STATE OF SOUTH CAROLINA **COUNTY OF OCONEE**	**IN THE COURT OF COMMON PLEAS**
City of Seneca, South Carolina, City of Westminster, South Carolina, and County of Oconee, South Carolina Plaintiffs, vs. Pioneer Rural Water District of Oconee and Anderson Counties, Defendant. Pioneer Rural Water District of Oconee and Anderson Counties, Third-Party Plaintiff, vs. Oconee Joint Regional Sewer Authority, Third-Party Defendant.	Case No.: 2017-CP-37-00187 **MEMORANDUM OF PIONEER IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

Pioneer Rural Water District ("Pioneer") was created to provide a reliable supply of safe drinking water to customers in its service area. It is authorized to draw water from any source (including water that may require treatment) and to operate a waterworks, with a broad grant of all powers necessary or incidental to supplying water to its customers. Treating water before it is delivered is a plain part of Pioneer's mandate.

While this lawsuit purports to be about Pioneer's statutory authority, the litigation is a thinly veiled attempt by Plaintiffs to force Defendant Pioneer to continue to be Plaintiffs' captive customer, purchasing water from them at whatever rates they decide to set. Neither the statute

creating Pioneer nor the preliminary injunction rule exists to guarantee these Plaintiffs a permanent stream of profits. Because Plaintiffs have known about Pioneer's plans for years and failed to raise any objection, and because Plaintiffs have otherwise utterly failed to satisfied the high standard for a preliminary injunction, the motion for preliminary injunction should be denied.

I. Summary of Argument

A preliminary injunction is an extraordinary equitable remedy, available only under narrow circumstances where necessary to preserve the *status quo ante*. Plaintiffs do not satisfy any of the requirements for a preliminary injunction.

Pioneer is a special purpose district formed by statute to deliver clean and economical water to its customers. Pioneer's enabling act, S.C. Code Ann. § 6-13-210 *et seq.* (the "Act") provides that "[i]t shall be the purpose and function of [Pioneer] to acquire, construct and operate a waterworks system, utilizing therefor water from available sources, by purchase or otherwise." S.C. Code Ann. § 6-13-210. The statute also contains a broad general grant of authority, giving Pioneer "all the powers herein granted and all other powers that may be necessary or incidental in carrying out" its functions. The Act plainly allows Pioneer to obtain water from sources other than purchase from these Plaintiffs and, so, equally plainly allows Pioneer to treat that water before it delivers the water to customers.

For many years, Pioneer has purchased treated drinking water from Plaintiffs Seneca and Westminster. This has been a lucrative arrangement for those cities – so lucrative, in fact, that Pioneer determined in 2008 that it would be far better for Pioneer's customers to build its own treatment facility (the "Facility"). Pioneer has been moving gradually and publicly toward construction of the Facility since then. Despite having known of these plans for years, these

Plaintiffs are now asking the Court to preserve their profits and to step in and halt construction of the Facility in its tracks – at huge cost to Pioneer's customers. There are numerous reasons that Plaintiffs' motion for preliminary injunction must be denied:

- **Plaintiffs cannot show irreparable harm.** The only harm these Plaintiffs have alleged, or can allege, is a monetary damage – that Oconee County and Seneca may be charged higher prices for water by Pioneer at some point in the future.
    - This is speculative, as it fails to consider the costs that Pioneer would incur if Plaintiffs were to prevail; Pioneer will have to upgrade its system to continue purchasing water from Plaintiffs.
    - Moreover, Plaintiffs will not incur these "damages" until some point in the future. At present, Plaintiffs can point to no harm at all.
    - This "harm" is the result of Plaintiffs' own inequitable delay. They have known about this plan for years and sat by. A plaintiff may not delay until harmed, and then invoke that harm in support of a remedy.
    - Plaintiffs' delay is also evidence that they were not overly concerned about the harm, and thus that it is not "irreparable."
- **Plaintiffs cannot show likelihood of success on the merits.** Plaintiffs argue that the Act does not give Pioneer the authority to construct a water treatment facility. This is incorrect, for numerous reasons.
    - The basic purpose of creating rural water districts would be subverted if those districts could not treat water to provide to their customers; this is what water districts do. The Act's broad grant of residual powers shows an obvious intent not to limit districts like Pioneer.

- The Act allows Pioneer to operate a "waterworks" and to obtain water "by purchase or otherwise." "Waterworks" includes a treatment facility, and the ability to obtain water other than by purchase necessarily means Pioneer must be able to treat water. The idea that Pioneer may only purchase and resell fully treated water appears nowhere in the statute, and makes no sense.
- Other portions of Pioneer's Act – such as its authority to maintain "dams and reservoirs," which would contain untreated water – make it clear that Pioneer may treat water.
- Numerous other water districts operating under the same language have treatment facilities.
- A legislative ally of Plaintiffs introduced a bill in 2012 to amend the statute to remove Pioneer's authority to construct a treatment facility. That amendment failed. In its place, a requirement was placed on Pioneer that it obtain and submit an audit for any expenditure of more than $1 million. Put another way, the Legislature prescribed the steps Pioneer was to take before adding this Facility. Pioneer has followed this statutory requirement to the letter, clearing the way for construction of the Facility.
- The Attorney General, at the request of that legislator, reviewed the Act in 2012 and issued an opinion that concluded that the statute allows construction of a treatment facility.

- **Plaintiffs have known about Pioneer's planned treatment facility for years.** It is very clear that Plaintiffs have known about Pioneer's plan since 2008. During that

entire time, they did nothing. On the other hand, Pioneer acted, committing to borrow funds and entering into a contract to construct the facility. An injunction is an equitable remedy, and it would be inequitable for these Plaintiffs, who have delayed to Pioneer's detriment, to obtain an injunction now.

- **Oconee County actually gave Pioneer the land for the treatment facility.** The inequity of the current request for an injunction is particularly clear in the case of Oconee County, which in 2014 ***gave Pioneer a site on which to place the treatment facility***. Then, at a 2016 press event announcing financing for the facility, Oconee's County Manager praised the Facility, saying, "it's obviously beneficial for customers within [Pioneer's] service territory to have a new and modern facility for water treatment," and "[t]he county also sees an upgrade in infrastructure to new technology as a benefit to our ability to recruit commercial and industrial development, as this allows us to highlight ample water capacity in the I-85 territory."[1] Oconee County cannot now claim with a straight face that it is entitled to have this facility enjoined.

- **Plaintiffs have an adequate remedy at law.** The Declaratory Judgment Act is designed to resolve disputes like this one. It has been invoked, and provides whatever remedy to which Plaintiffs may be entitled.

- **Pioneer is the party that would be harmed by an injunction.** Plaintiffs are suffering no current harm from construction of the Facility. Pioneer, on the other hand, would be drastically harmed by entry of a preliminary injunction. Pioneer's contractor has estimated that the cost to suspend construction on the Facility for 90 days would be

[1] A copy of this article quoting Mr. Moulder is attached as Exhibit K to the Pioneer Answer and Counterclaim.

approximately $2.721 million. In addition, Pioneer has secured a bridge loan and federal funding for its treatment facility; an injunction could endanger those sources of funds. The balance of harms weighs strongly against an injunction. And if the Court were to enter an injunction, it should require a substantial bond to protect Pioneer.

Pioneer has already started work on its Facility and has spent over $6 million. An injunction now would only add to the costs. It is too late for these Plaintiffs, who have known of the planned Facility for years, to seek "emergency relief." Beyond this, Pioneer's authority to construct such a Facility is clear. There is no basis for entry of a preliminary injunction.

II. Relevant Facts

Along with this memorandum, Pioneer is filing the affidavits of Terry L. Pruitt, Michael Odom, and Josh Fowler.

A. Pioneer's Structure and Purpose

Pioneer is a special purpose, rural water district, created by statute in 1965. *See* S.C. Code § 6-13-210 *et seq.* Its sole mission and focus is to satisfy the water needs of approximately 7,000 customers in southern Oconee County and Northwestern Anderson County. Its approximately 130 square mile service area is bounded on the north by Westminster and Seneca, on the east and south by Coneross Creek and Lake Hartwell, Choestra Creek, and Highway 20.

Because Pioneer is a political subdivision subject to the Freedom of Information Act ("FOIA"), all actions of its Board are taken in public meetings, and Pioneer is obligated to provide copies of documents subject to FOIA upon request. Accordingly, the following events are all matters of public record; many of them involved noticed public meetings. To the extent

Plaintiffs did not have actual knowledge of these events (which, in general, they did), they clearly had constructive knowledge.

B. Seneca and Westminster Raise Prices

Pioneer, which provides water to much of southern Oconee County, has purchased water on the wholesale market to meet the needs of its customers since its inception in 1965. Its main suppliers have been Westminster, from which it began purchasing water in 1965, and Seneca, from which it has purchased water since 1987. Currently, about 60% of Pioneer's water is supplied from the waterworks system of Seneca, and about 40% is supplied from the waterworks system of Westminster. Affidavit of Terry L. Pruitt ("Pruitt Aff.") ¶ 5.

Pioneer's purchases of water have been made pursuant to negotiated contracts with those cities. The cities have no statutory or other right to sell water to Pioneer. There is no allegation that Pioneer has breached any such contract.

Because Pioneer purchases its water from Seneca and Westminster, it is subject to price increases whenever either decides to raise prices. *Id.* ¶ 6. There is no regulation of the prices charged Pioneer by these cities.

Pioneer's customers have been subjected to substantial increases in water prices charged by Seneca and Westminster between 2008 and 2012, including an indefensible 174 percent overall rate increase by Westminster. Winchester imposed a 30% increase (from $1.81 to $2.36 per thousand gallons) in June 2012 alone. The average annual increase in water prices charged to Pioneer by Seneca and Westminster has been 4.55 percent for the period between 2003 and 2017. *Id.* ¶ 7.

C. Pioneer Begins the Slow and Public Process of Planning the Facility

To avoid exposure to arbitrary price increases by Seneca and Westminster, in or around 2007 Pioneer began exploring alternative means for providing water to its customers at fair and reasonable prices. Pioneer engaged an engineering firm, Design South Professionals, Inc. ("Design South"), to conduct a feasibility study for the construction of a water treatment facility to be added to the Pioneer waterworks system. Pioneer received a feasibility study from Design South on or about October 31, 2007. The results of the feasibility student were made known to Westminster and Seneca around that time. *Id.* ¶¶ 9, 11.

With the feasibility study in hand, Pioneer commissioned plans to construct the Facility. The plan to build the Facility has been the subject of public meetings since 2008, including requests for public input by the Army Corps of Engineers. *Id.* ¶ 10.

Pioneer originally planned to build the Facility in Fair Play, South Carolina. On or about December 21, 2010, Pioneer purchased approximately fourteen acres of property located on Tugaloo Drive in Fair Play for the Facility. *Id.* ¶ 12. On or about December 22, 2010, Pioneer purchased an additional lot in the Edgewater subdivision in Fair Play for a pump station for the Facility. *Id.* ¶ 13.

D. Oconee County Provides Land for, and Promotes, the Facility

The original plan to build the Facility in Fair Play, South Carolina met with resistance from local residents. *Id.* ¶ 14. This opposition was public. In response to the opposition – ***and in obvious promotion of the Facility*** – Plaintiff Oconee County offered Pioneer a 25-acre tract of land, in the Golden Corner Commerce Park (the "Commerce Park") in southern Oconee County for $132,000, as an alternate location for the Facility. *Id.* ¶ 19.

Pioneer then commissioned Design South to conduct a new feasibility study, to determine whether it could relocate the Facility to the Commerce Park. *Id.* ¶ 14. After this study, Design South prepared plans and specifications for the relocated Facility, and submitted those plans and specifications as part of a construction permit application to the South Carolina Department of Health and Environmental Control ("DHEC") for review and approval. DHEC issued its original construction permit for the Facility around July 2012. *Id.* ¶ 16.

In September of 2012, Pioneer's Board of Directors voted unanimously in a public meeting to accept the County's offer for the sale of property in Commerce Park. *Id.* ¶ 20.

While these events were unfolding, in about June 2012, the Act was amended to require that, before Pioneer invested in any new facility or took other action that obligated Pioneer for one million dollars or more, Pioneer had to provide an independent audit by an accounting firm, including the potential impact of the action on Pioneer's ratepayers, and present the audit at a public meeting. The audit was required to be verified by the South Carolina Office of Regulatory Staff ("ORS"). S.C. Code Ann. §§ 6-13-240(B), (C). For purposes of this litigation, it is noteworthy that this audit requirement was added to the Act in lieu of a proposed amendment that would have forbidden construction of a water treatment facility. Thus, the effect of this amendment was to establish a particular standard – which Pioneer has met – for major projects like the one at issue here.

In compliance with this requirement, Pioneer engaged a Seneca accounting firm to conduct the independent audit concerning the Facility, and that audit was presented at a public meeting in March 2013. *Id.* ¶ 21. That independent audit confirmed that Pioneer would save nearly $6 million in future water costs by adding a water treatment facility to its waterworks that would draw water out of Lake Hartwell, rather than continuing to purchase water from Seneca

and Westminster. *Id.* ¶ 22. By a report issued on April 10, 2013, the independent audit concerning the Facility was verified by ORS. *Id.* ¶ 23.

In or about June 2013, Oconee County informed Pioneer that Oconee County wished to sell the property in the Commerce Park, previously earmarked for the Facility, to another user. Accordingly, in or about July of 2014, Oconee County – with full knowledge the property would be used for a water treatment facility – offered to donate to Pioneer an approximately 70-acre parcel adjoining the Commerce Park on the other side of Cleveland Creek, for use in constructing the Facility. *Id.* ¶ 26.

It is Pioneer's understanding that Oconee made the decision not to charge for this property because the property was otherwise unmarketable because of the location of wetlands on the property, and because Oconee County understood that its change of position regarding the Commerce Park property would cause Pioneer to invest substantial time and money in revising its plans to relocate the Facility. *Id.* ¶ 27.

Pioneer accepted Oconee County's offer to donate the 70-acre parcel and, once again, invested money and time in revising plans so that it could relocate its Facility to suit the needs of others, including Oconee County. At a public meeting in August 2014, Oconee County Council voted unanimously to approve the conveyance of the property to Pioneer, and the deal was finalized by unanimous vote at the Oconee County Council meeting of September 16, 2014. *Id.* ¶ 28.

E. Pioneer Obtains Financing and Commences Construction

After Oconee County provided Pioneer with a new site in 2014 upon which to build the Facility, Design South submitted revised site design plans and specifications to DHEC based on the new location, along with a revised construction permit application. On or about December

10, 2015, DHEC approved the construction permit based on the revised site design plans and specifications. *Id.* ¶ 30.

During this period, Pioneer was seeking long-term funding for the Facility through the U.S. Department of Agriculture's Rural Development Agency ("USDA"). Communications with USDA had continued over several years, with the loan actually closing in February 2017. At that time, Pioneer closed a $19,402,000 Bond Anticipation Note with CoBank, ACB ("CoBank"). The CoBank loan will be drawn down to finance construction of the Facility. At the end of the term of that loan (scheduled to be no later than December 31, 2019), the USDA will succeed CoBank as lender on the project, repaying advances made by CoBank and purchasing bonds to be issued by Pioneer.

Promptly after closing, construction of the Facility commenced. Harper Corporation, the prime contractor on the project, has already made two draws in the combined amount of approximately $3.4 million. This amount has been drawn from the CoBank commitment and paid to Harper Corporation. *Id.* ¶ 50.

The Facility is currently projected to be completed in approximately August of 2018. *Id.* ¶ 37.

III. Plaintiffs Are Not Entitled to a Preliminary Injunction

Our courts have frequently emphasized that an injunction is a "drastic" remedy that must be applied "with caution." *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *see also Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004) ("An injunction is a drastic remedy . . . ").

The bar for a plaintiff seeking an injunction is correspondingly high: a plaintiff must establish that "(1) he would suffer irreparable harm if the injunction is not granted; (2) he will

likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law." *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 508 (Ct. App. 2009) (citing *Scratch Golf Co.*, 361 S.C. at 121, 603 S.E.2d at 908)); *see also Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). Plaintiffs cannot show any of the required elements.

A. Plaintiffs Cannot Show Irreparable Harm

The only harm alleged by Plaintiffs from completion of the Facility is the potential increase in rates to be charged Seneca and Oconee County at some point in the future. While such a commercial price increase would not constitute cognizable "damages" at all, it certainly is not "irreparable harm" that would support injunctive relief.

First, neither Seneca nor Oconee County is suffering any price increase at present. So there is no present harm at all.

Moreover – and critically – the harm they invoke is based on speculation as to what may happen in the future. Plaintiffs appear to assume that Pioneer would not have to make infrastructure changes even if it continued to purchase water. That assumption is not true, as Pioneer will require system upgrades either way. In short, Plaintiffs' alleged harm is a speculative projection of what might happen in the future. Parties who are suffering no harm cannot show "irreparable harm." *See, Denman v. City of Columbia*, 387 S.C. 131, 141, 691 S.E.2d 465, 470 (2010) (speculative harm insufficient to support injunctive relief); *see generally Momeier v. John McAlister, Inc.*, 203 S.C. 353, 27 S.E.2d 504, 521 (1943) (to support injunction, "such damage must be real and not merely speculative and imaginary").

Next, the harm that Plaintiffs speculate may befall them is entirely a product of their own inequitable delay. (The plans for the Facility have been public, and known to Plaintiffs, for

years). As such, this "harm" cannot be invoked to support an equitable remedy. *See Quince Orchard Valley Citizens Ass'n, Inc., v. Hodel*, 872 F.2d 75, 79 (4th Cir. 1989); *Mooreforce, Inc. v. U.S. Dep't of Transp*., 243 F. Supp. 2d 425, 434–35 (M.D.N.C. 2003).

In *Mooreforce*, the plaintiff knew of a Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD"), and knew, or should have known, it had a legal right to challenge the FEIS six years prior to bringing its motion for preliminary injunction. *Id*. The court ultimately determined that any irreparable harm the plaintiff faced was a consequence of its own procrastination and such procrastination could not support the conclusion that the harms faced by plaintiff significantly outweigh those the defendants would suffer. *Id*. at 435-36.

Similarly, in *Quince*, the plaintiffs sought to enjoin construction of a new four lane road, the proposed Great Seneca Highway, through the Seneca State Park. 872 F.2d at 76. The plaintiffs contended that officials carrying out the project failed to comply with environmental laws that protected the park. *Id*. Despite being aware of the alleged violations, the plaintiffs delayed bringing an action for a preliminary injunction until nine months after all necessary federal approvals for the project had been granted and six months after a necessary wetlands construction permit had been granted. *Id*. at 79. The Fourth Circuit concluded that much of the plaintiffs' potential harm was a product of their own delay in pursuing the preliminary injunction and that this barred injunctive relief. *Id*. In reaching this conclusion, the Fourth Circuit reasoned that "equity demands that those who would challenge the legal sufficiency of administrative decisions concerning time sensitive public construction projects do so with haste and dispatch. To require any less could well result in costly disruptions of ongoing public planning and construction." *Id*. The Fourth Circuit quoted the district court's unpublished opinion with approval:

> All the facts that the Plaintiffs needed to bring [for an action for preliminary injunction] were known to them at least six months before they requested preliminary relief . . . . If Plaintiffs had proceeded with this action expeditiously when the record was complete six months ago, it would not have been necessary for Plaintiffs to make their present request for extraordinary injunctive relief. . . . Thus, the Plaintiffs could have received a trial on the merits long before the awarding of the construction contract.

Id.

The same is true here. These Plaintiffs could have acted years ago, but did not. Apart from providing evidence that Plaintiffs were not so worried about the Facility as to make any harms "irreparable," this inequitable delay bars equitable relief.[2] Had Plaintiffs sought a declaration concerning the statute years ago, they could have avoided the harms they now claim to face.

It is also important to note that there is no harm here at all. Plaintiffs ignore the projections in the studies supporting the Facility demonstrating that in the long run, Pioneer's customers will be better off – that is, they will pay lower prices – once the Facility is completed and paid off. Perversely, Plaintiffs are pointing to their status as customers of Pioneer to seek to enjoin a project that is expected to save Pioneer's customers millions of dollars. Pruitt Aff. ¶ 34.

Finally, we discuss below that a balance of the equities disfavors an injunction. Pioneer will be harmed much more by entry of an injunction than these Plaintiffs will be by denial of the injunction.

[2] In this regard, it is noteworthy that its initial feasibility study was done, Pioneer approached both the City of Seneca and the City of Westminster in an effort to negotiate lower water rates from them, hoping to avoid the need to build the Facility at all. Pruitt Aff. ¶ 11. Pioneer's effort was ignored.

At most, Plaintiffs have alleged (without evidence) that Oconee County and Seneca may face higher prices at some point in the future. This is not enough to support a preliminary injunction.

B. Issuing a Preliminary Injunction at the Request of These Plaintiffs Would Be Inequitable

A preliminary injunction is an equitable remedy. Courts sitting in equity are charged with considering the equities of both sides, and must balance the two to determine what, if any, relief to give. *Straight v. Goss*, 383 S.C. 180, 206–07, 678 S.E.2d 443, 457–58 (Ct. App. 2009). Plaintiffs are barred by numerous equitable principles, including laches, estoppel, and unclean hands from obtaining an injunction.

Arceneaux v. Arrington, 284 S.C. 500, 327 S.E.2d 357 (Ct. App. 1985), a proceeding in equity to enforce a restrictive covenant on real property, is instructive. In *Arceneaux*, the plaintiffs waited over two years after they knew or should have known that a restrictive covenant was being violated to seek an injunction. *Id*. 284 S.C. at 503, 327 S.E.2d at 359. During their delay, they allowed defendant to incur the expense of erecting a metal building, without protest. *Id*. 284 S.C. at 502-03, 327 S.E.2d at 358-59. Given their two year delay and the injury plaintiffs allowed defendant to suffer, the court held that it would be inequitable to issue an injunction. *Id*. 284 S.C. at 503, 327 S.E.2d at 359.

Pioneer's plan to build the Facility has been a matter of public record for years, and these Plaintiffs have had specific knowledge of the plan for most or all of that period. Yet they sat by and did nothing until Pioneer had contracted, obtained financing, commenced construction, and spent millions of dollars.

Beyond this, Oconee County actively encouraged construction of the Facility. It donated land for the Facility and made strong statements in support of the Facility. Pioneer moved

forward in public and with the full knowledge of these Plaintiffs. They sat by and did nothing while Pioneer committed its funds.

The balance of potential harms weighs strongly against an injunction. The best information available to Pioneer is that it will suffer delay damages of approximately $2.721 million if forced to suspend construction of the Facility for even a 90-day period, and likely more if the contract is terminated completely. By contrast, as we noted at the outset, these Plaintiffs will face no harm at all until the Facility is operating, which will happen in late 2018 at the earliest. It is appropriate for the Court to consider these relative harms in deciding whether to enter an injunction. *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc*., 387 S.C. 583, 587, 694 S.E.2d 15, 17 (2010); *County of Richland v. Simpkins*, 348 S.C. 664, 560 S.E.2d 902 (Ct. App. 2002 ("court of equity must 'balance the equities' between the parties in determining what if any relief to give. The equities on both sides must be taken into account.").

Indeed, there is more than a small irony here, which weighs against the injunction. Because an injunction now will cause delay and demobilization costs, it would mean that the eventual water price to customers – including these Plaintiffs – will be greater if an injunction issues. Pruitt Aff. ¶ 49. Plaintiffs' inequitable delay is more than a procedural point. It has very real effects that make an injunction untenable.

These Plaintiffs cannot now, in equity or good conscience, ask a Court of equity to intervene on their behalf. There was ample opportunity for them to make such a request before Pioneer was so fully committed to this Facility.

C. Plaintiffs Are Not Likely to Succeed on the Merits

In order to obtain a preliminary injunction, a plaintiff must show that it is more likely than not to succeed on the merits of its claims. *Hook Point LLC v. Branch Banking & Trust Co.*,

397 S.C. 507, 517, 725 S.E.2d 681, 686 (2012). These Plaintiffs cannot clear this hurdle. Their wishful and careless interpretation of Pioneer's enabling act ignores the purpose, the language, and the actual practice under that Act.

Pioneer, like numerous other rural water districts in South Carolina, operates under an enabling act, codified at S.C. Code §§ 6-13-210 *et seq*. (the "Act"). While several sections of the Act have a bearing on this matter, the primary provision creating and empowering Pioneer provides:

> There is hereby created a body corporate and politic of perpetual succession to be known as the Pioneer Rural Water District of Oconee and Anderson Counties (hereinafter called the district). ***It shall be the purpose and function of the district to acquire, construct and operate a waterworks system, utilizing therefor water from available sources, by purchase or otherwise***, at such convenient points as the district shall select to provide a flow of water through pipes to the areas described in Section 6-13-220, and to such other domestic, commercial or industrial users who can be conveniently and economically served within or without the service area as herein provided. To this end the district shall perform the functions prescribed by this article, and shall be vested with the powers herein granted and ***all other powers that may be necessary or incidental in carrying out the functions herein prescribed and exercising the powers herein granted***. The water mains, distribution facilities, tanks, their several component parts, and all apparatus, equipment and property incident thereto or used or useful in the operation thereof and all additions, improvements, extensions and enlargements to any of them shall be referred to in this article as the system.

S.C. Code § 6-13-230 (emphases added).

The Act plainly contemplates that a rural water district like Pioneer (and there are many more districts operating under essentially identical language) may include treatment facilities within its "waterworks system." If Pioneer's only power were to buy and distribute water that had already been treated, the Act would say so, and it would look very different. This is not what the Act says, and moreover such a narrow interpretation would undermine the very purpose of the Act.

1. *The Purpose of the Act Is To Provide Water to Underserved Areas. This Requires the Power to Treat That Water.*

Enabling acts like the one at issue here are to be construed broadly to carry out their purposes. A construction that would interfere with a statutory purpose should be rejected. "All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 273, 789 S.E.2d 756, 760 (Ct. App. 2016), *reh'g denied* (Aug. 22, 2016) (internal citation omitted); *see also Chem-Nuclear Sys., LLC*, 374 S.C. at 205, 648 S.E.2d at 603 (finding the language of a statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose); *Roche v. Young Bros., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) (holding "[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

This means that an interpretation must avoid absurd results. *See Prot. & Advocacy for People with Disabilities, Inc. v. Buscemi*, 417 S.C. 267, 273-274, 789 S.E.2d 756, 760 (Ct. App. 2016), *reh'g denied* (Aug. 22, 2016) (citing *Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998)); *see also City of Charleston, S.C. v. Hotels.com, LP*, 586 F. Supp. 2d 538, 543 (D.S.C. 2008).

Rural water districts like Pioneer were created to ensure a supply of clean water to customers in areas not served by existing utilities. Affidavit of Josh Fowler ("Fowler Aff.") ¶ 4. It would be utterly nonsensical to create such water districts, but to deprive them of the ability to treat water before delivering it. Pioneer exists to deliver clean water to customers; this has to include the power to treat water before delivering it.

Indeed, the Act demonstrates the Legislative intention to give broad powers to Pioneer. The Act vests Pioneer "with the powers herein granted ***and all other powers that may be necessary or incidental*** in carrying out the functions herein prescribed." S.C. Code § 6-13-210 (emphasis added). This is the sort of language that a legislature uses when its intention is to make a broad and sweeping grant of authority; it says to do whatever is appropriate to carry out the function of delivering clean water.

It is important to step back from the language of the Act and view the Act's purpose. Pioneer submits that it is impossible to conceive of a legislative purpose that would be served by creating a network of rural water districts that have no ability to treat water, but instead are limited in their function to buying and re-delivering already treated water. Plaintiffs' interpretation of the Act is absurd when examined in context, and should be rejected.

2. The Act Empowers Pioneer to Construct a Waterworks System. This Includes Treatment Facilities.

Although Plaintiffs are asking this Court to interpret Pioneer's authority, they have completely ignored the key operative language of the Act. "***It shall be the purpose and function of the district to acquire, construct and operate a waterworks system, utilizing therefor water from available sources, by purchase or otherwise . . . .***" S.C. Code § 6-13-230 (emphasis added). The Legislature authorized Pioneer to construct and operate a "waterworks system." It is thus critical to understand what is meant by the term "waterworks system."

The Act does not define "waterworks." Accordingly, the Court should look to standard definitions of the term including, in particular, uses of the term by practitioners in the relevant field. *See, generally, FCC v. AT & T Inc.*, 562 U.S. 397, 397, 131 S. Ct. 1177, 1178, 179 L. Ed. 2d 132 (2011) ("When a statute does not define a term, the Court typically give[s] the phrase its ordinary meaning." (internal citations omitted)); *Hughes v. W. Carolina Reg'l Sewer Auth.*, 386

S.C. 641, 646, 689 S.E.2d 638, 641 (Ct. App. 2010) (same); *see also Gulf Oil Corp. v. S.C. Tax Comm'n*, 248 S.C. 267, 270, 149 S.E.2d 642, 643 (1966) (because the relevant statute does not define a specific term –"paid-in surplus" –the court must look to its common use in the relevant field –corporate accounting); *Miller Constr. Co., LLC v. PC Constr. of Greenwood, Inc*., 418 S.C. 186, 204, 791 S.E.2d 321, 331 (Ct. App. 2016) (if a term is not defined in a statute, the court must look to the common definition of the term, including dictionaries). All of these sources point plainly and unanimously to the conclusion that "waterworks" includes a treatment facility.

Pioneer has submitted the affidavit of Josh Fowler, an expert in the field of water engineering. Mr. Fowler states that in his professional experience, the term "waterworks" is commonly and consistently used to include water treatment facilities. Fowler Aff. ¶ 6. Mr. Fowler's affidavit points to numerous other sources that include treatment within the meaning of "waterworks:"

- The American Water Works Association describes itself as "the largest nonprofit scientific and educational association dedicated to managing ***and treating*** water." (Emphasis added.) Other definitions of "waterworks" include:
- "the system of reservoirs, channels, mains, and pumping ***and purifying equipment*** by which a water supply is obtained and distributed (as to a city)." *Merriam-Webster.com*, Merriam-Webster (accessed: April 28, 2017) (emphasis added);
- "a system of building and pipes in which a public supply of water is stored ***and cleaned*** and from which it is sent out." *Cambridge Academic Content Dictionary*, Cambridge University Press (accessed: April 28, 2017) (emphasis added);
- "a complete system of reservoirs, pipelines, conduits, etc., by which water is ***collected, purified***, stored, and pumped to urban users…. A pumping station or ***a purifying station*** of such a system." *Dictionary.com Unabridged.* Random House, Inc. (accessed: April 28, 2017) (emphasis added).

Fowler Aff. ¶ 7.

Statutes in other states that define the term routinely include treatment equipment and facilities in the definition:

- 70 Ill. Comp. Stat. Ann. 3705/1, authorizing the creation of public water districts, defines water works properties: "The words 'waterworks properties' as used in this Act shall mean and include any or all of the following: Wells, springs, streams or other source of water supply, *pumping equipment, treatment or purification plants*, distribution mains, cisterns, reservoirs, necessary equipment for fire protection and other equipment, and lands, rights of way and easements necessary for the proper development and distribution of a supply of water for the use of said area and the inhabitants thereof for compensation . . . ." (emphasis added).

- Mich. Comp. Laws Ann. § 325.1004, Sec.4 (2): "Upon receipt of the plans and specifications for a proposed waterworks system, the department shall evaluate the adequacy of the proposed system to protect the public health by supplying *water meeting the state drinking water standards . . . .*" (emphasis added).

- Neb. Rev. Stat. Ann. § 18-2418 (West): "Waterworks project shall mean any plant, works, system, facilities, and real and personal property of any nature whatsoever, together with all parts thereof and appurtenances thereto, or any interest therein or right to capacity thereof, used or useful in the supplying, transporting, conveying, collection, distribution, storing, *purification, or treatment of water."* (emphasis added).

- Ark. Code Ann. § 14-234-201(2) provides: "'Waterworks system' means and includes a waterworks system in its entirety, or any integral part thereof, including mains, hydrants, meters, valves, standpipes, storage tanks, pumping tanks, intakes, wells, impounding reservoirs, or *purification plants*." (emphasis added).

Pioneer's authority to treat water is reinforced by the remainder of the sentence from the Act quoted above. Pioneer is directed to utilize "water from available sources, by purchase or otherwise." Here again, Plaintiffs' proposed interpretation simply ignores key language, and imagines instead language that is not there. Pioneer is authorized to obtain water by "purchase ***or otherwise***." If Pioneer is not purchasing the water, the alternative is to draw it from sources such as wells, lakes, or reservoirs. And such water must be treated before it is given to customers to drink. *See* Fowler Aff. ¶ 6 ("Raw water obtained from any water supply in South Carolina must first be treated before it can be distributed for use and consumption."). Thus, the power to draw water from sources other than purchase necessarily includes the power to treat that water.

Conversely, not all purchased water is necessarily treated and ready for consumption. Thus, even if the Act read as Plaintiffs wish, and allowed Pioneer only to purchase water, this would not mean treatment is not part of a waterworks. There is simply nothing in the Act that prevents Pioneer from treating water before it provides that water to its customers. Because treatment is a key aspect of a waterworks system, it is included within Pioneer's powers.

In light of this clear intent, Plaintiffs' suggestion that the few items referred to in the final sentence of § 6-13-210 (water mains, distribution facilities, tanks . . . and all apparatus, equipment and property incident thereto or used or useful in the operation thereof and all additions, improvements, extensions and enlargements to any of them . . .") should be read narrowly as a complete inventory of the only items of property that Pioneer may own, and thus as placing an implicit limit on Pioneer's choices of how to deliver water, is obviously wrong. There are at least three powerful reasons that Plaintiffs' view of the statute is strained and incorrect:

First, on its face this language does not purport to place a limit on the types of property equipment Pioneer may own and operate. In the absence of clear legislative intent, this general and imprecise list should not be read to limit the clear language of purpose and power set forth earlier.

Second, this list is obviously too narrow to constitute an inventory of every sort of property and equipment needed to operate a water district. To name but a few examples of items not in the list, which Pioneer and every other water district must have, a district would need hydrants, truck filling stations, equipment used in laying and maintaining lines, meters, administrative offices, billing equipment, communications equipment, trucks and other vehicles.

This short list – if read the way Plaintiffs suggest – cannot be treated as placing hard limits on what a water district may do.

Third, in actuality, this list reinforces the broad grant of authority intended by the Legislature. It refers not merely to the few items specifically enumerated, but also to "all apparatus, equipment and property . . . useful in the operation thereof and all additions, improvements, extensions and enlargements to any of them." This is not language of limitation; it is the Legislature painting with a broad brush to give Pioneer and other districts the power they need to carry out their mandate of delivering water to customers.

Plaintiffs do not even attempt to deal with the key elements of the Act that define Pioneer's power and mission. Plaintiffs offer no meaning for the term "waterworks;" they fail to deal with the clear implications of Pioneer's full and absolute authority to obtain water by means other than purchase. Plaintiffs' wishful and selective reading of the Act arises solely from their desire to keep Pioneer as a captive and profitable customer, and not from the language of the Act.

3. Other Provisions of the Act Support the Conclusion that Pioneer May Operate a Treatment Facility.

Other aspects of the Act also point plainly to Pioneer's authority to treat water. Section 6-13-240(A)(7) allows Pioneer to build and operate dams and reservoirs. This would be a useless power if Pioneer could not treat the water contained by these structures before delivering it to customers.

Section 6-13-290 authorizes Oconee and Anderson Counties and all public bodies operating "water distribution systems in Oconee and Anderson Counties" to "buy water from [Pioneer] or sell water to [Pioneer]." This provision supports Pioneer's reading of the Act in two ways. First, if Pioneer's only power were to buy water from these entities, it would make no

sense to empower these entities to buy water from Pioneer. It would have nothing to sell them but their own water. Second, the reference in this section to water systems like those of Westminster and Seneca as "water distribution systems" illustrates that references to "distribution" in the Act do not have the narrow meaning suggested by these Plaintiffs. As used in the Act, a "distribution system" is a system for the delivery of clean water to customers. Because it would be pointless to distribute untreated water to end users, treatment is a necessary part of distribution.[3]

Section 6-13-240(A)(24) is also relevant. There, the Legislature authorized Pioneer to "construct, operate, or maintain sewer lines;" however, the provision goes on to state that this authority "does not give the district the power to construct or operate a sewerage treatment facility." When the Legislature intends to limit a power, it knows how to express this intention. *See Bowles v. Bradley*, 319 S.C. 377, 384, 461 S.E.2d 811, 815 (1995) (had Legislature wanted to limit a subsection of the Probate Code, it could have done so expressly); *see also Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) (same for criminal code).

4. Numerous Rural Water Districts Operating Under the Same Language Have Treatment Facilities

This litigation is not limited to Pioneer's authority. While the Act applies specifically to Pioneer, the South Carolina Code specifically establishes several other rural water districts. *See, e.g.*, S.C. Code §§ 6-13-410 *et seq.* (Saluda Valley); S.C. Code §§ 6-13-610 *et seq.* (Mitford); S.C. Code §§ 6-13-910 *et seq.* (Edgefield Valley). The Code also contains a general provision allowing the creation of rural water districts by petition and vote. S.C. Code §§ 6-13-10 *et seq.*

[3] Thus, the reference to "distribution facilities" in § 6-13-210 can be readily understood to include treatment.

All of these statutes contain the same basic language as the Pioneer language that is at issue here. And numerous rural water districts operate treatment facilities. Some of those districts that have or are constructing treatment facilities include:

- Beech Island Rural Community Water and Sewer District
- Easley Central Water District
- Gaston Rural Community Water District
- Georgetown County Water and Sewer District
- Gilbert-Summit Rural Water District
- Grand Strand Water and Sewer Authority
- Lancaster County Water and Sewer District
- Laurens County Water and Sewer Commission (water treatment facility planned)
- Startex-Jackson-Wellford-Duncan Water District
- Saluda County Water and Sewer Authority (water treatment facility under construction, using funds from United States Department of Agriculture Rural Development)
- Talatha Rural Community Water District
- Woodruff-Roebuck Water District

Foster Aff. ¶ 5.

Plainly, numerous districts (and lenders) operating under this language have concluded that the language allows a rural water district to treat water before providing it to its customers. This long and consistent history of interpretation is an important indication of how the Act should be read.

5. Pioneer Complied with the Special Provisions of the Act Concerning Large Investments.

As we have noted, Pioneer's plans for the Facility have been public for years. In 2012, an amendment to the Act was introduced that would have prohibited construction of a treatment facility by Pioneer. That language was not enacted. In its stead, S.C. Code §§ 6-13-240(B)-(D) were added to the Act. These new provisions required Pioneer, before "mak[ing] an investment in a facility or any other action that obligates the water district for one million dollars or more," to "provide for an independent audit" by an accountant including an impact analysis, to publicize that audit, and to submit the audit to the State Office of Regulatory Staff for verification of the audit's assumptions.

In other words, faced with a bill that would deprive Pioneer of all authority to construct the Facility, the Legislature instead imposed a requirement that the plan be demonstrated to be fiscally sound. The Legislature effectively said that if Pioneer wanted to construct this Facility, Pioneer would need to demonstrate its fiscal soundness. Pioneer did this. Twice. Pruitt Aff. ¶¶ 22-23, 34-35.

In short, the Act sets forth what Pioneer needed to do to build the Facility. Pioneer has thus satisfied the ***precise requirement*** of the Act for construction of the Facility. Given this, Plaintiffs' contention that the Act does not allow the Facility is plainly incorrect.

6. While Not Binding on This Court, the Attorney General's Opinions Interpreting the Act Support Pioneer.

Opponents of the Facility have twice asked the Attorney General for an opinion as to whether the Act allows Pioneer to construct the Facility. The Attorney General has twice responded that the absence of a reference to a treatment facility in the Act is not dispositive, and that the Act can be read to allow construction of such a facility.

Such opinions are not binding on the Court. *Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011). And Pioneer submits that these particular opinions are flawed in their failure to analyze the meaning of the term "waterworks," their failure to consider what Pioneer is supposed to do with water acquired by means other than purchase if it cannot treat that water, and in their overly narrow interpretation of what is involved in a distribution system.

The Attorney General opinions suggest that Pioneer's right to construct the Facility turns on whether such a facility is "necessary," and suggest further that treatment is necessary only if Pioneer cannot buy treated water. This second assumption has no basis in the Act. Nothing in the Act says that Pioneer must buy treated water if it is available. Instead, Pioneer has the clear statutory right to obtain ***water*** (it does not say "treated water") "from available sources, by purchase or otherwise." Since Pioneer is authorized to obtain water by purchase or otherwise, and since water taken from a lake or well must be treated before it can be consumed, treatment is "necessary" if Pioneer exercises its right to avail itself of sources other than purchase of treated water.

More generally, as we have shown, the provision of the Act giving Pioneer "all other powers that may be necessary or incidental" should not be given a crabbed reading. The Legislature's clear intention in this provision was to convey that Pioneer has broad powers to do things that are either necessary or incidental to its mission – not to leave to future litigation what is "necessary" and what is not. But even if the Court were to adopt this view, treating water plainly is "necessary;" Pioneer cannot deliver untreated water.

Moreover, as we discussed in detail above, the interpretation of the list of items in the Act as intended to provide a substantive limit on the powers available to Pioneer is mistaken. The

Attorney General opinion was given in a vacuum, without due regard to what water districts actually do, and so it is not an infallible guide to interpretation of the Act.

The Attorney General opinions are not binding on this Court, and their failure to take account of key elements of the Act make them flawed guides to interpretation. However, even under the Attorney General's approach, treatment of water obtained from sources other than purchase is "necessary," and so is authorized by the Act.

D. Plaintiffs Have an Adequate Remedy at Law

Plaintiffs have invoked the Declaratory Judgment Act to seek interpretation of the Act. This provides them with a remedy at law.

IV. Should this Court Nevertheless Decide to Grant Injunctive Relief, Plaintiffs Must Post a Bond of at least $2,721,000.

Pioneer strongly believes that injunctive relief should not issue because Plaintiffs will suffer no harm, have delayed inequitably, and are not likely to succeed on the merits. If, however, this Court nevertheless decides to grant Plaintiffs such relief, Pioneer respectfully requests the Court require Plaintiffs to post a bond of at least $2,721,000.00 in order to protect Pioneer's interests for the first 90 days of the pendency of the injunction.

Rule 65(c), S.C.R.C.P., mandates that in all but a few types of civil actions, a bond must be posted to secure the position of the enjoined party:

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, **no restraining order or temporary injunction shall issue except upon the giving of security by the applicant**, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(emphasis added).

In *Atwood Agency v. Black*, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007), the Supreme Court further explained that a mere nominal bond does not satisfy this requirement. In *Atwood*,

the Court reversed a circuit court's grant of a $250 bond where defendants were enjoined from certain business activities, reasoning that such a nominal figure "does not satisfy Rule 65(c) because it erroneously assumes the injunction is proper instead of providing an amount sufficient to protect appellants in the event the injunction is ultimately deemed improper." *Id.* Instead, the Court must require a bond that will cover the "amount of costs and damages incurred as a result of the temporary injunction." *Id.*

If construction of the Facility is enjoined for 90 days, Pioneer has been informed that it will be exposed to charges totaling just over $2,721,000 for the 90-day delay.[4] Pruitt Aff. ¶ 48. This number would rise if the delay is longer. Pioneer is also concerned that at some point, delay might interfere with its financing arrangements, as well as the availability of the prices obtained for construction. These additional harms may not be clear until later. Pioneer therefore respectfully requests that, if the Court does enter an injunction, that the Court require Plaintiffs to post a bond of at least $2,721,000 for the first 90 days of the injunction. If the injunction is in place longer than 90 days, Pioneer submits that it may be necessary for the Court to take additional evidence on harm, for the purpose of modifying the amount of the bond.

V. Conclusion

Plaintiffs are asking this Court to say that a water company does not have the authority to treat water before it delivers that water to its customers. This is nonsensical, and it has no basis in statute. In addition, Plaintiffs have no damages, and they surely have shown no irreparable harm. Finally, an injunction would be inequitable, and it would harm the very customers Plaintiffs purport to represent. These Plaintiffs have known about the planned Facility for many years, and their request now for an injunction should be denied.

[4] Pioneer bases these estimates on statements from Pioneer's contractor, Harper. Pioneer does not concede the calculation and reserves all its rights concerning any dispute over the amount.

Respectfully submitted,

WYCHE, P. A.

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