STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS Case No.: 2017-CP-37-00187 **FINAL ORDER AND JUDGMENT**
City of Seneca, South Carolina, City of Westminster, South Carolina, and County of Oconee, South Carolina, Plaintiffs, and Oconee Joint Regional Sewer Authority, Intervenor Plaintiff, vs. Pioneer Rural Water District of Oconee and Anderson Counties, Defendant.	

This matter came before the Court for a non-jury trial, conducted from August 28-31, 2017. After consideration of the arguments of the parties, the testimony and documentary evidence presented at trial, and pre-trial and post-trial briefing, the Court makes the following findings of fact and conclusions of law.

Procedural Background

This matter arises out of a plan by Defendant Pioneer Rural Water District of Oconee and Anderson Counties ("Pioneer") to construct a water treatment facility (the "Facility") that would allow Pioneer to draw water from Lake Hartwell, treat that water, and then deliver the treated water to its customers. Plaintiffs oppose the proposed Facility.

Plaintiffs City of Seneca ("Seneca"), City of Westminster ("Westminster") and Oconee County ("Oconee") filed a Complaint against Pioneer on April 3, 2017, seeking to enjoin construction and operation of the Facility. The original Complaint contained a single cause of action, for declaratory judgment, and alleged that Pioneer did not have statutory authority under Pioneer's enabling act (the "Act"), which appears at S.C. Code §§ 6-13-210, *et seq.*

On April 6, 2017, the original Plaintiffs filed a motion for a preliminary injunction in an effort to halt construction of the Facility pending trial. On April 24, 2017, Intervenor Plaintiff Oconee Joint Regional Sewer Authority ("OJRSA") filed a motion to intervene as a plaintiff in this action and to join in the motion for preliminary injunction. After a hearing and consideration of the briefs of the parties, this Court denied the motion for preliminary injunction, issuing an opinion dated June 14, 2017. At the hearing on the motion for preliminary injunction the Court suggested, and the parties agreed, that expedited proceedings were appropriate, given that construction of the Facility had already commenced. As a result, the matter was set for trial for the week of August 28, 2017.

Pioneer's Answer to the original Complaint, filed on April 26, 2017, included Counterclaims and a Third Party Complaint against OJRSA, alleging misconduct in connection with Pioneer's attempts to obtain a building permit for the Facility. OJRSA answered the Third Party Complaint on May 15, 2017.

On May 26, 2017, the original Plaintiffs filed an Amended Complaint. While the Amended Complaint contained the same single cause of action for declaratory judgment and sought the same relief, it added additional grounds in support of the contention that the Facility was improper. Specifically, the Amended Complaint added to the claim that Pioneer lacked authority under the Act to construct the Facility, allegations that (i) the construction contract for

the Facility was *ultra vires* because it was entered into before the statutorily required audit was completed and presented to customers; (ii) that the audit itself was based upon misinformation; and (iii) that the Facility was not in the best interest of Pioneer's ratepayers.

Pioneer answered the Amended Complaint on June 9, 2017. Because the building permit issue had been resolved by that time, Pioneer did not include the Counterclaims and Third-Party Claims from its earlier Answer, effectively removing those contentions from the lawsuit. Pioneer did, however, assert a counterclaim for declaratory judgment that the Act gives Pioneer the statutory authority to construct and operate the Facility as part of its waterworks system.

On August 23, 2017, this Court entered a consent order adding OJRSA as a Plaintiff. The original Plaintiffs and Intervenor Plaintiff are referred to collectively as "Plaintiffs" herein.

Plaintiffs and Pioneer each filed extensive motions for summary judgment prior to trial. The Court heard those motions before the commencement of trial and took them under advisement. Because the matter was tried to completion, the Court need not rule on those motions; however, the Court has considered the extensive briefing on those motions in reaching its conclusions after trial.

Findings of Fact

A. The Parties

Pioneer is a special purpose rural water district, created as a body politic by the Act in 1965. Pioneer's mission is to meet the water needs of customers in its service area. That service area, comprising approximately 130 square miles, 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. Pioneer currently serves approximately 7,000 customers in southern Oconee County and Northwestern Anderson County.

Each of the Plaintiffs is also a body politic. Seneca, Oconee, and OJRSA are customers of Pioneer; Westminster does not purchase water from Pioneer. Seneca and Westminster, which each operate a waterworks system, sell water to Pioneer.

Because Pioneer (like Plaintiffs) 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.

Other than the commercial relationships of buying and/or selling water, Plaintiffs and Pioneer have no relationship with one another; they are independent bodies politic. While Pioneer's Board is elected by "qualified customers," the statutory definition of qualified customers is limited to individuals, and so excludes these Plaintiffs. S.C. Code § 6-13-230(A)(2).

B. History of the Facility

Since Pioneer's inception, Pioneer has not owned or operated its own water treatment facility. Pioneer initially purchased all the water needed to serve its customers from Westminster. Starting in 1987, Pioneer has also purchased water from Seneca. While the percentages have varied somewhat over time, at the time of trial Pioneer was purchasing approximately 60% of its wholesale water from Seneca and about 40% from Westminster.

The testimony indicates that Pioneer's Board became concerned about Pioneer's dependence on Seneca and Westminster for water. The record reflects a history of increases in the prices charged to Pioneer, especially by Westminster. No regulatory body sets or limits the prices that Seneca or Westminster may charge Pioneer. The record also reflects periodic interruptions in the supply of water to Pioneer.

Motivated by these concerns, in or around 2007 Pioneer began exploring alternative

means for providing water to its customers. 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 the feasibility study from Design South on or about October 31, 2007. The study indicated that construction of a water treatment facility was worthy of additional consideration.

Terry Pruitt, Pioneer's General Manager, testified without contradiction that, shortly after the completion of the feasibility study, he met with both Westminster and Seneca, informed them of Pioneer's intention to move forward with exploration of the water treatment facility option, and asked each to make Pioneer an offer for a long-term supply contract that would make it unnecessary for Pioneer to construct such a facility.

After receipt of the feasibility study, Pioneer's Board voted publicly to commission plans to construct its own treatment facility (the "Facility"). After additional work and consideration, the Board passed a resolution on January 5, 2010 "to begin the process of permitting, designing, and constructing a new water treatment plant."

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 public resistance from local residents.

In late 2011, in an effort to mediate this public opposition, Oconee first suggested that Pioneer might acquire land in the Commerce Park for its Facility. Accordingly, Pioneer commissioned Design South to conduct a new feasibility study, to determine whether it could relocate the Facility to the Commerce Park. In March 2012, 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. Oconee was aware at the time that

Pioneer intended to use the parcel for a water treatment facility.

Design South prepared plans and specifications for the relocated Facility in the Commerce Park, 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.

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.

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 a proposed agreement to accomplish this transfer. 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 served by the Facility.

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 – again with 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.

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 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 contains an express commitment from Pioneer to build the Facility. The contract goes on to 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.

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.

In general, the record reflects numerous public meetings of Pioneer's Board at which Pioneer's plans to construct the Facility were discussed, starting in 2007 and continuing through the date of the filing of this litigation. 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, engineering studies, DHEC approvals, and other documents related to the Facility were also available to the public through FOIA.

C. Amendment of the Act to Add the Audit Requirements

In the midst of the years-long buildup to construction of the Facility just described, Pioneer's enabling act was amended. Before 2012, the Act was substantially similar to the other rural water district enabling acts of the same vintage. In particular, the Act did not contain the

provisions of S.C. Code §§ 6-13-240(B) and (C) (the "Audit Requirements") that came to occupy a central place in this litigation.

In the first half of 2012, a bill to amend the Act was introduced that would have expressly prohibited Pioneer from "contract[ing] for or undertak[ing] the construction of any new freshwater treatment facilities from the effective date of this subsection until July 31, 2016." House Bill 4801, introduced on February 22, 2012.[1] This amendment did not become law.

Instead, the Act was amended, with an effective date of July 26, 2012, to require that, before Pioneer invested in any new facility or took other action that obligated Pioneer for one million dollars or more, Pioneer was to provide for an independent "audit" by an accounting firm. The amendment did not specify the form or content of the audit in detail, but provided that the audit was to "include the potential impact of the board's action on [Pioneer's] ratepayers." The audit was required to be submitted to the South Carolina Office of Regulatory Staff ("ORS") "to verify the audit's assumptions," and it was to be presented to the district's customers at a meeting. S.C. Code §§ 6-13-240(B), (C).

D. Pioneer's Actions Pursuant to the Audit Requirements

By the effective date of the Audit Requirements, Pioneer had already undertaken substantial work and expended funds directed toward the acquisition of property for, and design of, the Facility.

To comply with the Audit Requirements, Pioneer engaged the independent accounting firm of Byerley, Payne & White ("BPW") to prepare a report or audit concerning the Facility pursuant to the requirements of S.C. Code § 6-13-240(B). This engagement was reported in the minutes of

[1] The March 8, 2012 version of the proposed amendment can be seen on the General Assembly website at http://www.scstatehouse.gov/sess119_2011-2012/prever/4801_20120308.htm.

the public meeting of Pioneer's Board held on September 18, 2012. Because the Audit Requirements were new, Jason White – the certified public accountant with BPW who was preparing the 2013 Audit – contacted ORS for guidance concerning what ORS expected to see. In addition to conversation with ORS, Mr. White received an email from ORS with a sample format.

BPW prepared the 2013 Audit, dating it January 25, 2013. The 2013 Audit used assumptions that included an estimated cost of the Facility $15 million; these assumptions came from the most recent Preliminary Engineering Report ("PER") available at that time. The 2013 Audit was submitted to ORS in early 2013. On April 10, 2013, ORS issued its verification of the 2013 Audit.

The 2013 Audit was presented at two public meetings of Pioneer's Board. The first was a regular Board meeting, conducted on March 5, 2013. For that meeting, Pioneer provided its typical notice in advance of the meeting, and did not attempt to give particular notice pursuant to the requirements of S.C. Code § 6-13-240(B). The 2013 Audit was presented a second time at a public meeting of Pioneer's Board on March 19, 2013.

For its second meeting concerning the 2013 Audit, Pioneer undertook to provide notice pursuant to the Audit Requirements. No later than Friday, March 1, 2013, Pioneer submitted a notice for the March 19, 2013 meeting to the Seneca Journal for publication, and directed the outside contractor managing Pioneer's website to post notice of the meeting on Pioneer's website. While Pioneer intended for the published notice to appear on Monday, March 4, 2013, the notice actually ran on March 5, 2013 because the Seneca Journal does not publish its newspaper on Mondays. Therefore, the published notice appeared 14 days before the March 19, 2013 meeting, rather than the 15 days required by statute. Pioneer posted the agenda of the March 19 meeting at its offices and on its website at least fifteen days prior to the meeting. Pioneer also included notice

of the meeting in the water bills for its customers in the billing cycle immediately preceding the meeting, but those notices were a smaller font size than specified in the Act.

The record does not reflect any complaint or discussion of any sort of these two deficiencies in notice – publishing notice one day late, and printing the bill insertion notice in the wrong type size – until November 23, 2016. At that time, in conjunction with the closing of financing for the Facility, the bond attorney engaged by Pioneer (who was a lawyer at the same law firm that had been engaged by Pioneer at the time of the 2013 Audit and thereafter) pointed out the deficiencies and advised Pioneer to redo the audit.

As a result, Pioneer commissioned the accounting firm Payne, White & Schmutz ("PWS"; successor to BPW) to update the 2013 Audit. For this update, PWS assumed the estimated cost of the Facility to be $21.6 million; this figure came from the November 2014 PER, which was again the most recent one available at the time. PWS issued the update to its report (the "2016 Audit") on December 9, 2016, and submitted it to ORS. On January 19, 2017, ORS issued its verification of the 2016 Audit.

Public notice of a meeting scheduled for January 10, 2017 to inform Pioneer's customers of the 2016 Audit was published in the Seneca Journal newspaper in its December 17, 2016 issue. Pioneer posted notice of the meeting on Pioneer's website that same day. The agenda for that meeting was also posted at Pioneer's offices more than 15 days prior to the meeting. Pioneer included written notice of the January 10, 2017 meeting in the water bills for its customers in the billing cycle immediately preceding the meeting. The meeting to present the findings of the 2016 Audit to Pioneer's customers was held on January 10, 2017. Hence, the Act's notice requirements for the public meeting to present the 2016 Audit were met.

E. Signing of the Construction Contract, Closing of Financing, and Commencement of Construction

Pioneer entered into a contract for construction of the Facility (the "Construction Contract") with Harper Corporation with an effective date of November 1, 2016. Thus, the Construction Contract was entered before completion of the 2016 Audit, and before the public meeting presenting that audit, which took place on January 10, 2017. The Construction Contract provided for a fixed price of $17.05 million for construction of the Facility.

The Construction Contract gave Pioneer the right to terminate for convenience at any time on seven days' written notice. Upon such termination, Pioneer would be obligated to pay Harper Corporation for work completed and expenses incurred by Harper Corporation prior to the effective date of termination, together with fair and reasonable sums for overhead and profit, and other reasonable expenses directly attributable to termination. Also relevant to this dispute, the notice to proceed provided to Harper Corporation made clear that "no Work shall be done at the Site prior to January 2, 2017."

For several years prior to the commencement of construction, Pioneer had been seeking long-term funding for the Facility through the Department of Agriculture's Rural Development Agency ("USDA"), which provides financing for projects like the Facility at favorable interest rates and terms. 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"). The CoBank loan is to 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.

Harper Corporation actually commenced work on the Facility on or about January 11,

2017. Undisputed testimony at trial was that Pioneer was not obligated to pay Harper $1 million or more at any time during January 2017. The first payment application for Work on the Facility was submitted by Harper Corporation on or about March 15, 2017. 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. The Facility is currently projected to be completed in approximately August of 2018.

F. Conduct of Pioneer's Board

There is no allegation or evidence of bad faith or conflict of interest on the part of Pioneer's Board or any of its members in connection with the decision to build the Facility. The record reflects that the Board proceeded deliberately and in public over the better part of a decade in moving toward construction of the Facility.

The Board commissioned its first feasibility study concerning the Facility in 2007. After it received and reviewed that study, the Board approved preliminary design work. From there, it moved on to explore financing. The Board also considered three different sites for the Facility over several years until 2014, when Oconee transferred to Pioneer the parcel of property where the Facility is currently under construction.

The Board received numerous reports and updates from Design South and from Terry Pruitt, Pioneer's General Manager. The Board received the 2013 and 2016 Audits. The Board was told about Preliminary Engineering Reports from Design South. Terry Pruitt testified that there was some discussion of the Facility at virtually every Board meeting during the period between early 2008 and January 2017. During this period, there was thus ample opportunity for public comment to the Board concerning the Facility. The Board was also aware of approvals of

the Facility from DHEC and USDA.

In connection with closing of the financing for the Facility, the Board adopted a detailed resolution concerning the Facility. And Pioneer obtained an opinion letter from its counsel, Nelson Mullins Riley & Scarborough, opining that "consummation by [Pioneer] of the transactions contemplated [by the financing for the Facility] will not … violate [Pioneer's] Creation Legislation…."

All of the studies provided to the Board by Pioneer's advisors showed that constructing the Facility would result in lower costs for Pioneer's ratepayers than if Pioneer were to continue to purchase water from Seneca and Westminster. Beyond this, the Board also considered the fact that neither Seneca nor Westminster was subject to regulation in the prices it could charge Pioneer for water, and that there were reliability issues with both systems.

Conclusions of Law

The Court's rulings on the claims and defenses asserted by the parties, along with additional relevant findings of fact, are as follows.

A. Standing

As an initial matter, Pioneer challenges the standing of all Plaintiffs to bring this action, and also argues that Oconee is estopped to act as a plaintiff. The Court agrees that Westminster lacks standing, but holds that the other Plaintiffs may proceed in light of their status as customers of Pioneer.

Pioneer's primary argument against standing arises from the fact that each Plaintiff is a body politic, and that the lawsuit seeks judicial review of the proper scope and exercise of the powers of another body politic. Citing *City of Spartanburg v. County of Spartanburg*, 303 S.C. 393, 395, 401 S.E.2d 158, 159 (1991), Pioneer argues that a 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."

The Court agrees with Plaintiffs that *City of Spartanburg* does not create a different standing test for bodies politic, and finds that three of the four Plaintiffs have standing under the general test for standing. The Supreme Court has recently stated that test, explaining that "[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).

As customers of Pioneer, Seneca, Oconee, and OJRSA are ratepayers with a concrete interest in the decision by Pioneer to construct the Facility. There will almost certainly be some impact on the rates that they pay for water as a result of the decision to construct the Facility. Accordingly, the Court holds that these three Plaintiffs are real parties in interest with an actual dispute with Pioneer, and thus have standing. In so holding, the Court rejects Pioneer's contention that these three Plaintiffs lack standing (i) because their interests are no different from the interests of other ratepayers; (ii) because any standing for ratepayers should be limited to the class of "qualified customers" under S.C. Code § 6-13-230(A)(2), which excludes these Plaintiffs; and (iii) because their only relationship with Pioneer is commercial and contractual, and these Plaintiffs make no allegation of a breach of that contractual relationship.

The other elements of traditional standing jurisprudence do not apply to these Plaintiffs. Neither the Act nor any other statute confers standing on these Plaintiffs, and so there is no statutory standing. And the Court rejects the application of "public importance" standing in this case. The 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 ATC South, Inc. v. Charleston Cty.*, 380 S.C. 191, 199, 669 S.E.2d 337, 341 (2008) ("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."). There is no allegation, nor any reason to expect, that Pioneer will undertake construction of another water treatment facility at any point in the foreseeable future; this was confirmed by the evidence presented at trial. Moreover, the very particularized factual circumstances surrounding Pioneer's compliance with the Audit Requirements are unlikely to be duplicated. The public importance exception does not apply here.

Westminster, on the other hand, is not a customer of Pioneer. Westminster therefore lacks standing and is dismissed as a Plaintiff.

Pointing to Oconee's contribution of land for the Project, and to the terms of the land transfer contract that required Pioneer to construct a water treatment facility on the Property, Pioneer argues that Oconee is now estopped to seek a judicial order halting the Facility. While the Court agrees with Pioneer that the record plainly reflects a change in Oconee's position concerning the Facility, the Court does not conclude that Pioneer made any prejudicial change in position in specific reliance on Oconee's initial support of the Facility; such reliance is an element of estoppel. *See 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). Oconee is not estopped to proceed as a Plaintiff in this action.

B. Statutory Authority to Construct the Facility

Plaintiffs' initial contention in filing the lawsuit was that the Act does not give Pioneer the

authority to construct or operate a water treatment facility. In support of this claim, Plaintiffs rely heavily on the reasoning of two opinions of the South Carolina Attorney General, which conclude that, while the Act does not prohibit operation of a water treatment facility, Pioneer may do so only if it is "necessary." For the reasons that follow, the Court concludes that the Act does authorize construction and operation of the Facility.

The parties agree that the starting point for this analysis is the language of the Act. Pioneer, like numerous other rural water districts in South Carolina, operates under an enabling 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 starting point for analyzing the Act is an understanding of its purpose. "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 v. South Carolina Board of Health & Envt'l Control*, 374 S.C. 201, 205, 648 S.E.2d 601, 603 (2007) (language of statute must be read to harmonize with its subject matter and in accord with its general purpose); *Roche v. Young Bros. of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998) ("[a] statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers."). Pioneer and other rural water districts were created to ensure a supply of clean water to customers in areas not served by existing utilities.

Ample evidence at trial – from both sides – makes it clear that water must be treated before it can be delivered to customers. It is undisputed that both federal and state regulations require such treatment. This means that the water delivered by Pioneer must be treated by someone. Thus, Plaintiffs' argument boils down to the claim that Pioneer is required to purchase treated water from some other utility, but is forbidden to treat water itself. The Court does not find this concept anywhere in the Act. It is certainly not present expressly, and the Court also does not find it to be implicit in the language or structure of the Act. Had the Legislature intended to limit Pioneer to the purchase and transport of water treated by other utilities, that concept would have been simple to express. It is absent from the Act.

Instead, the Act does provide express authorization for construction and operation of the Facility. The key operative language of the Act provides: "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. The Legislature authorized Pioneer to construct and operate a "waterworks system." The Court agrees with Pioneer that the term "waterworks system" includes a water treatment facility.

The Act does not define "waterworks." Accordingly, the Court may 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 relevant statute does not define a specific term – "paid-in surplus" – court must look to its common use in relevant field of 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 statute, court must look to common definition of term, including dictionaries). The evidence of standard definitions and technical use points plainly and overwhelmingly to the conclusion that "waterworks" includes a treatment facility.

Pioneer provided the evidence of two experts, who agreed that in their professional experience, the term "waterworks" is commonly and consistently used to include water treatment facilities. Pioneer also elicited similar testimony from Plaintiffs' own witnesses. And Pioneer's experts pointed to numerous other sources that include water 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).

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 waterworks 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).

- 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 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. And finally, the USDA makes clear that its financing of the Facility "will be evidenced by a ***waterworks*** and Sewer System Improvement Bonds *[sic]* secured by a pledge of revenue and a statutory lien on the ***waterworks***

and sewer system." (Emphasis added in all foregoing quotes.)

Pioneer's statutory authority to treat water is reinforced by the remainder of the sentence from the Act quoted above. Pioneer is empowered to utilize "water from available sources, by purchase ***or otherwise***." This language plainly allows Pioneer to obtain water other than by purchase. If Pioneer is not purchasing its 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. Thus, the authority to draw water from sources other than purchase necessarily includes the authority to treat that water.

This express statutory authority to operate a waterworks and to obtain water by purchase or otherwise is consistent with the commonsense understanding of the purpose of the Act. It would be unusual to create a rural water district, like Pioneer, but deprive it of the ability to treat water before delivering it. There is no evidence of such an intent. Pioneer exists to deliver clean water to customers, and this includes the power to treat water before delivering it.

Plaintiffs, citing "Dillon's Rule," as articulated in *Williams v. Town of Hilton Head Island*, 311 S.C. 417, 421, 429 S.E.2d 802, 804 (1993), argue that the Act is to be construed narrowly, and that Pioneer has only the powers that are (1) "granted in express words;" (2) "necessarily or fairly implied in or incident to the powers expressly granted;" or (3) "essential to the accomplishment of the declared objects and purposes of the [municipal] corporation, not simply convenient, but indispensable." Assuming this to be the standard, the Court nonetheless concludes that Pioneer may build and operate the Facility. First, the authority is either expressly granted or at minimum "fairly implied in" the powers granted to Pioneer, by virtue of the authorization of Pioneer to operate a "waterworks" and to obtain water "by purchase or otherwise." Second, beyond these clear grants of authority, the authority to treat water is also "essential to the accomplishment of

[Pioneer's] declared purpose" of providing a supply of clean water to its customers.[2] *See* S.C. Code § 6-13-210 (vesting Pioneer "with the powers herein granted ***and all other powers that may be necessary or incidental*** in carrying out the functions herein prescribed" (emphasis added)).

The authority of rural water districts like Pioneer to treat water is further reinforced by the large number of rural districts, operating under the same statutory language, that do so. At trial, Pioneer's experts identified twelve rural water districts that have essentially identical enabling acts that operate, or are in the process of constructing, water treatment facilities. The Court finds this consistent history of interpretation relevant and persuasive. Numerous other districts have concluded that their own, substantially similar, enabling acts allow them to treat water before providing it to its customers.

Plaintiffs ask this Court to adopt the interpretation of the Act put forth in two Attorney General Opinions. *See 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 "AG Opinions"). For the following reasons, and with due respect for the Office of the Attorney General, after taking extensive testimony both from experts and those involved in the day-to-day operation of Pioneer, this Court declines to follow those AG Opinions. *See Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 560–61, 713 S.E.2d 604, 609 (2011) (opinions of the Attorney General are not binding on the courts).

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[2] Plaintiffs rely on Dillon's Rule in part to avoid the difficulty to their position caused by S.C. Code § 5-31-250. This is the statutory provision that authorizes Plaintiffs to treat water. Like the Act, this provision does not mention water treatment specifically, but instead authorizes a city or town to operate a "waterworks." At first blush, this would seem to mean that Pioneer has exactly the same authority as Seneca and Westminster to treat water. While Plaintiffs argue that Dillon's Rule means the two statutes should be interpreted differently, the fact remains that Section 5-31-250 is further evidence of a legislative practice of using the term "waterworks" to include water treatment.

The Court agrees with Pioneer that the AG Opinions suffer from three fundamental shortcomings. First, they fail entirely to analyze the meaning of the term "waterworks." As is set forth above, the legislative grant of authority to operate a "waterworks" is key to the interpretation of the Act, and the failure of the AG Opinions to deal with this central term renders the remainder of their analysis unhelpful.

Second, and similarly, the AG Opinions do not consider the implication of the fact that Pioneer is authorized to obtain water "by purchase or otherwise." Water that is not obtained by purchase must be treated, and Pioneer's authority to obtain water "otherwise" means that treatment is necessary.

Third, the AG Opinions assume a preference for purchasing water over obtaining it otherwise that does not exist in the Act. The AG Opinions suggest that Pioneer's right to construct the Facility turns on whether such a facility is "necessary," and that treatment is necessary only if Pioneer cannot buy treated water. This priority of purchase over drawing from other sources has no basis in the Act. Nothing in the Act says that Pioneer must buy treated water if it can be had.

In reaching this conclusion, the AG Opinions place undue emphasis on the appearance of the word "necessary" in the provision of Section 6-13-210 of the Act that gives Pioneer "all other powers that may be necessary or incidental in carrying out the functions herein prescribed and exercising the powers herein granted." Read as a whole, this grant of powers that are "necessary ***or incidental***" is plainly intended to confer authority to carry out activities reasonably related to Pioneer's core function, not a narrow restriction to only those bare powers that can be shown to be absolutely "necessary" in court. Taken to the extreme, it would never be necessary to draw untreated water from a lake or well, as treated water could always be purchased and trucked in, at

some price.

Even if one agrees with the AG Opinions that Pioneer may construct the Facility only if it is "necessary," the Court finds that water treatment 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. *See* Safe Drinking Water Act, 42 U.S. Code § 300f, *et seq.*; State Primary Drinking Water Regulations, DHEC Regulation 61-58. 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 authority to avail itself of sources other than purchase of treated water.

With the benefit of substantial expert and factual testimony, this Court has received context and insight not available to the Attorney General when the AG Opinions were rendered. In light of this record, the Court declines to adopt the AG Opinions, and holds that the Act allows Pioneer to construct and operate the Facility.[3]

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[3] At various points in the course of this litigation, Plaintiffs advanced interpretations of the Act other than the one set forth in the AG Opinions. One such argument is that the items expressly mentioned 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 as a complete inventory of the only items of property that Pioneer may own. This contention, which Plaintiffs appear to have abandoned, is incorrect. This language does not purport to place a limit on the types of equipment Pioneer may own. Second, Pioneer has demonstrated that the list is too narrow to constitute an inventory of every sort of property and equipment needed to operate a water district.

Plaintiffs have also suggested that the word "available" in the Act should be construed to mean "treated." This argument lacks any basis in the Act or common usage, and it is incompatible with the rest of the statute. Unlike "waterworks," the word "available" does not have a technical meaning in the world of water engineering. 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. Read that way, it plainly means "whatever water sources are at hand." Water districts commonly and routinely draw water from wells, lakes, and reservoirs. These are "available" sources, and they require treatment. It is also important to note that "available" does not modify "water" in the Act – it modifies "sources." Plaintiffs' reading of

C. Laches and Availability of Injunctive Relief

Plaintiffs seek only a single remedy – an injunction of the Facility. In response, Pioneer emphasizes the deliberate and public progress of the Facility over the better part of the past decade. The record establishes beyond dispute that each of the Plaintiffs had both actual and constructive knowledge of Pioneer's intention to construct the Facility and its public affirmative steps to proceed with the design, financing, and construction of the Facility for years before the filing of this lawsuit.

Without belaboring every incident, the record is replete with evidence of Plaintiffs' knowledge of the Facility, and Plaintiffs do not seriously dispute their awareness of Pioneer's plan to construct a water treatment plant. For example, Terry Pruitt of Pioneer offered uncontradicted testimony that, around 2008, he informed both Seneca and Westminster of the results of the initial feasibility study and invited those two cities to make a proposal that would eliminate Pioneer's need to construct the Facility. Minutes of meetings of the Westminster City Council in March and July 2014 reflect discussions of the potential impact on Westminster of construction of the Facility. As described above, Oconee contributed land to Pioneer and entered into a contract for the transfer of that land in express contemplation of construction of the Facility. Robert Faires, who is Utility Director of Seneca and also served on the Board of OJRSA at the relevant time, wrote a detailed letter to Senator Thomas Alexander in August 2013, taking issue with the 2013 Audit conducted on the Facility. OJRSA specifically referred to the Facility in meeting minutes from November 2014, and the Oconee County Infrastructure Advisory Committee, which included representatives of all of the Plaintiffs, referred to the Facility in meeting minutes in 2010 and

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"available" to mean "ready to drink" is implausible when applied to "water," but incomprehensible when applied to "sources."

2013.

In addition to this and other evidence of actual knowledge on the part of each Plaintiff, there is a full record of constructive knowledge as well. All of Pioneer's meetings were conducted in public, by law, and the Facility was discussed often in those meetings. The Preliminary Engineering Reports and other documents concerning the plans for, and costs of, the Facility were discussed in meetings and available to any interested person through the Freedom of Information Act ("FOIA"). The record reflects periodic newspaper coverage of the planned Facility, and the March 19, 2013 meeting to present the 2013 Audit was publicly noticed in the newspaper and in Pioneer's bills. DHEC issued approvals of the Facility, and the USDA approved it for financing. Putting their actual knowledge to one side, the highly public and deliberate nature of the progress of the Facility placed Plaintiffs on inquiry notice of the plan to build the Facility. *See Arceneaux v. Arrington*, 284 S.C. 500, 504, 327 S.E.2d 357, 359 (Ct. App. 1985) ("if the circumstances are such as to have put [a party] upon enquiry and the means of ascertaining the truth were readily available had enquiry been made, the neglect of the party to make enquiry will charge him with laches the same as if he had known the facts").

Pioneer argues that this record supports a finding of laches that would bar the entry of an injunction against completing the Facility, even if the Court agreed with Plaintiffs otherwise that an injunction is appropriate. Pioneer has demonstrated substantial detrimental reliance on its part in proceeding with the Facility during the period that Plaintiffs could have acted, including design and engineering costs, land acquisition, permitting costs, applying for and obtaining financing (with related costs), the commissioning of the audits, the execution of a construction contract, and the commencement of construction, all of which took place before Plaintiffs filed suit.

A party's delay in asserting its rights will bar equitable relief, where the defendant has

incurred costs on the basis of the delay. *Arceneaux v. Arrington*, 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. During their delay, they allowed defendant to incur the expense of erecting a metal building, without protest. Given their two year delay and the costs plaintiffs allowed defendant to incur, the court held that it would be inequitable to issue an injunction. *Id*. 284 S.C. at 502-03, 327 S.E.2d at 358-59. The court explained that laches will bar equitable relief when "the delay has worked injury, prejudice, or disadvantage to the other party." 284 S.C. at 503, 327 S.E.2d at 358.

In the instant case, Plaintiffs knew of the Facility for years. Moreover, the first Attorney General's Opinion articulating Plaintiffs' theory that Pioneer lacks authority to construct the Facility was issued in 2012. Plaintiffs could have sought a declaratory judgment far earlier than they did, and Pioneer plainly incurred substantial costs related to the Facility after that point. Pioneer moved forward with the Facility while Plaintiffs, with knowledge of both the plan for the Facility and the language of the Act that they say prohibits it, did nothing. These circumstances present a strong case against an injunction.

Plaintiffs offer two arguments against such an application of laches. First, they contend that the 2016 Audit, occurring after the 2014 PER that increased the cost estimate for the Facility by approximately $4 million over the previous estimate, marked the decision by Pioneer to construct a "new" Facility, such that Plaintiffs' knowledge of the plan to build the "old" Facility was rendered irrelevant. Second, Plaintiffs argue that the Declaratory Judgment Act gives the Court the power to declare the Facility to be *ultra vires* and then to enforce that declaration without exercising equitable powers that are subject to laches. The Court does not find either contention persuasive.

In response to the first argument, the Court finds that Pioneer has undertaken a single project, to construct a single water treatment facility. The design has not changed, other than to accommodate the earlier changes in the planned location. The record reflects a single, uninterrupted path to the construction of the Facility at issue here. Nothing in the Act or in the record compels the conclusion that a cost increase – which is a common part of major construction projects – equates to a "new project."

Nor have Plaintiffs provided any authority for the argument that this Court may enter an injunction without exercising its equitable powers. It is clear that a declaratory judgment action can be either legal or equitable, depending upon the nature of the remedy sought. *See Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002) (recognizing that "whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action" and that where the plaintiff's main purpose was to enjoin defendant, the matter was equitable); *see generally* 23 SOUTH CAROLINA JURISPRUDENCE, *Declaratory Judgments* § 7. Here, the only remedy sought by Plaintiffs is an injunction. There is no such thing as a "non-equitable injunction," and so this matter is equitable.[4] *See Wiedemann v. Town of Hilton Head Island*, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001) ("Actions for injunctive relief are equitable in nature.").

Indeed, the South Carolina Supreme Court has applied laches in similar cases involving challenges to the scope of an entity's statutory authority, when there was delay in bringing the challenge. *City of Myrtle Beach v. Richardson*, 280 S.C. 167, 311 S.E.2d 922 (1984), involved a

[4] Plaintiffs acknowledged as much during the May 4, 2017 hearing on their motion for a preliminary injunction of the Facility. Plaintiffs' counsel stated that "a declaratory judgment is either legal or equitable, depending on what the case is about. This is a cause of action in equity. We don't have a legal remedy."

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

Similarly, in *Chambers of South Carolina, Inc. v. County Council for Lee County*, 315 S.C. 418, 434 S.E.2d 279 (1993), the Supreme Court declined to void a contract between a county council and a third party for operation of a landfill, even though the Court indicated its belief that the contract violated the South Carolina Procurement Code. "[I]f a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position," the Court explained, "then equity will ordinarily refuse to enforce those rights." *Id.* at 421, 434 S.E.2d at 280. The Court observed that the plaintiff "knew the [third party contractor] would be expending money and beginning its site approval with DHEC" and knew that "time was of the essence" in that the existing landfill was "nearing capacity" and obtaining a permit from DHEC would "typically take[] two years." *Id.* at 421, 434 S.E.2d at 281. "However meritorious [the plaintiff]'s claim would have been if timely made," the Court held, it was still barred. *Id.* at 421, 434 S.E.2d at 281.

See also Quince Orchard Valley Citizens Ass'n, Inc. v. Hodel, 872 F.2d 75, 80 (4th Cir. 1989) ("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"); *Mooreforce, Inc. v. U.S. Dep't of Transp*., 243 F. Supp. 2d 425, 434–35 (M.D.N.C. 2003) (plaintiffs' delay in challenging Final Environmental Impact Statement barred injunctive relief).

City of Myrtle Beach and *Chambers* speak directly to Plaintiffs' assertion that their claim is not subject to a laches defense. Plaintiffs bringing an action under the Declaratory Judgment Act and seeking equitable relief premised on an alleged absence of statutory authority or a defendant's alleged failure to comply with a statute cannot sleep on their rights. Such actions sound in equity, and laches may apply to bar relief. These Plaintiffs delayed for years, while Pioneer moved forward with the Facility, expending time and effort. Even if the Court concluded that Plaintiffs were otherwise entitled to an injunction, laches would bar an injunction of the Facility.

D. The Audit Requirements

In 2012, the provisions of S.C. Code §§ 6-13-240(B)-(D) were added to the Act. These new 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.

The contentions added by Plaintiffs' amendment of their Complaint relate to these Audit Requirements. In alleging that Pioneer's November 1, 2016 execution of the Construction Contract was *ultra vires*, Plaintiffs assert, in effect, that the 2013 Audit was invalid and that the 2016 Audit was either invalid or came too late. The Court addresses the two audits in turn.

1. The 2013 Audit

After the Audit Requirements took effect, Pioneer commissioned the 2013 Audit. The 2013 Audit was reviewed and its assumptions verified by ORS. Pioneer held the public meeting to discuss the 2013 Audit required by the Act. As is set forth above, while Pioneer did provide notice of the meeting, the notice was deficient in two particulars: notice by publication occurred one day later than specified by statute, and the insertions in customer bills were the wrong font size.

Neither Plaintiffs, nor anyone else, suggested at the time that there was any flaw in that notice. Accordingly, Pioneer credibly testified that it believed from that point forward that it had satisfied the Audit Requirements. On that basis, Pioneer proceeded with the plans for the Facility – deliberately and in public. It was only after Pioneer had signed the Construction Contract that Pioneer's own attorneys (the same law firm that represented Pioneer continuously since the 2013 Audit was completed) identified the two discrepancies in the 2013 notice.

There are a number of reasons that these imperfections, dating back to 2013, will not support an injunction of the Facility. The first is laches. In addition to barring Plaintiffs' claim for an injunction generally, laches applies particularly to attacks on the 2013 Audit notice. The flaws in notice – publishing notice fourteen days before the meeting instead of fifteen, and using the wrong font size in a bill insertion – were immediately knowable on the face of those notices. They were thus discoverable by no later than March, 2013. Plaintiffs failed to say anything. Plaintiffs' failure to raise these issues at the time prevents Plaintiffs from challenging the viability of the 2013 Audit, four years after those minor defects were on public view. *Cf. Mooreforce*, 243 F. Supp. 2d at 434-35 (plaintiffs' delay barred injunctive relief for alleged shortcomings in Final Environmental Impact Statement where plaintiffs had knowledge of shortcomings years earlier).

Beyond this, the Court finds that Pioneer substantially complied with the notice requirements for the 2013 Audit; the notice deficiencies are not substantive. Initially, the Court observes that Plaintiffs presented no evidence suggesting that they did not have actual notice of the plan to build the Facility or of the content of the 2013 Audit. To the contrary, Robert Faires of Seneca and OJRSA wrote a letter in August 2013 for the express purpose of criticizing that Audit. Nor do Plaintiffs identify any harm from the deficiencies in the 2013 notice. Similarly, there is no evidence that the deficiencies in notice were the result of bad faith or an intent by Pioneer to circumvent the Audit Requirements. Given that Pioneer did publish notice and did conduct the meeting, the Court concludes that Pioneer attempted in good faith to comply with the Audit Requirements.

South Carolina courts, like courts elsewhere, have recognized in similar cases that "substantial compliance" with requirements like these, especially when coupled with good faith, is sufficient to defeat a request for an injunction. *See, e.g., Quality Towing, Inc. v. City of Myrtle*

Beach, 345 S.C. 156, 164–65, 547 S.E.2d 862, 866 (2001) (looking to clear language and express purpose of act to determine whether substantial compliance occurred); *Davis v. NationsCredit Fin. Servs. Corp.,* 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred); *Responsible Econ. Devel. v. Florence Consol. Mun. Planning Comm'n*, No. 2005-UP-584, 2005 WL 7084861, at *4 (S.C. Ct. App. Nov. 16, 2005) (substantial compliance exists if the purpose of the statute is achieved). The purpose of the notice requirement was to ensure the public was aware of the audit; this purpose was met.

The Supreme Court's decision in *Kiawah Prop. Owners Grp. v. The Public Serv. Comm'n of S.C.*, 357 S.C. 232, 239–40, 593 S.E.2d 148, 152–53 (2004), is particularly instructive. That case involved a regulation that provided that no utility may enter into any agreement that would impact the utility's ability to provide sewer service "without first submitting said contract in form to the [Public Service] Commission and obtaining approval of the Commission." Despite this regulation, a regulated utility entered into two leases without prior Commission approval. Homeowners challenging inclusion of the leases in the utility's rates contended the leases were improper. Faced with this technical violation, the Supreme Court agreed with the Commission that the leases were a proper exercise of the utility's authority and thus would not be voided or ignored for failure to obtain the required approval before entry. *See also Responsible Economic Development v. Florence Consolidated Municipal Planning Commission*, 2005 WL 7084861, at *4 (S.C. Ct. App. 2005) (rejecting challenge to a zoning change where posted notice did not comply with ordinance, holding that "American jurisprudence generally holds substantial compliance is met if the purpose of the statute is achieved"); *Banister v. Lollis*, 183 S.C. 218, 190 S.E. 511 (1937) is to the same effect. There, the Supreme Court denied a bid to enjoin a bond issue to raise funds for sewage system improvements, on the basis of certain "procedural

deficiencies" in issuing the bonds. The Court held:

> There is no question of fraud or bad faith involved. There is no question of irregularity or illegality in the election. . . . No possible injury can come to the citizens of Honea Path. . . . Certainly manner and form should not be allowed to defeat the undoubted will of the people clearly expressed. This would be indeed subordinating and sacrificing the substance to the shadow. . . .

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

The same principles apply here. Pioneer provided the notices and held a public meeting. The 2013 Audit has been available to the public, including through FOIA, for the intervening four years. There was no evasion or bad faith here. Pioneer at least substantially complied with the notice requirements and the purpose of the Audit Requirements was achieved. The deficiencies in notice do not void the 2013 Audit or justify enjoining the Facility.

Even if the 2013 notices were not in substantial compliance with the Act, any deficiency was cured by the 2016 Audit. When Pioneer was apprised of those notice discrepancies, it immediately commissioned the 2016 Audit to update the 2013 Audit, asked its legal counsel to supervise notice, and conducted a new meeting. If there was a material problem with the 2013 notice, Pioneer cured that problem in 2016.[5] *See Watergate Imp. Associates v. Public Service Commission*, 326 A.2d 778, 786-87 (D.C. 1974) ("technical deficiencies" in original notice of increase in utility rates were cured when proceedings were reopened and petitioner was allowed to present its case; "the question on review is not the adequacy of the original notice or pleading but is the fairness of the whole procedure" (internal quotation marks omitted)).

Finally, the Court concludes that as a matter of equity, the notice deficiencies would not

[5] The same is true for any contention that the 2013 Audit was insufficient because the cost of the Facility had changed over time. While nothing in the Act requires more than a single Audit, and while Plaintiffs have not expressly argued that the 2013 Audit can be disregarded because of its timing, the conduct of the 2016 Audit would (subject to arguments concerning that later Audit's accuracy, discussed hereinafter) meet such objections.

support a permanent injunction of the Facility, even if Pioneer had not substantially complied with the Act and even if any deficiency were uncured. Plaintiffs assert only one cause of action and seek only one remedy – a permanent injunction. At trial, Plaintiffs were straightforward in acknowledging that what they want is to stop construction of the Facility. It is clear to the Court that Plaintiffs seek to halt the Facility – not because of any concern that they as customers might pay increased water rates – but because they have an interest in keeping Pioneer as a captive customer of Seneca and Westminster. Plaintiffs did not ask for a judicial decree that Pioneer must conduct another audit or another public meeting, which might be a reasonable judicial response to a showing that the audits already conducted were deficient. By contrast, it would be disproportionate and inequitable to base an injunction of the Facility on the notice discrepancies from 2013. Put another way, it would make no sense to say that Pioneer – which otherwise has the authority to construct the Facility – may not do so because of an inadvertent technical oversight. The notice deficiencies from 2013 will not support the only relief sought in this lawsuit.

For the foregoing reasons, the Court finds that the 2013 Audit satisfied the Audit Requirements.

2. The 2016 Audit

Plaintiffs do not challenge the notice provided for the public meeting to discuss the 2016 Audit. Instead, they argue that the 2016 Audit was substantively defective, and that the execution of the Construction Contract on November 1 – before the 2016 Audit was submitted to ORS for verification of its assumptions or presented in a public meeting – renders the Construction Contract void. The Court rejects both arguments.

Turning first to the challenge to the substance of the 2016 Audit, Plaintiffs point to two

primary aspects of that audit that they claim are erroneous. First, in comparing the impact of the Facility with the hypothetical case of continuing to purchase water from Seneca and Westminster, the Audit adopted the assumption contained in the 2014 PER for the Facility that $9.5 million worth of improvements to the Seneca and Westminster systems, necessary to continue purchasing water, would be paid by Pioneer; Plaintiffs have argued that this assumption is invalid. Second, the 2016 Audit did not make an attempt to adjust the construction cost estimate from the 2014 PER to take into account the roughly $17 million figure contained in the Construction Contract, which reflected an increase of about $2 million over the $15 million figure contained in the 2012 PER that was used in the 2013 Audit.[6]

The Court does not agree that the 2016 Audit was invalid because it included in the costs of continuing to purchase water the $9.5 million estimate of costs to upgrade the Seneca and Westminster system. While Plaintiffs offered testimony that Seneca and Westminster would be willing to pay those costs, this was offset by considerable testimony, including admissions from Plaintiffs' witnesses, that it is customary in the water industry for costs of improvements required by customers to be borne, ultimately, by those customers. In this case, that means that Pioneer would end up bearing the costs of improvements to the Seneca and Westminster system that were required to allow Pioneer to purchase water from them. While Plaintiffs suggested that the timing and manner of shifting of such costs to Pioneer could vary, such that treating the entire $9.5 million as a cost of Pioneer at "day one" of the analysis might be artificial, the Court does not find this to be significant. Even if Seneca and Westminster paid the costs initially and recouped them over time

[6] Notably, the 2016 Audit used the overall project cost of $21.6 million reflected in the 2014 PER. While there was some testimony that this figure included some work which was not part of the Facility, the total approved financing for the Facility in 2016, which did take into account the increase in construction costs reflected in the Construction Contract, was $20.402 million – that is, less than the cost figure used in the 2016 Audit.

through price increases, the ability to set those price increases to include the equivalent of an interest component means that the net effect could be to shift the entire cost to Pioneer as if it had been incurred on "day one." Beyond this, it is important to bear in mind that the entire analysis of what it would cost Pioneer to continue to purchase water from Seneca and Westminster is a purely hypothetical projection of an event that is not going to occur; there is no way to test whether the projection in the 2016 Audit was "correct" or not.[7] Furthermore, nothing in the Act requires that the Audit give consideration to any alternatives; the Act requires only an analysis of the potential impact of the proposed investment on Pioneer's customers. In light of this, and to the extent it falls to this Court to analyze the contents of the 2016 Audit at all, the Court finds that inclusion of the $9.5 million upgrade costs in the costs of continuing to purchase water was reasonable, and thus does not provide a basis for declaring the 2016 Audit invalid.

The same is true for the decision of Jason White, the CPA who performed the audits, to use the estimated costs from the 2014 PER, rather than adjusting the figures in the PER to include to use the higher construction cost from the Construction Contract. When Mr. White was asked to perform an update of the audit in 2016, he was provided with available information concerning the expected cost of the Facility. This included the 2014 PER, which was the last PER completed for the Facility, and information on the actual cost set forth in the recently signed Construction Contract.

At trial, Jason White explained his decision to use the 2014 PER in projecting the cost of

[7] For the same reason, Plaintiffs' complaints about the methodology adopted in the 2016 Audit to estimate future growth in water demand and water prices will not justify judicial invalidation of the audit. The 2016 Audit used historical rates of growth in demand and prices to project into the future; this was reasonable and there is no basis in the Act or otherwise to declare this improper. Moreover, because the 2013 Audit used the same methodology, any attack on that methodology would also be barred by laches.

the Facility. He made this decision to maintain consistency with the format and methodology of the previous audit, and out of concern that mixing and matching numbers from different sources would lead to problems or inconsistencies. Mr. White testified that, had he undertaken to modify one set of figures, such as by using the total from the 2016 Construction Contract, then in order to ensure consistency he would also have had to attempt to seek out and update all other cost estimates that he used, including the estimated costs of making the necessary capital improvements to the existing systems of Pioneer, Seneca, and Westminster that would allow Pioneer to continue with its "purchase water" option. He was concerned that updating only one figure in the 2016 Audit without having a basis to update all others would have created a risk of inconsistencies and thus would have been unreasonable.

Nothing in the record reflects that any such comprehensive update of all figures existed. And as an accountant, Mr. White was not qualified to make updated estimates on his own. Mr. White used the latest available consistent set of numbers supplied to him. Plaintiffs have failed to demonstrate this was unreasonable. In this regard, it is worth noting that the Audit Requirements do not require constant updating of the audit. The Act contemplates only a single audit as of a single point in time. Every project is going to involve changing costs, and each such change does not require a revision of the audit.

Nor is the Construction Contract the final word concerning the total cost of the entire project. The total cost estimates contain other elements – some of which may go down in the future. And the record reflects that there has already been a deductive change order under the Construction Contract. The record also reflects that the decision to use the 2014 PER figures did not have a material impact on the outcome of the 2016 Audit. Both the 2013 Audit and the 2016 Audit demonstrated that constructing the Facility provided a more favorable financial outcome for

Pioneer than continuing to purchase water from Seneca and Westminster. The only testimony at trial – from Jason White – concerning the impact of increasing the projected construction cost in the 2016 Audit as advocated by Plaintiffs was that such an increase would not alter this conclusion. Thus, even if he had used the higher construction cost, the Facility would have projected to be preferable financially.

Accordingly there is no basis for holding that Mr. White erred or violated the Act in deciding to use the numbers from the 2014 PER, since that set of figures represented the latest version of cost estimates that were updated for all of the options available to Pioneer to obtain water. In so holding, the Court is mindful that the Audit Requirements are apparently unique, that other than the 2013 Audit also performed by Mr. White there was no precedent for such audits, and that there was no accepted model or practice surrounding the Audit Requirements. Significantly, there is no evidence that Mr. White (or Pioneer) manipulated the process or tried to skew results. He followed a consistent and transparent procedure. In light of all this, Mr. White's approach was sound and reasonable.

In declining to declare the 2016 Audit invalid, the Court also agrees with Pioneer that the standard for judicial invalidation of such an audit is high. In the absence of a demonstration of bad faith, arbitrary and capricious conduct, or a complete failure to conduct the required audit – none of which is present here – the Court agrees that it is not the place of the judiciary to adjudicate differences of opinion concerning the contents of such an audit. Allowing such challenges would create an impractical situation in which every audit could be criticized by experts with the benefit of hindsight. Several related considerations support this conclusion.

First, the audit is inherently a prediction of the future. Plaintiffs' challenge to it is, in essence, an invitation to adopt a competing set of projections. Because the only true test of whose

projection is better would require waiting for years, there is no answer available in this lawsuit. *See, e.g., Emerson v. Powell*, 283 S.C. 293, 296, 321 S.E.2d 629, 631 (Ct. App. 1984) (in context of fraud or negligent misrepresentation, a prediction of the future is not a statement of "fact").

Second, there is no statutory standard against which to measure the audit. The Act contains only a few requirements, and Pioneer met them. Pioneer was to engage an independent CPA to review the potential impact of the Facility. That audit was then to be sent to ORS for verification. Then the Board of Pioneer was to make a decision, based on its assessment of the best interest of Pioneer and its ratepayers. The Act provides no specifications that would allow the Court to conduct meaningful judicial review of the contents of the audit. *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)).

Third, the Act refers review of the audit exclusively to ORS. The Act directs Pioneer to "submit" the audit to ORS "to verify the audit's assumptions." While Plaintiffs have criticized the depth of the review conducted by the ORS that, too, is beyond what the Court can address in this litigation, to which ORS is not a party. The Legislature's decision to have the audit's assumptions verified by ORS further confirms that there was no intention to open the contents of the audit to detailed judicial inspection. *See Doe v. Bd. of Trustees, Richland Sch. Dist. Two*, No. 2015-UP-314, 2015 WL 3885922, at *1 (S.C. 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"). Further, because this case involves a utility, it is useful to compare the Audit Requirements to the analysis done in a ratemaking. While there are differences, both involve a level of technical analysis that is poorly suited to judicial review. Our

courts have repeatedly declined to immerse themselves in this sort of dispute. *See Hamm v. S.C. Pub. Serv. Comm'n*, 294 S.C. 320, 322-23, 364 S.E.2d 455, 456 (1988) ("This Court has neither the expertise nor the authority to fix the rate of return to which a public utility is entitled. Even if we might have found a different rate of return to be fair and reasonable, such does not allow us to substitute our judgment for that of the Commission." (internal quotation omitted)).

Last, even if there were a judicially manageable standard for analyzing the contents of the audit, and even if this Court were to conclude that standard was violated, a permanent injunction would not be appropriate remedy. Given that the Court has concluded that Pioneer has the authority to construct the Facility, that authority could not be taken away because of a problem with the independent CPA's performance of the audit. This is so for two reasons.

First, the decision whether to build the Facility belongs to Pioneer's elected Board. A flaw in the audit would not justify taking that authority away. The Board had other good reasons to construct the Facility besides the outcome of the audit, and the Board's sound discretion is entitled to deference. *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) (to overturn decision of elected officials, plaintiffs must allege, and show by clear and convincing evidence, that decision was "arbitrary and capricious"; otherwise this Court "must leave that decision undisturbed"). Pioneer's Board did not decide to construct the Facility solely on the basis of the outcome of the audits. The record reflects that the Board considered the risk of continuing cost increases and supply interruptions in deciding how to proceed. There is no requirement in the Act that Pioneer adopt whatever action the audit indicates is financially preferable. Thus, even if the use of a different cost factor would have had the effect of "flipping" the financial outcome, this still would not provide the basis to enjoin the Facility.

Second, a flaw in the audit would not support an injunction prohibiting Pioneer from ever

constructing the Facility because Pioneer did not control the audit. The Act specified that Pioneer must engage an "independent" CPA to conduct the audit, and ORS is obviously independent as well. Thus, even if Jason White or ORS had made some misstep in connection with the audits, that would not justify limiting Pioneer's authority.

3. The Timing of Pioneer's Commitment to Pay $1 Million or More

Plaintiffs argue that, even if the 2016 Audit was properly performed, it came only after the November 1, 2016 execution of the Construction Contract, rendering the Construction Contract *ultra vires* and void. This argument fails because of the Court's conclusion that the 2013 Audit satisfied the Act. Beyond this, though, the Court finds as a factual matter that Pioneer was not committed to pay Harper Corporation $1 million or more upon signing the Construction Contract, nor until after all of the steps specified under the Act were concluded with respect to the 2016 Audit.

The trial testimony showed that the notice to proceed under the Construction Contract did not allow Harper Corporation to begin any work on the Facility until after January 2, 2017; in fact, Harper Corporation did not commence work on the Facility until on or about January 11, 2017; and Pioneer had the absolute contractual right to terminate the Harper contract for convenience by giving seven days' written notice. Taken together, these facts mean that Pioneer was obligated to pay Harper Corporation $1 million only when that amount of work had been performed, and that this amount of work was not completed at any point in January 2017. By that time, even if one focuses exclusively on the 2016 Audit and excludes the 2013 Audit from consideration, the statutory steps provided for in the Audit Requirements had all been performed.

E. Best Interests of Pioneer and Its Ratepayers

Plaintiffs also ask the Court to hold that the decision to construct the Facility was not in the best interest of Pioneer and its ratepayers. Here again, the Court concludes that Plaintiffs have not

satisfied the burden they must meet to support such a judicial determination.

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. 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). It is, in short, a governmental agency and its Board performs legislative functions, including making judgments of what 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, 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 judicial deference. Since 2007, Pioneer's Board has received numerous reports on the Facility, and has conducted numerous discussions of the Facility in public meetings. 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. This record reflects that 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's district and its ratepayers. For this Court to take the step of second-guessing this judgment, Plaintiffs must 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." *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 140, 459 S.E.2d 883, 885 (Ct. App. 1995) ("It is not the prerogative of the courts to pass upon the wisdom of County Council's decision[.]" A plaintiff challenging such a decision must "show by clear and convincing evidence the arbitrary and capricious nature of the ordinance."); *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").

Not only have Plaintiffs not met this high standard; they have failed to raise any substantial question about the propriety of the decision of Pioneer's Board to construct the Facility. Certainly, arguments can be made against the Facility, and as noted above the future outcome of any such governmental decision is inherently unknowable. However, nothing in the record would support the conclusion that Pioneer's Board made a mistake or error in judgment. This is especially true in light of the uncertainty inherent in Pioneer's dependence on Seneca and Westminster. As ORS noted in its response to the 2013 Audit, the Facility would allow Pioneer to "end the practice of being subject to rate increases to support expansion of other water utilities when the expansion program provides no or very little benefit to Pioneer's ratepayers." Plaintiffs have failed to prove that the Facility is not in the best interest of Pioneer or its customers.

Conclusion

For the reasons set forth herein, Plaintiffs' requests for a declaratory judgment and for an injunction are denied, and Pioneer's counterclaim for a declaratory judgment is granted. Pioneer

has the statutory authority under the Act to construct and operate the Facility. Pioneer satisfied the Audit Requirements added to the Act in 2012, and there is no basis to overturn the decision of the Pioneer Board to construct the Facility.

IT IS SO ORDERED.

_____
R. Lawton McIntosh
Judge, South Carolina Court of Common Pleas

November ___, 2017
Anderson, South Carolina.

Oconee Common Pleas

Case Caption: City Of Seneca, South Carolina , plaintiff, et al VS Pioneer Rural Water District Of Oconee And Anderson Counties , defendant, et al

Case Number: 2017CP3700187

Type: Order/Other

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