South Carolina Law Review

Volume 37
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 3

Fall 1985

Administrative Law

SOUTH CAROLINA LAW REVIEW

ISSN 0038-3104

VOLUME 37 AUTUMN 1985 NUMBER 1

ADMINISTRATIVE LAW

I. DEATH CERTIFICATES ARE NOT EXEMPT FROM DISCLOSURE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT

In *Society of Professional Journalists v. Sexton*[1] the South Carolina Supreme Court held that a Department of Health and Environmental Control (DHEC) regulation[2] limiting disclosure of death certificates contravenes the Freedom of Information Act[3] (FOIA) and is, therefore, invalid.[4] The court held that because death certificates are public records, they are not exempt from the disclosure requirements of the FOIA.[5]

1. 283 S.C. 563, 324 S.E.2d 313 (1984).
2. The regulation provides in pertinent part:

> (a) Except as otherwise provided, the State Registrar or the county registrar shall disclose information contained in vital records only when he is satisfied that the applicant therefore [sic] has a direct and tangible interest in the content of the record and that the information contained therein is necessary for the determination or protection of a personal or property right.
>
> . . . .
>
> (2) In the case of a death or fetal death certificate, a surviving relative or his legal representative shall be considered to have a direct and tangible interest.

S.C. Dep't of Health & Envt'l Control R., S.C. CODE ANN. (R. & REG.) 61-19-39(a)(1976). The term "legal representative" is defined to include "an attorney, physician, funeral director, insurance company, or an authorized agency acting in behalf of the registrant or his family." *Id.* § 61-19-39(b). A death certificate indicates the cause of death and is certified by a physician and medical examiner. Record at 61.

3. S.C. CODE ANN. §§ 30-4-10 to -110 (Supp. 1984).
4. 283 S.C. at 567, 324 S.E.2d at 315.
5. *Id.* at 566, 324 S.E.2d at 314.

The court rejected DHEC's argument that death certificates are medical records and, thus, exempt from public disclosure under the FOIA.[6] The court reasoned that although a death certificate is medically certified, it is merely a legally mandated conclusory statement of the decedent's cause of death.[7] The court also rejected DHEC's assertion that the disclosure of death certificates constitutes an invasion of privacy and, thus, is exempt under section 30-4-40(a)(2).[8] The court observed that the right of privacy must be asserted by the person holding that right: in this case, a decedent. The court also noted that the right of privacy does not prohibit the publication of information of legitimate public interest, such as the death certificate of a murder victim.[9]

The court invalidated the DHEC regulation because it conflicted with section 44-63-60 of the South Carolina Code,[10] which provides that death certificates be furnished upon request. The court observed that while the Code specifically limits the class of persons who may request a birth certificate,[11] it places no restrictions on who may request a death certificate. Inferring that section 44-63-60 thus mandates release of a death certificate to anyone requesting it, the court held that the DHEC regulation contradicted the code section and was, therefore, invalid.[12]

The court's holding is consistent with the legislative intent

---

6. S.C. CODE ANN. § 30-4-20(c)(Supp. 1984) exempts medical records from the disclosure requirements of the FOIA. The respondents did not appeal the lower court's holding that the Medical Examiner's records are exempt. 283 S.C. at 565, 324 S.E.2d at 314.

7. *Id.* at 566, 324 S.E.2d at 314. The court rejected DHEC's contention that death certificates were exempt under S.C. CODE ANN. § 30-4-40(a)(3)(Supp. 1984), which exempts information used in criminal investigations if premature disclosure would prejudice the investigation. The court agreed that this exemption is important, but noted that in this case the investigation had been concluded and the suspects tried before Ms. Glass requested the information. 283 S.C. at 566, 324 S.E.2d at 315.

8. S.C. CODE ANN. § 30-4-40(a)(2)(Supp. 1984). This section specifically exempts personal information that, if disclosed, would result in an unnecessary invasion of privacy.

9. 283 S.C. at 566, 324 S.E.2d at 315 (citing Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)(a news article about the birth of a baby to a twelve-year-old mother is not an impermissible invasion of the parents' privacy)).

10. S.C. CODE ANN. § 44-63-60 (1976). *Accord*, CONN. GEN. STAT. ANN. § 7-51 (West. 1972).

11. S.C. CODE ANN. § 44-63-80 (Supp. 1984).

12. 283 S.C. at 567, 324 S.E.2d at 315 (citing Banks v. Batesburg Hauling Co., 202 S.C. 273, 24 S.E.2d 496 (1943)). *See also* S.C. Tax Comm'n v. S.C. Tax Bd. of Review, 278 S.C. 556, 299 S.E.2d 489 (1983); 2 AM. JUR. 2D *Administrative Law* § 188 (1962).

of the South Carolina FOIA: to provide access to information affecting the public.[13] Although the FOIA has been adopted with a similar objective by the majority of states, the South Carolina Supreme Court is one of the first state courts to address whether a death certificate is a public record under the FOIA.[14] The court's conclusion that the circumstances surrounding a murder are of legitimate public concern is consistent with case law dealing with the issue of privacy.[15] The court's holding, however, fails to consider that the protection of other aspects of privacy might outweigh the court's broad interpretation of the FOIA. The court stated that it could find no public policy argument outweighing the goals of the FOIA[16] and cited *Cox Broadcasting*

---

13. The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner as it conducts its business so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formation of public policy. Toward this end, this act is adopted, making it possible for citizens, or their representatives, to learn and report fully the activities of their public officials.

1978 S.C. Acts 1736, 1736.

14. *See* Project, *Government Information and the Rights of Citizens*, 73 MICH. L. REV. 971, 1163 (1975). For a general discussion of the FOIA, see *id.* at 971-1340. Indiana is the only other jurisdiction that has directly addressed this issue. In Evansville-Vanderburgh County Dep't of Health v. Evansville Printing Corp., the court held that a death certificate is a public record. 165 Ind. App. 437, 332 N.E.2d 329 (1975). The court based its holding on the Hughes Anti-Secrecy Act, which provides for public inspection of records unless prohibited by law. *Id.* at 333. A Connecticut court, on the other hand, chose to decide this issue on a case by case basis. Meriden Record Co. v. Browning, 6 Conn. Cir. Ct. 633, 294 A.2d 646, 648 (1971). A Wisconsin court held that when a record is requested and there is no statutory exception, a writ of mandamus must be issued, absent any reason for denying it. Hathaway v. Joint School Dist. No. 1, 116 Wis.2d 388, 404, 342 N.W.2d 682, 690 (1984).

15. *See* Meetze v. Associated Press, 230 S.C. 330, 95 S.E.2d 606 (1956)(implying that since events such as births are recorded in a public record, they are matters of public interest). *See also* Waters v. Fleetwood, 212 Ga. 161, 91 S.E.2d 344 (1956) (the murder of a child was a matter of public interest, and a news article with pictures of the victim did not constitute an invasion of privacy); Fry v. Ionia Sentinel-Standard, 101 Mich. Ap. 725, 300 N.W.2d 687 (1980)(news account of a death caused by fire was a legitimate public concern).

16. 283 S.C. at 567, 324 S.E.2d at 315. *See supra* note 14. DHEC was primarily concerned that if death certificates were available for inspection, highly personal information beyond the scope of legitimate public concern would be revealed. Brief of Appellant at 5. DHEC asserted that the main purpose of a death certificate is to promote public health by providing accurate statistics indicating the cause of mortality in South Carolina. DHEC reasoned that if these records were not kept confidential, physicians, medical examiners, and coroners would not submit complete, accurate reports on causes of deaths related to abortion, venereal disease, alcoholism, or other conditions potentially

Corp. v. Cohn,[17] apparently relying on the policy of protecting the freedom of the press under the first and fourteenth amendments. This policy, however, requires that privacy interests be weighed along with the public right to information and the right of the press to publish that information.[18]

The implications of *Society of Professional Journalists v. Sexton* remain unclear. Under the court's broad holding, anyone would be entitled to examine a death certificate. Thus, DHEC's concern for privacy and confidentiality seems well founded. On the other hand, DHEC did not offer any evidence indicating the extent of public demand for death certificates.[19] It is probable that most requests for death certificates will be initiated by reporters, seeking information on behalf of the general public. Viewed from this perspective, the court's reasoning becomes clearer and more compelling.

Emily E. Garrard

II. WORKERS' COMPENSATION FOR PROSTHETIC DEVICES LIMITED

Two recent decisions in workers' compensation law address the issue of compensation for prosthetic devices. In *Lail v. Richland Wrecking Co.*[20] the court of appeals held that injury to a prosthetic device was not a "personal injury" under South Carolina law.[21] The supreme court in *Smith v. Eagle Construction*

---

embarrassing to the decedent's family. *Id.* at 12-13. DHEC further claimed that public disclosure of death certificates facilitates the fraudulent use of this information for false identification. *Id.* at 13-14.

17. 420 U.S. 469 (1975). In *Cox* the Supreme Court held there was no cause of action for invasion of privacy from the news publication of a deceased rape victim's name because the crime was of public interest and the information was available for public inspection through court documents.

18. *Id.* at 496-97. The Supreme Court feared that forbidding the publication of news offensive to a reasonable person would lead to censorship. In *Society of Professional Journalists*, on the other hand, DHEC argued that the test regarding public disclosure should be "whether the information is truly governmental in nature and properly subject to disclosure, or purely personal and more properly protected from general release." Brief of Appellant at 7-8.

19. *See* Record at 63. The court left it to the legislature to determine whether death certificates should be specifically exempted from the disclosure requirements of the FOIA. 283 S.C. at 567, 324 S.E.2d at 315.

20. 280 S.C. 532, 313 S.E.2d 342 (Ct. App. 1984).

21. *Id.* at 534, 313 S.E.2d at 343.

Co.[22] applied a 1980 amendment[23] retroactively to provide for the lifetime repair and replacement of the employee's prosthetic device.[24] These seemingly inconsistent results can be reconciled by analyzing the facts of each case.

The respondent in *Lail* sought compensation for a hearing aid which was broken beyond repair when he hit his head on a pipe.[25] In a hearing before a South Carolina Industrial Commissioner the stipulated facts indicated that the respondent wore a hearing aid prior to his employment with Richland Wrecking Company for reasons unrelated to this incident and that the accident occurred while in the scope of the respondent's employment.[26] There was not, however, any mention of any physical injury to the respondent.[27] The commissioner ordered the insurance carrier to pay the respondent the reasonable replacement cost of the hearing aid, and the full South Carolina Industrial Commission and the circuit court affirmed.[28]

The sole issue on appeal was whether the destruction of respondent's hearing aid was an injury within the meaning of sec-

---

22. 282 S.C. 140, 318 S.E.2d 8 (1984).

23. The statute provides time periods for which medical treatment and supplies will be furnished:

> Medical, surgical, hospital and other treatment, including medical and surgical supplies as may reasonably be required, for a period not exceeding ten weeks from the date of an injury to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability and, in addition thereto, such original artificial members as may be reasonably necessary at the end of the healing period shall be provided by the employer.

S.C. CODE ANN. § 42-15-60 (1976). The 1980 amendment provides:

> In cases in which total and permanent disability results, reasonable and necessary nursing services, medicines, prosthetic devices, sick travel, medical, hospital and other treatment or care shall be paid during the life of the injured employee, without regard to any limitation in this title including the maximum compensation limit. In cases of partial permanent disability prosthetic devices shall be also furnished during the life of the injured employee or so long as they are necessary.

S.C. CODE ANN. § 42-15-60 (1976).

24. 282 S.C. at 144, 318 S.E.2d at 9-10.

25. 280 S.C. at 533, 313 S.E.2d at 342.

26. Record at 3, 6, 8. The full Commission noted that the respondent had fallen and struck his head. *Id.* at 6. This point was also in the respondent's brief. Brief of Respondent at 5.

27. Record at 8.

28. 280 S.C. at 533, 313 S.E.2d at 342.

tion 42-1-160 of the South Carolina Code[29] so that its replacement would be compensable as a medical expense under section 42-15-60.[30] The appellants argued that injury to the respondent's property was not a personal injury within the meaning of section 42-1-160.[31] The court agreed, stating that when the statutory terms are clear, words are given their plain and ordinary meaning and the sole function of the court is to give effect to the intent of the legislature.[32] The court held that under the terms of the statute the damage to the hearing aid was not compensable as a personal injury.[33]

In *Smith* the employee was injured severely while performing duties within the scope of his employment when a backhoe severed his right leg.[34] This created the need for an expensive prosthetic device that proved to be unsatisfactory and would need to be replaced every three to five years.[35] The respondent applied to the South Carolina Industrial Commission for lifetime replacement of the prosthetic device and the request was approved.[36] The Commissioner's order was affirmed by the full Commission and the circuit court on the basis that the lifetime replacement of the device would tend to lessen the period of disability within the meaning of section 42-15-60 of the Code.[37]

The appellants challenged this reasoning and contended that the legislature did not intend for the prosthetic devices to

---

29. *Id.* at 533, 313 S.E.2d at 342-43. Section 42-1-160 provides in relevant part:

> "*Injury*" and "*personal injury*" shall mean only injury by accident arising out of and in the course of the employment and shall not include a disease in any form, except when it results naturally and unavoidably from the accident and except such diseases as are compensable under the provisions of Chapter 11 of this Title.

S.C. Code Ann. § 42-1-160 (1976).

30. For text of S.C. CODE ANN. § 42-15-60 (1976), see *supra* note 23.

31. 280 S.C. at 533, 313 S.E.2d at 343. The appellants also expressed a concern that fraudulent claims could be asserted if "personal injury" was to include damage to an employee's property. Brief of Appellant at 15-16.

32. 280 S.C. at 534, 313 S.E.2d at 343 (citing Worthington v. Belcher, 274 S.C. 366, 264 S.E.2d 148 (1980) and Hatchett v. Nationwide Mutual Ins. Co., 244 S.C. 425, 137 S.E.2d 608 (1964)).

33. 280 S.C. 534, 313 S.E.2d at 343.

34. Record at 1.

35. 282 S.C. at 142, 318 S.E.2d at 8-9. The respondent's witness stated that the respondent's activities and energy contributed to the rapid deterioration of the original prosthetic device.

36. *Id.* at 142, 318 S.E.2d at 9.

37. *Id.*

be construed as treatment tending to lessen the period of disability within the meaning of the section.[38] The supreme court agreed with the appellants on two grounds. First, the "plain meaning" of the section did not include prosthetic devices within the definition of treatment "tend[ing] to lessen the period of disability."[39] Second, the 1980 amendment[40] providing for the lifetime replacement of prosthetic devices raised the presumption that these devices were not intended to be included in the remedies afforded in the original section.[41]

The court, however, affirmed the circuit court on an alternate ground, applying the 1980 amendment retroactively.[42] The court cited *Hercules Inc. v. South Carolina Tax Commission*[43] and *Byrd v. Johnson*[44] as support for the proposition that remedial or procedural statutes can be retroactive when the statutes do not violate a preexisting contractual obligation.[45] The court then held that the 1980 amendment to the statute was remedial in nature and that it did not violate any existing contractual obligations.[46]

Smith and *Lail* represent the first attempt by appellate courts in South Carolina to deal with prosthetic devices in the area of workers' compensation. The decision in *Lail* follows the general rule in most jurisdictions.[47] In the future, the decision will prevent recovery for any damaged property such as eyeglasses under the workers' compensation laws. It may be possible to circumvent this decision by arguing that the injury to the employee and to his prosthetic device arose concurrently and, thus, the damage to the employee's property should be compensable.[48] Although argued by the respondent,[49] this reasoning was

38. *Id.*

39. *Id.* at 143, 318 S.E.2d at 9. For text of statute, see *supra* note 23.

40. For text of amendment, see *supra* note 23.

41. 282 S.C. at 143, 318 S.E.2d at 9.

42. *Id.* at 143-44, 318 S.E.2d at 9-10.

43. 274 S.C. 137, 262 S.E.2d 45 (1980).

44. 220 N.C. 184, 16 S.E.2d 843 (1941).

45. 282 S.C. at 143-44, 318 S.E.2d at 9.

46. *Id.* at 144, 318 S.E.2d at 9-10.

47. *See* 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 42.12 (1982); *see generally* 99 C.J.S. *Workmen's Compensation* § 158 (1958).

48. *See, e.g.*, Behl v. General Motors Corp., 25 Mich. App. 490, 181 N.W.2d 660 (1970); La Rose v. Hof, 28 A.D.2d 185, 283 N.Y.S.2d 902 (1967).

49. Brief of Respondent at 7-8.

not adopted by the court of appeals. It is not clear whether the court rejected this reasoning outright or whether absence of any mention in the stipulated facts of personal injury to the respondent made this reasoning inapplicable in *Lail*. Under a different set of facts, with a clear physical injury to the employee concurrent with the damage to the prosthetic device, this argument might prevail.

The *Smith* decision, on the other hand, leaves more questions than answers. The court did not mention two previous decisions that dealt with the retroactive application of a workers' compensation statute. In both *Ingle v. Mills*,[50] and *McPherson v. American Mutual Liability Insurance Co.*[51] the supreme court declined to apply a 1941 amendment to a workers' compensation statute retroactively to accidents that occurred before the amendment took affect.[52] In *McPherson* the court specifically stated, "The accident occurred on September 7, 1937, and the employee's right to an award for the claimed disfigurement of his hand was governed by the then existing law and was not affected by the amendment of 1941 . . . ."[53] The amendment added a remedy for bodily disfigurement without requiring proof of impaired employability.[54] The court did not consider, nor did it discuss, the difference between the 1941 amendment and the 1980 amendment.[55] Thus, the reasoning behind the court's decision in this case is unclear.

---

50. 204 S.C. 505, 30 S.E.2d 301 (1944).

51. 208 S.C. at 76, 37 S.E.2d 136 (1946).

52. 204 S.C. at 511, 30 S.E.2d at 303; 208 S.C. at 81, 37 S.E.2d at 138. The 1941 amendment added the following section:

> *Provided, Further*, That disfigurement shall also include the loss or serious or permanent injury of any member or organ of the body for which no compensation is payable under the schedule of specific injuries set out in this Section. And, *Provided, Further*, That in cases of body disfigurement it shall not be necessary for the employee to prove that disfigurement handicaps him in retaining or procuring employment, or that it interferes with his earning capacity.

1941 S.C. Acts 221, No. 162.

53. 208 S.C. at 81, 37 S.E.2d at 138 (citations omitted).

54. For text of the amendment, see *supra* note 52.

55. For other cases discussing the retroactivity issue, see Ship Shape v. Taylor, 397 So. 2d 1199 (Fla. App. 1981); Johnson v. Warren, 192 Kan. 310, 387 P.2d 213 (1963); Noffskerr v. Barnett & Sons, 72 N.M. 471, 384 P.2d 1022 (1963); Holmes v. State Accident Ins. Fund, 38 Or. App. 145, 589 P.2d 1151 (1979); Lester v. State Compensation Comm'r, 123 W.Va. 516, 16 S.E.2d 920 (1941).

The court also did not fully discuss the impairment of contract obligation issue.[56] Given the retroactive application of the amendment, an insurance carrier could acquire more of an obligation than it had bargained for. In addition, because the court did not specifically elucidate what would be considered remedial, this decision could have a significant impact on workers' compensation law. The uncertainty of which amendments will be given retroactive effect places a burden on both insurance carriers and practitioners in this area of the law.

Dennis J. Connolly

III. PUBLIC UTILITY RATE BASE DECISIONS

A. Exclusion of Operating Reserves from the Rate Base

In two recent utility rate cases, *Parker v. South Carolina Public Service Commission and South Carolina Electric and Gas*[57] and *Parker v. South Carolina Public Service Commission and Duke Power Co.*,[58] the South Carolina Supreme Court held that operating reserves could not be included in a public utility's rate base.[59] The rate base, which is used by the Public Service Commission (PSC) to fix reasonable rates, is "the amount of investment on which a regulated public utility is entitled to an opportunity to earn a fair and reasonable return."[60] South Carolina joins the majority of states that define operating reserves as noninvestor-backed funds that should be excluded from the rate base.[61]

South Carolina Electric and Gas (SCE&G) requested and was granted an electrical rate increase. Irvin D. Parker, South Carolina Consumer Advocate, appealed to the supreme court from an order sustaining the PSC's approval of the increase.

---

56. *See supra* note 47 and accompanying text. *See also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978).

57. 280 S.C. 310, 313 S.E.2d 290 (1984).

58. 281 S.C. 215, 314 S.E.2d 597 (1984).

59. 280 S.C. at 313, 131 S.E.2d at 292; 281 S.C. at 216, 314 S.E.2d at 598.

60. Southern Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n, 270 S.C. 590, 600, 244 S.E.2d 278, 283 (1978).

61. *See, e.g., Re* Central Maine Power Co., 26 Pub. Util. Rep. 4th (PUR) 388, 398-99 (1978).

The Consumer Advocate argued that the trial court erred in upholding the PSC's inclusion in the rate base calculation of funds in an injuries and damages reserve account.[62]

The court concluded that by the PSC's own order[63] the rate base should reflect actual investment of investors in the company.[64] Since there was uncontroverted testimony that the reserve account was funded by ratepayers and not by investors, the court reasoned that there was no justification for inclusion of the reserve in the rate base.[65]

Duke Power Company also requested and was granted a rate increase. The Consumer Advocate appealed to the supreme court from an order of the circuit court affirming the PSC's determination. One ground for the appeal was the inclusion of the company's operating reserve[66] in the rate base. Relying solely on its prior determination in *South Carolina Electric and Gas*, the court summarily concluded that the record clearly showed that the operating reserves were ratepayer funded.[67]

Although the record in both cases is devoid of evidence that operating reserves are not ratepayer funded, there was testimony that the PSC had never reduced the rate base by the amount of operating reserves in the past.[68] SCE&G argued that operating reserves are merely a balance sheet item representing amounts of booked but unpaid claims. The claims are paid out later, SCE&G contended, and thus there is no fund of ratepayer-supplied cash in the bank representing the balance sheet item.[69] The court failed to address these contentions.

Although these arguments were not a part of the record, since the PSC has never deducted operating reserves in the past, the PSC must have decided in its discretion that operating reserves are either investor backed or cannot be categorized either way. In fact, the PSC's order indicated that the Commission was unconvinced that the evidence presented warranted a

---

62. 280 S.C. at 313, 313 S.E.2d at 292.

63. Comm. Order No. 30-375 at 28.

64. 280 S.C. at 313, 313 S.E.2d at 292.

65. *Id.*

66. The Company's operating reserves were for property insurance, nuclear liability insurance, and injuries and damages. Brief of Respondent PSC at 2.

67. 281 S.C. at 216, 314 S.E.2d at 598.

68. Record at 42, *Duke Power Co.*

69. Brief of Respondent SCE&G at 16, 17.

departure from the previously adopted treatment of the issue.[70] The court pointed out, however, in *South Carolina Electric and Gas* that discretion cannot be exercised without a factual basis.[71] Moreover, the utility in both cases failed to use the opportunity at the PSC hearing to present evidence that operating reserves are not ratepayer funded. Therefore, the court was correct in concluding that the PSC included reserves in the rate base without evidentiary support that they were investor-backed.

South Carolina Electric and Gas and *Duke Power Company* are important because of their precedential value in excluding operating reserves from the determination of the rate base. Of equal importance is the court's emphasis in both cases that the rate base only represents funds provided by investors. In future rate cases public utilities should not request rate increases unless they are supported by a rate base that includes only investor-backed funds.

B. Exclusion of Posttest Year Revenue From the Rate Base

In *South Carolina Electric and Gas*, the court also held that minimal addition or loss of customers did not require adjustment of a utility's rate base.[72] The Consumer Advocate argued that the PSC erred in its rate base calculation by excluding the addition of eleven customers at the end of the test year.[73] The PSC had adopted a historical test year method as the basis for calculating a utility's rate base. Under this method the utility's operations are observed and measured during a given period of time, usually a year.[74]

The supreme court concluded that adjustments in the test year should be made only when an unusual situation exists which shows that the figures are atypical; the addition of eleven new customers produced a minimal change and was not an atypical circumstance warranting adjustment of SCE&G's rate base.[75] The court distinguished the routine occurrence of loss or

70. Brief of Respondent PSC at 8, *Duke Power Co.*

71. 280 S.C. at 313, 313 S.E.2d at 292 (quoting Brown v. Johnson, 276 S.C. 68, 275 S.E.2d 876 (1981)).

72. 280 S.C. at 312, 313 S.E.2d at 292.

73. *Id.*

74. Brief of Respondents at 4.

75. 280 S.C. at 312, 313 S.E.2d at 292.

addition of customers from the situation in *Southern Bell Telephone and Telegraph Co. v. Public Service Commission.*[76] In that case an adjustment was made to account for an approved wage increase that was to be effective just after the test year. The court also cited, as an example of an atypical situation requiring an adjustment, *City of Pittsburgh v. Pennsylvania Public Utility Commission,*[77] in which the test year was adjusted to reflect a steel strike. The court in *South Carolina Electric and Gas* was, therefore, concerned with preserving the integrity and finality of the test year time limitations.

C. The Depreciation Rate of Nuclear Power Plants

In *Duke Power Company* the supreme court held that the PSC erred in granting Duke Power a nuclear depreciation increase in the absence of evidentiary support.[78] The company had requested the increase for the purpose of recognizing anticipated decommissioning costs[79] as part of the cost of depreciation.

The court emphasized that no major nuclear plant had been decommissioned and that Duke Power's own witness conceded that the proposed depreciation increase was based on "very uninformed information."[80] In concluding that the record was inadequate to assess the depreciation rate, the court noted that only opinion evidence had been produced to show that a four percent depreciation rate was reasonable. Opinions, the court observed, have no probative value without evidentiary showing of the facts on which they are predicated.[81]

Although the court properly concluded that the nuclear depreciation rate should not be increased without evidentiary support, it is puzzling why the court remanded the issue to the PSC for further consideration. As the court stated, no method of decommissioning had ever been formulated by Duke Power, nor any major plant been decommissioned. There is a scarcity of in-

---

76. 270 S.C. 590, 244 S.E.2d 278 (1978).

77. 187 Pa. Super. Ct. 341, 361, 144 A.2d 648, 659 (1958).

78. 281 S.C. at 217, 314 S.E.2d at 599.

79. Decommissioning costs include replacement, salvage value, tearing down the building, storage, waste, etc. *Id.*, 314 S.E.2d at 598.

80. *Id.*

81. *Id.*, 314 S.E.2d at 599 (citing Young v. Tide Craft, Inc., 270 S.C. 453, 242 S.E.2d 671, 678 (1978)).

dustry data concerning decommissioning.[82] In fact, Duke Power based its claim for an increase in the nuclear depreciation rate on the decision in *Re Carolina Power & Light Co.*,[83] in which the court noted:

> As with the preceding determination [of a proper salvage rate] empirical data concerning nuclear plant depreciation rates is almost totally lacking. Consequently, we will permit the 25-year period as representing a reasonable estimation at this time. If in the future, it develops that a 4 percent annual depreciation rate is no longer appropriate, an adjustment will be made to account for any significant under or over accumulations.[84]

In effect, the court in *Carolina Power and Light* was granting a depreciation increase without evidentiary support. The South Carolina Supreme Court's approach is sounder.

Duke Power Company strongly suggests that public utilities would be wasting the PSC's and the court's time in the future by requesting increases for items that cannot be supported by a factual basis. The court made clear its position that it will not affirm the PSC's determinations unless made with evidentiary support.

D. Apportionment of Rate Increases

In *Parker v. South Carolina Public Service Commission and Southern Bell Telephone and Telegraph Co.*[85] the South Carolina Supreme Court upheld the PSC's apportionment and calculation of a telephone rate increase. The court followed the well-established principle that a reviewing court will not substitute its view of the evidence for that of the PSC.[86]

---

82. *See Re* Northern States Power Co., 11 Pub. Util. Rep. 4th (PUR) 385, 394 (1975). Although this is a 1975 case, it is still relevant since nuclear plants generally have a life span of 25-40 years. *See generally* Record at 46-50, *Duke Power Co.*

83. 26 Pub. Util. Rep. 4th (PUR) 75, 78 (1979).

84. *Id.*

85. 281 S.C. 22, 314 S.E.2d 148 (1984).

86. *Id.* at 23, 314 S.E.2d at 148-49. The court held that appellant's contention of error in the PSC's inclusion in the rate calculation of a $17,800 charitable contribution expense allocated to Southern Bell by its then parent company, AT&T, was moot. Prior to the opinion, the legislature amended S.C. CODE ANN. § 58-9-320 (Supp. 1984) to prohibit inclusion of a parent corporation's charitable contributions in rate calculations. The court, noting that precedential value is of more importance than the effect on a particu-

Southern Bell applied to the PSC in 1979 for a telephone rate increase of 35.9 million dollars with 13.1 million dollars of the increase to be alloted to "Supplemental Services."[87] The PSC approved an increase of 21 million dollars with 8.1 million of that amount going to "Supplemental Services." The Consumer Advocate appealed to the circuit court, arguing that the full 13.1 million dollars sought by Southern Bell had to be distributed to "Supplemental Services" in order to comply with residual pricing.[88] The circuit court sustained the PSC's determinations, and the supreme court affirmed.

The supreme court reasoned that although the allotment for "Supplemental Services" fell short of the original request, it was reasonable since only sixty percent of the overall request was authorized by the PSC.[89] Given the PSC's broad discretion in setting reasonable rates, the court relied on the proposition that the PSC's findings are presumptively correct and its orders reasonable and valid.[90]

The PSC found that the amount alloted to "Supplemental Services" met current cost, a requirement of residual pricing. Since the court has consistently held that the PSC's findings will be upheld unless they are without evidentiary support,[91] the holding in this case is sound.

In view of the broad discretion granted the PSC, the Consumer Advocate would better serve consumers in future rate cases by focusing on clearly unreasonable findings by the PSC. This case indicates the court's unwillingness to tamper with the

---

lar rate case issue, determined that resolution of the charitable contribution issue would have no precedential value. *Id.* at 25, 314 S.E.2d at 149-50.

87. "Supplemental Services" consist of discretionary nonessential options available to telephone users, such as call forwarding and music on hold. Brief of Appellant at 2.

88. Residual pricing is a method adopted by the PSC under which rate increases are first allocated to all categories other than Basic Service. Once discretionary categories are priced to at least current cost, the remainder is allocated to Basic Service. 281 S.C. at 23-24 n.1, 314 S.E.2d at 149 n.1.

89. *Id.* at 24, 314 S.E.2d at 149.

90. *Id.* (citing Petroleum Trans., Inc. v. Public Serv. Comm'n, 255 S.C. 419, 179 S.E.2d 326 (1971); Chemical Leaman Tank Lines, Inc. v. Public Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972)).

91. Southern Bell Tel. and Tel. Co. v. Public Serv. Comm'n, 270 S.C. 590, 594, 244 S.E.2d 278, 280 (1978).

PSC's findings unless there is absolutely no evidence to support them or they are the result of caprice.

Michelle D. Brodie