THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION

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S.C. Supreme Court

Docket number 2011-47-WS
Case tracking number 2012-208126

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

v.

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

FINAL BRIEF OF RESPONDENT FORTY LOVE POINT HOMEONWNERS' ASSOCIATION

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STATEMENT OF ISSUES ON APPEAL

1. Did the Public Service Commission err in completely denying a rate increase to Carolina Water Service, Inc. in light of the vast amount of testimony it received, both in public hearings from interveners, regarding the quality of water and the quality of service provided by CWS to its customers?

2. Did the Public Service Commission err in completely denying Carolina Water Service, Inc. rate relief based upon a finding of unacceptable quality of service and unacceptable quality of water based upon CWS's violation of South Carolina Code 58-5-710?

STATEMENT OF THE CASE

The case has proceeded basically as the Appellant describes in its brief.

During the public hearings held on September 7 and 8, 2011 however, it should be noted that the Appellant and Forty Love Point presented both pre-filed evidence and testimony and live testimony from their witnesses. Due to time constraints the South Carolina Office of Regulatory Staff presented only pre-filed testimony.

STATEMENT OF FACTS

Respondent, Forty Love Point Homeowners' Association ("Forty Love"), is an association defined by South Carolina Code section 12-43-230 and other sections in the South Carolina Code of Laws. Forty Love represents a community of approximately 150 households near Chapin, South Carolina. Our water is provided by a system of seven wells owned and operated by Appellant Carolina Water Service ("CWS"), a subsidiary of Utilities, Inc., a much larger company.

The well system that provides water to Forty Love also services the Indian Fork neighborhood. Together, the neighborhoods comprise about 210 households. The water systems of these two neighborhoods are linked.

Virtually no one in either Forty Love or Indian Fork drinks the water provided by Carolina Water Service. The water is sometimes muddy and brown because of excessive iron and iron bacteria, it contains visible grittiness on account of excessive manganese, and it corrodes appliances and bathroom fixtures. The water smells bad -- often of excessive chlorine or a sulfur-like odor.

Neither neighborhood has fire hydrants.

During the September 2011 hearings before the Public Service Commission, Forty Love presented three witnesses -- Kim Nowell, Nancy Williamson, and Frank Rutkowski. (R. Vol. 2 pp. 621-634, 636-663, and 664-685). They testified about the unappetizing quality of the water at their homes, showed photos of brown water, and entered into exhibit a household water filter filled with brown crud. (R. Vol. 6 p. 2604; Exhibit 22). They complained about the cost of ruined appliances and bathroom fixtures. They wondered about the safety of bathing in this water and brushing their teeth in it. Although Forty Love has not experienced billing issues, Indian Fork residents do have complaints about billing. Nancy Williamson has complained multiple times to South Carolina DHEC, to no avail. (R. Vol. 2 pp 638-639 et ff). Everyone was worried about the lack of fire hydrants.

Witnesses from CWS -- CEO Lisa Sparrow and Bob Gilroy -- admitted during the hearings that they had problems with "iron bacteria and manganese"

in the Forty Love/Indian Fork water system. (R. Vol. 2 p. 846; Vol 3. pp.1456 – 1458). This came as a surprise to the Forty Love witnesses and counsel. Although we had been battling CWS for years over water issues, (smelly brown water; grit in the water; low water pressure) we had never heard about excessive manganese. The iron bacteria problem was well known to us. This revelation that excessive manganese was an issue of concern to CWS led us to believe the company was withholding information from Forty Love.

After the 2006 rate case in which Forty Love filed an amicus brief (2006 - 92-WS), and after an outbreak of iron bacteria in our water in 2008, CWS assigned Bob Gilroy to deal with complaints from our neighborhood. Mr. Gilroy communicated frequently with HOA board member Nancy Williamson and with other neighbors by email. To our knowledge, Mr. Gilroy never mentioned to us a concern about manganese in our water before the November 2011 hearings. And yet, CWS had conducted secret water tests of at least four households after 2009 to measure the amounts of manganese in the water. The test results were added as exhibits to the hearing at my request. One result showed manganese at a point barely below the acceptable level of 0.05%. (R. Vol. 6 pp. 2978-2979, Exhibit 42).

On January 13, 2012, Forty Love and Indian Fork received notice that one of the seven wells servicing the neighborhoods was infected with e-coli. Since some neighbors had been suffering from gastro-intestinal illnesses over the holidays, they speculated it was because they ingested ice from their refrigerators. After this infestation of e-coli, one of the wells was shut down, and

we experienced decreased water pressure. Carolina Water Service has asked us to conserve water since January 2012. The water we did get began to smell of chlorine even more than usual. The e-coli incident occurred outside of the test year – but I use it to show that our problems with this utility are on-going.

Before Carolina Water Service appealed this case and issued a bond, Forty Love homeowners were paying $3.55 per thousand gallons for this water, on top of a rate base of $11.09 per month, and 25.70 for sewage collection. The rate increase proposed by the appellant would have increased our water charge to $6.49 per thousand gallons, plus a rate base of $19.87, $11.00 per month for wastewater treatment, and $29.20 for sewage collection.

The homeowners became incensed. We intervened in 2011-47-WS as a party of record.

Neighborhoods within half a mile from the Forty Love entrance have City of Columbia water. Because Carolina Water Service owns the pipelines in our neighborhood, they stand in the way of our hooking up to the City.

The fact that CWS has no employees of its own -- all are employees of Utilities, Inc., the parent company -- and that it borrows revenue from Utilities, Inc. should greatly increase the amount of financial risk CWS can withstand and continue functioning. (R. Vol 2, pp 799-803). We oppose the rate increase and support the decision of the PSC.

SUMMARY OF ARGUMENT

The South Carolina Public Service Commission (PSC) is entrusted to balance the needs of utility customers with the rate demands of the utilities. As

such, it is completely appropriate under the statutes and under the case law, for the PSC to consider all comments by protestants at public hearings, and all comments made by customer witnesses, when setting rates for utilities.

The PSC must be especially concerned about utilities that do not follow or do not appear to meet the demands set out by South Carolina Code 58-5-710 – in this case, providing adequate water and service to customers. Providing water is such a vital service that the water utility should be closely monitored by the state, and not simply by South Carolina Department of Health and Environmental Control.

The PSC MUST pay careful attention to the complaints of customers.

STANDARD OF REVIEW

The standard of review at this appellate level is a "substantial evidence" test. The South Carolina Administrative Procedures Act, ("APA"), codified in S.C. Code Ann Section 1-23-310 et ff., does not allow this Court to "substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code 1-23-380 (6). Rather, this court must decide whether the agency's findings are clearly erroneous, unconstitutional, exceeding the agency's authority, unlawful, capricious, or arbitrary -- when viewing the entire record.

This Court, by its own description, must bow to the expertise of the Agency when dealing with issues related to private utilities. The Agency is seen as the expert on these matters. *Friends of Earth v. Public Service Comm'n of South Carolina,* 387 S.C. 360, 692 S.E.2d 910 (SC 2010). "[This Court] employs a deferential standard of review when reviewing a decision of the Public Service

Commission and will affirm that decision when substantial evidence supports it." *Duke Power Co. v. Public Service Comm'n of South Carolina*, 343 S.C. 554, 558, 541 S.E.2d 250, 252 (2001).

The Utility, in this case, bears the burden of proving that the Agency is clearly erroneous. Findings by the Agency are presumptively correct unless the Utility can show that the decision is clearly erroneous. *Kiawah Property Owners' Group v. The Public Service Comm'n of South Carolina*, 357 S.C.232, 593 S.E.2d 148 (S.C. 2004). *Patton v. South Carolina Public Service Comm'n*, 328 S.C.222, 493 S.E.2d 92 (1997).

ARGUMENT

1. The PSC did not err in denying the utility's request for a rate increase based upon overwhelming evidence, from parties and from protestants, that the utility failed to provide adequate service.

A. The PSC properly considered testimony from parties and from protestants regarding the poor quality of service provided by the Utility.

Once CWS had proposed its rate increase under 2011-47-WS, hundreds of protestants showed up at local public hearings in Lexington, York, and Richland counties. Additional hearings had to be scheduled because the hearing rooms were packed and overflowing with vociferous crowds. \

In addition to the local public hearings, two hundred and fifty-eight more protestants filed their comments on line. None of them argued in favor of the rate increase.

Forty Love Point Homeowners' Association intervened in the case and presented evidence during the regular hearing that summarized many customers' concerns about the quality of water and service provided by CWS. The order from the PSC summarizes some of the highlights regarding nightmarish issues surrounding the quality of water provided by CWS, and the undrinkable quality of the water the utility provides at exceptionally high prices. Most of the customers who testified as parties and protestants stated they did not drink the water, they would not allow their pets to drink the water, and that they purchased drinking water and ice from outside sources. The billing problems occurred in neighborhoods with pass-through systems, and the water quality problems occurred in neighborhoods with well systems.

The PSC is allowed to rely on sworn testimony by non-party protestants to measure the reasonableness of the utility's claims that it has incurred increased expenses improving the water system. The relevant holding in *USSC* is stated as follows -- "We hold the PSC could consider customer testimony that Utility's water quality had not improved... when determining whether to credit Utility with the expenditures for capital improvement that it claimed." ***Utilities Services of South Carolina, Inc. v. South Carolina Office of Regulatory Staff,*** 708 S.E.2d 755, 760? (SC 2011).

The main service provided by CWS is household water. When the quality of the water is undrinkable -- due to smell, chlorine content, iron deposits and iron bacteria, low water pressure, and high manganese content -- the main service provided by the utility has failed, and raising the rates would be fundamentally unfair.

CWS argues that the PSC has an "obligation to provide Utility an opportunity to achieve a reasonable return on its investment." (App. Brief, p. 23). The PSC, however, does not operate as an arena to ensure that the utility earns a high rate of return on its investments (CWS believes it deserves 9%). The PSC must supervise and regulate both rates charged by the utility AND service provided to the customers. SC Code 58-5-210. The PSC must perform a balancing act of fairness.

Unlike the situation in USSC, the appellant utility in the present case was well aware of the arguments presented by customers, since they were raised both by protestants and by a party to the action – Forty Love. We, the customers, can only testify regarding the results. If so much money has been pumped into the well system, why does our water either look brown or smell like chlorine? If there is open communication, why were we not apprised of all problems regarding our water – such as manganese? If the utility's customer service system has been improved, why has the complaint office been moved to Florida, and why can we never get a representative on the phone? There is no question that the service provided by the utility is simply unacceptable – and this is evidenced by the record number of protests filed in this case.

We rely on the Office of Regulatory Staff to audit the expenses presented by the appellant utility. It was unfortunate that the hearing ended before the ORS had an opportunity to present their full findings during the formal hearing process. The utility submitted pre-filed testimony and oral testimony in court. The ORS presented only pre-filed testimony. The utility had two bites of the apple, whereas the ORS had only one.

B. *The PSC is not required to follow a particular methodology in setting rates.*

The Utility argues that the PSC must prescribe and follow a ratemaking methodology that allows the Utility to "achieve a reasonable return on its investment." (Brief of Appellant p. 23). ***Porter*** states, however, "South Carolina law does not require Commission to use any particular price-setting methodology." *Porter v. Public Service Comm'n*, 493 S.E.2d 92, 91 (SC1997), citing *Heater of Seabrook, Inc. v. Public Service Comm'n, 332 S.C.20, 503 S.E.2d 739 (1998).*

The "just and reasonable" language in S.C. Code 58-5-210 refers to setting reasonable "standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State." The PSC has power over fixing rates, and it has the power to ensure proper service.

The cases cited by the Utility, *Heater of Seabrook* and *Kiawa*h, involve different circumstances than the present case. Heater of Seabrook was a 1998 case, before the ORS (with its power to audit and examine utilities) was

established in 2004, and it concerned a remand to the PSC. *Heater of Seabrook, Inc. v. Public Service Comm'n, 332 S.C.20, 503 S.E.2d 739 (1998).* The PSC had been instructed by the Court to look at certain revenues in certain ways. It involved the comparison of test year expenses, and questions about how to count investment capital. The present case is different – an examination of whether the utility has delivered on its promises to provide better service and improved billing. In *Heater*, the Court establishes that it cannot prescribe a particular method for determining rates.

Kiawah is an affirmation that the PSC is to be taken as the expert in determining rates. *Kiawah Property Owners' Group v. The Public Service Comm'n of South Carolina*, 357 S.C.232 (2004). The PSC's order is affirmed, based on substantial evidence that they figured expenses correctly and acted fairly. The PSC's expertise in these matters must be considered.

Forty Love was intent on illustrating the lack of service provided by this utility. As a party, we have no interest in assuring that the utility make a 9% return on its investments. In fact, the utility's financial demise might pave the way for our obtaining drinkable water.

The PSC, on the other hand, was most patient in listening to the utility's financial woes – problems based on the small size of CWS and the risk it faces. As their financial expert testified, however, CWS is owned and operated by a parent company, Utilities, Inc., that operates a total of five water companies in South Carolina as well as other water companies throughout the United States. CWS borrows its capital from Utilities, Inc. at a rate of 6 percent – lower than it

could borrow that money on the open market. (R. Vol. 2 p. 802). CWS is pretty much assured of a customer base, since they own the water pipelines to our homes. (R. Vol. 2 pp. 799-802). The risk involved to this utility business is much less than they would encounter on their own, without the parent company, Utilities, Inc. Also, their customers are held prisoner by the need for household water. All of these factors were discussed and considered by the PSC as they made their decision to deny the rate increase in its entirety.

II. The PSC did not err in denying the Utility its rate increase, considering that they fail to provide drinkable water and adequate service under S.C. Code 58-5-710.

In their brief, the Utility threatens to continue ignoring, and to disregard further the requirements of South Carolina Code 58-5-710 because the PSC has not provided the utility with a monetary incentive to improve service. (Brief of App. P. 24). This is an almost laughable example of the inordinate power this utility exerts over its customers. We continue to pay the utility more money, and yet the quality of our water is so bad we don't dare drink it (R. Vol 2, p.654), we pay at least $40 per month for bottled drinking water and an additional amount for water filters, and the quality keeps declining. Many protestants and the Forty Love witnesses complained about appliances and bathroom fixtures being ruined by the water, which imposes an additional expense.

The average household of 5 in Forty Love pays about $120 per month to the utility for this undrinkable water. (R. Vol 2, p. 644)

More households are being built in our neighborhood, and the utility is apparently not sure they can keep up with the demand. (R. Vol. 3 p. 1457-1458).

Despite all these problems, the utility offers no real solution, when many options are available to it to resolve our water issues. The utility could pay for a connection to the City of Columbia, put a reasonable cap on lost water, and give us a fair distribution – only service. They could sell our neighborhood systems to the City of Columbia at a fair and reasonable price – considering the system is 25 years old. There are many solutions to this problem that the utility will not consider because, presumably, they don't want to lose the revenue from our neighborhood. Meanwhile, our homes and our property lose value. (R. Vol 2, p. 658).

We agree with the utility's statement in their brief that the PSC ought to fine CWS whenever they provide water that is unpalatable, that ruins appliances and that poses a potential health risk. (Brief of App. P. 33).

We ask this Court to affirm the order of the PSC in its entirety.

Respectfully submitted,

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January 16, 2013

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CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

This is to certify that the Final Respondent's Brief I am filing in this case complies with rule 211(b) of the South Carolina Rules of Appellate Procedure.

January 16, 2013

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CERTIFICATE OF SERVICE

This is to certify that I have one served one copy of the Respondent's Final Brief by placing same in the U.S. Mail, postage prepaid, on January 16, 2013 addressed as follows:

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