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.	Case No.: 2017-CP-37-00187 **PIONEER'S POST-TRIAL MEMORANDUM**

At the close of trial, the Court issued several rulings from the bench: (i) that Pioneer's Board has the discretion and authority under Pioneer's enabling legislation to construct and operate a water treatment facility as part of Pioneer's waterworks, and that no finding of "necessity" is required; (ii) that there are not two Facilities or projects at issue here; Pioneer is now constructing the Facility that it first began considering in 2007; (iii) that, with the exception of Westminster, the Plaintiffs have standing as ratepayers. The Court also confirmed with Plaintiffs that they do not contend that Pioneer was obligated to base the decision whether to construct the Facility solely on the financial outcome of the statutory Audit under S.C. Code Ann. § 6-13-240(B).

The Court then requested briefing on three specific points. We submit that it is clear:

1. This is an equitable action, subject to the (clearly established) defense of laches.

2. The minor discrepancies in notice concerning the public meeting to present the 2013 Audit will not support the sole relief sought by Plaintiffs – a permanent injunction.
3. The decision by the CPA who performed the 2016 Audit to use cost projections from the 2014 PER, rather than the construction contract figure from 2016, will not support a permanent injunction.

I. Plaintiffs Seek an Injunction, Which Is an Equitable Remedy

A. Whether a Declaratory Judgment Action Is Equitable or Legal Depends on the Remedy Sought

Plaintiffs' Amended Complaint contains a single cause of action, for "Declaratory Judgment – Injunction"), and seeks only one remedy, "enjoining Pioneer from undertaking to construct and operate" a water treatment facility. Am. Comp. ¶ 29. This was reiterated at trial. Plaintiffs did not ask for damages. They asked the Court to stop construction of the Facility.

Under clear authority, which Plaintiffs have acknowledged (*see infra*) a declaratory judgment action can be either legal or equitable, depending upon the nature of the remedy sought. *See Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002) (recognizing that "whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action" and that where the plaintiff's main purpose was to enjoin defendant, the matter was equitable); *see generally* 23 SOUTH CAROLINA JURISPRUDENCE, *Declaratory Judgments* § 7.

Here, the only remedy sought is an injunction. There is no such thing as a "non-equitable injunction," and so this matter is equitable. *See Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) ("Actions for injunctive relief are equitable in nature.").

We will not rehash here the ample evidence that Plaintiffs had both actual and constructive knowledge of Pioneer's public plan to construct a water treatment facility. Plaintiffs delayed inequitably in bringing their challenge to Pioneer's authority, and so their claim is barred by laches.

B. Plaintiffs Acknowledged in Argument to This Court That They Seek an Equitable Remedy

On May 4, 2017, Plaintiffs were before this Court seeking a preliminary injunction of the Facility. In their argument at that hearing, Plaintiffs repeatedly acknowledged that their only claim in this case is equitable:

> MR. ELLIS: . . . [T]here's not going to be a situation where we can win the case and Pioneer will have to pay us damages. There's not a remedy at law here. ***This is an equitable cause of action.*** . . . And, under the case law, with a declaratory judgment, a declaratory judgment is either legal or equitable, depending on what the case is about. ***This is a cause of action in equity. We don't have a legal remedy.***

Transcript of Argument on May 4, 2017, p. 16 (emphasis added; excerpt attached as Ex. A).

While Plaintiffs amended their Complaint after this argument, that amendment did not alter the remedy sought. The Amended Complaint still contained only a single cause of action, for declaratory judgment, and sought only a single remedy, a permanent injunction of the Facility. As Plaintiffs' counsel admitted, this is plainly an equitable matter, and Plaintiffs' inequitable delay in raising questions about the Facility and the Audit bars any relief.

C. Our Supreme Court Has Applied Laches in Cases Indistinguishable from This Matter

To the extent the Court is concerned about applying equitable principles in a challenge concerning the scope of statutory authority, the South Carolina Supreme Court has explicitly

done precisely that. There is clear governing authority that equitable defenses do not disappear in such a setting.

City of Myrtle Beach v. Richardson, 280 S.C. 167, 311 S.E.2d 922 (1984), involved a taxpayer challenge to the creation of a fire protection district.[1] The Supreme Court agreed with the plaintiff taxpayers that the authority to create the fire protection district had been repealed by implication. However, the Court also noted that the legal challenge was brought more than five years after creation of the disputed district. In light of this delay, the Court exercised its equitable authority and refused to abolish the district – even though the district was *ultra vires* – giving its ruling prospective effect only. In so holding, the Court observed that the matter was a declaratory judgment action seeking an injunction – exactly the posture of the instant case. "This Court is not blind to the equities in this matter, particularly since the plaintiffs have sought a Declaratory Judgment and injunctive relief. Justice will be served in this instance by a finding that the Home Rule Act repealed by implication the provisions of 1974 Act 1167, a finding which shall be limited in its operation to the establishment of fire protection systems commenced after the filing of this opinion." 280 S.C. at 173-74, 311 S.E.2d at 926.

Similarly, in *Chambers of South Carolina, Inc. v. County Council for Lee County*, 315 S.C. 418, 434 S.E.2d 279 (1993), the Supreme Court confronted a case in which a plaintiff sought to void a contract between a county council and a third party for operation of a landfill on the basis that the contract violated the South Carolina Procurement Code. The contract was entered into in February 1990, and the plaintiff protested the award of the contract twice – including one month after its award – before filing suit in October 1990. The trial court entered

[1] A similar challenge was brought by three cities. The Court held the cities lacked standing to bring their challenge. 280 S.C. at 169, 311 S.E.2d at 923.

summary judgment for the council, holding that the council had complied with or was exempt from the Procurement Code and that in the alternative the plaintiff's claim was barred by laches. Although the Supreme Court made clear it "disagreed with the trial judge on the merits," the Court was "constrained to agree" the plaintiff's claim was barred by laches. "[I]f a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position," the Court explained, "then equity will ordinarily refuse to enforce those rights." *Id.* at 421, 434 S.E.2d at 280. The delay between the award of the contract and the lawsuit was only seven months, but the Supreme Court, noting in passing that courts are "vested with wide discretion in determining what is an unreasonable delay," observed that the plaintiff "knew the [third party contractor] would be expending money and beginning its site approval with DHEC" and knew that "time was of the essence" in that the existing landfill was "nearing capacity" and obtaining a permit from DHEC would "typically take[] two years." *Id.* at 421, 434 S.E.2d at 281. "However meritorious [the plaintiff]'s claim would have been if timely made," the Court held, it was still barred. *Id.* at 421, 434 S.E.2d at 281.

The rationale of *City of Myrtle Beach* and *Chambers* is recognized in numerous federal decisions as well. *See Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel,* 872 F.2d 75, 80 (4th Cir. 1989) (in suit for declaratory and injunctive relief alleging failure to comply with environmental laws protecting park in constructing highway, injunction rejected for inequitable delay; "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."); *Mooreforce, Inc. v. U.S. Dep't of Transp.*, 243 F. Supp. 2d 425, 434–35

(M.D.N.C. 2003) (in an action seeking declaratory and injunctive relief, plaintiffs' lengthy delay in challenging Final Environmental Impact Statement barred injunctive relief); *Holmes v. Government of the Virgin Islands*, 370 F. Supp. 715, 721-23 (D.V.I. 1974) (taxpayer challenge under federal Declaratory Judgment Act to legislative act authorizing agreement between the government of the Virgin Islands and a third party for building oil refinery was barred by laches where plaintiffs waited nine months to bring suit, during which time the third party had acquired land and expended considerable funds for the refinery project).

City of Myrtle Beach and *Chambers* speak directly and authoritatively to the question posed by the Court. Plaintiffs bringing an action under the Declaratory Judgment Act and seeking equitable relief premised on an alleged absence of statutory authority or a defendant's alleged failure to comply with a statute cannot sleep on their rights. Such actions sound in equity, and laches may apply to bar relief. *See* 22A AM. JUR. 2D *Declaratory Judgments* § 183 ("[A]n action for a declaratory judgment should be subject to equitable defenses such as laches when the underlying cause of action on which it is based sounds in equity.") These Plaintiffs delayed for years, and their request for an injunction is accordingly barred.

II. The Imperfections in the Notice Concerning the 2013 Audit Do Not Invalidate That Audit or Justify an Injunction

Promptly after the Audit Requirements[2] took effect, Pioneer commissioned the 2013 Audit. The 2013 Audit was reviewed and its assumptions verified by ORS. Pioneer held the public meeting to discuss the 2013 Audit required by statute, and set out in good faith to provide notice of that meeting. Neither Plaintiffs, nor anyone else, suggested at the time that there was any flaw in that notice, and so Pioneer proceeded with the plans for the Facility – deliberately, in good faith, and in public.

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[2] "Audit Requirements" refers to the requirements of S.C. Code Ann. §§ 6-13-240(B)-(D).

It was only after Pioneer had signed the Harper construction contract that Pioneer's own attorneys (the same law firm that represented Pioneer continuously since the 2013 Audit was completed) identified two minor discrepancies in the 2013 notice – notice was published fourteen days before the meeting, rather than fifteen days, and the notice inserted in customer bills before the meeting was the wrong font size. Both of these discrepancies were, of course, visible on the face of the respective notices, and no issue concerning either was raised at the time. For a number of reasons, these minor imperfections, dating back to 2013, will not support an injunction of the Facility.

A. Laches

Plaintiffs' claims are entirely barred by laches; this general proposition holds for attacks on the 2013 Audit notice as well. The flaws in notice – publishing notice fourteen days before the meeting instead of fifteen, and using the wrong font size in a bill insertion – were immediately knowable on the face of those notices. They were thus discoverable ***by no later than March, 2013***. Plaintiffs failed to say anything. Plaintiffs' failure to raise these issues at the time prevents Plaintiffs from challenging the viability of the 2013 Audit, four years after those minor defects were on public view. *Cf. Mooreforce*, 243 F. Supp. 2d at 434-35 (plaintiffs' delay barred injunctive relief for alleged shortcomings in Final Environmental Impact Statement where plaintiffs had knowledge of shortcomings years earlier).

B. Pioneer Substantially Complied with the Notice Requirement

Pioneer substantially complied with the notice requirements for the 2013 Audit; the deviations that occurred four years ago are not substantive. Moreover, to the extent those discrepancies are a concern, they have been cured, and certainly do not justify enjoining the Facility permanently – the only remedy sought by Plaintiffs. Pioneer plainly acted in good faith

to comply with the Act. Pioneer's efforts constituted at least substantial compliance, and it would be wildly disproportionate to enjoin the Facility on the basis of these two minor issues.

Initially, it is important to note that Plaintiffs presented no evidence that they did not have actual notice of the plan to build the Facility or of the content of the Audit. Nor do they identify any harm from the nominal deficiencies in the 2013 notice. Notice was published, and it was inserted in customer bills.

Pioneer's good faith provision of notice complied with the Audit Requirements. South Carolina courts, like courts elsewhere, have recognized in similar cases that "substantial compliance" with requirements like these, especially when coupled with good faith, is sufficient to defeat a request for an injunction. *See, e.g., Quality Towing, Inc. v. City of Myrtle Beach,* 345 S.C. 156, 164–65, 547 S.E.2d 862, 866 (2001) (looking to clear language and express purpose of act to determine whether substantial compliance occurred); *Davis v. NationsCredit Fin. Servs. Corp.,* 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred); *Responsible Econ. Dev. v. Florence Consol. Mun. Planning Comm'n*, No. 2005-UP-584, 2005 WL 7084861, at *4 (S.C. Ct. App. Nov. 16, 2005) (substantial compliance is met if the purpose of the statute is achieved). The purpose of the notice requirement was to ensure the public was aware of the Audit; this purpose was met.

The Supreme Court's decision in *Kiawah Prop. Owners Grp. v. The Public Serv. Comm'n of S.C.*, 357 S.C. 232, 239–40, 593 S.E.2d 148, 152–53 (2004), is particularly instructive here. That case involved a regulation that provided that no utility may enter into any agreement that would impact the utility's ability to provide sewer service "without first submitting said contract in form to the [Public Service] Commission and obtaining approval of the Commission."

Despite this regulation, a regulated utility entered into two leases without prior Commission approval. Homeowners challenging inclusion of the leases in the utility's rates contended the leases were improper. Faced with this technical violation, the Supreme Court agreed with the Commission that the leases were a proper exercise of the utility's authority and thus would not be voided or ignored for failure to obtain the required approval before entry.

Another case closely on point, that rejected an attempt to stymie governmental action on the basis of purely technical defects, is the Court of Appeals' 2005 decision in *Responsible Economic Development v. Florence Consolidated Municipal Planning Commission*. There, the plaintiff sought to block a planned shopping center because the zoning ordinance required, for a zoning change, posting of a notice that included the nature of the change, as well as the time, date and place of the zoning hearing. Instead, the notice included only a large Z, a statement that "zoning change proposed," and a telephone number to call for more information. 2005 WL 7084861, at *3. The Court of Appeals rejected this challenge, noting that "American jurisprudence generally holds substantial compliance is met if ***the purpose of the statute is achieved***." *Id.* at *4 (emphasis added; citing cases). The Court went on to hold that the "objectives sought to be achieved by the notice requirements were, in fact, met. The purpose of the posting requirement is to put interested parties on notice of a public hearing." *Id.* at *4. This is consistent with the Supreme Court's decision in *Banister v. Lollis*, 183 S.C. 218, 190 S.E. 511 (1937), which denied a permanent injunction of a bond issue to raise funds for sewage system improvements, on the basis of certain "procedural deficiencies" in issuing the bonds. The Court held:

> There is no question of fraud or bad faith involved. There is no question of irregularity or illegality in the election. . . . No possible injury can come to the citizens of Honea Path. . . . Certainly manner and form should not be allowed to

> defeat the undoubted will of the people clearly expressed. This would be indeed subordinating and sacrificing the substance to the shadow. . . .

183 S.C. at 222-25, 190 S.E. at 512-14.

A final example comes from the federal environmental context, in a case challenging whether environmental cleanup costs were recoverable under CERCLA. In *Franklin County Convention Facilities Auth'y v. American Premier Underwriters, Inc.*, 240 F.3d 534 (6th Cir. 2001), Plaintiff claimed certain environmental response costs were not recoverable under CERCLA because of violations of public notice requirements. These claims were rejected by the Sixth Circuit: "[A]lthough CFS's compliance with the [federal] notice and comment requirements was not perfect, we conclude that any deviation was immaterial, insubstantial, and did not affect the overall quality of the cleanup. …CFA substantially complied with its obligation to provide meaningful notice and opportunity for comment concerning the remediation." *Id.* at 545-46.

The same principles apply here. Pioneer provided the notices. The meeting took place – over four years before the Complaint in this action was filed. The Audits have always been available to the public, including through FOIA. There is no evasion or bad faith here. Pioneer inadvertently missed the publication deadline for the 2013 Audit by a single day because the local newspaper takes a three-day hiatus, and used the wrong font size in bill insertions. There can be no question that Pioneer at least substantially complied with the notice requirements and the purpose of the Audit Requirements was achieved. These are not bases to enjoin a major public works project. Plaintiffs cannot identify any harm to themselves or anyone else from these minor matters.[3]

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[3] In assessing any claim of harm, it is important to recall that the Audit is informational only. There is no requirement in the Act that the public approve or vote on the Audit; nor is Pioneer's Board required to act in accordance with the outcome of the Audit.

C. Any Defect Was Cured, and Will Not Support a Permanent Injunction

Even if this Court were to conclude the 2013 notices were not in substantial compliance with the Act, an injunction still would not be proper.

As soon as Pioneer was apprised of discrepancies in the 2013 notice, it immediately commissioned the 2016 Audit to update the 2013 Audit, asked its legal counsel to supervise notice, and conducted a new meeting. It obtained an opinion letter from a separate law firm indicating that proceeding with the Facility would not violate the Act or any other statutory law or regulation of the state. Defense Trial Exhibit 60. If there was a material problem with the 2013 notice, Pioneer cured that problem in 2016. *See Watergate Imp. Associates v. Public Service Commission*, 326 A.2d 778, 786-87 (D.C. 1974) ("technical deficiencies" in original notice of increase in utility rates were cured when proceedings were reopened and petitioner was allowed to present its case; "the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure" (internal quotation marks omitted)).

In this regard, it is worth considering how this case would look if Pioneer had not performed the 2016 Audit, but had relied only on the 2013 Audit. We submit that – if in that case the Court had concluded that the 2013 notice was inadequate – the proper judicial response to that situation would be to direct Pioneer to re-perform whatever portions of the Audit Requirements the Court deemed to be insufficient. But Pioneer essentially did this, voluntarily, when it commissioned the 2016 Audit. Because, as this Court has already recognized, there was only one project and one Facility, there was only a single Audit requirement. That was met in 2013, and updated out of an abundance of caution in 2016.

The foregoing hypothetical reinforces the inequity of Plaintiffs' years-long delay. Plaintiffs could have raised concerns about the Audit format, notice, and contents in 2013. Instead they have waited, and now seek to attack the 2016 Audit in isolation, masking their

inaction behind the fact that Pioneer proactively and voluntarily updated the 2013 Audit. This divide-and-conquer strategy will not work; Pioneer's compliance must be viewed as a whole.

It bears repeating that Plaintiffs seek only one remedy – a permanent injunction. At trial, Plaintiffs were straightforward in acknowledging that what they want is to stop construction of the Facility, and it is transparent that they want to do so – ***not*** because they are concerned about increased water rates, inasmuch as their payments to Pioneer are insignificant – but solely to keep Pioneer as a captive customer of Seneca and Westminster. Plaintiffs do not care about the content of the Audits, or about notice. The Audit Requirements are for Plaintiffs only the potential means to the end of halting the Facility. Plaintiffs did not ask for, and do not want, a judicial decree that Pioneer must conduct another Audit or another public meeting. Yet, it would be wildly disproportionate, and inequitable, to base an injunction of the Facility on the notice discrepancies from 2013. It would make no sense to say that Pioneer – which otherwise has the authority to construct the Facility – may not do so because of an inadvertent technical oversight. Pioneer's provision of fourteen days' notice four years ago cannot in equity deprive it permanently of its ability to build the Facility, and thus will not support the only relief sought.

Pioneer acted reasonably and in good faith at all times to comply with the requirements of S.C. Code § 6-13-240(B)-(D). These actions were taken in public and were known to or knowable by the Plaintiffs. Pioneer never attempted to evade any such requirement. To the extent Pioneer made any omissions or errors in this process, any such omissions or errors were inadvertent and of no consequence to anyone or to the process. Moreover, Pioneer took affirmative steps to cure any problem that might have existed. Pioneer substantially complied with the notice requirements concerning the 2013 Audit – which was completed long before the Harper contract was signed.

III. The Use of the Construction Estimate from the 2014 PER Does Not Invalidate the 2016 Audit or Justify an Injunction

When Pioneer asked Jason White, the CPA who performed the 2013 Audit, to perform an update of the Audit in 2016, he was provided with available information concerning the expected cost of the Facility. This included the 2014 Preliminary Engineering Report (the "2014 PER") (Defense Trial Exhibit 38) and information on the actual cost set forth in the recently signed construction contract with Harper Corporation. Given the inevitable increases in construction costs over time, the cost in the Harper contract was about $17 million, or about $2 million more than the $15 million estimated cost for constructing the Facility contained in the earlier PER (from 2012), that Mr. White used as the basis for his 2013 Audit. (Defense Trial Exhibits 21 (2012 PER, at p. 5-5) & 22 (2013 Audit)).

Notably, however, the total estimated cost of the project as contained in the 2014 PER was $21.6 million, which was actually higher than the total project cost ($20,402,000.00) used as the basis for USDA's approval of financing for the Facility after the Harper contract was signed. (Defense Trial Exhibit 38, at p. 5-5; Defense Trial Exhibit 79).

The Court has asked whether the use of the 2014 PER, which included a projection of construction costs lower than the cost in the Harper contract, invalidates the Audit or justifies an injunction. It does not. Here again, there are several reasons, that fall roughly into three categories.

- First, as a factual matter, the decision to use the 2014 PER figures was a sound, rational, good-faith choice that did not have a material impact.
- Second, as a matter of legal analysis, the detailed contents of the Audits are not subject to judicial challenge. Absent bad faith or a complete failure even to conduct an Audit – neither of which is present here – there is no judicially manageable standard for assessing the contents of the Audits.

- Third, even if the Court were to conclude that the decision to use the cost figures from the 2014 PER was objectively erroneous, this would not support the remedy sought by Plaintiffs of a permanent injunction of the Facility.

A. On the Facts of This Case, the Decision to Use the 2014 PER Figures Was Sound, and It Had No Material Impact.

At trial, Jason White explained his decision to use the 2014 PER in projecting the cost of the Facility. He made this decision because he wanted to maintain consistency with the format and methodology of the previous Audit, and out of concern that mixing and matching numbers from different sources would lead to problems or inconsistencies. If Mr. White had undertaken to update one set of figures (*i.e.*, the most recent construction costs for the Facility, based on the 2016 Harper Contract), then in order to ensure consistency he would also have had to seek out and update all other cost estimates that he used, including the estimated costs of making the necessary capital improvements to the existing systems of Pioneer, Seneca, and Westminster that would allow Pioneer to continue with its "purchase water" option. Updating only one figure in the 2016 Audit without having a basis to update all others would have created a risk of inconsistencies and thus would have been unreasonable. As an accountant, he was not qualified to make updated estimates on his own, and the Audit Requirements do not in any way suggest that the accountant conducting the audit must hire engineering professionals to accomplish his work. Moreover, the Act does not require such constant updating; it plainly contemplates only a single Audit as of a single point in time. Every project is going to involve changing costs, and each such change does not require a revision of the Audit.

Accordingly – while different experts could offer different opinions about the best practice – there is no basis for a definitive ruling, as a matter of law, that Mr. White erred or violated the Act in deciding to use the numbers from the 2014 PER, since that set of figures represented the latest version of cost estimates that were updated for all of the options available

to Pioneer to obtain its water. The Audit Requirements are unique, there is no accepted model or practice surrounding them, and what he did was sound and reasonable.

Equally importantly, there is not a shred of evidence that Mr. White (or, more to the point, Pioneer) manipulated the process or tried to skew results. He followed a consistent and transparent procedure. He made a reasonable judgment concerning what figures to use, and the possibility of including different figures does not invalidate the Audit.

In this regard, it is important to recognize that the price in the Harper contract does not represent the final word concerning the total cost of the entire project. The total cost estimates contain other elements – some of which may go down in the future. There already has been a deductive change order (see Defense Trial Exhibit 58, reflecting a deductive change order in the amount of $77,790.70) and there may be other change orders to the Harper contract that reduce the original contract price. Each such change does not require an update of the Audit. It would be far too simplistic to treat the price in the Harper contract as definitive, or to say that the decision not to use that figure resulted in an understatement of total project cost of $2 million. That number, like the other numbers in the Audit, is still just part of a projection of what will happen in the future.

Even if the Court were inclined to find fault with Mr. White's decision, the fact in this particular case is that the decision did not have a material impact on the outcome of the 2016 Audit and was verified by ORS, as required. Both the 2013 Audit and the 2016 Audit demonstrated that constructing the Facility provided a more favorable financial outcome for Pioneer than continuing to purchase water from Seneca and Westminster. The only testimony at trial – from Jason White – concerning the impact increasing the projected construction cost in the 2016 Audit by $2 million was that such an increase would not alter this conclusion. Thus, even

if he had used the higher construction cost, the Facility would have projected to be preferable financially.

Beyond this, and as Plaintiffs acknowledged to the Court at the close of trial, there is no requirement in the Act that Pioneer adopt whatever action the Audit concludes is financially preferable. Thus, even if the use of a different cost factor would have had the effect of "flipping" the financial outcome, this still would not provide the basis to enjoin the Facility.

Indeed, in this case, Pioneer's Board did in fact consider important non-financial factors in making its decision to construct the Facility – including ensuring reliability of and control over its own water supply, and avoiding pricing uncertainty. Plaintiffs did not dispute that these are legitimate considerations. Those factors remain, whatever the "outcome" of the Audit. Even if the financial outcome of the Audit were changed, there would be no basis for a court ruling that Pioneer must halt the Facility. As we discuss in more detail below, Pioneer's Board is entitled to deference in its decision to construct the Facility. The Board had sound reasons for its exercise of discretion in deciding to construct the Facility. Even an error by the CPA in conducting the Audit would not justify interfering with that discretion.

B. There Is No Justiciable Standard for Determining Whether the Contents of the Audit Were "Adequate"

As one of Plaintiffs' experts rather memorably put it (and this is a paraphrase), "the only thing I can tell my clients with confidence about my projections is that they will be wrong." The Audits on the Facility were largely, if not entirely, exercises in predicting the future. For this reason, and for several other closely related reasons, the substance of the Audits is not justiciable. The Audits could be approached in numerous ways; while it is easy to critique Jason White's efforts with the benefit of hindsight, he was working with no statutory standard or history to guide him, and his decisions were reasonable.

Pioneer submits that the standard for judicial invalidation of an Audit like this one is accordingly high. In the absence of bad faith, or a complete failure to conduct the required Audit, a line-by-line challenge to the contents of an Audit such as the one made by these Plaintiffs should be rejected. The alternative would be an unworkable situation in which every Audit could be criticized by experts, and every project hobbled, with the benefit of hindsight. If this were allowed, the courts would have to be prepared for challenges to any Pioneer project costing $1 million or more that had less than unanimous support.

There Is No Statutory Standard Against Which to Measure the Audit. The Act contains only a few requirements, and Pioneer met them. Pioneer was to engage a CPA to review the potential impact of the Facility. That Audit was then to be sent to ORS for verification. Then the ***Board of Pioneer*** was to make a decision, based on its assessment of the best interest of Pioneer and its ratepayers. That is all the Act says. There is no room for competing engineers or ratemaking consultants to propose competing predictions of the future.

Thus, there is no statutory standard for measuring the Audit; and no requirement that the Audit reach a particular conclusion, or be approved by any group – including Pioneer's ratepayers. The Audit is an informational tool for the Board's use in exercising its discretion. Because it has no specified form and no required outcome, there is nothing about the content of the Audits that is subject to judicial review. *See Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 316 (4th Cir. 2008) ("judicial review is unavailable if a statute provides no judicially manageable standards . . . for judging how and when an agency should exercise its discretion" (internal quotations omitted)); *Montgomery Cty., Maryland v. Leavitt*, 445 F. Supp. 2d 505, 513–14 (D. Md. 2006) ("judicial review is also foreclosed where statutes are so broad that in a given case there is no law to apply or where the court could have

no meaningful standard against which to judge the agency's exercise of discretion" (internal quotations and citations omitted)).

The Act's lack of specificity concerning the content and format of the Audit is fatal to Plaintiffs' desire to complain about particulars contained in the Audits. There simply is no statutory standard that will allow such an attack. Certainly, experts can offer opinions about other ways to do the Audits; but these musings do not have force of law. *Cf. Webb v. Gorsuch*, 699 F.2d 157, 160 (4th. Cir. 1983) (noting in the administrative law context that "[w]hen there is conflicting expert opinion, it is for the administrative agency and not the courts to resolve the conflict"); *Mooreforce*, 243 F. Supp. 2d at 439 (allegation based on expert affidavit of erroneous projection in Final Environmental Impact Statement would not support overturning agency decision and demonstrated only "a difference in opinion" and "not a clear error in judgment"). The lack of specificity does not mean that the Facility can be derailed by any expert with a "better idea" of how to conduct the Audit; to the contrary, it means there is no judicially manageable standard here at all.

The Statute Refers Review of the Audit Solely to ORS. To the extent there is any test of the adequacy of the Audits, it is the review by ORS. The Act directs Pioneer to "submit" the Audit to ORS "to verify the audit's assumptions." All assumptions made by Jason White in his audits were clearly identified and specifically noted in the documents – nothing about the figures he used to complete his work was hidden. The question of verifying these assumptions is thus finally and definitively referred to ORS for resolution. The Legislature's decision to have the Audit verified by ORS precludes collateral attacks on the Audit. *Dema v. Tenet Physician Servs. – Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009) ("[w]here not expressly provided [by the statute in question], a private right of action may be created by implication

[only] if the legislation was enacted for the special benefit of the private party"; further, "[i]f the overall purpose of the statute is to aid society and the public in general, the statute is not enacted for the special benefit of a private party."); *Doe v. Bd. of Trustees, Richland Sch. Dist. Two*, No. 2015-UP-314, 2015 WL 3885922, at *1 (Ct. App. June 24, 2015) (where statute "does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party").

Pioneer Cannot Be Enjoined for an Error of Jason White or ORS. Plaintiffs are critical of Jason White's performance of the Audits and of ORS's review. Pioneer disagrees that either failed to carry out any obligation. The actions of both, however, are completely outside Pioneer's control. The Act specified that Pioneer must engage an "independent" CPA to conduct the Audit, and ORS is obviously independent as well. Thus, even if Jason White or ORS had made some misstep in connection with the Audits, that would not give Plaintiffs a cause of action against Pioneer.

If there were something wrong with that independent work, it would make no sense to say that ***Pioneer*** could be sued – and its project permanently enjoined – over that issue. Pioneer did not conduct the Audit, nor review and verify it. Plaintiffs' attacks on the Audits amount to allegations of malpractice concerning the work of a professional whom they did not engage, and on whose work they did not – could not – rely. *Cf. Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) ("an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of . . . his client"); *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 250 (2009) ("Legal principles concerning professional malpractice claims generally remain constant from one profession to another.").

The Audit Is Inherently a Prediction of the Future, and Thus Non-Justiciable. The Audit requires a prediction of the future. Plaintiffs, in challenging it, are simply offering a competing set of projections of the future. Plaintiffs can tout their predictions as "better," but there is no way to know that. As noted above, this remains true even after the signing of the construction contract. Because the only true test of whose projection is better would require waiting forty years, there is no answer available in this lawsuit. *See, e.g., Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984) (in context of fraud or negligent misrepresentation, a prediction of the future is not a statement of "fact").

Because this case involves a utility, it is useful to compare the Audit Requirement to the analysis done in a ratemaking. While there are certainly differences, both involve a level of technical analysis that is poorly suited to judicial review. Our courts have repeatedly declined to immerse themselves in this sort of arcane calculation. *See Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320, 322-23, 364 S.E.2d 455, 456 (1988) ("This Court has neither the expertise nor the authority to fix the rate of return to which a public utility is entitled. Even if we might have found a different rate of return to be fair and reasonable, such does not allow us to substitute our judgment for that of the Commission." (internal quotation omitted)). The same conclusion makes sense here. Pioneer had the Audits conducted. The work was done in a reasonable fashion, and in good faith. That should be an end to the inquiry.

C. Even a Material Error in the 2016 Audit Would Not Support the Injunction Plaintiffs Seek

Finally, as is true for Plaintiffs' attacks generally on the Audits, a permanent injunction would not be an appropriate remedy even if the 2016 Audit were determined to fall short of the statutory standard. Given that the Court has concluded that Pioneer has the authority to construct

the Facility, it would make no sense to say that authority is forever forfeited because the CPA's analysis took the incorrect form.

This is so for two primary reasons. First, the decision whether to build the Facility belongs to Pioneer's Board. A flaw in the Audit would not justify taking that authority away. The Board had other good reasons to construct the Facility besides the outcome of the Audit, and the Board's sound discretion is entitled to substantial deference. *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) (to overturn decision of elected officials, plaintiffs must allege, and show by clear and convincing evidence, that decision was "arbitrary and capricious"; otherwise this Court "must leave that decision undisturbed"); *see also Green*, 149 S.C. 234, 147 S.E. at 356 (standard for actions of a municipal corporation is "good faith and reasonableness, not wisdom or perfection"). Pioneer's Board exercised its discretion to construct the Facility, not merely on the basis of the Audits, but on the basis of years of cost increases, supply interruptions, and the risk of more. It could be argued that it would have been a dereliction of the Board's duty ***not*** to move forward with the Facility. A flaw in the Audit does not render the decision to build the Facility "arbitrary and capricious," which is the standard Plaintiffs must meet to overturn the Board's decision. In the words of *Bear Enterprises*, the Court should "leave that decision undisturbed."

Second, it would make no sense to say that the authority to build the Facility is forever forfeited because a CPA used the "wrong" construction cost figure in the Audit, especially when more current estimates of construction costs of the other alternative options available to Pioneer (which would most certainly have increased those estimated costs as well, thus counteracting the known increase in construction costs of the Facility) were not available. This is especially true because the Audits have no dispositive weight. This would be wildly disproportionate and

inequitable. Since a permanent injunction is the only remedy sought by Plaintiffs, and since that remedy is nonsensical, no remedy is available.

D. Pioneer Was Not Committed to Pay Harper Corporation $1 Million Prior to the 2016 Audit

To ensure the proper context for the discussion of the 2016 Audit, we add here a few points concerning the timing of the Harper contract, since the signing of that contract is the linchpin of Plaintiffs' arguments concerning the 2016 Audit. As was made clear at trial, in unrebutted testimony, the signing of the Harper contract in November 2016 did not commit Pioneer to the payment of $1 million or more. The undisputed facts presented at trial confirm that (1) the Harper contract did not allow Harper Corporation to begin any work on the Facility until after January 2, 2017 (see Notice to Proceed, part of Defense Trial Exhibit 55); (2) Harper Corporation did not commence any work on the Facility until January 10, 2017; (3) Pioneer had the absolute contractual right to terminate the Harper contract for convenience by simply giving seven days' written notice (see Section 16.03 of the General Conditions, Defense Trial Exhibit 56); and (4) Pioneer was not obligated to pay Harper $1 million or more for work done on the Facility until well after February 2017.

Plaintiffs' continued reference to the November 2016 date of execution of the Harper contract as a meaningful date is thus completely unfounded. Pioneer was not committed to anything on that date. Moreover, Plaintiffs' position ignores the fact that the 2013 Audit was completed and verified by ORS by April 2013 – more than three and a half years earlier – and that the 2013 Audit, which had been publicly available for years, provided a basis on which Pioneer could proceed. Plaintiffs also ignore the fact that the 2016 Audit was undertaken by Pioneer voluntarily and in good faith, to make sure of Pioneer's compliance. Pioneer thus satisfied the Audit Requirements long before it was obligated to pay Harper Corporation $1

million or more for work on the Facility. In short, Plaintiffs' arguments about the Harper contract and its execution in November are red herrings and should be rejected.

IV. Conclusion

Pioneer's elected Board exercised its discretion to construct the Facility. This decision was made in public, with deliberate steps taken in public along the way. Pioneer undertook, fully and in public, to comply with the special Audit Requirements in the Act. There is no suggestion of bad faith on the part of Pioneer; to the contrary, Pioneer's Board had sound reasons to do what it did, in the best interests of Pioneer's ratepayers.

Plaintiffs' request for a permanent injunction should be denied. As this Court has concluded, Pioneer has the authority to construct the Facility. Plaintiffs' attacks on Pioneer's compliance with the Audit Requirements will not justify the drastic remedy of shutting down the Facility. And Plaintiffs' years-long delay in challenging the Facility deprives them of any right to equitable relief.

Respectfully submitted,
WYCHE, P. A.

s/ J. Theodore Gentry

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Dated: October 2, 2017

EXHIBIT A

EXCERPT FROM TRANSCRIPT OF RECORD

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF OCONEE)

CITY OF SENECA, SC. ET. AL.,)
)
PLAINTIFFS,)
vs.)
)
PIONEER RURAL WATER DISTRICT)
OF OCONEE & ANDERSON COUNTIES,) TRANSCRIPT OF RECORD
) 2017-CP-37-00187
DEFENDANTS &)
3RD-PARTY PLAINTIFF,)
vs.)
)
OCONEE JOINT REGIONAL SEWER)
AUTHORITY,)
)
DEFENDANTS.)

MAY 4, 2017
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH, JUDGE.

A P P E A R A N C E S:

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Vivian Cross
Official Court Reporter

1 this question of preliminary injunction is this.
2 First of all, as far as likelihood of success on the
3 merits, I don't agree with my friends on the other side
4 about the standard. I think the case that they cited is
5 unique to the facts of that case because it deals with a
6 statute where you really have to prove you're more likely
7 than not to win the case. Under a general preliminary
8 injunction standard, what you have to prove is that you
9 have set forth a prima facie case. Because it's not
10 really -- the Court is not placed in a position of having
11 to give odds on it, which is basically, okay, have you
12 presented a case that is worthy of the Court's
13 consideration?
14 THE COURT: Do you have a case that says that?
15 MR. ELLIS: It's cited in my memo.
16 THE COURT: If it's in your memo, I'll --
17 MR. ELLIS: Right. It's in there. It's the Compton
18 case. And it says the Court's really not supposed to
19 look any further than just to see if a prima facie case
20 has been stated.
21 As far as Your Honor -- I think the big issue -- and
22 also as far as lack of an adequate remedy at law, I think
23 that the meaning of that is can a legal remedy be given
24 for this as opposed to an equitable remedy? The answer
25 is no. I mean, the only thing we have to ask the Court

1 to do is estop them. We don't have a -- there's not
2 going to be a situation where we can win the case and
3 Pioneer will have to pay us damages. There's not a
4 remedy at law here. This is an equitable cause of
5 action.
6 THE COURT: Okay.
7 MR. ELLIS: And, under the case law, with a
8 declaratory judgment, a declaratory judgment is either
9 legal or equitable, depending on what the case is about.
10 This is a cause of action in equity. We don't have a
11 legal remedy. So I think that the key question here is,
12 can we show irreparable harm? And the irreparable harm
13 is the fact that if they go forward with this and this
14 case takes a while -- and I really had not considered
15 your question before this morning just to be honest with
16 you, about could we go ahead and just tee this thing
17 right up. A very good question. The question is, what
18 happens if they build this place, the Court ultimately
19 agrees with the Attorney General's opinion and says,
20 "Yeah, you really can't build a water treatment facility
21 unless you show you can't get the water somewhere else."
22 Then they've spent $19 million on something that can't be
23 used, and they don't have the ability to remedy this
24 other than to raise rates.
25 THE COURT: So you're claiming their irreparable

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
)
4 COUNTY OF OCONEE)

5

6

7 I, Donna Brady, Official Court Reporter for the
8 Tenth Judicial Circuit of the State of South Carolina, do
9 hereby certify that the foregoing is a true, accurate and
10 complete Transcript of Record of the proceedings had and
11 evidence introduced in the trial of the captioned case,
12 relative to appeal, in the Court of Common Pleas for
13 Oconee County, South Carolina, on the 4th day of May,
14 2010. Such proceedings were taken by Vivian Cross and
15 transcribed by me.
16 I do further certify that I am neither of kin,
17 counsel nor interest to any party hereto.

18

19
 May 8, 2017
20

21

22 Donna M. Brady, RPR
 Donna M. Brady, RPR
23 Family Court Reporter

24

25