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 **MEMORANDUM OF PIONEER IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT**

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ATTORNEYS FOR DEFENDANT PIONEER RURAL WATER DISTRICT OF OCONEE AND ANDERSON COUNTIES

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Defendant Pioneer Rural Water District of Oconee and Anderson Counties ("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 available source (including water that may require treatment) and to operate a waterworks system, with a broad grant of all powers necessary or incidental to supplying water to its customers. Treating water before it is delivered is a necessary element of the work of any water utility, and a plain part of Pioneer's mandate. Faced with the risks of dependence on other sources for a supply of water, Pioneer's Board made the reasonable, good faith determination that Pioneer needed to have the independent ability to treat water, rather than being wholly dependent on the Cities of Westminster and Seneca for water. These Plaintiffs seek to substitute their judgment for that of Pioneer's Board. They may not. Seneca, Westminster, and Oconee are not the Attorney General, and they do not have a roving mandate to enforce the laws of the State.

Pioneer's statutory authority is clear, as are a number of defects in Plaintiffs' belated and commercially motivated attack on Pioneer's plan. Because there are no material facts in dispute, Pioneer is entitled to summary judgment, or partial summary judgment, on each of the points set forth herein. Pioneer should be allowed to proceed with the water treatment facility that Pioneer has been publicly planning for almost a decade and that is now several million dollars into construction. Plaintiffs' eleventh-hour challenge is ill-conceived, and it should be rejected.

I. Summary of Argument

This is an unusual case. Three bodies politic are suing another body politic over the latter's exercise of legislative authority. There is, and can be, no allegation that Pioneer's actions infringe on the sovereignty of any of the Plaintiffs or affect any interest of theirs that is

cognizable in court. There are numerous reasons that the Court should reject this bid by Plaintiffs to take a hand in the legislative affairs of Pioneer.

Pioneer is a special purpose district created to deliver clean and economical water to its customers. Pioneer's enabling act, S.C. Code Ann. § 6-13-210 *et seq.* (the "Act") declares that Pioneer is a "body corporate and politic" and 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 Act 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.

For many years, Pioneer has purchased treated water from Plaintiffs Seneca and Westminster. This has been a lucrative arrangement for those cities – so lucrative, in fact, that Pioneer's Board determined in 2007 that this captive situation was dangerous to Pioneer, and that it would be better for Pioneer's customers to build its own treatment facility (the "Facility"). Not only was this a reasonable judgment; the failure to look out for Pioneer's customers in this way would have been foolish. Pioneer has been moving gradually and publicly toward construction of the Facility for years, and Plaintiffs knew it. Plaintiffs' position fails for several reasons.

Plaintiffs Lack Standing to Bring This Challenge. A clear and controlling line of cases, including *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393, 395, 401 S.E.2d 158, 159 (1991), makes it clear that Plaintiffs lack standing. Under *City of Spartanburg*, one body politic may challenge the authority of another only if it can "allege an infringement of its own proprietary interests or statutory rights." Plaintiffs cannot pass this test.

Although we do not believe it applies, the same result flows from the general test for standing, applicable to non-governmental bodies. (i) No statute gives Plaintiffs standing to bring this action. (ii) Nor do Plaintiffs have "constitutional standing." They do not allege a tort or breach of contract, or other particularized dispute with Pioneer. They express only a generalized interest in litigating the scope of Pioneer's authority. (iii) The "public importance" exception to the standing requirement does not apply here. First, that exception is not available to entities that are not members of the "public"; Plaintiffs can point to no South Carolina case in which one body politic invoked "public importance" standing to sue another body politic over the scope of the latter's function. This would be a huge expansion of an exception that has been limited to members of the public, and this Court should decline the request to expand the exception. Further, the public importance exception is available only where "future guidance" is desirable. That is not the case here. Pioneer is entitled to summary judgment on this basis, dismissing the matter in its entirety.

This Challenge Is Barred by Laches. As this Court saw in ruling on Plaintiffs' request for a preliminary injunction, Plaintiffs have known about Pioneer's plan since at least 2008. During the nearly ten years between then and the start of construction, they did nothing. On the other hand, Pioneer took action – in a very public way – to carry out its plan: committing to borrow funds, entering into a contract to construct the facility, and commencing work. The standards for preliminary and permanent injunctions are substantially similar, and the same facts that barred a preliminary injunction in this case also render a permanent injunction inappropriate. Pioneer is entitled to summary judgment on this basis as well.

Oconee Is Barred by Estoppel. Not only did Oconee provide the real property for the site of the Facility; in the contract conveying that property, Oconee obtained from Pioneer a

covenant that Pioneer would "diligently proceed with construction of, and commence operation of, the Water Facility as quickly as is reasonably practicable," and an acknowledgement that the "agreement to construct and operate the Water Facility" was a "material term of this Agreement and a material inducement to [Oconee's] agreement to convey the Property" to Pioneer. Oconee cannot now sue Pioneer to stop the Facility. Pioneer is entitled to partial summary judgment dismissing Oconee as a Plaintiff.

Pioneer's Board's Determination That the Facility Is in Ratepayers' Best Interests Is Entitled to Substantial Deference; Plaintiffs Cannot Meet the Standard to Question That Legislative Act. Pioneer is a body politic exercising legislative functions. Plaintiffs seek to challenge Pioneer's determination that construction of the Facility is in the best interests of Pioneer's customers. In order for a Court to substitute its judgment for that of a legislative body like Pioneer, a plaintiff must "show by clear and convincing evidence the arbitrary and capricious nature" of the challenged enactment. *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995). Plaintiffs cannot meet this standard, and Pioneer is entitled to partial summary judgment dismissing Plaintiffs' challenge to whether the Facility is in the best interest of Pioneer's ratepayers.

The Contents of the Audits, and ORS's Verification Thereof, Are Not Subject to Judicial Review, at Least in This Proceeding. The Act directs that Audits of the Facility be submitted to the South Carolina Office of Regulatory Staff ("ORS") for verification of the assumptions of those Audits. ORS provided that verification. Twice. Plaintiff seek to go behind those verifications to criticize both Audits and (at least by implication) the ORS verification; they may not. This issue is confided to ORS, by the Act, and is not justiciable. Pioneer is

entitled to partial summary judgment dismissing any claim seeking to litigate the contents of the Audits or ORS's approval thereof.

The Act Authorizes Pioneer to Construct the Facility. Plaintiffs' core contention is that the Act requires Pioneer to purchase treated water exclusively from other utilities, such as Westminster or Seneca, and does not allow Pioneer to obtain water from any other readily available source, like Lake Hartwell. The Act does not say this, of course, and there are numerous reasons not to impose such an unlikely interpretation on this statute.

1. 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.
2. 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.
3. Comparison of the Act with the statutes that allow Westminster and Seneca to treat water confirm that those cities have the same authority as Pioneer. Either all of them have the power to treat water, or none of them does.
4. 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.

5. Numerous other rural water districts operating under the same statutory language as Pioneer have treatment facilities as part of their waterworks systems.

6. Plaintiffs rely on an opinion of the Attorney General construing the Act. The Attorney General's opinion is not persuasive. And to the extent the Attorney General's opinion is correct that Pioneer may build a water treatment facility if one is "necessary," it is "necessary" to treat water before it is sent to customers, and Pioneer's Board's judgment that the Facility should be built is a determination of necessity entitled to substantial judicial deference.

Pioneer is entitled to partial summary judgment on this basis, holding as a matter of law that the Act gives Pioneer the authority to construct the Facility.

II. Statement of Undisputed Facts

The factual record is clear in the case on each of the issues raised above, and summary judgment is appropriate. This memorandum cites to the Third Affidavit of Terry L. Pruitt ("Pruitt Aff.") and to the Expert Report of Josh Fowler dated August 3, 2017 (the "Fowler Report"), which is verified by an affidavit from Mr. Fowler.

A. Pioneer's Structure and Purpose

Pioneer is a special purpose rural water district, created as a body politic 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. Pruitt Aff. ¶¶ 3, 4.

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. Pruitt Aff. ¶ 4.

B. Plaintiffs

Each of the Plaintiffs is also a body politic.

Seneca and Oconee allege that they are customers of Pioneer; Westminster does not allege this. Seneca and Westminster sell water to Pioneer. Pioneer's customers have been subjected to substantial increases in water prices charged by Seneca and Westminster between 2008 and 2012.

Other than these commercial relationships of buying and/or selling water, Plaintiffs have no authority over or relationship to Pioneer. By statute, none of the Plaintiffs has a vote in elections of the members of Pioneer's Board. S.C. Code § 6-13-230(A)(2) ("qualified customers" must be individuals who are qualified electors of Anderson or Oconee County). Pruitt Aff. ¶ 4.

C. Pioneer's Planning of the Facility Was Deliberate, Public, and Known to Plaintiffs for Years

Because Pioneer is subject to FOIA, all of its meetings, including meetings at which the Facility was discussed and voted on, were open to the public, with agendas and minutes available to the public. Executed contracts, resolutions concerning loans and bond financing, and other documents related to the Facility were also available to the public through FOIA; Pioneer published notices making it clear it planned to build the Facility on numerous occasions. One example of many is the Public Notice of its March 19, 2013 meeting. Pruitt Aff. ¶¶ 46, 50.

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. Pruitt Aff. ¶¶ 13, 14, 17.

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. Pruitt Aff. ¶¶ 15, 16.

Pioneer originally planned to build the Facility in Fair Play, South Carolina. In 2010, Pioneer purchased land in Fair Play for the Facility. However, the plan to build the Facility in Fair Play met with resistance from local residents. Pruitt Aff. ¶¶ 19-21. In March 2012, in response to the opposition – ***and in obvious promotion of the Facility*** – Oconee 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. Pruitt Aff. ¶ 25.

In late 2011, after Oconee first suggested that Pioneer might acquire land in the Commerce Park for its Facility, Pioneer commissioned Design South to conduct a new feasibility study, to determine whether it could relocate the Facility to the Commerce Park. Pruitt Aff. ¶ 22. 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. Pruitt Aff. ¶¶ 23, 24.

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. Pruitt Aff.

¶ 26. In March 2013, Pioneer provided the following Public Notice concerning a public meeting at which the Facility and the financing for the Facility would be discussed:

> Pioneer Rural Water District proposes to file an application for a loan/grant with Rural Utilities, a division of Rural Development, and will hold a public meeting on March 19, 2013 at its office located at 5500 West Oak Highway, Westminster, SC at 6:00 p.m. The purpose of the meeting is to give an opportunity to become acquainted with a proposed Rural Utilities project, consisting generally of the construction of a new 2.5 MGD water treatment plant, raw water intake facilities, transmission mains and related appurtenances.
>
> Citizens will have the opportunity to comment on such items as economic and environmental impacts, service area and alternatives to the project.
>
> Projects funded by Rural Utilities, Rural Development are equal opportunity programs and discrimination in the program is prohibited by federal law.

Pruitt Aff. ¶ 46 & Related Exhibit.

In July 2013, Oconee passed an Ordinance approving the transfer of approximately 22 acres of property within the Commerce Park to Pioneer and sent a letter to Pioneer including an executed version of an agreement to accomplish this transfer. Pruitt Aff. ¶ 25 & related Exhibits (Oconee Ordinance 2013-07 and letter dated July 18, 2013 from Oconee to Pioneer). At the same time that it was offering property within the Commerce Park to Pioneer, Oconee was applying to the South Carolina Department of Commerce ("SCDOC") for certification of the Commerce Park as an industrial park. As part of that application process, Oconee made certain representations to SCDOC about the water service available for the Commerce Park, including representations that the Commerce Park would be serviced by the Facility that Pioneer was in the process of designing for construction. Pruitt Aff. ¶¶ 38-41.

In or about June 2014, Oconee informed Pioneer that Oconee 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 – with full knowledge the property would be used for a water treatment facility – offered to donate (for nominal consideration of Ten Dollars) to Pioneer an

approximately 60-acre parcel adjoining the Commerce Park on the other side of Cleveland Creek, for use in constructing the Facility. Pruitt Aff. ¶¶ 29, 30.

Pioneer accepted Oconee's offer to donate the 60-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. To accomplish this transfer, Oconee passed an Ordinance in September 2014 approving the transfer of the approximately 60 acres of property where the Facility is now under construction. Oconee and Pioneer then entered into a contract for that transfer. The contract is noteworthy because Oconee extracted a contractual ***commitment*** from Pioneer to build the Facility. The contract goes on affirm that Pioneer's promise to construct the Facility was "a material term of this Agreement and a material inducement" to conveyance of the property, and Oconee ***reserved the right to collect attorney's fees if it had to sue Pioneer to compel it to build the Facility***. Pruitt Aff. ¶ 32 & related Exhibit (Oconee Ordinance 2014-21).

D. Pioneer Obtains Financing and Commences Construction

After Oconee provided Pioneer with a new site for the Facility in 2014, 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. Pruitt Aff. ¶ 36.

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 on February 27, 2017. At that time, Pioneer closed a $19,402,000 Bond Anticipation Note with CoBank, ACB ("CoBank"). Pruitt Aff., ¶¶ 51-54. 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), USDA will succeed CoBank as lender on the project, repaying advances made by CoBank and purchasing bonds to be issued by Pioneer. Pruitt Aff. ¶ 51.

In connection with the closing of the CoBank financing, Pioneer obtained an opinion letter from its counsel, Nelson, Mullins, Riley & Scarborough. Among other things, the letter opined:

> The execution and delivery of the Loan Documents by the Borrower [i.e., Pioneer] and the performance by the Borrower of its obligations under the Loan Documents and the consummation by the Borrower of the transaction contemplated thereby have been duly authorized by the Borrower ***in compliance with the Enabling Legislation*** [i.e., the Act], and all such authorizations are presently in effect.
>
> The execution and delivery of the Loan Documents by the Borrower and consummation by the Borrower of the transactions contemplated thereby ***will not*** (a) violate the Borrower's Creation Legislation, (b) ***violate any statutory law or regulations of the State applicable to the Borrower*** in connection with the transaction….

Pruitt Aff. ¶ 52 & related Exhibit (emphasis added).

Pioneer entered into a contract (the "Construction Contract") with Harper Corporation on November 1, 2016. Construction commenced on or after January 2, 2017, with the first payment made to Harper Corporation on or about March 24, 2017. Pruitt Aff. ¶ 56. As of June 14, 2017, the date of this Court's Order denying Plaintiffs' motion for preliminary injunction, Harper Corporation had made three draws in the combined amount of approximately $3.4 million under the Construction Contract. Pruitt Aff. ¶ 56. This amount has been drawn from the CoBank commitment and paid to Harper Corporation. Pruitt Aff. ¶ 51. By that time, Pioneer had also paid over $3 million in costs associated with land acquisition, design and engineering work, permitting requirements, and other costs relating to the Facility. Pruitt Aff. ¶ 56.

The Facility is currently projected to be completed in approximately August of 2018. Pruitt Aff. ¶ 58.

III. Pioneer Is Entitled to Summary Judgment on Several Grounds

The only sensible reading of the Act makes it clear that Pioneer may treat water before delivering it to customers. Numerous other utilities – ***including Plaintiffs Westminster and Seneca*** – have read similar language this way for decades in South Carolina. Plaintiffs are asking the Court to adopt a strained and radical interpretation of the Act.

Furthermore, even if there were a problem with the Facility, these are the wrong Plaintiffs and this is the wrong lawsuit for adjudicating such a problem. Plaintiffs have only a commercial relationship with Pioneer; they have no special role in Pioneer or in the policing of any exercise of Pioneer's legislative discretion. Plaintiffs have a very particular axe to grind, with a goal of making Pioneer a permanent captive customer, forced to pay whatever they may ask for water. They lack standing. Moreover, Plaintiffs also delayed inequitably in bringing this action. For those reasons and others set forth hereafter, Plaintiffs are not entitled to the equitable relief of an injunction halting the Facility.

A. Standard for Summary Judgment

A motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Café Assoc. Ltd. v. Gengross*, 305 S.C. 6, 9, 406 S.E.2d 162, 164 (1991). The party opposing summary judgment must set forth specific facts

showing there is a genuine issue of material fact for trial. *Charping v. J.P. Scurry & Co., Inc.*, 296 S.C. 312, 315-316, 372 S.E.2d 120, 122 (Ct. App. 1988).

B. Plaintiffs Lack Standing and May Not Bring This Lawsuit

This is an unusual case. This Court is faced with three public bodies seeking judicial review of the discretionary functions of another governmental body with which they have no relationship, other than a commercial one.[1] Plaintiffs seek judicial review of a legislative decision made by Pioneer's Board, in the exercise of the Board's discretion to serve its constituents.

Such a case may not proceed. Our Supreme Court has held that one body politic lacks standing to sue concerning the authority of another municipality where the plaintiff does not allege "an infringement of its own proprietary interests or statutory rights." *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393, 395, 401 S.E.2d 158, 159 (1991). While we believe that line of cases is dispositive, the same result emerges if one applies our courts' three-part standing analysis. In particular, Plaintiffs cannot invoke the "public importance" exception to standing. We have found no cases allowing one public entity to invoke public importance standing in suing another public entity. Indeed, the *City of Spartanburg* decision compels the conclusion that public importance standing is not available here. And public importance standing operates only where there is a need for future guidance. That does not exist here.

These Plaintiffs are not proper parties to bring suit questioning Pioneer's execution of its duties to deliver water to customers in its service area. Plaintiffs have no constitutional role in

[1] A fourth public body, Oconee Joint Regional Sewer Authority ("OJRSA") originally sought to intervene in this case, but at this point, based on the pleadings on file, OJRSA is not a party to this litigation. Even if OJRSA were to be allowed to intervene, its status is identical to that of the other Plaintiffs and it is subject to the same summary judgment arguments set forth herein.

enforcing statutes at large, and no affected interest in this case. Pioneer's legislative decision to construct the Facility is, as a matter of law, none of Plaintiffs' business.

1. This Case Must Be Dismissed Under City of Spartanburg

In *City of Spartanburg*, the City of Spartanburg brought suit to challenge the validity of the creation of a special taxing district that would provide fire protection to a textile plant; the City brought the action because it had been paid a fee by the textile plant to supply fire protection, and would lose this business to the new district. In a short and to-the-point opinion, the Supreme Court upheld a grant of summary judgment holding the City lacked standing. 303 S.C. at 395, 401 S.E.2d at 159. In doing so, the Court established that bodies politic like these Plaintiffs face a special test to determine whether they have standing.

The Supreme Court made it clear that the City of Spartanburg's commercial desire to force the textile plant to continue as a captive customer for fire protection services was not sufficient to confer standing. Instead, one body politic may challenge the authority of another only if it can "allege an infringement of its own proprietary interests or statutory rights." *Id*.; *see also Capital View Fire District v. County of Richland*, 297 S.C. 359, 377 S.E.2d 122 (Ct. App. 1989) (fire district lacked standing to challenge legality of fire service agreement when its proprietary interest not affected; noting that cities and counties lack *parens patriae* standing); *City of Myrtle Beach v. Richardson*, 280 S.C. 167, 311 S.E.2d 922 (1984) (cities lack standing to challenge fire protection district outside their limits).

That holding is controlling here. Like the City of Spartanburg, these Plaintiffs' sole interest is in maintaining a competitive advantage. None of these Plaintiffs can claim any infringement on "proprietary interests or statutory rights." Simply stated, to have a "proprietary interest" sufficient to establish standing, a party must own property involved in the dispute. *State Budget & Control Board v. City of Columbia*, 308 S.C. 487, 489, 419 S.E.2d 229, 230

(1992) (Budget and Control Board did not have a proprietary interest in land it did not own); *Town of Arcadia Lakes v. S.C. Dep't of Health & Envtl. Control*, 404 S.C. 515, 529–31, 745 S.E.2d 385, 393 (Ct. App. 2013) (town's asserted interest in protecting environmental quality within town limits; complying with law; maintaining desirable attributes; and impact on property values not sufficient to confer standing).

Nor do these Plaintiffs allege an infringement on their statutory rights. They retain full authority to carry out their own functions, unimpaired, regardless of whether Pioneer builds the Facility. Plaintiffs' sovereignty and authority is untouched by this decision, and so they do not have standing to challenge it.

All Plaintiffs have are commercial connections to Pioneer, like those at issue in *City of Spartanburg*. There was no standing there, and there is no standing here.

2. Plaintiffs Also Fail the Traditional Test for Standing

Pioneer submits that the foregoing cases limiting the standing of bodies politic are dispositive here. In addition, though, Plaintiffs fail the general test that is applied to non-governmental entities.

As our Supreme Court explained recently, "[u]nder our current jurisprudence, there are three ways in which a party can acquire this fundamental threshold of standing: (1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception to standing." *Bodman v. State*, 403 S.C. 60, 66-67, 742 S.E.2d 363, 366 (2013).

Plaintiffs do not allege and plainly cannot establish that the Act, or any other statute, confers standing on them. The first source of standing is foreclosed.

As to constitutional standing, one of the core requirements is that the plaintiff suffer a concrete and particularized injury – that they be "real parties in interest" in a case or controversy. *Id.*, 403 S.C. at 67, 742 S.E.2d at 366; *Baird v. Charleston County*, 333 S.C. 519,

530, 511 S.E.2d 69, 75 (1999). These plaintiffs did not. They do not allege a tort or breach of contract. They do not accuse Pioneer of a wrong ***directed at them***. Instead, Plaintiffs seek a generalized declaration of the law concerning Pioneer's ***authority to act***. Because Plaintiffs have no special interest in such a determination, they cannot establish constitutional standing either.

In this regard, it is important to emphasize that none of these Plaintiffs has any role or say in Pioneer's decision making. The Act is clear in placing all decisions of Pioneer in the hands of its Board. S.C. Code § 6-13-230(a) ("The district must be operated and managed by a board of directors to be known as the Pioneer Rural Water District Board of Oconee and Anderson Counties which constitutes the governing body of the district."). These Plaintiffs are not on the Board nor do they vote for Board members.[2] *See* Pruitt Aff. ¶ 4. Nothing in the Act gives any Plaintiff any role or interest in Pioneer's decisions any more than Pioneer would have a role or interest in the legislative decisions made by the Plaintiffs.

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[2] The Act defines the individuals who may vote for Board members. They are "individual" residents who are "residents" of Pioneer's service area and "qualified electors," with a limit of one vote "per household."

> Each board member must be elected by the ***qualified customers*** of Pioneer Rural Water District who are both (a) ***residents*** of the district's service area and (b) ***qualified electors*** of Anderson or Oconee County. For purposes of this section, "resident" is an ***individual*** domiciled in Anderson or Oconee County. Each qualified customer is entitled to one vote, provided that ***only one vote is cast per household***.

S.C. Code § 6-13-230(A)(2) (emphases added).

This definition plainly excludes commercial customers and governmental entities. The Act thus deprives these Plaintiffs of any role in selecting Pioneer's Board; we submit it plainly follows that they do not have the right to sue to question that Board's actions. They are not constituents of Pioneer. Once one puts the (unbreached) commercial relationships to one side, this lawsuit is no different from a suit brought by the City of Myrtle Beach to enjoin the Facility. It would be clear that Myrtle Beach lacks standing and is merely meddling in the decisions of another body politic. The same is true for these Plaintiffs.

Plaintiffs have only a commercial relationship with Pioneer; Seneca and Westminster sell Pioneer water, and Seneca and Oconee allege that they are customers of Pioneer.[3] While these commercial relationships might allow Plaintiffs to assert a claim for breach of a supply contract, if one had occurred, these purely commercial ties do not allow them to sue over Pioneer's decisions as to how to carry out its mission of service or to prevent Pioneer from competing with them. The Fourth Circuit rejected a similar argument in *Carolina Power & Light Co. v. S.C. Pub. Serv. Auth.*, 94 F.2d 520, 523 (4th Cir. 1938) – a case with striking similarities to this one. In that decision, the court considered the standing of three hydroelectric power companies to stop a project that would allow the South Carolina Public Service Authority to generate electricity which it could then sell in competition with them. The court flatly rejected such increased competition as a basis for standing. "The only interest which plaintiffs claim to have in the matter is that they will be damaged by reason of the fact that the defendant Authority will sell electric current in competition with them and that the construction of the project will enable it to produce the current. As plaintiffs have no exclusive franchise for the sale of electric current, however, no right of theirs will be invaded by competition on the part of the Authority or by any sales which it may make."[4] *Id*. The Fourth Circuit went on to summarize, "It has never yet been

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[3] Pioneer assumes these allegations to be true for purposes of this motion, but does not concede them.

[4] Plaintiffs may suggest that they can rely on the doctrine of taxpayer standing to proceed. This is incorrect for at least three reasons. First, our courts have now made it clear that mere status as a taxpayer will not support standing. *Bodman*, 403 S.C. at 66-67, 742 S.E.2d at 366 ("Here, to the extent Bodman has suffered or will suffer any harm as a result of this tax scheme, this harm is shared by all taxpayers in the State. In *ATC*, ***we unanimously closed the door to a litigant asserting standing simply by virtue of his status as a taxpayer for this reason***. There, we explained that '[t]he injury to ATC . . . as a taxpayer is common to all property owners in Charleston County. This feature of commonality defeats the constitutional requirement of a concrete and particularized injury.'" (emphasis added; internal citation omitted)).

Second, none of the Plaintiffs is a "taxpayer." Each of them is, instead, a political body that is exempt from taxation. So they cannot, by definition, proceed as taxpayers. They are instead

held, so far as we are aware, that the mere fact of competition entitles one whose rights are not invaded to enjoin the unlawful acts of a competitor." *See also ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 196, 669 S.E.2d 337, 340 (2008) ("This Court rejected a competitor's assertion that standing exists when alleged damages flow from increased or perceived unfair competition.").

This leaves only the "public importance exception" to standing requirements. It is not available here. Our Supreme Court has held that standing may be conferred upon a party "when an issue is of such public importance as to require its resolution ***for future guidance***." *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999) (emphasis added); *see also Sloan v. Dep't of Transp.*, 365 S.C. 299, 304, 618 S.E.2d 876, 878 (2005).

> The key to the public importance analysis is whether a resolution is needed for future guidance. It is this concept of "future guidance" that gives meaning to an issue which transcends a purely private matter and rises to the level of public importance. *Baird*, 333 S.C. at 531, 511 S.E.2d at 75 ("[A] court may confer standing upon a party when an issue is of such public importance as to require its resolution for future guidance.")[.]

ATC South, Inc. v. Charleston Cty., 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008).

Plaintiffs have made no showing that resolution of Pioneer's authority to construct a water treatment facility is something that must be resolved for "future guidance," which is the "key" to the test created by the Supreme Court. There is no allegation, and no reason to think,

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subject to the rule of *City of Spartanburg*, discussed *supra*. Moreover, while Pioneer does not concede the standing of qualified customers to bring an action like this one, as discussed in the preceding footnote those persons are the closest analogy to "taxpayers" in this situation.

Third, Pioneer is not expending tax funds. Pioneer has only a single source of revenue – amounts paid to it for the sale of water. Pioneer does not have the right to impose or collect taxes. Pruitt Aff. ¶ 7. Pioneer will be expending water revenues, not taxes, to construct the Facility. *See Ansley v. Warren*, No. 16-2082, 2017 WL 2782622, at *5 (4th Cir. June 28, 2017) (plaintiffs held to lack standing because they "have not shown that the legislature ***extracted tax dollars*** to support the allegedly unconstitutional practice" (emphasis added)).

that Pioneer will build another treatment facility at any time in the foreseeable future, Pruitt Aff. ¶ 57, and we submit that litigation here is not the right place to resolve the authority of some other water district, operating under a different set of facts and perhaps a different statute, to build a different facility. This is ultimately a matter of legislative intent, and if future guidance is needed, the Legislature would be the best source for such guidance.

Moreover, given the long planning horizon for such a facility – as shown in this case – a reasonably diligent plaintiff could obtain a ruling on any future question over authority to build a water treatment facility. There is no need for "future guidance" because there will be ample time in the future to obtain such guidance at the time the issue arises.

Beyond this, Plaintiffs cannot credibly claim any interest in vindicating a particular reading of the Act for the benefit of, or on behalf of, the general public. Their interest is transparently (and only) commercial, in hoping to keep Pioneer as a customer for Seneca and Westminster. Such an interest "directly conflicts with the purpose and spirit of the public importance exception." *Freemantle v. Preston*, 398 S.C. 186, 194, 728 S.E.2d 40, 44 (2012).

Pioneer also submits that the holdings in the *City of Spartanburg* line of cases, limiting the standing of bodies politic, is relevant here (even to the extent it is not absolutely dispositive). *City of Spartanburg* makes it clear that bodies politic are limited to bringing suits that vindicate interests within their own particular zone of interests. Because these Plaintiffs have no ***governmental*** interest at stake in Pioneer's exercise of its own separate authority, they are not the right parties to purport to vindicate the public interest.[5] It is the ***members of the public*** who should be able to invoke this exception to test matters of "public importance."

[5] Here again, it is useful to consider how this case would look if the City of Myrtle Beach were the Plaintiff. We submit that it would be peculiar indeed to allow Myrtle Beach to sue to vindicate the "public interest" in whether this Facility is built. Since the only difference between

Finally, the public importance exception to the standing doctrine is just that, an exception. The general rule is that courts should decide only concrete disputes between parties within the zone of interest, who have statutory or constitutional standing. As an exception to this key constitutional principle, the public importance doctrine should be narrowly construed, and this Court should decline to expand it in ways that the Supreme Court has not indicated it is prepared to recognize. *S.C. Pub. Interest Found. v. S.C. Transp. Infrastructure Bank,* 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013) (courts "must be cautious with [public importance] exception, lest it swallow the rule"). We are aware of no case holding that a body politic – as opposed to a member of the public – may invoke this exception. This Court should reject any invitation to extend the exception beyond boundaries already recognized by the Supreme Court.

C. Plaintiffs Do Not Meet the Standard for an Injunction of the Facility. In Particular, Their Unjustified Delay in Filing This Suit, Which Prevented Entry of a Preliminary Injunction, Also Bars a Permanent Injunction

This Court has already considered in detail the fact that all three of these Plaintiffs knew about the plan to build the Facility for ***years*** before they filed this suit. The Court held that this delay prevented equitable relief at the preliminary injunction stage. That conclusion holds now.

While the Court's order denying Plaintiffs' motion for preliminary injunction was careful to note that further factual development was possible, nothing has changed about the core facts that made a preliminary injunction halting the Facility improper. Plaintiffs have never seriously contested that they knew of Pioneer's plans to build the Facility for the better part of a decade before filing this suit. They waited to file their lawsuit until after Pioneer had expended money on plans, studies, and permits, closed its loan, directed Harper to commence construction, and started draws against the loan to pay Harper. Pruitt Aff. ¶¶ 22, 23, 35, 44, 48, 51, 56.

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these Plaintiffs and Myrtle Beach – the buying and selling of water – is irrelevant to standing, the result should be the same here.

The standards for preliminary and permanent injunctions are essentially the same. *See, e.g., Rawlinson Rd. Homeowners Ass'n, Inc. v. Jackson*, 395 S.C. 25, 35, 716 S.E.2d 337, 343 (Ct. App. 2011) ("A party seeking injunctive relief must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law. An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." (internal citations and quotation marks omitted; *citing Denman v. City of Columbia*, 387 S.C. 131, 140–41, 691 S.E.2d 465, 470 (2010)). Accordingly, the same result should apply. *See Crutchfield v. U.S. Army Corps of Engineers*, 192 F. Supp. 2d 444, 464 (E.D. Va. 2001) (noting Fourth Circuit recognizes laches as defense to permanent injunction in environmental cases).

1. Enjoining the Facility at the Request of These Plaintiffs Would Be Inequitable

An 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. *E.g.*, Pruitt Aff. ¶¶ 17, 18, 22, 25, 30-32, 40, and 46. Yet they sat by and did nothing until Pioneer had contracted, obtained financing, commenced construction, and spent millions of dollars. Beyond this, Oconee actively encouraged construction of the Facility. It donated land for the Facility, made strong statements in support of the Facility, and contractually ***required*** Pioneer to construct the Facility as promptly as possible. Pioneer moved forward in public and with the full knowledge of these Plaintiffs.

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 much more than that if the contract is terminated completely, for Pioneer would be saddled with millions invested in a Facility that would be unusable. Pruitt Aff. ¶ 59. By contrast, these Plaintiffs will face no harm at all until the Facility is operating, which will happen in late 2018 at the earliest – and even that "harm" is not cognizable, since Pioneer has the right ***not*** to contract with Plaintiffs. 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.").

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.

2. Plaintiffs Cannot Show Irreparable Harm

Plaintiffs cannot meet the test of showing "irreparable harm" because they have no cognizable harm at all. Plaintiffs cannot point to any sort of injury to their "sovereignty" or their ability to exercise their governmental functions. The Facility does not impinge on any cognizable right of any Plaintiff in any way, and so does not do them harm, much less irreparable harm.

The only prospective future injuries that Plaintiffs can claim arise from their commercial relationships with Pioneer as either a supplier or purchaser of water. Their relationships as purchasers are negligible (and Westminster is not even a customer at all); so their true concern is loss of Pioneer as a captive customer. But these commercial relationship are established and governed by contract, and Plaintiffs have not alleged any breach in either one. Plaintiffs do not contend that Pioneer must buy water only from them; even on their theory, Pioneer is free to purchase elsewhere. So those injuries are irrelevant to the question of whether Pioneer can build the Facility. There is no dispute that it can do so ***without breaching a contract***, and so these "harms" are nothing more than acceptable commercial outcomes that will not support an injunction. *See Carolina Power & Light Co. v. S.C. Pub. Serv. Auth.*, 94 F.2d 520, 523 (4th Cir. 1938) ("It has never yet been held, so far as we are aware, that the mere fact of competition entitles one whose rights are not invaded to enjoin the unlawful acts of a competitor."); *see also South Carolina Public Serv. Auth. v. Carolina Power & Light Co.*, 244 S.C. 466, 476, 137 S.E.2d 507, 510–11 (1964) (rejecting injunction for allegedly *ultra vires* utility construction where only impact is commercial); *Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n*, 238 S.C. 282, 295, 120 S.E.2d 6, 12 (1961) ("Having no exclusive franchise to serve the area in controversy, no legal right of appellant will be invaded by the Power Company's competition. Any injury from such competition is *damnum absque injuria*".).

Moreover – and critically – the harm Plaintiffs invoke in their capacity as customers is based on speculation as to what may happen in the future. Plaintiffs ask the Court to speculate that they will pay more for water after the Facility is built. 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"). Indeed, the statutory Audits and ORS validation showed that these Plaintiffs – in their capacity as customers – will be better off with the Facility than without it.

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.[6] Had Plaintiffs sought a

[6] In this regard, it is noteworthy that after 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. ¶ 17. These efforts never resulted in a concrete agreement to lower rates.

declaration concerning the statute years ago, they could have avoided the harms they now claim to face and avoided any harm to Pioneer as well.

D. Because Oconee Encouraged – Indeed Contractually Required – Pioneer to Construct the Facility, Oconee Is Estopped from Pursuing This Action

Oconee – which is now suing to stop the Facility – was an eager and vigorous proponent of the Facility. Oconee actively and affirmatively made representations to the South Carolina Department of Commerce ("SCDOC") about the Facility in connection with its efforts to have the Commerce Park certified as an industrial park by the state. In connection with that effort, Oconee submitted an application to SCDOC in which it certified that the Commerce Park would be serviced by Pioneer as its water service provider, and that Pioneer had a water treatment plant expected to come on line for the Commerce Park in the first quarter of 2015. Pruitt Aff. ¶ 39. In September 2013, Oconee submitted a more detailed questionnaire to SCDOC in its effort to certify the Commerce Park, and in that document Oconee identified the Facility as part of a planned upgrade to the water service for the Commerce Park:

> Pioneer … is currently in the process of building a 2.5 MGD Water Treatment Plant, expandable to 5.0 MGD, on a parcel located within the Golden Corner Commerce Park. The project has already been designed and is awaiting approval to move forward with construction. Pending approval to move forward with construction, the schedule is 2 to 4 years.

Oconee Application for Site Certification dated September 12, 2013. *See* Pruitt Aff. ¶¶ 38-42.

In addition to making favorable public statements concerning the Facility and representing to the SCDOC that the Commerce Park would have adequate water supplied by Pioneer's Facility, Oconee first agreed to sell property to Pioneer for the Facility within the Commerce Park, and then ***donated*** alternative property (with recited consideration of Ten

Dollars) to Pioneer when Oconee changed its mind about selling the first parcel to Pioneer. Pruitt Aff. ¶¶ 25-33.

Beyond this strong encouragement and support, though, Oconee actually elicited a promise from Pioneer that it would construct the Facility and would not use the property donated by Oconee for any other purpose. In fact, each of (i) the initial proposed land sale and (ii) the ultimate contribution of property for the Facility was accompanied by Oconee's passage of an Ordinance containing virtually identical language concerning the reason for (and a condition on) the proposed transaction:

> WHEREAS, Pioneer Rural Water District "(Pioneer") wishes to acquire from the County and the County wishes to convey to Pioneer, the Property ***for the purpose of allowing Pioneer to construct thereon a potable water treatment facility to be connected to and operated as part of Pioneer's waterworks system*** (such acquisition and conveyance, the "Transfer"), subject to and in accordance with the terms and provisions of a Purchase and Sale Agreement ("Purchase Agreement"), the form of which is now before the County Council and is attached as Exhibit B hereto….

Oconee County Ordinance 2013-07 (enacted by Oconee on July 16, 2013); Oconee County Ordinance 2014-21 (enacted by Oconee on September 16, 2014). Notably, each of these Ordinances required first, second, and third readings – and a public hearing – before passage. Pruitt Aff. ¶¶ 25, 32.

After passage of a County Ordinance on the subject, Oconee required the inclusion of contractual language affirming that Pioneer's promise to construct was "a material term of this Agreement and a material inducement" to conveyance of the property, and Oconee ***reserved the right to collect attorney's fees if it had to sue Pioneer to compel it to build the Facility***. The October 6, 2014 contract between Oconee and Pioneer for conveyance of that property reiterates the essential purpose of the Agreement: "Purchaser desires to purchase the Property … for the

purpose of constructing and operating a potable water treatment facility (the "Water Facility") thereon. The Agreement then provides as follows in its section 10:

> 10.1. Construction of Water Infrastructure Facility. Seller acknowledges and agrees that this Agreement is being entered into with the expectation that Purchaser build and commence operation of the Water Facility and any necessary ancillary improvements on the Property. ***Purchaser hereby covenants and agrees that it will diligently proceed with construction of, and commence operation of, the Water Facility as quickly as is reasonably practicable*** following Closing, and acknowledges that ***its agreement to construct and operate the Water Facility on the Property is a material term of this Agreement and a material inducement to Seller's agreement to convey the Property to Purchaser*** under this Agreement. Purchaser covenants and agrees not to use the Property for any purpose other than the construction, maintenance and operation of the Water Facility, and not to sell, grant, bargain, convey or encumber the Property, any portion thereof, or any interest therein, prior to completing construction and installation of the Water Facility.
>
> 10.2. Attorney's Fees. ***If the Seller retains an attorney to enforce Section 10.1 of this Agreement***, the Seller shall be entitled to recover, in addition to all other items of recovery permitted by law, reasonably attorney's fees and costs incurred through litigation and all appeals.

Pruitt Aff. ¶ 32 & Ex. I (emphases added).[7]

To establish estoppel,[8] the relying party must prove (1) lack of knowledge of the truth as to the facts in question, and no means of access to the truth; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position. *Midlands Utility, Inc. v. South Carolina Dep't of Health & Envtl. Control*, 298 S.C. 66, 378 S.E.2d 256 (1989); *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 638, 699 S.E.2d 699, 706–07 (Ct. App. 2010).

[7] The contract to sell 22 acres within the Commerce Park to Pioneer for the Facility, also executed by Oconee, contained identical language.

[8] Estoppel is not generally available to prevent a governmental entity from exercising its police power or to thwart the application of public policy. As we have already thoroughly discussed, Oconee's action in bringing this suit is not an exercise of police power or an application of public policy; Oconee's concerns are purely commercial. A body politic may be estopped in such a circumstance.

These elements are present. Pioneer had no way to know that Oconee, after contributing the necessary real property and requiring Pioneer to construct the Facility thereon, would turn around and bring this suit. Pruitt Aff. ¶ 34. This turnabout occurred only later. Pioneer was justified in relying on this contribution of property, which was made for the express purpose of constructing the Facility. Pruitt Aff. ¶ 32. Finally, Pioneer certainly changed its position to its prejudice when it redesigned and actually began construction of the Facility. Pruitt Aff. ¶ 34. Governmental entities have been held estopped under far less egregious circumstances. *See Landing Dev. Corp. v. City of Myrtle Beach*, 285 S.C. 216, 221, 329 S.E.2d 423, 425–26 (1985) (city estopped to deny business licenses for short-term rentals because Director of Zoning stated they were allowed); *Abbeville Arms v. City of Abbeville*, 273 S.C. 491, 257 S.E.2d 716 (1979) (city estopped by defect in zoning map).

The decision in *HHHunt Corp.* is of interest, and involves similar facts. The Town of Lexington entered into a contract with a landowner to provide water service. 389 S.C. 623, 699 S.E.2d at 702. The landowner – like Pioneer – relied on this promise by making substantial investments in water and wastewater facilities. The Town knew of those improvements and accepted fees in connection with them. When the Town subsequently voted to deny utility services to the property, the Court of Appeals agreed with the landowner that estoppel applied. 699 S.E.2d at 706-07.

The case for estoppel here could not be stronger. Oconee's contract requiring that Pioneer construct the Facility was not an error, or the action of a rogue or misinformed employee. It was approved by the Oconee County Council by County ordinance, in multiple readings. This lawsuit is a blatant and egregious double-cross, undermining a binding contract

between Pioneer and Oconee on which Pioneer relied in moving forward with the Facility. Oconee is therefore estopped to bring this lawsuit and is not a proper plaintiff.

E. Pioneer's Board's Judgment of Ratepayers' Best Interests Is Entitled to Deference

Paragraph 26 of the Amended Complaint asserts that Pioneer may not proceed with the Facility "because it is not in the best interest of the ratepayers." This appears to be a reference to Section 6-13-240(D) of the Action, which provides in part that "[a]ny action taken by the board must be made in the ratepayers' best interests."

Plaintiffs thus seek to substitute their own judgment of the ratepayers' best interest for the judgment of the Pioneer Board. This would be improper. Pioneer's Board is an elected, quasi-legislative body entitled to substantial deference. Plaintiffs, by contrast, have independent motives that are at odds with the best interests of Pioneer's constituents.

Pioneer is a "body corporate and politic." S.C. Code § 6-13-210. It is controlled by its Board, which is elected in public elections by qualified electors.[9] S.C. Code § 6-13-230. It is subject to FOIA. It has power to exercise eminent domain, and to promulgate regulations. S.C. Code § 6-13-240(A)(11), (13), (19); *see also* Pruitt Aff. ¶ 4. It is, in short, a governmental agency and its Board performs legislative functions, including determination that Pioneer's actions are in the best interests of Pioneer's constituents. S.C. Code § 6-13-240(D). *See generally City of Beaufort v. Beaufort-Jasper County Water & Sewer Auth.*, 325 S.C. 174, 181, 480 S.E.2d 728, 732 (1997) ("provision of utility service . . . constitutes an exercise of police power (clearly governmental) that may not be delegated [and] . . . the provision of utility service is especially governmental in nature where the municipal entity at issue was formed for the specific purpose of providing such service"); *Green v. Rock Hill*, 149 S.C. 234, 147 S.E. 346,

[9] A group that excludes these Plaintiffs. *See supra* note 2.

356 (1929) (rejecting challenge to municipal corporation's actions "in relation to water works"; "court of equity will not attempt to control the discretionary powers conferred on trustees, or, more specifically, will not interfere at the suit of a taxpayer to restrain the authorities of a municipal corporation in the exercise of their discretionary powers with regard to the control or disposition of property of the municipality, in the absence of illegality, fraud, or clear abuse of their authority").

It follows that Pioneer's Board's determinations of how to act to further Pioneer's interest are entitled to substantial judicial deference. Since 2007, Pioneer's Board has received numerous reports on the Facility, and has conducted numerous discussions of the Facility in public meeting. It has voted numerous times to authorize the Facility and related actions, including obtaining the property for the Facility and approving the financing. There is no allegation of bad faith or conflict of interest in the Board's actions. In short, the Board has exercised its legislative judgment, over a period of years and with professional advice, that the Facility is in the best interest of Pioneer district and its ratepayers. Pruitt Aff. ¶¶ 18, 50, 52. To persuade this Court to take the extraordinary step of second-guessing this judgment, these Plaintiffs must allege, and show by clear and convincing evidence, that Pioneer's decision to construct the Facility was "arbitrary and capricious." Otherwise this Court "must leave that decision undisturbed."

> It is not the prerogative of the courts to pass upon the wisdom of County Council's decision; rather, the controlling inquiry is whether County Council's refusal to change the zoning of Bear's property is ***so unreasonable as to impair or destroy Bear's constitutional rights***. *Id. at 598*. If the propriety of the Council's decision is ***even "fairly debatable," we cannot inject our judgment into a review of their decision, but must leave that decision undisturbed***. *Id. at 598*; see also *Rushing v. City of Greenville, 265 S.C. 285, 217 S.E.2d 797 (1975)* (the action of a municipality regarding the rezoning of property will not be overturned by a court if the municipality's decision is "fairly debatable" because the municipality's action is presumed to have been validly exercised, and because it is not the court's

> prerogative to pass upon the wisdom of the municipality's decision). Only where the municipality's action is "so unreasonable as to impair or destroy constitutional rights," *Rush v. City of Greenville, 246 S.C. 268, 276, 143 S.E.2d 527, 531 (1965),* will the courts declare the municipality's action unconstitutional. The burden of proving the invalidity of a zoning ordinance is on the party attacking it; thus, ***it is incumbent upon Bear to show by clear and convincing evidence the arbitrary and capricious nature of the ordinance***. *Town of Scranton v. Willoughby, 306 S.C. 421, 412 S.E.2d 424 (1991).*

Bear Enterprises v. County of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) (emphases added); *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 made a good decision, plainly in the interests of its constituents. The Audits and all other available information showed that constructing the Facility would serve Pioneer's constituents by saving millions over the option of continued purchase of water from Westminster and Seneca.

The propriety of this decision becomes even clearer when one factors in the uncertainty inherent in Pioneer's dependence on Seneca and Westminster. Those Plaintiff Cities have made profits from selling water to Pioneer, and there are no limits on what they may charge Pioneer in the future. In addition, the last contracts Pioneer signed with Seneca and Westminster each contain provisions limiting City liability for failure to provide water to Pioneer and/or allowing the City to reduce or even eliminate deliveries to Pioneer in case of shortage or fire. Pruitt Aff. ¶¶ 9-13; *see* Seneca Contract, at ¶ 11 (no liability on Seneca if water service "shall be interrupted, or suspended or fail by … any cause beyond its control"); Seneca Contract, at ¶ 12 (Seneca has absolute right to discontinue water service "during a fire in the City of Seneca …."); Westminster Contract, at ¶ C2 (simply provides that "[t]emporary or partial failures to deliver water shall be remedied with all possible dispatch," and allows Westminster to reduce water supply to Pioneer "[i]n the event of extended shortage of water" without penalty).

Moreover, the Westminster water supply is unreliable and subject to periodic pump failures (the latest one having occurred just last week). Pruitt Aff. ¶ 11. The Westminster contract implicitly recognizes this, giving Westminster the right to pass on to Pioneer any cost associated with replacement of the unreliable pump station that currently serves Pioneer: "In the event that it becomes necessary to modify or replace the pump station supplying water to Pioneer [] an amortized cost will be passed on to [Pioneer] to begin upon completion of such change." Westminster Contract, ¶ C2. It would be reckless and imprudent to do anything ***other*** than ensure Pioneer's independence from such a precarious situation, in which the Cities can balance their budgets on Pioneer's ratepayers' backs.

In short, the decision to build the Facility was sound. But judicial review is not available merely to test whether it was a good decision or not. Pioneer is not required to come into Court and persuade a judge or jury that Pioneer made the right decision. Under *Bear Enterprises* and similar cases, to obtain an injunction, Plaintiffs must allege and prove by clear and convincing evidence that Pioneer's Board acted arbitrarily and capriciously. Plaintiffs have not pled this, and cannot meet that standard.

F. The Contents of the Audits, Having Been Verified by ORS as Required by the Act, Are Not Subject to Review in This Action

In 2012, the provisions of S.C. Code §§ 6-13-240(B)-(D) were added to the Act. These new provisions (the "Audit Requirements") 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, to publicize that audit, and to submit the audit to the State Office of Regulatory Staff "to verify the audit's assumptions." These provisions state in full:

> (B) Before the board makes an investment in a facility or any other action that obligates the water district for one million dollars or more, it must provide for an

> independent audit by a certified public accountant or public accountant or firm of these accountants who have no personal interest, direct or indirect, in the fiscal affairs of the district or in an entity which may benefit financially from the transaction to be audited. This audit must include the potential impact of the board's action on its ratepayers and must be presented to the district's customers at a meeting prior to entering into the action prompting the audit. Notice of a meeting pursuant to this subsection must be provided to customers of the district as follows: (1) posted in at least one newspaper with general circulation in the district's service area fifteen days prior to the meeting; (2) posted on Pioneer Rural Water District's website for at least fifteen days prior to the meeting; and (3) written notice, in a conspicuous font, in at least twenty-four point bold font, included with the water bill to all customers for the billing cycle immediately preceding the meeting.
>
> (C) Within thirty days of receiving the audit and prior to its presentation to the customers, the board must submit the audit to the Office of Regulatory Staff for the Office of Regulatory Staff to verify the audit's assumptions.
>
> (D) Any action taken by the board must be made in the ratepayers' best interests. Best interests must include consideration of, but not limited to, the public interest of the ratepayers, financial integrity of the water district, and economic development of the area to be provided with service by the water district.

Pioneer engaged an accounting firm to prepare two such Audits, and to submit them to ORS, which performed the statutorily required review and verification. Pruitt Aff. ¶¶ 46, 48 & related Exhibits. Plaintiffs ask this Court to allow them to second-guess the substance of the Audits and, by extension, ORS's verification of the Audits. This invitation should be rejected for several reasons.[10]

The adequacy of the verified Audits is confided exclusively to ORS and so is non-justiciable – and certainly is not properly addressed in this lawsuit. The Act directs Pioneer to "submit" the Audit to ORS "to verify the audit's assumptions." This question is thus finally and definitively referred to ORS for resolution. The Legislature's decision to have the Audit verified

[10] In making these arguments concerning the unreviewability of the ORS verifications, Pioneer makes no concession concerning whether, or to what extent, this Audit requirement applied to the Facility. Pioneer reserves the right to argue that the Audit requirement does not affect the Facility.

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").

Moreover, to the extent that there is a justiciable battle here, it is a fight with ORS, which Plaintiffs have chosen not to engage.[11] While Pioneer reiterates that it does not believe the ORS verification is subject to review at all, to the extent review is possible it would have to take place under the Administrative Procedure Act, S.C. Code §§ 1-23-310, *et* seq. and would of course have to involve ORS. *Chapman v. S.C. Dep't of Soc. Servs.*, No. 2015-001548, 2017 WL 1731112, at *2 (S.C. Ct. App. May 3, 2017), *reh'g denied* (July 17, 2017) ("In an appeal from the decision of an administrative agency, the [APA] provides the appropriate standard of review."); *Original Blue Ribbon Taxi Corp. v. S.C. Dep't of Motor Vehicles*, 380 S.C. 600, 604, 670 S.E.2d 674, 676 (Ct. App. 2008) (same). Plaintiffs cannot ask the Court to reject the ORS verifications of the audits in an action to which ORS is not a party. This lawsuit against Pioneer is the wrong vehicle for an attack on the verified Audits.

[11] Similarly, note that Pioneer did not itself conduct the Audits. As required by statute, they were conducted by an independent accounting firm. Therefore, suing Pioneer to challenge the work product of the independent accounting firm and the ORS is inappropriate.

The lack of justiciability is underscored by (i) the absence of a statutory standard for measuring the Audit; and (ii) the fact that there is no requirement that the Audit reach a particular conclusion, or be approved by any group – including Pioneer's Board or ratepayers. The Audits are informational tools for the Board's use in exercising its discretion. They are not hurdles to be nitpicked by any member of the public (let alone a separate body politic) hoping to interfere in Pioneer's plans. 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)).

Plaintiffs' desire to argue about the way this was done is not a proper legal challenge. Even if this Court were to conclude, now, that there was some defect in one of the Audits, we cannot conceive of a workable judicial remedy for a past technical defect.

For very similar reasons, Plaintiffs lack standing to challenge the content or ORS verification of the Audits.[12] S.C. Code § 6-13-240(C) requires Pioneer to submit the audit of a project like the Facility to ORS to allow ORS to "verify the audit's assumptions." There is thus clear legislative intent that the audit be reviewed by ORS, and that this be the end of the matter;

[12] Pioneer has of course already argued that Plaintiffs lack standing to bring any portion of their lawsuit. But even if this Court were inclined to grant Plaintiffs standing to seek an interpretation of the Act concerning Pioneer's authority to construct the Facility, the Court should not allow Plaintiffs to proceed with the portion of their suit that seeks to second-guess the contents of the statutory Audits and their approval by ORS.

there is no place in that legislative scheme for intervention by neighboring governments. *See Dema*, 383 S.C. at 121, 678 S.E.2d at 433. Plaintiffs have no proprietary or statutory interest at stake in the Audits, and thus no standing under *City of Spartanburg*. Similarly, applying the three-part "non-governmental" test for standing, (i) the statute plainly does not confer standing; (ii) there is no constitutional case or controversy; and (iii) it is impossible to conceive that the particular facts of these Audits will provide useful future guidance that would justify invoking the public importance exception.

ORS's verification of the Audits, and hence the contents of those Audits, is not justiciable.

G. Pioneer's Enabling Act Allows Pioneer to Build and Operate the Facility

Finally, if this Court were to decide to reach the merits of this dispute, Plaintiffs' proposed interpretation of Pioneer's enabling act is both wishful and careless. Plaintiffs' view has shifted in the brief course of this litigation, and it 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." As demonstrated below, the accept usage of the term "waterworks" includes water treatment facilities, which are simply one very common component of most waterworks. 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. Fowler Report ¶ 1.[13] 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.

[13] The Fowler Report is adopted and made part of Josh Fowler's sworn testimony by the Fowler Affidavit dated August 8, 2017, and filed contemporaneously herewith.

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.

We demonstrate in the next section of this memorandum that the statutes allowing Westminster and Seneca to treat water provide clear confirmation of this meaning of "waterworks." Considerable other evidence and usage confirms this.

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 Report ¶¶ 7-9. 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 Report ¶ 9.

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).

The USDA, which routinely deals with water treatment facilities like this one and which ultimately approved the financing of the Facility, defines the Facility as part of Pioneer's "waterworks," and expressly requires that the loans to finance the construction of the Facility "will be evidenced by a waterworks and Sewer System Improvement Bonds secured by a pledge of revenue and a statutory lien on the waterworks and sewer system." Pruitt Aff. ¶ 54 & Related Exhibit. Because of the USDA requirements, the Bond Anticipation Note issued by Pioneer defines the Facility as an "improvement to the System," which is defined as Pioneer's waterworks system under the Act. Pruitt Aff. ¶ 51, 54 & Related Exhibit. (Pioneer Resolution dated February 27, 2017, at Section 1.01(a) and (f)).

The course of dealing between the parties to this litigation further confirms this meaning of "waterworks." Notably, Oconee County Ordinance 2014-21, authorizing the transfer of property to Pioneer for the Facility, states in its fourth recital that the purpose of the transfer was to allow "Pioneer to construct thereon a potable water treatment facility to be connected to and operated ***as a part of Pioneer's waterworks system***." Similarly, the water purchase contract between Seneca and Pioneer indicates that "the water to be delivered hereunder shall be supplied from the Seneca L&W Plant ***waterworks system***…." Seneca Contract, Para. 2.

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 Report ¶ 8 (no water utility "may distribute raw water obtained from any water supply in South Carolina for use and consumption without first treating that water" to meet applicable standards). 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.

3. The Statutory Authority Allowing Seneca and Westminster to Operate Treatment Facilities Supports Pioneer's Right to Treat Water

If one reads the statute that gives municipalities like Seneca and Westminster the authority to operate water utilities in the manner that these Plaintiffs suggest, it would be necessary to conclude that they also lack the power to operate a water treatment facility. Since both Seneca and Westminster treat water, it is obvious that they do not, in fact, subscribe to their own theory.

The provision of the South Carolina Code giving municipalities the authority to operate utilities provides:

> The board of commissioners of public works of ***any city or town may purchase, build or contract for building any waterworks*** or electric light plant authorized under Article 7 of this chapter and may operate them and shall have full control and management of them. ***It may supply and furnish water to citizens of the city or town*** and also electric, gas or other light and may require payment of such rates, tolls and charges as it may establish for the use of water and light.

S.C. Code § 5-31-250 (emphasis added).[14]

Using the interpretive approach suggested by Plaintiffs, this statute contains no express authority to treat water and no mention of a right to own a water treatment facility. The statute allows the municipality only to "supply and furnish" water, but not to treat that water. So it must contemplate that the municipality will obtained treated water.

This is, of course, absurd. Seneca and Westminster have always understood their authority to include water treatment, and that understanding is correct for the same reasons that Pioneer's authority includes water treatment. As a matter of common sense, of course a water utility needs the ability to treat water. As a matter of statutory interpretation, the term "waterworks" encompasses that power. *See* Fowler Report ¶¶ 6-7. If the authority to operate a "waterworks" is sufficient to allow Seneca and Westminster to treat water, it is sufficient for Pioneer as well. Conversely, if Pioneer does not have the authority under its statute to treat water, then Westminster and Seneca (and numerous other rural water districts in South Carolina) are violating the law.

4. 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

[14] Article 7 of the chapter, S.C. Code §§ 5-31-610 to -690, does not affect this discussion. Those sections refer several times to construction and acquisition of "waterworks," but they do not expressly address water treatment.

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.[15]

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).

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

5. 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.*

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 as part of their waterworks systems. 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

Fowler Report ¶¶ 2-3.

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.

6. Plaintiffs' Alternative Readings of the Act Will Not Hold Water.

Plaintiffs grasp at a variety of linguistic straws to try to avoid the obvious conclusion that a water district has the authority to treat water. Plaintiffs' interpretations ignore key elements of statutory language and intent, and they result in absurd outcomes.

Plaintiffs' primary suggestion is 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. Pruitt Aff. ¶ 5; Fowler Report ¶ 5.

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. While, as we discuss below, the Attorney General's opinions construing the Act are flawed, those opinions are correct in rejecting the narrow view that the Act contains a full inventory of the only types of equipment Pioneer may own.

Beyond all this, the primary flaw in Plaintiffs' interpretation is that it does 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.

To try to patch this hole, Plaintiffs ask this Court to conclude that the word "available" in the Act should be construed to mean "treated." This argument lacks any basis other than wishful thinking, and it is incompatible with the rest of the statute. First, like Plaintiffs' other arguments, this one ignores the consistent practice of other utilities subject to similar language, the meaning of the term "waterworks," and the statutory directive that Pioneer may obtain water "by purchase

or otherwise." If Pioneer has no choice but to obtain treated water, it is going to have no choice but to purchase that water.

Unlike "waterworks," "available" does not have a technical meaning in the world of water engineering. Pruitt Aff. ¶ 56; Fowler Report ¶ 11 (never seen term "available sources" used in the industry to mean "treated water ready for consumption"; available sources would in the industry refer simply to "various sources of water commonly drawn from"). There is no evidence – or even contention – that this is a term of art that means "treated." So "available" must be understood in its common language sense in the context of the statute. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013) ("In interpreting a statute, '[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'"). Read that way, it plainly means "whatever water sources are at hand."[16] Water districts commonly and routinely draw water from wells, lakes, and reservoirs. These are "available" sources, and they require treatment. Plaintiffs' suggestion that available means "having been chlorinated" is, by contrast, plainly "subtle or forced construction [designed] to limit . . . the statute's operation."

It is also important to note that "available" does not modify "water" in the Act – it modifies "sources." Plaintiffs' reading of "available" to mean "ready to drink" is implausible when applied to "water," but utterly incomprehensible when applied to "sources." Plaintiffs ask

[16] Interestingly, albeit in a different context the United States Supreme Court has defined the ordinary meaning of "available" as "'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.' " *Ross v. Blake*, 136 S. Ct. 1850, 1858–59, 195 L. Ed. 2d 117 (2016) (quoting Webster's Third New International Dictionary 150 (1993)); see also OXFORD ENGLISH DICTIONARY 812 (2d ed. 1989) ("capable of being made use of, at one's disposal, within one's reach"). Lake Hartwell would satisfy these definitions as an available source for Pioneer.

this Court to read "available sources" to mean "sellers of water that has already been treated." This is pure invention and should be rejected.

If the Legislature had intended to require rural water districts like Pioneer to purchase water from municipalities like Seneca and Westminster, this could have been clearly expressed. It was not. This Court should not accept Plaintiffs' invitation to twist the language of the Act in such an unnatural fashion, to achieve such a nonsensical result.

7. The Attorney General's Opinions Interpreting the Act Do Not Support Plaintiffs and Are Not Binding on the Court.

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. *Op. S.C. Att'y Gen.*, 2012 WL 1649764 (S.C.A.G. Apr. 30, 2012); *Op. S.C. Att'y Gen.*, 2017 WL 1528200 (S.C.A.G. Apr. 13, 2017) (the "Opinions"). While Pioneer submits that the Opinions are flawed and that the Court should not adopt their reasoning, it is important to note that the opinions do not support Plaintiffs' interpretation of the Act.

As an initial matter, opinions of the Attorney General 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). The Court should not adopt the reasoning of these particular Opinions, which err 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 their arbitrary and extra-statutory creation of a hierarchy requiring Pioneer to purchase water if it is on offer on certain unspecified terms.

The 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, and is made up from whole cloth. Nothing in the Act says that Pioneer must buy treated water if it can be had. The Act contains no "hierarchy" or "priority" of sources or methods of operation. Instead, Pioneer has the clear statutory right to obtain ***water*** (the Act does not say "treated water") "from available sources, by purchase or otherwise." Even if one assumes for the sake of argument that Pioneer may construct the Facility only if it is "necessary" (and we think that is an incorrect reading of the Act), water treatment plainly is a "necessary" part of delivering drinkable water to customers. In fact, it is ***legally required*** by both federal and state safe drinking water statutes and regulations. Fowler Report ¶ 8. 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.

As discussed, Pioneer is a body politic with a quasi-legislative Board whose decisions are owed substantial judicial deference. Pioneer's Board determined that the Facility was needed by Pioneer to avoid the substantial risk of being at the financial mercy of Westminster and Seneca – to say nothing of the risk that that unforeseen events or system unreliability might render Westminster and/or Seneca unable to supply Pioneer's water requirements. Pruitt Aff. ¶¶ 8-13. This constitutes the determination of "necessity" that the Opinions suggest are required; while Pioneer disagrees with the Opinions on this score, the Board's decision to go forward with the Facility is entitled to deference unless shown to be "arbitrary and capricious." *Bear Enterprises*

v. Cty. of Greenville, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995). *See* Fowler Report ¶ 10 (experience with report showing Facility was beneficial to ratepayers).

A related problem with the approach of the Opinions is that the Attorney General gives no guidance on the very unclear issue of when it becomes "necessary" for a utility like Pioneer to treat water. The Opinions suggest an unworkable standard. If one uses the natural meaning of the words of the Opinion, it will never be "necessary" to treat water; short of worldwide drought, it will always be possible to purchase water, at some price, from some other source. Fowler Report ¶ 12 (water "does not spoil" and can be transported "over many miles"; other than cost, there is no barrier to purchase and thus never "necessary" to treat water). Or does "necessary" merely mean "benefits outweigh costs"? That is not what the Opinions say, but if that is the intent, then Pioneer has demonstrated it meets the standard, through the statutorily required Audits. Pioneer submits, though, that none of these problems arise if the problematic Opinions are rejected as useful guides to the Act.

More generally, the appearance of the word "necessary" in the Act should not be read to hamstring Pioneer and subject it to nit-picking litigation over whether any of its actions go beyond what is absolutely "necessary." The provision of the Act giving Pioneer "all other powers that may be necessary ***or incidental***" (emphasis added) should not be given the crabbed reading adopted by the Attorney General. 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.

While Plaintiffs embrace the Attorney General's opinions, it is important to recognize that those Opinions are inconsistent with Plaintiffs' arguments in important respects. Unlike the Opinions, Plaintiffs place tremendous interpretive weight on the word "available" and on the brief list of equipment in the Act; the Opinions do not agree with that approach. Indeed, while the Opinions conclude that Pioneer may treat water if "necessary" (without giving guidance to what "necessary" means in this context, Plaintiffs' arguments would force the conclusion that Pioneer can ***never*** operate a water treatment facility. Ultimately, the Opinions do not support Plaintiffs in the relief they seek.

The problem at the core of these Opinions is that they plainly were delivered without consideration of the realities of operating a water utility. Some statutes can be interpreted solely by reviewing their terms; others require more context. Because of this litigation, this Court has context and insight not available to the Attorney General when these opinions were rendered. Their lack of context, and their failure to take account of key elements of the Act, make the Opinions 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.

IV. Conclusion

Pioneer's Board exercised its judgment in the best interests of its ratepayers to build the Facility. The suggestion that a water district may not treat water is far-fetched, and finds no support in the Act. These Plaintiffs sat by for years while Pioneer moved forward with the Facility. They would never have been proper parties to seek judicial review of Pioneer's exercise of discretion, and they certainly are not proper parties to do so after sitting silent for so

long. Pioneer is entitled to summary judgment or partial summary judgment on the grounds set forth in its motion.

Respectfully submitted,

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s/ J. Theodore Gentry

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