* adjustments (Initial Brief of Respondent ORS at 19) wholly fails to comply with the requirement that the PSC determine a fair rate of return that is documented fully in its findings of fact and based exclusively on reliable, substantial and probative evidence of record. *See* S.C.

Court's holding in *USSC* regarding the PSC's authority to consider the testimony of non-party customers. (Initial Brief of HOA at 7.) Again, although this recitation of the Court's holding in *USSC* is accurate, it does not respond to Utility's argument based upon *USSC*.

Also, neither ORS nor HOA have responded to Utility's argument that the PSC misinterpreted *Patton* as permitting the PSC to consider quality of service as the **sole** factor in determining just and reasonable rates, misapplied *Patton* to justify a complete denial of rate relief as a "reasonable requirement...to insure adequate and proper service" and failed to recognize that its determination to deny all rate relief achieved the opposite effect of creating an incentive for Utility to improve its business practices as recognized by this Court in *USSC* as being sanctioned by *Patton*. For its part, ORS simply notes that "quality of service" is "**a** factor to consider" and "**an** important and necessary consideration in" the PSC's establishment of just and reasonable rates (*see* Initial Brief of ORS at 11-12 (emphasis supplied)), but never mentions Utility's argument that *Patton* cannot be read to support the proposition that quality of service can be the sole factor considered by the PSC in setting just and reasonable rates. Nor does ORS address Utility's argument that in light of the limited testimony regarding quality of service, denial of rate relief as to the services provided by Utility to all of its customers is not the "reasonable requirement ...to insure adequate and proper service" under *Patton,* but is the antithesis of an "incentive[] for [Utility] to improve [its] business practices" as described by this Court in *USSC*. (*See* Initial Brief of Appellant at pp. 24, 26.) Instead,

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Code Ann. §58-5-240 (Supp. 2011)(H). And, neither of these resulting returns on equity were within a range testified to by the cost of capital witnesses who testified in this matter, as ORS's witness testified to a return on equity range of 9.02% to 10.03 % [R. 1579; Tr. Vol. 5, p. 1348, ll.10-12] while Utility's witness testified to a return on equity range of 10.8% to 11.4%. [R. 710; Tr. Vol. 3, p.462, ll. 15-16.] Accordingly, as a matter of law there can be no substantial evidence of record which could support a finding that either of the resulting returns on equity relied upon by the PSC are reasonable. *See Hamm v. South Carolina Public Service Commission*, 309 S.C. 282, 287-288, 422 S.E.2d 110, 113-114 (1992).

ORS cites to a number of holdings by this Court which, although correctly stated, simply do not address Utility's argument in this regard.[4]

Like ORS, HOA fails to respond to Utility's argument that *Patton* does not permit the PSC to consider quality of service as the sole factor in determining just and reasonable rates and that the PSC's denial of all rate relief misinterprets and misapplies *Patton* by far exceeding the placement of reasonable requirements upon Utility designed to improve the quality of Utility's service and to create a business incentive for Utility to do so. Indeed, HOA's sole reference to *Patton* is also for a proposition not in dispute.[5]

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[4] Among the holdings cited by ORS are *Hamm v. S.C. Public Service Comm'n*, 294 S.C. 320, 364 S.E.2d 455 (1988) (citing *Patton* for the proposition that the PSC has been recognized "as the 'expert' designated by the legislature to make policy determinations regarding utility rates" and as trier of facts, is "akin to a jury of experts"); *Porter v. South Carolina Pub. Serv. Comm'n*, 327 S.C. 220, 489 S.E.2d 467 (1997) (recognizing that the PSC is vested with broad general powers to supervise and regulate rates and service of public utilities); *Parker v. South Carolina Pub. Serv. Comm'n* 280 S.C. 310, 313 S.E.2d 290 (1984) (observing that ratemaking is not an exact science but a legislative function involving questions of judgment and discretion), and *S.C. Energy Users Comm. v. S.C. Public Service Comm'n*, 388 S.C. 486, 697 S.E.2d 587 (2010) (reiterating long-established law that the PSC's ratemaking decisions are entitled to deference and will be upheld if supported by substantial evidence). All of these cases pre-date *USSC* and, of course, none of them hold that the PSC is entitled to be affirmed where it has committed legal error as has been asserted by Utility to have occurred in the instant case. *Cf. USSC*, 392 S.C. at 103-4, 708 S.E.2d at 759 ("[h]owever we "may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the [PSC's] findings, inferences, conclusions, or decisions are: ... (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; [or] (d) affected by other error of law.") Moreover, with respect to the PSC's status as an expert in ratemaking matters, this Court has held that the "[e]xpert status, however, does not somehow diminish the PSC's duty to support its conclusions with factual findings; indeed, that status heightens the duty to make the explicit findings of fact which allow meaningful appellate review of these complex issues." *See Seabrook Island Property Owners Association v. South Carolina Public Service Commission*, 303 S.C. 493, 497, 401 S.E.2d 672, 674 (1991), *citing Hamm v. South Carolina Public Service Comm'n*, 298 S.C. 309, 312, 380 S.E.2d 428, 430 (1989). *See also Parker, supra* 280 S.C. at 313, 313 S.E.2d at 292 (holding that "[d]iscretion cannot be exercised without a factual basis.") *Cf. Initial Brief of Appellant,* at p. 16, n.9 and pp. 38-39. In addition to these citations, ORS also mentions the North Carolina, Pennsylvania and New Jersey cases cited by the PSC in support of its order denying Utility all rate relief; however, in so doing it never responds to Utility's argument that the PSC failed to explain how these cases were factually similar to the instant case or addresses Utility's argument that the statutes in these states pertaining to the authority of their respective utility regulatory bodies to completely deny rate relief based upon adequacy of service issues alone are substantively different than the South Carolina statutes delegating regulatory authority over public utilities to the PSC. *Compare* Initial Brief of Appellant, pp. 27-31 and Initial Brief of ORS, pp. 11-12.

[5] *See* Initial Brief of Respondent HOA at 6 citing *Patton* for the proposition that the PSC's orders are presumptively correct and the burden of demonstrating clear error is upon Utility. Of course, this holding of *Patton* was made in the context of describing the substantial evidence standard of review. Further, and as noted below, HOA (as well as ORS) offer no response to Utility's assertion that, if the

Further, although HOA makes an implicit reference to Utility's argument that the PSC's decision does not provide Utility the business incentive to improve service arising under *Patton* as explicated in *USSC* (*see* Initial Brief of Respondent HOA at 11), the HOA's accompanying argument only reinforces Utility's point with respect to the overreaching nature of the PSC's decision.[6] This is so because HOA cites only to testimony of its members addressing the quality of Utility's water service (Initial Brief of Respondent HOA at 2) and suggests solutions to address only the quality of service rendered to their members. (*See* Initial Brief of Respondent HOA at 11-12.) As a result, the HOA does not address the substance of Utility's argument based upon the PSC's misinterpretation and misapplication of *Patton*.

**B. ORS and HOA do not respond to Utility's argument that the PSC failed to find that Utility's service was inadequate, failed to find that Utility's service was inadequate under any applicable standard, and failed to state specific facts which could support such a finding.**

In its brief, Utility also asserts that the PSC erred because it failed to make an explicit finding that Utility's service was inadequate as required by this Court's precedents, failed to make a finding that the quality of Utility's service was inadequate under any applicable regulatory standard (thus rendering the decision below arbitrary and capricious as a matter of law), and failed to comply with statutory requirements regarding the statement of specific facts to support a finding of inadequate service. (*See* Initial Brief

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substantial evidence standard is to be considered in the instant case, the PSC's orders are unsupported by substantial evidence and must be reversed. See discussion at pp. 8-9, *infra*.

[6] In its argument in this regard, HOA contends that "Utility threatens to continue ignoring, and to disregard further the requirements of South Carolina Code 58-5-710 (*sic*)." *Id.* HOA confuses the **procedure** by which the PSC is required to address a complaint of inadequate utility service under the cited statute with the **standards** for determining the adequacy of service under the PSC's regulations. *See* Initial Brief of Appellant at 33 (discussing interplay of regulations providing substantive quality of service standards and the statute providing for the enforcement of such standards after a utility has been found to have failed to adhere to such standards after an order to do so and opportunity to be heard.) This confusion is somewhat understandable in view of the fact that the PSC's orders make no reference to any regulatory standard by which Utility's service may be judged inadequate. *See* Initial Brief of Appellant at 33-38.

of Appellant at 33-39.) Neither the ORS brief nor the HOA brief addresses this argument.

The Initial Brief of Respondent ORS recites "four specific findings of fact related [to] Utility's service" made in the PSC order and the limited testimony[7] specifically relied upon in the PSC order, and then states that the PSC "examined and considered Utility's returns and Utility's level of service in light of 'widespread and pervasive problems ...with quality of service provided by Utility." (*See* Initial Brief of Respondent ORS at 13,19.) ORS does not, however, respond to Utility's argument that the lack of a finding that Utility's service is inadequate in the PSC's order is contrary to this Court's holding in *Able Communications, Inc. v. S.C. Public Service Comm'n*, 290 S.C. 409, 351 S.E.2d 151 (1986). (*See* Initial Brief of Appellant at 38-39.) Likewise, it does not respond to Utility's argument that the absence of a reference to any standard by which Utility's service may be determined to be inadequate (or, using the PSC's undefined term, "unacceptable") renders the decision "arbitrary and capricious" under S.C. Code Ann. §1-23-380(5)(e) (Supp. 2011) and as defined in *Deese v. S.C. State Bd. of Dentistry*,

[7] In this portion of its brief, ORS contends that Utility "attempts to minimize the effect of customer testimony by repeated reference to the number of customers testifying before the PSC to the total number of customers served by Utility." *Id.* at 14. While acknowledging that "the number of witnesses may be small when compared to the total number of Utility's customers across the state," ORS asserts that because the Commission found that the testimony of these customers was "compelling and convincing" it was appropriate for the PSC to conclude "that the problems testified to by the customers were persistent ... and had persisted at an unacceptable level" such that the PSC's further conclusion that there existed "widespread and pervasive problems with regard to quality of service" justified the PSC's denial of all rate relief. *Id.* at 14-15. This contention misses the mark in several respects. First, and as *USSC* teaches, limited customer testimony regarding quality of service cannot inform the PSC with respect to the quality of service to all customers. In other words, evidence that the service rendered to all utility customers is inadequate is the *sine qua non* to a conclusion that a utility is not entitled to rate relief as to any of its customers on the grounds of inadequate service. *Cf. USSC*, 392 S.C. at 112, 708 S.E.2d at 764, *Patton*, 280 S.C. at 293, 312 S.E.2d at 260. Second, this contention does not dispute the fact that of the Utility's test year end 10,962 sewer customers and 7,645 water customers, only 34 customers testified and of these customers, 21 testified regarding complaints about billing issues (that ORS's own witness testified had subsided to an average of 1.7 complaints per month in the ten months prior to the hearing) and only 2 testified regarding sewerage service issues. *See* Initial Brief of Appellant at 3 and at 21, n. 13. Under any reasoned analysis, this quantum of customer testimony is minimal. Finally, as asserted in the Initial Brief of Appellant, and as discussed further herein below, this testimony is not substantial evidence of either a pervasive or persistent problem with quality of service that is experienced by all of Utility's customers.

286 S.C. 182, 332 S.E.2d 539 (Ct. App. 1985). Nor does it respond to the argument that even if a finding of inadequate service by Utility had been made by the PSC under any of its regulations, such a finding must be accompanied by an explicit statement of supporting facts as required by S.C. Code Ann. §1-23-350 (2005). Similarly, HOA fails to respond to these arguments in its brief, asserting only that Utility has "fail[ed] to provide drinkable water and adequate service under S.C. Code Ann. §58-5-710 (Supp. 2011)." (*See* Initial Brief of Respondent HOA at 11.) As previously noted, S. C. Code Ann. §58-5-710 (Supp. 2011) does not supply a standard with respect to the adequacy of utility service (see n.6, *supra*); moreover, this assertion simply fails to address the Utility's argument.

### C. Neither ORS nor HOA responds to Utility's argument that the PSC's decision was not supported by substantial evidence of record.

Utility argues that, to the extent *USSC* may be read to have been decided on the basis of a lack of substantial evidence and not simply the legal errors committed by the PSC as found by this Court therein, the PSC's findings in the instant case regarding the quality of Utility's service are not supported by substantial evidence. (*See* Initial Brief of Appellant at 39-46.) However, other than acknowledging that the substantial evidence standard of review applies in the instant case and citing to cases for that proposition,[8] neither ORS nor HOA mentions substantial evidence. Neither ORS nor HOA discusses Utility's arguments that substantial evidence does not exist because the PSC viewed the evidence blindly from one side, failed to consider the record as a whole, and adopted a conclusion based upon evidence that a reasonable mind would not accept as being adequate to support the conclusion. (*See* Initial Brief of Appellant at 39-46.) Further,

[8] *See* Initial Brief of Respondent ORS at 7-9 and Initial Brief of Respondent HOA at 5.

neither respondent has affirmatively asserted to this Court that substantial evidence exists to support the PSC's finding that Utility's quality of service to **all** customers was "unacceptable" – which would be required under *USSC*.

### D. The Court Should Reverse and Remand to the PSC as Requested by Utility.

The failure of the ORS and HOA to respond to the arguments made in Utility's brief and described hereinabove is not the result of an oversight by these respondents. Rather, Utility believes it to reflect candor on the part of these respondents and their counsel and a reasoned assessment that these arguments cannot be refuted under the facts and law. And such an assessment is particularly warranted in light of this Court's instructions to the PSC in *USSC* and its explication therein of the import of *Patton*. Accordingly, Utility submits that this Court should deem Respondents to have confessed that Utility's arguments are correct, reverse the PSC's determination to deny Utility all rate relief, and remand this matter to the PSC with instructions that it set just and reasonable rates based upon the existing evidence of record and supplemental evidence regarding Utility's rate case expense.[9]

## II. The HOA improperly bases its arguments on matter not presented to the PSC and findings not made by the PSC.

Throughout its brief, HOA makes reference to a number of facts which do not appear in the record on appeal. Accordingly, these facts should not be considered by this Court on appeal. See Rule 210(h), SCACR.

For example, HOA suggests that Utility engaged in nefarious conduct "by **withholding** information from [HOA] pertaining to "**excessive** manganese" in the water

[9] Neither ORS nor HOA has responded to Utility's contention that a remand to the PSC should include instructions that Utility be allowed additional rate case expense for the legal fees incurred in pursuing the instant appeal. (*See* Initial Brief of Appellant at p.15 and p.47). Therefore, such instructions should be included in an opinion of this Court reversing and remanding this matter to the PSC. *First Union Nat. Bank v. FCVS Communications, Turner v. S.C. Dept. of Health and Environmental Control, supra.*

provided to customers in the Forty Love Point subdivision and by performing "**secret** water tests of at least four households **after 2009** to measure the amounts of manganese in the water." (*See* Initial Brief of Appellant HOA at 3 (emphasis supplied)). However, all of the evidence of record regarding the presence of manganese demonstrated that the Department of Health and Environmental Control ("DHEC") found that the levels present in the water provided to customers in the Forty Love Point subdivision during its August 2009 inspection of Utility's water system serving that subdivision was below any maximum contaminant levels – a fact confirmed by counsel for HOA on cross-examination. [R.1456-1457; Tr. Vol. 5, p. 1225, l. 24 – p. 1226, l.4; R.2978; Hearing Exhibit 42.] Thus, contrary to HOA's assertion to this Court, there is no evidence of a test after 2009 reflecting "excessive" manganese.

Moreover, nothing in the testimony pertaining to the results of the water tests alluded to by HOA suggests, much less establishes, that the sampling and laboratory tests were conducted by Utility in "secret" or withheld by Utility as alleged by HOA. [R. 1396-1398, Tr.V. 5, p.1165, l.21 – p.1167, l.25;] The very exhibit cited by HOA in its brief (which HOA introduced into the record) reflects that the water samplings giving rise to the test results introduced at hearing were in fact conducted by Sonia Johnson of DHEC, not Utility personnel. [R.1397-98, Tr.V. 5, p.1166, ll.1-11; p.1167, ll.1-16; R. 1456-57,1462, Tr. V. 5, p.1225, l.5 – p. 1226, l.15; p.1231, ll.3-5; R.2978-2983, Hrg. Ex. 42.] This same exhibit reflects that the laboratory testing was conducted by DHEC and not Utility. [R.2978-2983; Ex. 42.] Further, the record clearly reflects that members of HOA were aware of the DHEC water sampling and testing [R.1375-97; Tr.V. 5, p. 1143, l.7 – p. 1166, l.11.]. The HOA itself introduced minutes of a meeting it held on September 24, 2009, in which Ms. Johnson of DHEC and the Utility's regional manager

and witness, Bob Gilroy, discussed the ongoing testing of the well system. [R.2618-2619; Hrg. Ex. 23; R.639; Tr. Vol. 3, p. 391: ll.17-21.] Also, an email message dated September 2, 2010, from Mr. Gilroy to one of the HOA's witnesses, Nancy Williamson, transmitted the results of DHEC's tests for iron bacteria and manganese and described measures that the utility planned to take to address her complaints about water quality. [R.2975; Hrg. Ex. 40; R.1440-1441, Tr. Vol. 5; p. 1209: l.5-1210: l.2.] The record also shows that after the Utility began the new water measures described by Mr. Gilroy in September of 2010, complaints of discolored water abated. [R.1442, Vol. 5 p. 1211, ll. 1-14; R.1404-1405, p. 1173; l.23 – p. 1174, l.16.] Further, Utility would have had no need to conduct any "secret water tests" inasmuch as Utility is entitled by law to access the premises of its water customers (and under certain circumstances, non-customers) for, *inter alia*, "any...purpose which is proper and necessary in the conduct of [Utility's] business." *See* Vol. 26 S.C. Code Ann. Regs. 103-737.A (Supp. 2010). More to the point, Utility would have had no need to keep the results of the tests a "secret" as HOA contends as the only evidence of record demonstrates that manganese levels met regulatory standards.[R.1396-1397 Vol. 5, p. 1165: l. 21 – p. 1166: l. 11]. Because all of the foregoing purported "facts" asserted by HOA are conclusively refuted by the record on appeal, they necessarily do not appear in the record on appeal and should therefore not be considered by this Court. See Rule 210(h), SCACR.

In its Statement of the Facts, HOA states that "[o]n January 13, 2012, Forty Love and Indian Fork received notice that one of seven wells servicing the neighborhoods was infected with e-coli" and recounts Utility's subsequent reaction to this. (*See* Initial Brief of Respondent HOA at 3-4.) While she acknowledges that this event occurred outside the test year, HOA's counsel states that "**I** use it to show that our problems with this

utility are on-going." (*Id.* at 4, emphasis supplied.) As HOA is aware, the hearings in this matter were conducted between September 7 and 8, 2009 (see Initial Brief of Respondent HOA at 1), closing arguments conducted on September 17, 2011 (R.1610--1668: Tr. Vol. 5, pp. 1380-1438), proposed orders submitted to the PSC on October 5, 2011, (R.1668; Tr. Vol. 5, p. 1438l. 18), and the record closed and the PSC's decision in the matter issued on October 24, 2011. [R.3; Order No. 2011-784 at 1.] No additional evidence of record was submitted on rehearing. [R.28; Order No. 2012-31 at 1.] Thus, any events occurring in January of 2012 are clearly beyond the record on appeal in this matter and should not be considered by this Court as provided for in Rule 210(h), SCACR.[10]

The HOA strays from the record in several other respects. The HOA refers to the lack of fire hydrants in the Forty Love Point subdivision, apparently implying that their absence is a ground for supporting the Commission's decision to deny rate relief. (Initial Respondent's Brief of HOA, p. 2.) Purportedly summarizing the testimony of its witnesses, HOA states, without citation or attribution that, "[e]veryone was worried about the lack of fire hydrants". (*Id.*) Yet, none of the HOA's witnesses mentioned fire hydrants during the hearing. And, contrary to HOA's assertion in this regard, an ORS witness, testified that "[w]ith the exception of the Lake Wylie community, CWS does not provide fire protection services to its customers and is not required to provide this service." [R.1537; Tr. Vol. 5, p. 1306: ll. 4-6.]

The HOA also implies that the PSC prevented the ORS from presenting oral testimony at the hearing, and was constrained to stipulating the prefiled testimony of its witnesses into the record. (Initial Respondent's Brief of HOA, pp. 8-9.) However, the

[10] The HOA also cites to the number of individuals who wrote letters to the Commission opposing the rate increase but, , these unsworn letters were not introduced into evidence in this case, and as the HOA recognizes the Commission may only rely on sworn testimony in arriving at its decision. (Initial Respondent's Brief of HOA, pp. 6-7.) The letters should be disregarded by the Court.

HOA's description of the hearing procedure is flatly contradicted by the record which shows that the **ORS moved** to stipulate its prefiled testimony into the record **without objection** from the HOA or the Utility. [R.1474-1478; Tr. Vol. 5, pp. 1243-1247.]

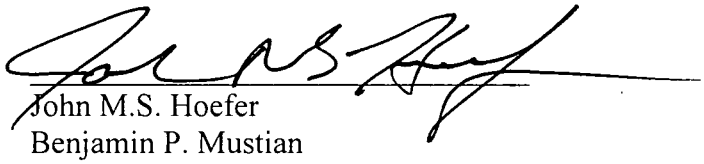
The HOA asserts, without any support in the record, that the Utility "stand[s] in the way of our hooking up to the City" and argues that the "utility could pay for a connection to the City of Columbia." (Initial Respondent's Brief of HOA, pp.4,11.) There is no evidence of record that the Utility has "stood in the way" of connecting the Forty Love Point subdivision to the City of Columbia water system. However, the record does show that the cost of the interconnection had been estimated to be as much as $1.3 million. [R.1466-1467; Tr. Vol. 5, p. 1235, l. 15 - p. 1236, l. 23.] Incongruously, the HOA argues that Utility should pay for the interconnection, but that Utility should also be denied the opportunity to earn a reasonable rate of return on the investments that it has made in its system to date. (Initial Respondent's Brief of HOA, pp. 11-12.) Assuming for argument's sake that an interconnection with the City of Columbia were a desirable outcome (a conclusion not supported by the evidence in the record), the Utility would have no reason to make such an expenditure without the expectation that its investors would realize on the constitutionally guaranteed opportunity to earn a reasonable rate of return. However, the Commission's total denial of rate relief in the present case, which is supported by HOA, contradicts the expectation of such an opportunity. Simply put, no rational investor would support such an investment in the current regulatory climate.

In light of the foregoing, these factual assertions by HOA should not be considered by the Court. The Utility further submits that the Court should consider all of HOA's arguments through the prism of these unsupported or demonstrably inaccurate statements.

## CONCLUSION

For the reasons discussed above and in Utility's Initial Brief of Appellant, the PSC should be reversed and the case remanded with instructions that the PSC set just and reasonable rates based upon the record below supplemented only to permit Utility to add to its rate case expenses the legal fees and other costs associated with pursuing the instant appeal.

Respectfully submitted,



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