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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2018-CP-10-02764
Appellate Case No. 2021-001395

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated.....Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Respondent.

**RECORD ON APPEAL
VOLUME 3**

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2018-CP-10-02764

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated,

Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks,

Respondent.

NOTICE OF APPEAL

Appellant Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated, appeals the orders of the Honorable R. Markley Dennis, Jr., dated July 12, 2021 and November 24, 2021, which granted summary judgment in favor of Respondent The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks, and denied Appellant's motion to alter or amend that judgment. Judge Dennis' orders are attached hereto as Exhibits A and B, respectively.

[SIGNATURE BLOCK ON NEXT PAGE]

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2018-CP-10-02764

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated,

Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks,

Respondent.

PROOF OF SERVICE

I, Alicia M. Terwilliger, hereby certify that on December 2, 2021, I have served a copy of the **Notice of Appeal** by email, pursuant to The Supreme Court of South Carolina's Order, dated August 25, 2021, to the attorneys of record as follows:

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Mount Pleasant, South Carolina
December 2, 2021

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Snee Farm Lakes Homeowner's
Association, Inc., Individually and on
Behalf of those Similarly Situated,

Plaintiff,

v.

The Commission of Public Works for the
Town of Mount Pleasant d/b/a Mount
Pleasant Waterworks,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2018-CP-10-2764

**ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

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Dec 02 2021

SC Court of Appeals

Plaintiff Snee Farm Lakes Homeowner's Association, Inc., Individually and on Behalf of those Similarly Situated ("Plaintiff" or "Snee Farm") initiated this litigation on June 1, 2018 complaining of the manner in which Defendant the Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("Defendant" or "MPW") charged certain of its commercial customers. MPW assesses commercial customers a portion of their monthly bill based on the number of Residential Equivalency Units ("REUs"), representing a reservation of water capacity, assigned to the commercial customer's account. Specifically, Plaintiff complained that it was charged excess Basic Facility Charges ("BFC") because it had unused Residential Equivalency Units (REUs) assigned to its account. In essence, Plaintiff's claim is based on a theory that MPW violated state statutes by basing its rates on assigned REUs that at times reflect a greater reservation of water capacity than the actual water usage by a particular commercial customer.

Plaintiff filed an Amended Summons and Complaint on September 1, 2020 alleging five different causes of action against MPW: 1) Declaratory Judgment, 2) Breach of Contract, 3) Conversion, 4) Unjust Enrichment/Money Had and Received, and 5) Constructive Trust. Plaintiff

seeks a refund on behalf of the entire class from MPW for what Plaintiff claims are excess BFC payments from January 1, 2014 through December 31, 2019. On March 9, 2021, MPW filed a Motion for Summary Judgment asking the Court to dismiss Plaintiff's claims.

Plaintiff's action was certified as a class action on June 14, 2019, with the following class definition:

All current and former MPW commercial customers who paid excessive BFC in excess of \$100, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to December 31, 2019 being less than that customer's assigned REU.

The Court heard arguments in support and opposition to MPW's Motion for Summary Judgment on April 16, 2021 ("Hearing"). Prior to the Hearing, Snee Farm submitted a Memorandum in Opposition and MPW submitted a Reply Memorandum in addition to MPW's Motion for Summary Judgment. After considering MPW's Motion for Summary Judgment, the pleadings, memoranda and exhibits submitted by both parties as well as the oral arguments and facts presented during the Hearing, this Court grants Summary Judgment in favor of MPW and dismisses Plaintiff's case in total with prejudice for the reasons set forth below.

SUMMARY OF FACTS

While there are some disputed facts, which this Court considered in the light most favorable to Plaintiff, the most significant facts presented to this Court are undisputed. The undisputed facts are as follows:

1. MPW is a municipal water and sewer authority established pursuant to ordinance of the Town of Mount Pleasant, South Carolina and state law. (See Plaintiff's Response, p. 1).
2. Titles 5 and 6 of the Code of Laws of South Carolina of Joint Acts and Resolutions of the General Assembly of the State of South Carolina provides the authority and responsibility

for MPW to conduct its fiscal affairs, fix rates, collect fees for services, and dispose of these revenues for purposes germane to MPW 's functions.

3. MPW's rates are set by its elected commissioners. (*See* Plaintiff's Response, p. 2).
4. MPW's monthly invoice to customers is made up of two different types of charges: the volumetric charge based on the volume of water used by a commercial customer during the billing cycle and the BFC, a consistent rate charged each month regardless of water usage. (*See* Defendant's Reply, Exhibit G, Snee Farm Water Bill).
5. MPW bases its BFC on the total number of Residential Equivalency Units ("REUs") assigned to the commercial property associated with MPW's customer's account such that the BFC is determined by calculating the rate times the account's number of REUs. (*See* Plaintiff's Response, p. 2).
6. MPW defines BFCs as a charge for reservation of capacity based on the total active REUs assigned to a property and a fixed charge to recover an amount equal to or greater than the sum of annual Renewal and Replacement (R&R). (*See* Plaintiff's Response, Exhibit B, MPW Cost Recovery Policy 7.2, pp. 4-5).
7. One REU is equal to 300 gallons per day or approximately 9,200 gallons per month. (*See* Plaintiff's Response, p. 2).
8. MPW has calculated its BFC based on REUs since the early 1990s.
9. A customer's initial REU determination is assessed based on an engineering formula and capacity assumptions made at the inception of service. (*See* Plaintiff's Response, p. 2).
10. A commercial customer is required to pay impact fees at the initiation of their account based on the number of REUs assigned to their account. (*See* Plaintiff's Response, pp. 2-3).

11. MPW's water bills sent to each of their commercial customers includes both the number of REUs assigned to that particular account as well as the number of gallons consumed for the particular billing cycle. (*See* Defendant's Reply, Exhibit G, Snee Farm Water Bill).
12. The BFC provides for MPW's fixed costs including but not limited to Renewal and Replacement, debt service, capital costs, operating and maintenance costs, and general administrative costs. (*See* Plaintiff's Response, p. 2).
13. BFC are used to finance MPW's general operations and maintenance, which will confer benefits generalizable to all customers. (*See* Plaintiff's Response, p. 13).
14. MPW allows customers to petition to decrease their REUs in order to reduce a customer's BFC. There are no out-of-pocket expenses for an MPW customer wishing to reduce its REUs. In so doing, a customer must give up their REUs, which could subject the customer to excessive use charge if the customer exceeds the capacity reservation relative to its new, lower number of REUs. (*See* Plaintiff's Response, p. 5; Motion for Summary Judgment p. 3; MPW Policies 5.3.2 Assessment of Impact Fees and 5.3.3 Impact Fee Management.)
15. If a commercial customer's water needs change in the future, the commercial customer may later increase its REUs by paying the applicable current impact fee per REU at the time of increase or the back BFC charges from the time the REU was reduced until increase, whichever is less. (*See* MPW Policy 5.3.3 Impact Fee Management.)
16. Snee Farm is a horizontal property regime for a mutli-family residential unit. (*See* Plaintiff's Response, Exhibit A.)
17. Snee Farm established an account with MPW in 1982 and was assigned 148 REUs, which is equal to the number of units at Snee Farm. (*See* Amended Summons & Complaint, p. 3; Defendant's Reply, Exhibit F, Lona Vest Deposition p. 42, ll. 20-23.)

18. Snee Farm paid significantly less for its impact fees based on 148 REUs in 1982 than today. In fact, it appears that Snee Farm paid no water impact fees in 1982 and only paid roughly \$39,088.35 in sewer impact fees. (*See* Defendant's Answer and Counterclaim to the Amended Complaint, Exhibit A.) According to impact fee rates in 2019, Snee Farm would pay \$1,103,932.00 in impact fees.¹ (*See* Plaintiff's Response, Exhibit Y, Mantz Draft Questions and Answers p. 16).
19. Going back years, Snee Farm actual water usage was less than the amount of water represented by its assigned REUs or approximately 1,332,000 gallons per month. (*See* Amended Summons & Complaint, p. 3).
20. Snee Farm has maintained the same level of REUs originally assigned to its account.
21. Snee Farm never sought to reduce the number of REUs assigned to its account.
22. Snee Farm employs a professional property management company that manages Snee Farm's expenses and homeowners' fees for the Snee Farm property owners. (*See* Defendant's Reply, Exhibit F, Lona Vest Deposition p. 12, ll. 13-21).
23. The professional property manager employed by Snee Farm knew that MPW charged a basic facility charge for the reservation of capacity or demand for a certain amount of water. (*See* Defendant's Reply Memorandum, Exhibit F, Lona Vest Deposition p. 12, ll. 1-12).
24. In 2018, MPW sent a letter to certain of its commercial customers, including Snee Farm, suggesting that the customer reduce their REU number based on the customer's apparent water needs as shown by their recent consumption ("the 2018 Letter"). The suggested REU reduction would result in a reduced monthly BFC for the customer. (*See* Plaintiff's Response, Exhibit H).

¹ Based on rates listed in Mantz' Draft Questions and Answers, Water Impact Fees were \$2,295 and Sewer Impact Fees were \$5,164 in 2019.

25. MPW sent the 2018 Letters to 288 commercial customers and of those recipients, approximately 80 commercial customers responded and reduced their REUs. (*See* Motion for Summary Judgment, p. 3).
26. Snee Farm received a 2018 Letter from MPW suggesting that Snee Farm consider reducing its REUs from 148 to 76 based on Snee Farm's "average monthly consumption for [its] highest quarter....." (*See* Plaintiff's Response, Exhibit H).
27. Snee Farm did not contact MPW regarding the 2018 letter and, again, never tried to reduce its REUs.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that a circuit court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A moving party must meet its burden of showing there is "an absence of evidence to support the non-moving party's case." *Lord v. D.&J Enterprises, Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (S.C. 2014) *citing* *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (S.C. 1991). Once the moving party has met its burden, "the opposing party must do more than rest upon the mere allegations or denials of his pleadings, but must, by affidavit or otherwise, set forth specific facts to show that there is a genuine issue for trial." *Id.* In reviewing a summary judgment motion, the facts and circumstances must be viewed in the light most favorable to the non-moving party. *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 154, 758 S.E.2d 483, 492 (2014). In order to withstand a motion for summary judgment, though, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial, meaning that the evidence presented "must meet the prerequisite

of being probative.” *Lemmons v. Macedonia Water Works, Inc.*, 431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020) *citing* *Bass v. Gopal, Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct.App. 2009), *aff’d*, 395 S.C. 129, 716 S.E.2d 910 (S.C. 2011). “[A]ny evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.” *Id.* “A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (S.C. 2006). Here the undisputed facts when applied to the applicable law justify a grant of summary judgment.

FINDING OF FACT

I. MPW’s ratemaking methodology does not violate South Carolina statutes.

Plaintiff’s claim is based on a theory that MPW violated state statutes by basing its rates on assigned REUs that at times reflect a greater reservation of water capacity than the actual water usage by a particular commercial customer. Plaintiff asserts MPW has a duty to unilaterally right-size a commercial customer’s REUs for purposes of the BFC calculation. The question that must be answered is whether MPW’s BFC rate structure based on REUs reflecting reservation of water capacity rather than actual water usage violates South Carolina law.

S.C. Code Ann. § 5-31-250 grants a “board of commissioners of public works or any city or town” the authority to create, operate and manage a waterworks and “require payment...of such rates, tolls and charges as it may establish for the use of water....” Further, S.C. Code Ann. § 5-31-670 requires only that the charge for use of the water to be “reasonable compensation and charge a minimum and reasonable sewer charge for maintenance and construction of such sewerage system....”

The court has the ability to review a municipality's current rate system to determine whether such a rate system violates the municipality's authority or statutory requirement. If the court finds that the rate structure does not violate applicable South Carolina statute, it is not for the court to supplant the General Assembly or MPW's elected commissioners and invalidate MPW's rate methodology. Thus, in reviewing MPW's rate structure, the court can only determine whether or not the rate structure is permitted pursuant to South Carolina statute rather than condemn a rate structure because it is not optimal. After an in depth analysis of MPW's rate structure, this court finds that MPW's rate structure does not violate any South Carolina statute.

Here, the Town of Mount Pleasant, empowered by the statutes *supra*, has chosen to empower MPW to administer and orchestrate Mount Pleasant's water and sewer systems. S.C. Code Ann § 5-3-210 and 215 enables MPW governance by five elected commissioners as well as two additional commissioners: the Mayor of the Town of Mount Pleasant and the Chair of the Town's Water Supply Committee. MPW's commissioners chose the rate structure in order to collect money from its customers to run the water and sewer system. As a part of that rate structure, MPW's commissioners chose a BFC rate structure based on a commercial customer's assigned REUs. If MPW's chosen rate structure is "reasonable" pursuant to S.C. Code Ann. § 5-31-670, the rate structure is permissible.

Thus, ultimately, the question is whether MPW's rate structure of basing BFC on a customer's number of REUs is reasonable pursuant to S.C. Code Ann. § 5-31-670. In general, "water rates are entitled to a presumption of reasonableness, and a reviewing court will defer to the municipal corporation as long as the rates are nondiscriminatory, and are not arbitrary and capricious." 12 McMillian Mun. Corp. § 35:57 (3d ed.) (citation omitted). "Generally speaking, water rates as set by a municipality are presumed to be valid and reasonable until the contrary has

been established; and the burden of overcoming the presumption of validity and reasonableness rests with the challenging party.” *Id.* In South Carolina the “test of the reasonableness of rates established by a public service district is the service received.” *H.A. Sack Company, Inc. v. Forest Beach Public Service District* 272 S.C. 235, 238, 250 S.E.2d 340, 341 (1978) *citing* *Simons v. City Council of Charleston et al.*, 181 S.C. 353, 187 S.E. 545 (1936). “The burden of proof of the unreasonableness or arbitrariness of rates is upon the person attacking the rate schedule.” *Id. citing Shirk v. City of Lancaster*, 313 Pa. 158, 169 A. 557 (1933). In this litigation, Plaintiff has presented no allegations regarding the quality of service it has received or continues to receive. For this reason Plaintiff has not met the burden of showing MPW’s BFC rate structure is unreasonable.

Plaintiff argued S.C. Code Ann § 6-1-300(6) and the case, *Azar v. City of Columbia*, 414 S.C. 307, 778 S.E.2d 315, (2015) support its claim that MPW’s rates violate South Carolina statutes because allegedly the rates are not paid in return for a particular government service or program made available to the Plaintiff. However, both the S.C. Code Ann. § 6-1-300(6) and *Azar* relate to the way the funds collected are “spent,” not the rate structure or method of collection. In this case there are no allegations that the amounts collected were spent on anything other than water and sewer related expenses.² In fact, Plaintiff admits in its Response that, “the BFC are used to finance MPW’s general operations and maintenance, which will confer benefits generalizable to all customers [including Plaintiff]....” (*See* Plaintiff’s Response p. 13). Plaintiff states, “...the payers of excessive BFC are garnering no more or different benefit.” *Id.* Plaintiff’s share of BFC is higher than Plaintiff believes it should be, but Plaintiff’s receipt of services has not been diminished and there are no allegations that the money collected is spent on anything other than

² Plaintiff’s expert, Bryan Mantz, testified that he took no issue with the collection of the funds, rather he believes charges should be allocated differently among MPW’s customer base according to actual customer use. (*See* Deposition of Bryan Mantz, 1/20/21 pp. 57-58, ll. 25-25).

water and sewer related services and expenses. S.C. Code Ann. § 6-1-300(6) and any related statutes are not applicable to the facts in this case.

Even if the court were to review the actual rate structure beyond the service provided, Plaintiff has presented no reliable evidence that MPW's rate structure is unreasonable. Plaintiff asserts that S.C. Code Ann. § 5-31-250, which gives utilities the ability to "require payment of such rates, tolls and charges as it may establish for the use of water and light," must be interpreted to require rates to be associated with actual volumetric use.³ However, in order to accept Plaintiff's interpretation, the court must add the words and meaning to the statute to require volumetric or some measured amount of usage. If Plaintiff's interpretation were accepted, South Carolina utilities would be required to tie their entire rate to the amount of water or electricity a customer uses each month, ignoring the utilities' requirement to make the water or electricity available at the flip of a switch or the turning of a tap by covering fixed costs that do not decrease when a customer's actual volumetric use decreases. Such a rate structure is contrary to the recommendations by Plaintiff's own expert. Bryan Mantz, Plaintiff's expert, testified that he recommends a fixed charge as a part of a utility's rate system in order to support revenue stability because salaries and benefits as well as debt service, are all fixed costs for the utility regardless of customer usage. (*See* Mantz Deposition 1/13/21 pp. 90-91, ll. 7-9, 12-25, pp. 116-117, ll. 5-8, 20-4). This court does not accept Plaintiff's position as to the interpretation of S.C. Code Ann. 5-31-250. The word "use" cannot mean the literal volumetric use of a water or electricity and ignore the ability to use; availability of ready service; the reservation of capacity or on-demand service.

³ Section 5-31-250 of the South Carolina Code reads as follows: "[The utility] 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."

Accepting that the statute does not *per se* deem a rate structure unreasonable simply because it is based on something other than actual volumetric use, the analysis turns to whether there are some other issues with MPW's BFC rate structure that render it unreasonable. For purposes of summary judgment, this court again looks to Plaintiff's own expert's analysis regarding the MPW's REU rate structure as compared to other BFC rate structures.

Many water utilities, including the City of Charleston, use a commercial customer's water meter size to determine a BFC charge. (See Hearing Transcript p. 14, ll. 19-22; Plaintiff presentation). Different size water meters are provided to customers according to anticipated use. Generally speaking, the greater the anticipated use, the larger the water meter size. The water meter size systems do not consider the commercial customer's actual volumetric water usage in determining the BFC. Rather, the only measure for the BFC calculation is the anticipated water demand when determining pre-service the water meter size. After service is established, the BFC is not dependent on whether any water flows through the water meter. Rather the BFC rate is determined based on the size of the water meter alone.

When Plaintiff's own expert was asked about a BFC based on a water meter size, Mantz testified that a water meter size BFC is reasonable even though such a system: 1) is unrelated to a customer's actual volumetric water or sewer use, 2) a customer is required to initiate procuring a new water meter if they want to reduce their BFC, 3) a customer must pay to have an old water meter removed and a new water meter installed if the customer wishes to reduce their REUs, and 4) if a customer wishes to someday increase their water capacity, the customer must pay for reinstallation of their old significantly larger water meter.

Water meter size BFC rates calculate a customers fixed rate based on the size of the water meter. Mantz testified that in a water meter size rate structure, the initial assignment of a particular

water meter size is based on “potential of the [customer’s] demand”.... (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 23-25, ll. 14-25, pp. 45-46, ll. 12-6). The assignment of a larger water meter size is necessary for larger intended water usage. If the customer’s fixed rate is based on the size of the customer’s water meter, the fixed rate is necessarily based on future potential demand. In fact, Mantz testified that in a water meter size rate structure, if the customer does not use the water, their BFC charge remains the same. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 30-31, ll. 5-20). Similarly, the number of REUs assigned to a customer at the time an account is established or a property is developed is based on the projected amount of water a customer may use in the future. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 66-67, ll. 20-5). Thus simply because the BFC is based on potential future demand or a reservation of capacity rather than actual use does not prove the rate system is unreasonable.⁴

Also, like the REU rate structure, Mantz testified that the customer, not the utility, must initiate a change in their water meter size in order to reduce the calculated BFC. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 29-30, ll. 3-4, pp. 31-32, ll. 21-4, pp. 45-46, ll. 12-2, pp. 55-56, ll. 7-6, pp. 100-101, ll. 14-6, pp. 103-104, ll. 24-9, p. 173, ll. 14-23). Mantz also affirmed that the utility has no responsibility to alert the customer to the possibility of reducing their water meter size. (See Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 31-32,

⁴ Plaintiff’s characterization that there was “quite a bit of dispute, even within MPW itself, how this idea of capacity reservation fits into the BFC calculation and whether MPW’s utilization is reasonable” is not supported by the evidence. Plaintiff cites to an email thread by Joe Crea from Raftelis Financial Consultants (MPW’s rate consultant at that time) as evidence that Crea disagreed with the BFC as some type of capacity reservation fee. However, a close reading of the entire document and conversation of emails makes it clear that there is no dispute. Rather, there was simply some discussion about what to call a fee required to be paid when a customer seeks to reinstate their REUs after decreasing the same. (See Defendant’s Reply, Exhibit E). Regardless, the name of the method is not as important as what it actually stands for, which is an assumption of future water use.

ll. 1-4). Water utilities using the water meter size rate structure do not unilaterally right size a customer's water meter size based on the customer's water usage. *Id.*

Clearly, Plaintiff's own expert does not believe that a rate system is unreasonable simply because the charges are based on something (such as a water meter size) other than the customer's actual volumetric use. Plaintiff has failed to show that MPW's REU BFC system is unreasonable such that it would violate the South Carolina statutes.

Further, there is no case law that indicates MPW's rate structure is unreasonable. In support of Plaintiff's claims, Plaintiff cites *Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936), one of two South Carolina cases that discusses reasonableness in the context of water utility rates.⁵ In *Simons*, the Supreme Court analyzed "whether a municipality has the power to make a pledge of income derived from a revenue producing project in the absence of a specific statutory grant of authority." *Id.* at 546. The plaintiff in that case, a taxpayer, alleged that the municipality did not have the authority to use revenues derived from its waterworks system to repay the costs of a project to increase the town's water supply. *Id.* While the court did note that a municipality is bound by the rule of reasonableness, it further elaborated that the proposed method in which the city chose to allocate those funds was within the *discretion of the city council* and "so long as the revenues it uses for the purposes named are derived from "reasonable" rates, *the court will not interfere with the discretion sought to be exercised.* *Id.* (emphasis added). In support of this contention the court added that "it is incumbent upon a municipal corporation to exercise its judgment in a manner that will inure to the greatest benefit of the city and its inhabitants." *Id.* Further, as mentioned previously in this brief, "[t]he service received is the test" as to

⁵ The other case, *Sloan v. City of Conway*, 347 S.C. 324, 555 S.E.2d 684, (2001), discusses S.C. Code Ann. § 5-31-670 in determining the reasonable rate requirement for water service to nonresidents – an issue that is not present in this case.

reasonableness, not the profit or amount collected by the utility. *Id.* at 547 and 45, citing 67 C.J. 1243.

Here, Plaintiff is not alleging that MPW is setting the rates in order to pay off bonds for a project like the municipality in *Simons* - it is alleging that MPW's rate structure is unreasonable.⁶ And, as a result of those rates, Plaintiff believes that MPW's commercial customers have been overcharged and Plaintiff is entitled to a refund. Yet, again, Plaintiff has not alleged any complaints regarding the quality of service received, only that they believe they have paid too much for said service or "water rent" as the *Simons* court describes it. *Id.*

Plaintiff also cites to *City of Commerce v. Duncan & Godfrey, Inc.*, 277 S.E.2d 266 (Ga.Ct.App. 1981) for the position that the city has a legal duty to disclose to the customer the availability of a more favorable rate. However, the case cited is a Georgia case and there are no similar South Carolina cases creating such a duty.

For all the reasons stated above, there is no genuine dispute of material fact as to the reasonableness of MPW's rates and rate structure pursuant to South Carolina law, and therefore summary judgment is granted in favor of MPW and all of Plaintiff's claims are dismissed with prejudice.⁷

II. Plaintiff's causes of action should be dismissed due to Plaintiff's failure to mitigate damages.

Snee Farm initiated this lawsuit because it has more REUs assigned to its account than its actual water usage. Ignoring the fact that REUs represent reservation of capacity rather than actual usage, Snee Farm failed to correct this perceived inaccuracy even though it had the opportunity to

⁶ When asked if he believed MPW has collected too much revenue over all, Plaintiff's expert responded in the negative. (See Exhibit C, Mantz Deposition 1/13/21, p. 129 ll. 7-24).

⁷ All of Plaintiff's causes of action are reliant on a finding that MPW's rate structure violates South Carolina statutory law.

do so. Snee Farm never tried to reduce the 148 REUs assigned to its account, either before the filing of this lawsuit or after. Snee Farm is a corporate entity with a professional property manager. Prior to 2018, Snee Farm's professional property manager could have determined that Snee Farm had more REUs assigned to its account when compared with Snee Farm's actual water usage. (*See* Defendants Reply, Exhibit G). Other commercial customers reduced their REUs during this time. For instance, Plaintiff attached to the Response a confidential exhibit including a 2014 settlement agreement with a commercial customer whereby the customer had allegedly contacted MPW and sought to reduce its REUs. Because MPW did not reduce this customer's REUs in a timely fashion, MPW reimbursed the customer for BFC paid on the account. (*See* Plaintiff's Response, Exhibit G). Clearly, the particular commercial customer involved in the settlement was able to discern in 2014 that it had more REUs assigned to the MPW account than it needed based on its actual water usage.

In 2018, MPW completed an audit of its commercial customer accounts. At that time, MPW identified certain commercial customer accounts with a large number of unused REUs. MPW identified Snee Farm as one of those commercial customers. In an effort to bring the unused REUs to the attention of those commercial customers, MPW sent a letter to 288 commercial customers recommending a reduction in the assigned REUs. Even after receiving the 2018 letter, Plaintiff chose not to contact MPW to reduce its REUs. Instead Plaintiff initiated this lawsuit. By failing to take action to reduce its REUs, Plaintiff has failed to mitigate its alleged damages.

Plaintiff's claim that reducing its REUs would require Plaintiff to prejudice itself by complying with illegal practices is not persuasive. Plaintiff takes issue with MPW's policy of requiring a customer to surrender its REUs when that customer seeks to reduce its REUs for purposes of BFC. Plaintiff asserts that having to give up something it previously paid for is

“illegal.” However, again, this situation is akin to the water meter right sizing, which Plaintiff’s expert deems reasonable. Not unlike the customer who is required to replace its larger water meter in order to reduce its BFCs based on water meter size, MPW’s requirement that a customer give up assigned REUs in order to reduce its BFC is reasonable pursuant to the applicable statutes.

Mantz testified that in a water meter size rate structure if the customer chooses to right size, the customer is responsible for paying for and installing a new water meter. (*See* Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 31-32, ll. 21-15). Thus, the customer must immediately come out of pocket in order to right size a water meter that is larger than the customer’s current water needs. Mantz further testified that the utility should not have to pay for the customer’s smaller water meter because it is costly – an even greater deterrent to the customer who wishes to reduce its BFC charge in a water meter rate structure. (*See* Defendant’s Reply, Exhibit C, Mantz Deposition 1/13/21 pp. 33, ll. 1-11).

Pursuant to MPW’s policies, MPW’s customers are required to give up REUs they previously paid impact fees for in order to right size. Unlike a water meter size customer, MPW’s customers have no out of pocket expense upon deciding to right size their REUs. The only expense MPW’s customer may have occurs if they later determine they wish to increase the number of REUs assigned to their property. In that case, MPW requires customers to repurchase REUs at the current impact fee rate or back pay unpaid BFC in order to have the REUs reinstated (whichever is less). (*See* MPW Policy 5.3.3). If the water meter size rate structure is reasonable and legal, as testified to by Plaintiff’s expert, then MPW’s system cannot be the basis for Plaintiff’s refusal to mitigate its alleged damages.

If someone purchases something but then decides to give up that asset, it cannot be illegal for the person to then be required to pay to repurchase the same asset. Similarly, it cannot be

illegal to require a water meter customer who may chose in the future to go back to a larger water meter, to purchase the larger meter. These are all business decisions that sophisticated commercial customers, like Plaintiff with the help of its retained professional property manager, must make in order to determine what is best for their own business and individual future needs. Giving up REUs would presumably benefit the business by reducing their BFC. So, determining whether to reduce REUs even if it means possibly repurchasing the same in the future is not an illegal choice, but rather a business decision similar to the accepted policy of paying to purchase and install a smaller water meter. Yet, Plaintiff complains because it wants the benefits of both retaining its REUs and having its BFC reduced. This court will not penalize MPW because Plaintiff never made the decision as to whether it wanted to maintain its REUs. Plaintiff failed to mitigate its damages that it seeks to be reimbursed in this lawsuit and for that reason MPW's Motion for Summary Judgment is granted as to all of Plaintiff's causes of action with prejudice because of Plaintiff's failure to mitigate damages.

III. Plaintiff's Claims are barred by the Voluntary Payment Doctrine.

In South Carolina, "[i]t is well-settled law that money voluntarily paid with full knowledge of all material facts and without any fraud, duress, or extortion cannot be recovered, although there was no legal obligation to make such payment." *Shockely v. Wickliffe*, 148 S.E. 476, 477 (S.C. 1929) (citing *Hardaway v. S.Rey.*, 73 S.E.1020, 1025 (S.C. 1912)). Plaintiff's MPW water bills included the number of REUs assigned to the particular account as well as the number of gallons used for each particular billing cycle. Further, the back side of each bill states: "[o]ne REU equals 9,200 gallons per month" and that "[a] Basic Facility Charge for residential and commercial

customers is a monthly base charge on the number of Residential Equivalency Units assigned.” The back of the bill also includes a further reference to MPW’s website and phone number to call for more information on other rates, fees and charges. (See Defendant’s Reply, Exhibit G). Finally, Plaintiff at all times employed and relied upon a professional property manager who manages multi-family units throughout the Charleston area, admits that she had access to the information and could have calculated how many REUs were being used by Plaintiff. (See Defendant’s Reply, Exhibit F, Lona Vest Deposition pp. 12, ll. 1-25, pp. 47-48, ll. 3-16). Thus Plaintiff was aware of and had access to all material facts and yet voluntarily paid their bill without questioning the same.

Certainly, after receiving the 2018 Letter, Plaintiff was well aware of unused REUs assigned to their account, yet many, including Plaintiff made no effort to reduce their REU assignments. Finally, Plaintiffs have made no allegations of fraud, duress or extortion that might impact the application of the voluntary payment doctrine. It is Plaintiff’s burden to allege and prove that the money at issue was paid under fraud, duress, or extortion. *Hardaway v. Southern Ry. Co.*, 90 S.C. 475, 488-89, 73 S.E.1020, 1025 (S.C. 1912). Plaintiff’s claims regarding voluntary payment doctrine fail because Plaintiff cannot meet this burden.

Plaintiff’s response that “you can’t live without water and sewer,” is unpersuasive. This point misconstrues the principals behind the voluntary payment doctrine. The point is not that Plaintiff is paying for a service it needs, but rather that Plaintiff paid without ever asking that its rate be lowered or its REUs be reduced.

For the reasons stated, this court dismisses Plaintiff’s complaint with prejudice due to the voluntary payment doctrine.

IV. Plaintiff’s claimed damages are barred by the Statute of Limitations.

Even assuming MPW's rates violated state law, Plaintiff's claims are barred by the statute of limitations because Snee Farm knew or should have known that it had a claim against MPW more than three years prior to initiating this lawsuit. As noted earlier, each bill contains the number of REUs assigned to the customer's account as well as the gallons consumed in the particular billing cycle. The back of each bill notes that "one REU equals 9,200 gallons per month." (See Defendant's Reply, Exhibit G). Plaintiff employs a professional property manager who received Plaintiff's water bills and reviews the same. Plaintiff claims that it has been "overcharged" for excessive REUs for years, yet Plaintiff had all necessary information before it to discover this claimed inequity simply by looking at its bills. Plaintiff's professional property manager testified that she knew that MPW charged a basic facility charge based on the bill, but she had never attempted to calculate the BFC and compare it to the total water gallon usage listed on the bills. (See Defendant's Reply, Exhibit F, Lona Vest Deposition pp. 12, ll. 1-25, pp. 47-48, ll. 3-16). As was discussed earlier, other commercial customers as early as 2014 sought out reductions in their REUs based on their volumetric water usage. Simply put, Plaintiff had all necessary information to start asking questions and determine whether or not it had "unused REUs" assigned to its account. For this reason, the statute of limitations bars Plaintiff's claims even assuming MPW's rates violate applicable statutes.

CONCLUSION

Many of the facts in this case are undisputed. All parties agreed as to the structure of MPW's BFC rate structure and the ability of the Plaintiff to reduce their REU assignments, but the parties did not agree as to the implications of the rate structure or the ideal method by which Plaintiff could reduce its REUs. However, after performing a detailed analysis and comparison of the facts with the applicable law, this Court finds MPW's rate structure does not violate the

standards set by the applicable statutes. The General Assembly granted municipalities wide ranging freedom to determine how municipal utilities will set rates and which rate methodology they will employ. It is not for this court to supplant the General Assembly and invalidate MPW's rate methodology. Rather, this court's review of MPW's rate methodology is limited to a determination as to whether it violates the applicable statutes. It is not for this court to determine the optimal rate structure, but only if the rate structure in place meets the statutory requirements. This court finds that considering all of the facts, and specifically Plaintiff's expert testimony, in the light most favorable for the Plaintiff, summary judgment should be granted to MPW because Plaintiff cannot meet its burden of showing that MPW's rate system violates South Carolina law.

However, even if this court were to find MPW's BFC rate system violated South Carolina law, summary judgment should still be granted in MPW's favor because Plaintiff's claims are barred by the voluntary payment doctrine, the failure to mitigate damages, as well as the statute of limitations.

For these reasons, the Court grants MPW's motion for summary judgment and dismisses Plaintiff Class' claims in total with prejudice.

IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.

This ____ day of July, 2021



Charleston Common Pleas

Case Caption: Snee Farm Lakes Homeowners Association Inc VS Commission of Public Works for the Town of Mount Pleasant Th , defendant, et al
Case Number: 2018CP1002764
Type: Order/Summary Judgment

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

Electronically signed on 2021-07-12 09:19:12 page 21 of 21

ELECTRONICALLY FILED - 2021 Dec 12 9:29 AM - CHARLESTON - COMMON PLEAS - CASE#2018CP1002764

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Snee Farm Lakes Homeowner's
Association, Inc., Individually and on
Behalf of those Similarly Situated,

Plaintiff,

v.

The Commission of Public Works for the
Town of Mount Pleasant d/b/a Mount
Pleasant Waterworks,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2018-CP-10-2764

**ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND
PURUSANT TO RULE 50(e) SCRCP**

RECEIVED

Dec 02 2021

SC Court of Appeals

Plaintiff Snee Farm Lakes Homeowner's Association, Inc., Individually and on Behalf of those Similarly Situated ("Plaintiff") filed a Motion to Alter or Amend Pursuant to Rule 59(e) ("Motion"), SCRCP this Court's Order granting summary judgment and dismissing the lawsuit in favor of Defendant the Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("Defendant" or "MPW"). The basis of Plaintiff's Motion is that this Court's Order contains the following mistakes of law: 1) failure to address the law on service and user fees; 2) misstating the relevant legal framework on reasonableness; 3) misapplying the standard of review; and 4) misunderstanding the affirmative defenses. The Court denies the Motion and upholds its initial grant of summary judgment in favor of Defendant for the reasons described below.

1. This Court addressed the applicable law on service and user fees.

For purposes of this analysis, the Court will assume that MPW's BFC charge is a service fee or user fee, and S.C. Code Ann. § 6-1-300(6) and 6-1-330(B) apply. Thus, the BFC fee must be paid "in return for a particular government service or program made available to the payer that

benefits the payer in some manner different from the members of the general public not paying the fee.” S.C. Code Ann. § 6-1-330(6).

According to the Plaintiff citing *Burns v. Greenville County Council*, the statute “requires that a service or user fee provide some special benefit to the members of the public paying that fee.” See Motion p. 3 and *Burns*, 861 S.E.2d 31, 33 (2021). The *Burns* court invalidated road maintenance fees and telecommunication fees because they did not provide the payers with a special benefit. *Burns*, 861 S.E.2d 31 (2021). The *Burns* facts are distinguishable from the facts in this case, and for that reason the *Burns* ruling does not impact this Court’s grant of summary judgment. In summation, the BFC charge based on assigned REUs provides Plaintiff with a special benefit not available to the general public, including but not limited to the use of the water and sewer system, which is not available to the general public. Further, the BFC collected is used to maintain and keep the water and sewer system running. There are no allegations that the funds collected should not be collected or that the revenues are being used improperly. The ability to have water flow through a customer’s faucets at any time on demand is a real benefit that must be paid for regardless of how much water a customer uses. Deposition of Bryan Mantz 1/13/21, p. 37 -38, ll. 8-11. This Court has addressed the law on service and use fees and finds that the law supports a grant of summary judgment in favor of Defendant.

2. This Court did not misstate the relevant legal framework on reasonableness.

The “test of the reasonableness of rates established by a public service district is the service received.” *H.A. Sack Company, Inc. v. Forest Beach Public Service District*, 272 S.C. 235, 238, 250 S.E. 2d 340, 341(1978), citing *Simons v. City Council of Charleston et al.*, 181 S.C. 353, 187 S.E.545 (1936). In this case, Plaintiff reserved a certain level of service capacity or potential demand of service on the system, and MPW provided service to Plaintiff for that reserved capacity

or reserved demand of service. By calculating a BFC based on Plaintiff's reserved capacity, MPW has fixed a rate "reasonably proportionate to the value of the service rendered or bearing some relationship to the present or future cost of providing service." 94 C.J.S. Waters § 730. Plaintiff has not presented any facts to support a finding that MPW did not or was unable to provide the level of reserved service if and when Plaintiff demanded the same.

Instead, Plaintiff complains that it did not need the entire reserved capacity. Plaintiff, argues BFC based on the reserved capacity is "completely divorced from [Plaintiff's] demands on the system (what it costs to serve Snee Farm Lakes HOA, for example) and thereby subsidizing other ratepayers." See Motion p. 7. Plaintiff argues that the BFC must be periodically "rightsized to reflect actual use records over time." *Id.* So, although Plaintiff readily agrees MPW is allowed to charge a base rate¹, which by Plaintiff's own expert's definition is a fixed rate unrelated to a customer's volumetric use, Plaintiff seeks to have this Court require BFC to be tied to actual volumetric use. In essence, if Plaintiff believes that the concept of BFC is acceptable and reasonable, then a BFC based on reserved capacity is certainly reasonable.

Plaintiff tellingly argues the Court's conclusion would allow "a municipality to charge whatever rates it may fancy provided the water is clear and free-flowing." The question before the Court is not whether MPW has charged "whatever rates it may fancy" but instead whether the rates charged are reasonable, which they are based on the facts presented and the applicable legal standard. The Court cannot and will not dictate exactly how a municipality sets its rates so long as those rates meet the legal parameters, which they do in this case.

¹ "To be clear, Plaintiff has never argued that MPW is not allowed to charge a base rate." Motion p. 7.

3. This Court applied the correct standard of review in considering the merits of Plaintiff's claims.

Plaintiff argues the Court misapplies the standard of review when it considered the merits of the case, because *the Court relied on Plaintiff's own expert*. Plaintiff identified Bryan Mantz as an expert in his field, but now asks the Court to ignore Mr. Mantz's clear testimony that contradicts Plaintiff's position. Plaintiff accuses the Court of ignoring other evidence indicating of MPW's ratemaking practices are unreasonable, but Plaintiff fails to identify such evidence that would trump Plaintiff's own expert. The problem Plaintiff has is that Mr. Mantz testified 1) that a water system should charge a BFC based on something other than actual volumetric use –that to do so is the recommended best practice and 2) that a system whereby the BFC is based on a water meter size is reasonable and acceptable. See Mantz Deposition 1/13/21 pp. 90-91, ll. 7-9, 12-25, pp. 116-117, ll. 5-8, 20-4, p. 49, ll. 16-19. Plaintiff offered Mr. Mantz up as an expert and thus is tied to his opinions.

Again, the Court is not entitled to review and criticize a municipalities' rate making unless such rate making falls below a legal standard. In this case, the evidence, including Plaintiff's own expert support a finding that MPW's rates meet a basic legal standard of reasonableness.

4. This Court correctly addressed the affirmative defenses.

The Court, reviewing the facts, pleadings, law and importantly, Plaintiff's own expert, in the light most favorable to Plaintiff, finds that Plaintiff's claims are barred for a variety of reasons, including the applicable statute of limitations, Plaintiff's failure to mitigate its damages and Plaintiff's voluntary payment of the funds it claims are damages. Plaintiff claims the Court incorrectly analyzed these defenses.

Statute of Limitations

Plaintiff argues that each bill issued by MPW caused a new injury. This argument does not change this Court's ruling that the statute of limitations bars Plaintiff's claim. A cause of action accrues at the time a plaintiff has a legal right to sue on it. *Brown vs. Finger*, 240 S.C. 102, 124 S.E.2d 781 (1962). The genesis of Plaintiff's claim is that MPW assigned excessive REUs to each customer prior to establishing service or at a change in use and that these assignments were incorrect. See Amended Summons & Complaint § 9. Plaintiff claims that because of the alleged incorrect REU assignments, MPW charged Plaintiff excessive BFC each month. But the charge was set at the time the REU assignment was made, not as of a calculation made each month. In fact, the BFC, based on the REU assignment, is the exact same every month. So, the statute of limitations began to run when Plaintiff knew or should have known that it had been assigned allegedly excessive REUS. As a result, Plaintiff's claim is barred by the applicable statute of limitations.

Further, it is relevant that Plaintiff employed a *professional property manager*, who testified she knew that MPW charged a basic facility charge based on the assigned REUs, but she had never attempted to calculate the BFC and compare it to the total water gallon usage listed on the bills. See Defendant's Reply, Exhibit F, Lona Vest Deposition pp. 12, ll. 1-25, pp. This admittance illustrates Plaintiff's lack of regard for the issue. Simply put, it appears Plaintiff never took the time to calculate its bill versus Plaintiff's volumetric usage. Plaintiff had all necessary information and professional staff to start asking questions and determine whether it had "unused REUs" assigned to its account.

Plaintiff also argues that the bills did not provide an explanation as to how Plaintiff could reduce its assigned REUs. However, again, Plaintiff had the information at its fingertips to determine that it was being allegedly overcharged for the BFC – its' assigned number of REUs

and the volume of water used each month. Most importantly though, Plaintiff never made an inquiry as to how it could reduce its assigned REUs. Plaintiff knew or should have known that it had a claim but failed to initiate the claim within three years from the date of being put on notice.

Voluntary Payment

Plaintiff asserts that the voluntary payment doctrine does not apply because “South Carolina has never found this doctrine applicable in a case involving a local government in a tax, fee, or rate dispute.” See Motion p. 14. In fact, in *Self Storage Ass’n vs. City of Aiken*, WL 10862806 (Ct. App. 2012), the Court of Appeals affirmed a trial court ruling that the voluntary payment doctrine bar provided the grounds for summary judgment in favor of the City of Aiken regarding paid taxes. While this is an unpublished opinion that did not discuss the merits of the voluntary payment doctrine decision, the Court of Appeals did not strike down the voluntary payment doctrine application simply because it was asserted by a government entity.

Plaintiff also seems to distinguish payment for water service from some other type of voluntary payment because Plaintiff asserts that failure to pay the water bill could “result in the suspension of ...a basic need.” See Motion, p. 15. Plaintiff cites a case from Illinois regarding phone service. However, again, there are no South Carolina cases, which distinguish between the services for which the voluntary payment doctrine applies. Even assuming Plaintiff had no option but to purchase water from MPW, Plaintiff has not addressed why it never sought to reduce its REUs except to assert that it didn’t want to give them up. Plaintiff was not forced to maintain its level of REUs at its current level, the same level that was assigned to Plaintiff in 1982.

Plaintiff can lower its REUs, but Plaintiff has chosen not to. This is the definition of voluntary payment, which bars Plaintiff's claims against MPW. The Court properly granted summary judgment on the voluntary payment doctrine.

Failure to Mitigate Damages

Plaintiff claims that if it had reduced its REUs and thus reduced its claimed damages, as Plaintiff agrees it is able to do, it would incur an "expense" by giving up its REUs. Plaintiff's argument is not new. The Order addresses the fact that Plaintiff has made a business decision to keep its REUs and thus continue to pay BFC based on the number of REUs assigned. All parties agree there is a value to maintaining unused REUs. This Court will not allow Plaintiff to go forward seeking "damages" from MPW that Plaintiff chose to incur.

CONCLUSION

For the reasons stated herein, Plaintiff's Motion to Alter or Amend Pursuant to Rule 59(e), SCRCF is denied in its entirety.

IT IS SO ORDERED.

The Honorable R. Markley Dennis, Jr.

November ____, 2021
Charleston, South Carolina



Charleston Common Pleas

Case Caption: Snee Farm Lakes Homeowners Association Inc VS Commission of
Public Works for the Town of Mount Pleasant Th , defendant, et al
Case Number: 2018CP1002764
Type: Order/Other

R. Markley Dennis Jr., 2060

R. Markley Dennis Jr., 2060

1 STATE OF SOUTH CAROLINA TRANSCRIPT OF RECORD
2 COUNTY OF CHARLESTON CASE NO. 2018-CP-10-2764
3

4 -----
5 April 16, 2021

6 BEFORE: The Honorable Markley Dennis, Jr.
7 -----

8 Snee Farm Lakes Homeowner's Association, Inc., Individually
9 and on behalf of those Similarly Situated,
10 Plaintiffs,

11 vs.

12 The Commission of Public Works for the Town of Mount
13 Pleasant d/b/a Mount Pleasant Waterworks,
14 Defendant.
15 -----

16
17 APPEARANCES:

18 Ross Appel, Esq.,
19 Attorney for the Plaintiffs.

20
21 Amy Hill, Esq.,
22 Attorney for the Defendant.

23 Official Court Reporter,
24 Cynthia D. Weaver
25

1 P-R-O-C-E-E-D-I-N-G-S

2 THE COURT: Okay. Having said all of the parts
3 about incorporating everything it occurred to me this
4 morning, and I don't expect you all to necessarily agree
5 with this Amy and Gray or anybody for the Defendant, but to
6 me it seems that really we need to look and focus for
7 purposes of Summary Judgment on two of the causes of action.
8 Because, obviously, the waiver implies that they've waived
9 something, they should have had or could have had.

10 The Statute of Limitations, obviously, this is an
11 ongoing action, so that would be a limitation at a trial, I
12 don't see it as a bar to anything, completely.

13 All the other things, to me -- that two that leap
14 out at me that really either are or aren't -- the facts are
15 what they are, basically, looking at it. It is what it is.
16 There's nothing really nothing unusual or hidden here, I
17 don't believe. And it seems to me that if -- and I'm
18 summarizing it so you can address this -- if the Commission
19 has the right to set the fees and they've set them, and
20 everybody's paid them, no question about that, nobody's
21 arguing that. And that -- the question is whether or not,
22 to me, it violates the general provision that says basically
23 they provide services for reasonably -- I'm adding that
24 word -- I wanted to put up the statute, but I read it again
25 this morning. But it all boils down to whether or not

1 that's a reasonable -- if whether or not they've abused
2 anything.

3 Because clearly, folks, if, to me, the essence of
4 this is: Can the Court tell an elected body -- and, really,
5 I just took it from the legislature on down -- an elected
6 group how they should run their business. And that's
7 basically what I'm doing today as I see it.

8 So to me the two real issues are, the first is:
9 Does it violate any law? Does it really violate the
10 statute? Have they violated it? And let me say this, I've
11 read the Azar Case, and I know you all cited and you don't
12 necessarily agree with the Defendant's interpretation of it
13 in their reply, but I read it again. I wouldn't have any
14 problem denying Summary Judgment in that case, because it
15 was clear, they were using it for something other than water
16 and sewer business and developing that, as I read that case.

17 It's been asserted in the reply brief, as I need
18 to know, do you all have -- is it evidence -- I confess, I
19 could have missed it -- that says that they've used these
20 monies inappropriately as they did in the -- allegedly in
21 the Azar Case? That would be something that would need to
22 be addressed. But other than that, it's either up or down,
23 the way I see it.

24 And then the second one was: Assuming, for the
25 sake of discussion, that, Yeah, you've got -- you're right,

1 they violated -- they violated what they had the right to do
2 when they were created and what the legislature authorized
3 them to do. Then the question is: Does the Tort Claims Act
4 bar any recovery? Because it seems to me there's a hurdle
5 there also.

6 So I think, having said that, I think -- what I'd
7 like to hear is from the Plaintiff as to why I should deny
8 Summary Judgment, focusing on those two things. Because the
9 other ones, I'll agree with you, I would deny Summary
10 Judgment on all the rest of them, because it's going to
11 depend on certain things that would be developed at trial.
12 And, to me, this action rises or falls primarily on the
13 rate-making methodology and whether or not they had the
14 right to do that in the first place.

15 So let me hear from you.

16 MR. APPEL: All right. Thank you, Your Honor.

17 Ross Appel, here for the Plaintiff Class and I'm
18 happy to address those issues that you mentioned.

19 Your Honor, respectfully we believe this case may
20 be many things, but it's certainly not a good candidate for
21 Summary Judgment. And MPW's counsel admits this on the
22 first page of their brief. They say, quote, MPW takes issue
23 with many of the facts presented in Plaintiff's response.
24 Clearly there are factual disputes all over the place in
25 this case. That, in and of itself, means MPW's motion for

1 Summary Judgment ---

2 THE COURT: Ross. Ross. Do me a favor. I don't
3 quarrel with that statement. It's a blanket statement.
4 You're right, 100 percent correct, you deny it.

5 I want you to tell me not that they're all over
6 the place, tell me the specific facts that you're relying on
7 that said that they violated the authority that was given to
8 them by this -- the basically 5-31-670 which said they
9 created what they done.

10 So what are the facts that say they violated that?

11 MR. APPEL: Sure. Your Honor, and there are a
12 variety of facts and circumstances that are highly ---

13 THE COURT: Just tell me -- I don't need to know
14 the variety.

15 Just go down and enumerate those facts that you
16 think the evidence shows that says that they violated that
17 section.

18 MR. APPEL: Absolutely.

19 So, Your Honor, in 2014 MPW's rate consultant told
20 MPW, quote, MPW has determined that certain commercial
21 customers have been assigned an incorrect number of REUs,
22 end quote.

23 George Raftelis, a national expert in water and
24 rate making then goes on to say in this letter to MPW in
25 2014, quote, These inconsistencies present complexities and

1 potential customer inequities, end quote. CDM Smith, a
2 subcontractor to Raftelis then performs an exhaustive study
3 of MPW's commercial customers, and they determined that
4 4,400 REU have gone unused by commercial customers going
5 back seven years.

6 So consistently, for seven years prior to ---

7 THE COURT: Seven years prior to 2014, correct?

8 MR. APPEL: Yes, sir. Yes, sir.

9 THE COURT: Okay. You've also now kicked in
10 another problem for you, haven't you? It's called the
11 Statute of Limitations. You now know something and you
12 didn't do anything.

13 MR. APPEL: Well, Your Honor, we would
14 respectfully say that the first our client learned of this
15 issue was in 2018.

16 THE COURT: Your client -- your client -- you said
17 somebody who you've cited and I assume there are persons
18 that you knew or should have known that aren't there?

19 MR. APPEL: No, Your Honor, this document that
20 we're talking about is an internal document that we obtained
21 in discovery of this case, this was not something that was
22 in the ---

23 THE COURT: Well, let's just assume for the sake
24 of discussion that there's an inequity. Isn't that
25 inherently a risk of everything single water/sewer authority

1 that's operated in South Carolina?

2 MR. APPEL: Absolutely, Your Honor.

3 THE COURT: So, again, how does that violate it
4 and give you a cause of action? So for the Court to come in
5 and say, You can't do that. You can't -- you can't create
6 something that may penalize somebody else, that's improper.
7 And the problem that you have also with that as far as I'm
8 concerned is, again, assuming that that violates -- and
9 that's, at this point, the fact that they say that I don't
10 know that necessarily violates that act in the first place.
11 Where is the case law that said that would violate that act?
12 That they have something that they've charged somebody too
13 much?

14 MR. APPEL: Well, um ---

15 THE COURT: Because let me give you an example --
16 one of the things, I think your expert talked about was
17 interesting -- you all have learned a lot more than I
18 have -- I didn't know there was a meter size that had
19 something to do with how much water you use and that if
20 you've got a certain size that's a minimum size, I guess,
21 meter that you have to pay and then you may or may not use
22 all of it. Isn't that the same thing? But your expert
23 didn't have any problem with that one did he?

24 MR. APPEL: Right. You know, we're not attacking
25 the concept of the base charge in this case. We're not even

1 attacking the concept of an REU-based base charge in this
2 case.

3 But Your Honor, respectfully, the water utilities
4 that operate based upon a meter-size or a pipe-size approach
5 for calculating base charges are apples and oranges to this
6 situation. And the reason for that is because the whole
7 purpose and the whole benefit for having an REU-based
8 approach is the ability to make easy efficient adjustments
9 to a customer's account.

10 MPW didn't have to dig up pipes. MPW didn't have
11 rip off water meters for customers to more accurately size
12 these customers after use took place. An REU is just a
13 digit in a database somewhere. And the whole purpose of an
14 REU is so that MPW could press a button to more equitably
15 allocate REU assignments across its customer base. And if I
16 may --

17 THE COURT: Mr. Appel, I don't disagree with that
18 at all. The question I have is this: First of all -- and I
19 know there was some statement about it was hidden, but
20 clearly they afford the customers the right to come in and
21 say I want it changed, don't they?

22 MR. APPEL: Yes, sir. And that right there is a
23 huge part of the problem we have with MPW use-rate system.
24 Because in exchange -- in exchange for reducing your REU,
25 MPW requires you to forfeit capacity assets that you've

1 previously purchased, their very expensive impact fees.

2 THE COURT: Now we're getting into something
3 that's critical to the whole concept, aren't we? They're
4 basing it on what you're going to need to develop to provide
5 the service in the first place, aren't you?

6 MR. APPEL: Well, um, Your Honor, we would submit
7 that, you know, impact fees are what a customer pays to
8 purchase their proportion at capacity needs into the system.
9 And once they've paid that impact fee, they've purchased
10 that capacity.

11 MPW has a process where they've decided to link
12 their base charge to their impact fee program in a way that
13 MPW's own expert said he had never heard of in his 30-plus
14 years of experience.

15 THE COURT: That's another thing I wanted to ask
16 you. Are you telling me that in all of the water and sewer
17 services provided in this state this is the only one that
18 uses this approach?

19 MR. APPEL: Absolutely.

20 THE COURT: Okay.

21 MR. APPEL: As far as we can tell. And, believe
22 me, I would -- I'm sure MPW would have talked about other
23 utilities that do this exact thing. Now, there maybe other
24 utilities that use an REU approach, but we have not seen one
25 with impact fees to the base charges like MPW does.

1 THE COURT: Well, I understand that. I don't
2 quarrel with -- again, I think that's the whole purpose of
3 it, would make sense to me, what the cost of providing in
4 one place may not even come close to covering the cost in
5 another place. So it can't possibly be uniform. I mean, if
6 you're going to add -- if the basis for it is to fairly plan
7 and fairly spend enough money to provide a service for an
8 area that -- again, this is yours -- you all have delved
9 into this -- but, you know, you go in and you say, Okay,
10 we're going to develop Snee Farm, and that was -- what's it
11 going to look like? Does anybody have a picture of it?
12 Does anybody know exactly? There's no way to know that. So
13 you have to do what they did I assume, is put all this data
14 in a computer and it printed out something that said this
15 is -- this is a suggestion here.

16 And then -- and then -- because we're getting back
17 to what, again, the essence of my concern. And I know it's
18 really not -- although to me it's analogous -- I don't have
19 the right tell the legislature they can do or shouldn't do
20 something. I think, personally, I'll give you a trite
21 example, I think -- I think minimum sentences are
22 ridiculous. I think that's a waste of state money to put
23 people in jail because they had a certain amount of drugs.
24 I don't get to tell the legislature you can't do that.

25 MR. APPEL: Well, Your Honor, to that I would say

1 that this Court is the only check on MPW's authority for
2 setting rates. Unlike the Public Service Commission that
3 regulates private utilities, there is, yes, the legislature
4 has set up the general framework.

5 THE COURT: That's right.

6 MR. APPEL: And the general framework is cast in
7 broad strokes the word "reasonableness." But that statute
8 also refers to the use of water. We believe that the
9 reasonableness concept has to have some nexus, some
10 connection to the use of water. But the legal test is not
11 just that reasonable test. It's, these are service and user
12 fees, there needs to be a rational nexus between what people
13 are paying and what people's demands are in the structure.

14 And that is -- that is the problem here, is
15 because that 2014 report that MPW got that was never
16 publicized to anybody says 700 commercial customers were
17 overpaid, 90 customers were underpaid.

18 Our class that we represent, Your Honor, has been
19 subsidizing the rest of the rate base by paying excessive
20 BFC that are based on pre-use assumptions, not actual-use
21 data. So that the impact fee stage -- when a customer comes
22 in -- when Snee Farm comes in 1982 and says we want to build
23 148 townhomes, all MPW has to go on are engineering
24 forecasts and estimates. That's how they get to the 148.

25 We have no problem with that.

1 All we are saying, Your Honor, is that in the
2 intervening 40 years, once actual-use data starts to pour in
3 every month, every year, every decade, at some point MPW has
4 the burden to look at the data and make a correction to that
5 REU assignment for base charge purposes and not put that
6 burden onto customers. And if they do put that burden onto
7 customers, certainly not condition the reduction on
8 forfeiting those capacity assets that were purchased for
9 thousands of dollars per REU or the impact fees themselves.

10 There's no reason why MPW can't have a separate
11 column for REU capacity assets and REUs for base charges.
12 And MPW has performed three audits during the class period.
13 They have the resources to do this. This is not the water
14 utility for Aynor, South Carolina. They are very well
15 resourced. They have the ability to do this. All they
16 could do -- all they needed to do was press a button, right
17 size commercial accounts, and more equitable spread the cost
18 and burden amongst the rate base.

19 THE COURT: And, Mr. Appel, I don't argue with one
20 thing you have said. I agree with all of that, they could
21 have done a lot of things, but they didn't. And the problem
22 that I see you have, from my standpoint is, that's what the
23 legislature said. Now, they can be unelected. You can run
24 for that, just as you ran. You know, you can run for the
25 body and say, Look, we need to change this, this is totally

1 wrong. Let's vote on this.

2 But the Court doesn't come in and say, No, no,
3 folks, you elected persons, you can't do that. You need to
4 find a better system, because this isn't fair to certain
5 people here.

6 I hear you. I just -- my question is, How do I
7 have the authority to tell an elected board this is what
8 you -- you have to use a different method. That's my --
9 that's my concern.

10 MR. APPEL: Certainly, Your Honor, and I
11 understand and respect the judicial, you know, hesitation to
12 enter into these situations. But when the legislature set
13 that standard they left open the possibility, that's why
14 it's a law. They left open that possibility for ---

15 THE COURT: Precisely the point. And that's
16 precisely the point. That's why -- that's why to me, those
17 two that we have talked about, Ross, kind of connect as far
18 as I'm concerned. As we know, and I don't think -- maybe
19 Gray did -- you all didn't practice at a time when we had
20 strict sovereign immunity, did you? I did, and I remember
21 that. And it was totally wrong to think, and of course it
22 started with a gradual chipping away, but it finally did.

23 But they -- they said we're going -- we're
24 going -- we're going to restrict some of it still. And
25 therein lies the problem, I think. Because as I read it

1 again this morning, and we can agree to disagree on the
2 interpretation of the law, that's why all are -- that's why
3 we're lawyers and that's why we all have a job because the
4 beauty of it is it isn't all black and white. And we have
5 to -- we have to use our best -- best analytical ability and
6 reason and say this is what we think that means, and we
7 think it does.

8 My concern is, that's -- this is a discretionary
9 ruling, is it not? I mean, this is precisely the kind of
10 thing that that section deals with. Yeah, you may -- you
11 have made a bad one and maybe somebody else would have made
12 a better one, but unless they did something that was known
13 to be, I think that's what the problem is now.

14 But, anyhow, that's why I'm saying I hear you. I
15 understand what you're saying. I just -- I just think
16 you -- I just don't see -- I just don't see how you get
17 there, to get to your point. I understand you've got some
18 legitimate concerns for people that -- to me, if I happened
19 to be one of those persons, I'd probably be a little upset
20 about it, too. I wouldn't want to be paying for everybody
21 else.

22 But the bottom line is: Get somebody that these
23 people -- I assume all of these people vote in the
24 elections, don't they?

25 MR. APPEL: I wish -- well, you know, I don't know

1 how to answer that.

2 THE COURT: This is serving the municipality. I
3 mean, and, obviously, these people are being served by the
4 municipality, correct?

5 MR. APPEL: Yes, sir.

6 THE COURT: So that means they have to live in the
7 municipality, in the corporate limits, do they not?

8 MR. APPEL: For the most part, that's my
9 understanding.

10 THE COURT: Well, they would have a right to
11 certainly voice their objection, would they not, at the
12 polls?

13 MR. APPEL: Yes, Your Honor.

14 THE COURT: Isn't that what the legislature is
15 doing when they create, as you said, A very broad brush
16 thing. I mean, you can -- municipalities -- you can
17 create -- you can create the commission, you can have a
18 commission that provides water and sewer services. It has
19 to be reasonable, and that word is there. There's no
20 question about that. I don't argue with that. But does it
21 say "reasonable according to what?" It says, "reasonable
22 according to everything."

23 And the bottom line I have is -- well, you've made
24 your points about that. Why don't -- why don't we -- why
25 don't I hear from Amy as to why what you have argued is

1 not -- doesn't carry the data for me to deny Summary
2 Judgment.

3 Amy, I was told before you came on that you were
4 going to be the primary argue person this morning.

5 MS. HILL: That's correct, Your Honor.

6 THE COURT: All right.

7 MS. HILL: I hope everybody can hear my fine.

8 THE COURT: We can.

9 MS. HILL: Can you all hear me okay?

10 THE COURT: Yes.

11 MS. HILL: And yes, Your Honor, I think you -- and
12 I'm not going to go through my brief or go through my
13 arguments, because it's clear you've read them and you
14 understand them. But I will hit on some of the points that
15 Mr. Appel made.

16 First, I want to say that there are other
17 utilities within South Carolina that use the REU system.
18 Horry County is one of them that I know off the top of my
19 head. But, that being said, forget that for a minute. The
20 Plaintiff themselves, their own experts -- and you touched
21 on this -- have said the water meter size system is fine.

22 So using their -- their status of what is okay and
23 acceptable if we compare our system to the water meter
24 system, we should be fine too. We should be -- we are just
25 as reasonable, if not more reasonable than the water meter

1 system.

2 In fact, Mr. Appel was talking about part of the
3 issue is, is he believes there should be a rational nexus
4 between what is being paid and the demand and the use of
5 water. As you said earlier, you know, you set up the water
6 meter size at the time you set up the development. Maybe
7 you're having a big hotel, you're going to have a huge water
8 meter, in fact, the City of Charleston uses this system.
9 You have a big old hotel, you're going to use a big water
10 meter.

11 But you've got then you got an office building, or
12 maybe you just go away for a few months, it's not in
13 operation, you've got Covid, and so the whole place is shut
14 down for a few months. Guess what? Your BFC is exactly the
15 same whether or not you turn on any of those taps or not.

16 So if the water meter system is okay, which can be
17 charged the exact same amount regardless of whether any
18 water is used at all, then, certainly, an REU system is
19 okay.

20 Our second point I wanted to touch on is Mr. Appel
21 said part of the issue they have with our system is that it
22 puts the burden on the customer. Again, and I think I
23 touched on this in my brief I won't go into it in detail,
24 but the water meter meet system, again, requires the
25 customer to initiate a new water meter size in order to

1 reduce their BFC.

2 And, in fact, a customer in a water meter system
3 has to actually go out and purchase a new water meter. They
4 have to have it installed. So they have a significant
5 monetary outlay at the outset of trying to reduce their BFC.
6 In our system you don't. In fact, I'd argue that our system
7 even more reasonable, because you can come to us and just
8 say, I'd like to reduce my REU. Great, we'll do it. Now,
9 if you want to increase those REUs further down the road,
10 there are some costs associated with that.

11 So those are the two highlight points I have, Your
12 Honor. Certainly, I'm happy to answer any other questions.
13 But, again, I don't want to take up time when it's clear
14 that you've read our briefs.

15 THE COURT: Well, and I have and I want
16 everybody -- I wanted to have the arguments, too, that would
17 help me in revisiting things in the briefs, too, that's the
18 purpose. I think that's one of the reasons -- I think
19 sometimes -- and I know the men and women that sit in
20 Columbia and grade our papers, they're a lot smarter than I
21 am, I know that.

22 But, still, sometimes when you listen to lawyers
23 they bring up something you just didn't think about and
24 that's precisely what I glean from argument, and it's very
25 helpful to me. When I'm looking at something, I bet I

1 have -- for instance, Mr. Appel's arguments about the length
2 of time that this went on without any real, realistic
3 change.

4 Is that -- is that -- is that the scintilla
5 necessary to say no to the Summary Judgment request.

6 Mr. Appel, and I cut you off to let her rebut. I
7 don't want -- I want you to please tell me, Judge, I'm
8 trying to build my record here, so please give me a chance,
9 and I'll defer to you for that, because that's the last
10 thing I ever want to do. That part I remember being a
11 lawyer, don't -- don't mess -- don't lose my case for me,
12 Judge. I need to go ahead and protect myself.

13 So, please feel free to continue to argue and
14 maybe address some of Ms. Hill's comments, if you would,
15 please.

16 MR. APPEL: Thank you, Your Honor. And I
17 appreciate that. And, yes, I have a few other factual
18 issues that I think I'd like to talk about.

19 THE COURT: Sure.

20 MR. APPEL: But before jumping into that I want
21 address this question about the role of judicial oversight
22 in this -- in this matter under the statutory framework that
23 we're talking about. And I want to draw an analogy to an
24 area of the law where I'm actually very familiar with which
25 is zoning and land use litigation.

1 THE COURT: Yes, you are.

2 MR. APPEL: Yes, sir. When a Board of Zoning
3 Appeals renders a decision and that decision is appealed to
4 the Circuit Court -- the Circuit Court -- it's very clear in
5 the case law that the judge is not supposed to substitute
6 its subjective judgments and determinations for that of the
7 board. And the reason for that is the same reasons you
8 articulated earlier. We don't want to have judges sort of
9 stepping in and usurping the role of legislative and quasi
10 judicial functions at the local government level. And we
11 see that normally when you're challenging any ordinance.
12 You know, there's a lot of deference that's given to the
13 legislature under the rational basis test, et cetera.

14 However, there are exceptions in both of those
15 scenarios. For example, when there's an arbitrary and
16 capricious decision, when there's no evidence to support a
17 decision, we believe and we respectfully submit that when
18 you take the totality of all the facts and circumstances in
19 this unique case and you put all of that together and you
20 filter that through the prism of reasonableness -- which is
21 the main test, it's not the only test as we've set out in
22 our brief -- there's other things about the use of water,
23 there's other language that talks about how municipalities
24 are supposed to charge minimum charges to customers -- we
25 believe that under the unique, you know, stew of facts and

1 circumstances in this case, MPW's practices are unreasonable
2 and they violate the law. And this Court, and only this
3 Court, is the opportunity to adjudicate these issues.

4 And I respect the legislative process and the
5 ability to, you know, bring in new commissioners and things
6 of that nature, but we don't believe respectfully that our
7 Class should have to be subject purely to the democratic
8 process. There's a role for the judiciary here. There's a
9 role for the Courts to step in and call balls and strikes
10 when it comes to whether or not this particular practice is
11 reasonable or not.

12 MPW talks a lot about utilities that don't do what
13 they do. They don't charge base charges based on a meter
14 size. They don't charge base charges based on pipe size.
15 They choose to charge base charges according to REU and
16 they've let their program get way off track over the years.
17 Forty percent of the REUs that are in their system are not
18 used but they're charging people for them.

19 That amounts, Your Honor, and I'm not that good at
20 math either, I'm not good at math at all, but that is
21 482 million gallons of water a year that is being unused,
22 that MPW knows is going unused, but they are charging our
23 Class for it every single month. And we believe
24 respectfully, Your Honor, that that is -- that is
25 inappropriate.

1 And, if I may, I'd just like to add a couple more
2 factual issues that overlay that information from 2014, that
3 we believe creates, if nothing less, a question of fact for
4 trial in this case.

5 So in 2014, MPW was provided this information:
6 4,400 unused REUs, 700 commercial customers being
7 overcharged. What did they do? The next year, they jack up
8 their base charge rates by 80 percent on water, 33 percent
9 on waste water, and that nails our Class. That dis -- our
10 Class was already disproportionately carrying the load of
11 the entire rate system. But when they jack up the rates,
12 the year after they're told this information, that -- that
13 significantly impacts our clients, so we believe that's
14 unreasonable.

15 Then, in 2015, MPW goes on to notify commercial
16 customers about this problem. But here's the issue, they
17 only notified the customers who had undersized REU. So they
18 were told 700 are oversized, 90 are undersized. They
19 informed the 90 customers, Hey, you all may want to pay more
20 impact fees to raise your REUs up.

21 Your Honor, impact fees are thousands of dollars
22 per REU. MPW kept quiet when it came to our Class. Not
23 until 2018 was our Class Representative and hundreds of
24 others, notified by MPW that they have excessive REU. And
25 we believe that's significant.

1 And this whole issue of a capacity reservation
2 fee -- and I can't stress this strongly enough -- in MPW's
3 policies, Policy 7.2 -- this is what a customer would see if
4 they were to take the time to navigate through the website
5 and pull all this information -- 7.2 in MPW's cost recovery
6 policy defines what a base charge is. It refers to a base
7 charge as a "capacity reservation fee" and that in order to
8 keep the capacity you pay for at the impact fee stage, you
9 have to pay base charges according to that amount. And if
10 you want to reduce your REU, as we talked about earlier, you
11 have to surrender the assets that you previously purchased.
12 That's what a customer is told.

13 Here's the problem with the capacity reservation
14 concept. MPW's own rate consultants had testified that that
15 is an improper use for a base charge. MPW's own attorneys,
16 in the emails that we included in our memorandum, called
17 that specific conduct inequitable multiple times.

18 That is the nature and the feature of this program
19 coupled with the dramatic oversizing of the system -- the
20 4,400 that we talked about. You add up all of those facts,
21 you add up all of those circumstances together, and that's
22 what we would respectfully submit to creates and
23 unreasonable structure, as applied to these unique facts and
24 circumstances.

25 You know, we're not adjudicating these practices

1 in the abstract or in the concept. I mean, under a
2 different factual scenario that's different from this
3 record, MPW's practices may pass muster. It's just the fact
4 of the matter is the assignments are so off, they're so
5 wildly inaccurate, MPW has had actual knowledge of this for
6 years. They failed to take any steps to promote more equity
7 into the system, which they talk all about in their policy
8 documents: We strive for equity, we strive for fairness, in
9 other utilities around the country rightsize.

10 We have -- we have -- you know, our expert is
11 prepared to talk about numerous examples of utilities around
12 the country that annually rightsize commercial REUs. It's
13 easy to do. In fact, it is the feature that makes the REU
14 system a beneficial system. MPW has failed to avail
15 themselves of the feature that actually makes this system
16 preferable to the -- to the meter and pipe-size approach.

17 And one last point about the meter and pipe-size
18 approach. The inaccuracies that we've seen in the MPW
19 scenario, the 4,400, the 40 percent going unused, water
20 meters and water pipes cannot be oversized to that degree.
21 The magnitude by which MPW's system is off, the magnitude by
22 which MPW is overcharging its customers is dramatically --
23 it far exceeds, you know, the kind of scenarios you would
24 see in the pipe and metering context. And, again, it's very
25 similar to like a negligence or duty-type analysis.

1 It's all about evaluating the positions of the
2 parties, the facts and circumstances at issue in each
3 situation and the costs it would take for MPW to fix this,
4 in line with what we're saying. It's easy. It's a click of
5 a button. And they failed to do it. And they failed to do
6 it because it was helping them, it was coming to their
7 benefit. These oversized customers are paying more than
8 they ought to. And we just respectfully believe that that's
9 unfair.

10 And I think that that pretty much covers it. You
11 know, of course we go into much more detail about all of
12 these issues in our brief and I'll be happy to answer any
13 questions.

14 THE COURT: That's why I incorporated them, Mr.
15 Appel.

16 MR. APPEL: Yes, sir.

17 THE COURT: And if you -- that's in -- you're
18 protected, because you certainly have articulated it very
19 well this morning, but you expounded on it in your briefs
20 and I thank you for that. I appreciate it.

21 All right. Do you wish to respond, Amy, or Gray
22 you said you may want to have a reply? But either or both
23 or none, whatever you want to do is fine with me.

24 MR. CULBREATH: I'll let Amy start.

25 THE COURT: All right. Amy.

1 MS. HILL: Yes, Your Honor. And I did take issue
2 with Mr. Appel saying that we have -- and I don't know that
3 I wrote the exact number down, but 40 percent unused REUs.

4 Again, it goes to what exactly is an REU in this
5 situation. And as we defined ---

6 THE COURT: Amy, in fact, could I stop you at
7 that?

8 MS. HILL: Yes.

9 THE COURT: Because I appreciate that, but
10 that's -- when I listen to these, there are cues that I
11 listen for. Let's assume that he's right, do they still
12 have a right to go forward? Do they have a right to
13 proceed? Assuming that's correct ---

14 MS. HILL: Yes.

15 THE COURT: --- what he just said.

16 MS. HILL: They do not have a right to proceed,
17 Your Honor.

18 THE COURT: That's what I'm saying. When you
19 start arguing with -- you disagree with what his assessment,
20 I understand that, that's -- frankly, one of the things that
21 leaped out at me also was that he mentioned other places,
22 I'm sure there are other places that have been doing things
23 and they're -- probably if we had to compare water and sewer
24 service providers, there would probably be a lot of
25 differences across the United States. And some are good and

1 some are not so good.

2 There have been arguments about -- you know,
3 that's one of the real problems of having monopolies. I
4 represented Home Telephone when I practiced law. And, you
5 know, they had a good service but people would say, Well, we
6 want to add this or this, or they had another provider, and
7 they said, Well, I'd like to use Home Telephone, but you
8 can't. You know, that's -- therein lies the real crux of
9 where we are, as far as I'm concerned, because that's where
10 we're getting into -- you know what competition does it
11 makes us all better. And that's -- that's -- that is sort
12 of the inherent issue with any service that we're talking
13 about.

14 But that -- I think that may be -- and I don't
15 know why the legislature drafted that the way they did, I'm
16 not going to presumptuous to try to interpret that. But I
17 think you almost have to get into saying, Well, we'll just
18 have to let each place do what they going to do.

19 And Mr. Appel, I understand one of the things
20 the -- although, there's some question whether PSCs have
21 done their duty over the years, so there's some argument
22 that could be made that they didn't do so well with the
23 issues that happened in Winnsboro, but anyway, that's for
24 another day.

25 But the -- but the bottom line is, even if that's

1 correct, you still think, so what? I cut you off, I
2 interrupted, keep going with whatever flow you wanted, Amy,
3 I'm sorry.

4 MS. HILL: No. no. No, you hit the point. Which
5 is exactly what I was going to say. You know, it doesn't
6 matter. It doesn't matter that there are these unused REU.
7 I mean, again, our point of REU is that it's a capacity
8 reservation. It's not that you're necessarily going to use
9 them, and we state that in our policy. So they're on notice
10 that it's a capacity reservation.

11 I did want to add, Your Honor, that there's a lot
12 of Mr. Appel's argument is that we -- we knew this
13 information, but we didn't provide it, we didn't tell people
14 about it. And I attached to our brief in Exhibit G the bill
15 that Snee Farm Lakes receives every month and it's just like
16 the bill they've received for years. It has their REUs on
17 it, it has the gallons of water they use on it, it has on
18 the back that an REU equals "X" number of gallons a month.
19 So they're on notice that they're using much less water than
20 their REU.

21 So that's my additional point for the Statute of
22 Limitations, Your Honor. But -- but getting back to the
23 reasonableness I think -- I think that you said it -- you
24 said it best. I mean, but we have it in our brief, and that
25 is the reasonableness is -- we have met that standard as it

1 is set forth in South Carolina which is the charge
2 associated with the service provided, it absolutely is.

3 They reserve a certain capacity, we provide
4 service for that reserve capacity, they have the ability to
5 reduce that reserve capacity at any time. There are
6 customers who have, in fact, done that.

7 And another point I might make, Your Honor, is
8 even after we sent them a letter 2018 saying, Oh, by the
9 way, just again, you have REUs that you're not using. They
10 still haven't reduced their REU. So we're going on
11 three years later and the Plaintiff still hasn't even done
12 it.

13 So, Your Honor, we're doing the best we can.
14 We're an elected body. We are trying to be fair and we're
15 trying to do it as well as we can. But our standard,
16 according to the law in this state, is reasonableness and we
17 think we have met that and then some.

18 Thank you, Your Honor.

19 THE COURT: Thank you. I noticed, as I was
20 looking at the file, and one of my teachers, when I changed
21 jobs back '94, was your mediator, and was at an impasse and
22 I thought, Well, no need for me to offer, if the Man can't
23 get it resolved, I sure can't.

24 Just out of curiosity was there any discussion
25 of -- monetary discussion or was there just we can't -- we

1 can't, this is -- this is a situation that's got to be up or
2 down?

3 I'll just say I'm throwing that out for this
4 reason: I'm going to go back and look at things now based
5 on you all's arguments. Obviously, if I grant it, I want to
6 frame it so they have to address the issue. That's been one
7 of my chief complaints as a trial judge, when they appeal
8 you and you get reversed and they don't bother to address
9 the issue for future purposes.

10 And to me that's -- that's -- we're talking about
11 something here that I -- I really -- maybe I'm -- maybe I'm
12 wrong, but I see this as something that could be -- have an
13 incredible effect across the state, to be honest with you.

14 Because it does -- Ross, I understand your analogy
15 to the Zoning Board, but I think -- I think you all's rules
16 provide for that appeal to the -- to the -- to the Court.

17 You set that up, we don't just step in, you
18 provided that avenue, I believe, and that's part of the law
19 for the Zoning Board. This is something that really --
20 you're right, there's nobody there -- nobody there
21 supervising this and checking -- running checks on this
22 monopoly, or any monopoly, by a municipality.

23 So it's a -- it's a -- it really is a truly
24 interesting question and I'll let you all add whatever
25 adjectives you want to add to the "interesting." Because

1 it's something it's -- it's something that -- I don't know,
2 maybe it does need to be looked at.

3 And maybe -- but the question I have is, here,
4 obviously, if I rule in your favor, and the decision is
5 going up, you know, that. And if I rule in their favor now,
6 it's going up. And the question is how much -- I don't want
7 them to come back and just say, No, there was an issue of
8 fact. That's -- that's -- that's the concern that I have.

9 It just -- well, they really addressed it in the
10 Azar Case to what it was and I wouldn't have had any
11 problem. If we had -- if we had any indication that this
12 money was being used, that they were generating was being
13 used for the general funds, and now you're getting into an
14 area that I think you're right. I don't think they have the
15 right to overcharge somebody. And, again, assuming -- I'm
16 using that term, I'm not suggesting they do, but just the
17 argument and the perception that they're being overcharged
18 to fund something else, now we're getting into -- I don't
19 know that the legislature provided that authority.

20 Because the whole concept is, as I see in reading
21 that, it's a very short section, but it's to let each
22 governing board decide what they need to do to provide the
23 services for the municipality. And to provide it fairly and
24 effectively and deal with all the concerns and questions
25 about how you anticipate growth.

1 How in the world, for instance, I'm glad -- I a
2 friend that he was a year -- well, he and I are the same
3 age, but I had to wait a year I was almost seven before I
4 went to first grade because my birthday was in December, and
5 Ron was in the class that I would have been in if I had gone
6 at six -- but there was an article in the paper about Ron
7 Harvey, he's written -- but he's talking about New Hope and
8 talking about that area, and talking about what's happening
9 with Volvo. Do you think anybody really -- I know never
10 envisioned that sort of thing. There's a place that I've
11 enjoyed, we had the opportunity to -- the privilege of
12 representing Oakland Club as their local counsel when I was
13 practicing law. And, as a result, I got to go to the
14 Oakland Club and it's nice and they have a lot of land they
15 lease. Well, they didn't -- nobody anticipated that one
16 either. And fortunately for them they were able to acquire
17 some and put it in the conservation trust and so at least
18 that's protected. But it's -- it's frightening what's
19 happened there. Do you think -- you think Berkeley County
20 planned for that? I don't think so.

21 So those are the things that when you're doing
22 something and you're sitting in an area where we are and we
23 know that -- I'll tell you this, five years ago I started
24 driving from Daniel Island, it's taking me longer to get
25 here now than it did five years ago in the mornings to go

1 that same 17 miles. And it isn't for one thing, it's just
2 more people, and there we are.

3 Those are the things that I think that the
4 legislature had to just really say I'm going to delegate
5 that responsibility to you, the elected board. Because I
6 can't possibly sit there and mange every single corporation
7 or every single city or incorporated area, it would be
8 impossible.

9 So I hear you, but I'm going to look at it
10 further, and I'll let you all know shortly, because I know
11 the time's coming for the trial. And I don't want you all
12 to waste your time if I'm going grant the Summary Judgment
13 getting ready.

14 So anything else folks before we say adios? Yes,
15 Ross.

16 MR. APPEL: Just real quickly. One more fact to
17 put in the cauldron of facts that we're looking at to
18 distill through the reasonableness.

19 THE COURT: Sure.

20 MR. APPEL: MPW has to tell DHEC how much water
21 capacity it needs what its demand is under its permit.

22 THE COURT: Okay.

23 MR. APPEL: They took the 4,400 out of that report
24 to DHEC. That's why they performed the study. They wanted
25 to know the accurate demand so that they could be more

1 accurate with their reporting to DHEC, but they still
2 charged the customers for the 4,400, that's unreasonable.

3 Thank you, Your Honor.

4 THE COURT: Okay. Do you want to respond to that
5 Amy or Gray?

6 MS. HILL: I'll just add that I'm not aware of
7 that. So I'm not saying that that changes anything, but I'm
8 not aware of that. But, Your Honor, I will say I don't
9 think that changes a thing. Again, it's a reservation
10 capacity a customer picks it for themselves with the input
11 of Mount Pleasant Waterworks. And the customer has the
12 ability to change it.

13 THE COURT: Well, let's do this, because the other
14 concern I have is -- and let's just assume for the sake of
15 discussion it does -- are they still entitled to recover
16 with the Tort Claims Act provision if they did that, would
17 they be entitled to damages?

18 MS. HILL: No, Your Honor. Because they're acting
19 within the state law and they're acting under the authority
20 provided to them by the state law.

21 THE COURT: Okay. Ross, you want to address that?

22 MR. APPEL: Yes, just real quickly on the Tort
23 Claims Act scenario, Your Honor.

24 We look at this case primarily as a statutory
25 authority case, an equitable case. You know, we're to the

1 extent there are Tort Claims Acts problems, we're willing to
2 put aside our conversion claim. Our conversion claim is not
3 something that's necessary here. I mean, we dispute that
4 the Tort Claims Act bars it, but this is not, at its core, a
5 negligence or a tort claim. This is a question about
6 whether or not there's a statutory violation and what the
7 consequences of that statutory violation would be.

8 THE COURT: Well, aren't you getting damages if --
9 isn't that what you're seeking?

10 MR. APPEL: Yes, Your Honor, but those damages
11 would be either under our declaratory judgment cause of
12 action or our equitable causes of action or our contractual
13 causes of action.

14 THE COURT: Well, it would certainly be covered by
15 the Tort Claims Act, because those are damages. And if the
16 Tort Claims Act is saying you're not entitled to damages --
17 assume you are -- assume you prove the damages, you're not
18 entitled to collect, you can't bring the action.

19 MR. APPEL: Yes, Your Honor, the Tort Claims Act
20 only applies to tort claims, it doesn't apply to breach of
21 contract claims, statutory violation claims, or equitable
22 claims.

23 THE COURT: Okay. Point well taken. Thank you,
24 Sir.

25 MR. APPEL: Thank you, Sir. I appreciate the

1 time.

2 THE COURT: Well, I appreciate you all's
3 thoroughness. I appreciate your patience with me. But
4 thank you very much, and I'll be letting you know very soon.

5 Thank you. Have a great day everybody, stay safe.

6 MR. APPEL: Thank you, Your Honor.

7 MS. HILL: Thank you, Your Honor.

8 END OF REQUESTED PROCEEDINGS

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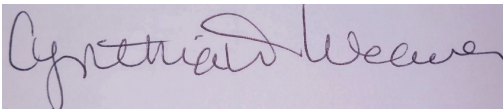
CERTIFICATE OF REPORTER

State of South Carolina)
County of Berkeley)

I, Cynthia D. Weaver, Official Court Reporter for the
State of South Carolina, do hereby certify that the
foregoing is a true, accurate and complete Transcript of
Record of the proceedings had and evidence introduced in the
Court of General Sessions for Berkeley County, South
Carolina, on the 16th day of April, 2021.

I do further certify that I am neither of kin, counsel,
nor interest to any party hereto.

May 4, 2021

A handwritten signature in dark ink, reading "Cynthia D. Weaver", is written over a light purple rectangular background.

Cynthia D. Weaver,
Official Court Reporter
State of South Carolina

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 CHARLESTON COUNTY

4 DEPOSITION OF WILLIAM ZIEBURTZ

5 SNEE FARM LAKES HOMEOWNERS'
6 ASSOCIATION, INC., individually
7 and on behalf of those similarly situated,

8 Plaintiff,

Case No. 2018-CP-10-2764

9 vs.

10 THE COMMISSIONERS OF PUBLIC WORKS
11 for the TOWN OF MOUNT PLEASANT d/b/a
12 MOUNT PLEASANT WATERWORKS,

13 Defendant,

14 DEPONENT: WILLIAM ZIEBURTZ

15 DATE: April 1, 2021

16 TIME: 10:00 AM

17 LOCATION: VIA VIDEOCONFERENCE

18
19 REPORTED BY: PAULA WONDRA
20 CLARK & ASSOCIATES, INC.
21 P.O. Box 73129
22 Charleston, SC 29415
23 843-762-6294
24 WWW.CLARK-ASSOCIATES.COM
25

1 A P P E A R A N C E S

2 (All appearances via videoconference)

3 ON BEHALF OF PLAINTIFF:

4 McCULLOUGH KHAN, LLC
5 BY: ROSS APPEL
359 King Street, Suite 200
Charleston, SC 29401

6 AND

7 MCGOWAN, HOOD & FELDER, LLC
8 BY: JAMES L. WARD, JR
321 Wingo Way, Suite 103
9 Mount Pleasant, SC 29464

10 ON BEHALF OF DEFENDANT:

11 GALLIVAN, WHITE & BOYD, P.A.
12 BY: GRAY CULBREATH and AMY HILL
PO Box 7368
13 Columbia, SC 29202

14 AND

15 ROSEN, ROSEN & HAGOOD, LLC
16 BY: DAVID JENNINGS
PO Box 893
Charleston, SC 2940217 ALSO PRESENT: McKenna Joyce
18

19

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25

1 A. Yes.

2 Q. And towards the bottom of the page, it
3 says, quote, Additionally, Mr. Zieburtz
4 recommended and assisted in the implementation of
5 true base charges and the elimination of the past
6 practice of using minimum bills to enhance
7 revenue stability.

8 Do you see that?

9 A. Yes.

10 Q. What is a true base charge?

11 A. A true base charge is a reference to a
12 fixed fee that captures some of the costs of
13 utility operation typically including a portion
14 of administrative costs and often including a
15 portion of capital costs and sometimes other
16 types of costs and charges that amount on a
17 monthly basis regardless of use and including
18 cases where there is no use at all.

19 Q. So this is essentially the same concept
20 that Mount Pleasant Waterworks has with respect
21 to its BFC, it's just a base charge?

22 A. Yes.

23 Q. Okay. Well, how is this different from
24 minimum bills as referenced in this excerpt from
25 the CV?

1 suggests something deeply wrong. It's just
2 something worth looking at. That's the sense in
3 which I would agree with that sentence. It's
4 just something worth looking at.

5 Q. Would you agree with me that the
6 magnitude of the incorrect assignments is
7 relevant to determining whether an inequity
8 exists in the rate structure?

9 A. Yes.

10 Q. All right. I'm now on page five of this
11 document, Exhibit 7. This is a memorandum from
12 CDM Smith to Mount Pleasant Waterworks dated
13 November 12, 2014. First of all, are you
14 familiar with CDM Smith, that company?

15 A. Yes.

16 Q. What does that company do in your
17 opinion?

18 A. They are a consulting firm similar to
19 the firm I work for, Stantec. They are -- they
20 were formed by a fairly recent merger between CDM
21 and -- what is it? Was it Wilbur Smith? I
22 forget. But they -- CDM in particular had a long
23 -- has a long corporate history of water industry
24 service, especially engineering, but including
25 some rate work.

1 A. I can't think of an instance, but I
2 don't believe that it is necessarily unique in my
3 experience. I think that -- I perceive that as
4 unusual, but I don't perceive it as unique.

5 Q. All right. So now I'm confused because
6 you've repeatedly testified that it's an uncommon
7 practice, but now you're saying it's not unique.

8 A. Both of those are true at the same time.

9 Q. All right. Okay. So for something to
10 be not unique, there has to be more than one
11 example of that something, correct?

12 A. Yes.

13 Q. As you sit here today, do you know of
14 any utility -- I want you to name the utility
15 that marries BFC REU with impact fee REU the way
16 MPW does with all the policies I just mentioned,
17 including the surrendering provision in the
18 capacity reservation fee component. Can you name
19 a utility as you sit here today that does that?

20 A. No.

21 MR. APPEL: All right. I think I'm
22 at the end of my line. Mr. Zieburtz, I
23 appreciate your time today. I know that talking
24 about this for any extended period of time can be
25 taxing, and I just appreciate your time today,



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BRYAN A. MANTZ

January 13, 2021

Snee Farm Lakes HOA, et al

VS

Comm of Public Works for the Town of Mt. Pleasant

2018-CP-10-2764

REPORTER: Janice Stanton

1 A. Huh?

2 **Q. Go ahead. I didn't mean to interrupt you. Go**
3 **ahead.**

4 A. As long as they're tied to use and reflect the
5 actual -- the customers' actual usage of the
6 facilities.

7 **Q. And as I understand basic facility charges --**
8 **well, you tell me. What is a basic facility**
9 **charge?**

10 A. It's usually used to recover a portion of the
11 utilities' fixed costs. Usually, the base
12 facility charges don't recover all of the
13 utilities' fixed costs. I mean, usually a
14 utilities' fixed cost might be 80 per cent of the
15 overall expenditures of the utility. But as I
16 mentioned, the purpose is to provide some revenue
17 stability, and as I mentioned, recover a portion
18 of the utilities fixed costs.

19 **Q. Are basic facility charges usually tied to use?**

20 A. Are base facility charges tied to use?

21 **Q. Correct.**

22 A. For this particular rate structure, yes.

23 **Q. Are there rate structures where basic facility**
24 **charges are not tied to use?**

25 A. I mean, certainly the meter size -- well, even

1 **Q. Are you aware of any?**

2 A. No.

3 **Q. So meter size based BFC -- and you told me that**
4 **is tied to usage. How is that tied to usage?**

5 A. Each meter size can have -- can handle a certain
6 amount of flow. And so utilities are --
7 customers are outfitted with a meter size based
8 on their usage.

9 **Q. Is it their usage or their potential demand?**

10 A. It can be -- the initial meter size might be
11 based on potential of the demand, but certainly,
12 moving forward, customers have always had the
13 option of having a higher -- either increasing or
14 decreasing their meter size.

15 **Q. Okay. So let me unpack that for a minute. So**
16 **you're saying initially it's based on what their**
17 **potential demand may be, but they can always**
18 **reduce or increase their meter size. Does the**
19 **customer choose to increase or reduce their meter**
20 **size, or is it based upon the water utility**
21 **coming to the customer and saying, "You need to**
22 **increase or decrease your meter size based on**
23 **your water usage"?**

24 A. In these cases, it's the customer. The customer
25 would, you know, based on -- the customer would

1 choose to -- whether to adjust the meter size.

2 **Q. In other words, it would be up to the customer to**
3 **right-size the meter size. Is that correct?**

4 A. Yes.

5 **Q. And again, I mean, so the charge -- help me with**
6 **the meter size base facility charge. Is it**
7 **essentially that I have a meter size of X, and my**
8 **basic facility charge is based on that meter**
9 **size, whether I turn on my water or not? Is that**
10 **correct?**

11 A. Yes.

12 **Q. So you know, we've been in a pandemic. I can**
13 **shut my business down for six months and never**
14 **turn on the tap, and my base facility charge is**
15 **going to remain the same. Correct?**

16 A. That depends upon the policy of the utility.
17 Some utilities have a policy that if you shut off
18 your water service, you're not billed for
19 service. A lot of utilities do continue to
20 charge a base charge or a charge that's lower
21 than the base charge, just for a system -- kind
22 of -- they call it maybe a system availability
23 charge.

24 **Q. Okay. So maybe shutting down my business**
25 **completely and not turning on my tap was a bad**

1 example. Let's talk about the pandemic. I'm a
2 restaurant that prior to the pandemic was serving
3 lunch, and dinner, and breakfast, and busy all
4 the time. Now I do a lunch take-out and that's
5 it, so my water is greatly reduced; yet I am
6 billed based on the size of my meter regardless
7 of how much water flows through that meter.
8 Correct?

9 A. Yes.

10 Q. For the base facility charge. Is that correct?

11 A. Yes.

12 Q. So it's not tied to actual water usage, is it?

13 A. Again, a customer -- a restaurant -- a customer
14 can choose to increase or decrease their meter
15 size based on their specific usage
16 characteristics.

17 Q. But again, that's up to the customer, and the
18 water utility has no responsibility to alert them
19 of that possibility, do they?

20 A. That's correct.

21 Q. And what exactly does that entail, right-sizing
22 the water meter?

23 A. That would just be -- and you see this quite a
24 bit. If a utility implements a change to rate
25 structure -- and with any change to a rate

1 structure, you're going to have a customer
2 response -- and some customers might feel that
3 under the new rate structure, they should either
4 upsize or downsize their meter size.

5 **Q. Okay, but again, I mean, are we talking about**
6 **actually changing -- I mean, digging out and**
7 **taking out the water meter, and changing, and**
8 **putting in a new water meter?**

9 A. Yes, changing the size.

10 **Q. I mean, that's a significant undertaking.**
11 **Correct?**

12 A. I mean, it's really just -- most water meters,
13 all you do is just -- you take them out and put a
14 new one in. It's not a -- and usually the
15 customers will, you know, pay for that expense.

16 **Q. Does it also talk about the size of the piping**
17 **going into the water meter?**

18 A. Well, if the piping is -- if it is possible -- if
19 they needed a larger meter size, the piping may
20 need to be upgraded too. I mean, it's the
21 customers' decision.

22 **Q. But it's up to the customer. Correct?**

23 A. That's correct.

24 **Q. Do you know, is that an expensive undertaking?**

25 A. It depends upon the utilities' specific rates.

1 Q. Well, I mean, if you've got to change water pipe
2 size and buy a whole new meter, I would think
3 that that's not cheap.

4 A. Again, it just depends upon how much the utility
5 pays for the -- charges for that service.

6 Q. So --

7 A. Whether it's cheaper or not, I don't -- that's a
8 matter of perspective in ...

9 Q. Who pays for that? Would the customer pay for
10 that change in water meter?

11 A. Yes.

12 Q. And so essentially, the customer is having to pay
13 to right-size the water meter. Is that correct?

14 A. That's the typical practice.

15 Q. And do you see anything wrong with that?

16 A. No. No, I don't.

17 Q. In your mind, what does "excessive BFC" mean?

18 A. Excessive BFC means that BFC amount is applied to
19 an REU count that is unrealistic with respect --
20 that is not tied to the actual use of the
21 customer.

22 Q. Let me go back a little bit on this. As I know
23 you're well aware, Mount Pleasant Waterworks sent
24 out a letter in February or the spring of 2018,
25 letting customers know that the -- and I refer to

1 standards that in today's society with more
2 efficient fixture units and just the, you know,
3 water conservation incentives, I mean, these 300
4 gallons per day, I rarely see utilities that are
5 planning at that level any more. Most utilities
6 nowadays are downsizing their levels of service
7 standards.

8 **Q. And I was going to ask you, what exactly does a**
9 **customer pay for when they are paying their bill?**
10 **I mean, is it simply the water flowing through**
11 **their tap, or are they paying for something more**
12 **than just that?**

13 A. They are paying for service, you know, and that
14 includes the cost to operate the utility.

15 **Q. Make sure that they have the ability to turn on**
16 **that tap at any point day or night, every day of**
17 **the year. Correct?**

18 A. Yes.

19 **Q. And a utility must plan and have the ability to**
20 **provide water at any point, day or night, every**
21 **day of the year. Correct?**

22 A. That is correct.

23 **Q. So a utility has to plan for peak water usage.**
24 **Correct?**

25 A. Yes.

1 **Q. And not just an average. Correct?**

2 A. Yes.

3 **Q. Is there any water or wastewater service that**
4 **Snee Farm is not receiving? Are they receiving**
5 **everything that they should be getting from a**
6 **utility like MPW?**

7 A. I can't speak for Snee Farms. I can't speak for
8 them.

9 **Q. So sitting here, you have no knowledge that they**
10 **are not getting all the services?**

11 A. As far as I know, they are.

12 MS. HILL: Let's take a short break right
13 now. I know we've been going a little bit less than an
14 hour, but let's just take a quick break, and let's
15 reconvene in about 10 minutes. Okay?

16 DEPONENT: Okay.

17 COURT REPORTER: All right, we are off the
18 record.

19 MS. HILL: Okay, thanks.

20 (Off the record)

21 DIRECT EXAMINATION RESUMED BY MS. HILL:

22 **Q. Mr. Mantz, tell me everything you know about Snee**
23 **Farm Lakes.**

24 A. They are a customer of MPW, and I don't claim to
25 have an extensive knowledge of this customer.

1 would presumably have more demand on the system.

2 **Q. Do you know how many units Snee Farm has?**

3 A. No.

4 **Q. Do you know what Snee Farms' meter size is?**

5 A. No.

6 **Q. Do you know how Snee Farm passes their water**
7 **service charges on to their owners?**

8 A. No.

9 **Q. Does that matter to you?**

10 A. No.

11 **Q. I mean, should Snee Farms be charging their**
12 **owners by actual water usage?**

13 A. What Snee Farms does with its' owners is not as
14 important to me as whether the rates that are
15 charged to Snee Farms tie to Snee Farms' usage.

16 **Q. Tell me, can you list for me every utility that**
17 **you're aware of -- every water utility and**
18 **wastewater utility that you're aware of that**
19 **right-sizes their REUs for BFC purposes?**

20 A. The ones that I'm aware of immediately, there are
21 two Raftelis clients that do it. As we talked
22 about, the City of Melbourne, Florida does it,
23 and they're currently a Raftelis client. Also,
24 another Raftelis client is Brunswick-Glynn County
25 Joint Water and Sewer Commission in Georgia, and

1 **sounds like only three. Are there any others**
2 **that you are aware of anywhere that do this?**

3 A. Well, it's important to note that this is not the
4 most common. This type of rate structure is not
5 really covered in any of the standard utility
6 rating manuals, such as the AWA, M1 Manual, and
7 the Water Environmental Federation's Manual of
8 Practice, 27, so this is not really a rate
9 structure that's covered. A majority of rate
10 structures that we deal with are meter size.

11 **Q. In fact, let me back up a second. I mean, can**
12 **you name utilities that use this type of rate**
13 **structure, regardless of whether they right-size**
14 **or not? Can you tell me utilities that use the**
15 **REU/BFC rate structure?**

16 A. I know that the town of Longboat Key, Florida
17 uses it. I know that -- as I mentioned,
18 Melbourne, Florida.

19 **Q. Can you give me the name again -- Longboat Key?**

20 A. Longboat Key, Florida.

21 **Q. How do you spell that?**

22 A. L-O-N-G-B-O-A-T, Key, K-E-Y, Florida, uses it.
23 I can't really name a lot of utilities that use
24 this type of rate structure that I've come into
25 contact with.

1 Q. Okay, and does that -- I mean, is there anything
2 wrong with this type of rate structure in
3 general?

4 A. If the --

5 Q. I'm not talking about MPW, by the way. I'm
6 sorry, let me get my question out. I know I may
7 be disjointed in my question, but is there
8 anything wrong, in your opinion, with an REU
9 based BFC rate structure?

10 A. If it is done properly and linked to usage, then
11 I think it can be a fair rate structure.

12 Q. Why does it have to be linked to usage when water
13 meters are not linked to usage?

14 A. Well, again, water meters -- the size of a water
15 meter is linked to the customers' usage range.

16 Q. Usage range. Right?

17 A. Uh-huh (affirmative response), yes.

18 Q. But not actual use. Right?

19 A. Right, because you have to -- I mean, you install
20 the meter in the ground, and I mean, the meter is
21 sized to accommodate the customers' usage.

22 Q. Potential usage. Right?

23 A. Yeah, the customers' usage, and based on the
24 customers' usage, they can choose -- you know,
25 again, based on the -- what makes the most sense

1 for them, they can either upsize or downsize
2 their meter size.

3 **Q. But the water meter is established based on the**
4 **customers' potential use. Correct?**

5 A. Right, because it's a mechanical object, I mean,
6 that you have to set into the ground.

7 **Q. So does Longboat -- and I'm just going to**
8 **mispronounce that, I'm sorry -- but does Longboat**
9 **Key, in Florida -- which I'm sure is a wonderful**
10 **place, and I apologize to anybody who lives**
11 **there. So are you telling me they do not**
12 **right-size their REUs?**

13 A. They're built-out, so it -- and I mean, if
14 someone had an issue with their REUs, they can
15 get it. I mean, they're a built-out community.
16 They're not growing at all, so it's not really
17 relevant.

18 **Q. But explain that to me. I don't know that I**
19 **appreciate that.**

20 A. They are built-out. And again, if someone has an
21 issue with their REU count, and they're primarily
22 a residential community -- they don't really have
23 a lot of nonresidential customers, so
24 nonresidential REU uses are not really an issue
25 with them.

1 **let the customer decide whether or not to**
2 **right-size their REUs?**

3 A. Melbourne, Florida and -- is a -- and again, I
4 think we're trying to still collect some
5 information on Brunswick-Glynn County, but I know
6 that Melbourne, Florida unilaterally adjusts
7 their -- or right-sizes their REUs.

8 **Q. And as I understand it, you do not know whether**
9 **or not that occurred in Longboat Key, Florida?**

10 A. Right, that's correct.

11 **Q. Any other water utilities that you are aware of**
12 **that use this REU/BFC rate structure, other than**
13 **the ones you've already mentioned?**

14 A. Yeah, I don't have -- like I said, I don't
15 usually work with a lot of utilities with this
16 kind of rate structure.

17 **Q. So is it fair to say you're not very familiar**
18 **with this type of rate structure?**

19 MR. APPEL: Object to form.

20 A. Oh, I'm familiar with it, and certainly with any
21 utility, I always have the option of recommending
22 this structure, but I have never recommended it.

23 **Q. Why have you not recommended it?**

24 A. It's just -- I mean, most of the utilities I work
25 with are very comfortable with the meter based

1 methodology which is covered throughout all the
2 standard utility publications on ratemaking. And
3 so, you know, we certainly -- we kind of like to
4 try and stick with the mainstream and not
5 recommend something that could lead to
6 controversy.

7 **Q. And you don't think the water meter leads to**
8 **controversy?**

9 A. No. It's heavily covered throughout all the
10 standard ratemaking manuals, and so I don't think
11 that there's much controversy in the meter based
12 approach.

13 **Q. And you believe the water meter size/BFC approach**
14 **is fair?**

15 A. Sure.

16 **Q. You believe the water meter sized approach is**
17 **reasonable?**

18 A. Yes. I mean, I would consider it to be an
19 accepted methodology.

20 **Q. Well, I mean, this REU/BFC approach is accepted.**
21 **Correct?**

22 MR. APPEL: Object to form.

23 A. "Accepted" is a strong word. I don't know if
24 it's been properly challenged in court, and so
25 that's one of the reasons why I think we're here

1 **what I'm hearing?**

2 A. Not reduced, right-size them based on the
3 customer's usage -- whether it's an increase in
4 the REUs or a decrease -- but right-size it
5 based on the customers' actual usage.

6 **Q. Without input from the customer?**

7 A. Right, and again, this is rates, not capacity.

8 **Q. What do you mean by that?**

9 A. I consider that the capacity that the customer
10 pays for should be maintained. For rate setting
11 purposes, the rate should be based on the
12 customers' actual use and not the demand that
13 they paid for.

14 **Q. But yet, we've already gone through that water**
15 **meters do not do that. Correct? Water meter**
16 **size rates aren't based on actual use. Correct?**

17 A. Well, again, that's a mechanical thing that you
18 put in the ground; whereas an REU-based
19 structure, it's very easy to right-size an REU
20 count because it's not a mechanical thing. It's
21 very easy. And I've seen MPW's billing customer
22 stats, and MPW does have sophisticated billing
23 systems. And a billing system -- and MPW could
24 very easily right-size the REU counts based on
25 the customers' usage.

- 1 Q. But again, the water meter size -- which is set
2 based on the potential demand that the customer
3 may desire -- if I charged somebody simply based
4 on the size of their meter, that does not
5 contemplate the customers' actual use. Does it?
- 6 A. That is correct. What was the question again?
- 7 Q. If I charge somebody based on the water meter
8 size, that does not contemplate the customers'
9 actual use, does it?
- 10 A. I think it does. Yes, it does contemplate the
11 customers' actual use, because that's what
12 dictates the meter size.
- 13 Q. But if I have the largest meter size, but yet I
14 am greatly reducing my amount of water, do my
15 rates go down?
- 16 A. The customer would have to pay for a lower meter
17 size -- a smaller size, or --
- 18 Q. And -- go ahead.
- 19 A. No, that's fine.
- 20 Q. And the customer would have to initiate that
21 reduction, wouldn't they?
- 22 A. Yes.
- 23 Q. And you think there is nothing wrong with that.
24 Correct?
- 25 A. That's correct. It would be because the key to

1 -- with the meter size, the utility would incur
2 costs to go out and dig up meters, and then
3 right-size them and all that. For the REUs,
4 it's very easy to right-size them based on the
5 customers' actual use and in order to have a
6 fair rate structure.

7 **Q. It's very easy to install a new meter, and**
8 **install -- redo the pipes. Is that what you're**
9 **telling me?**

10 A. It's very easy? Well, then, no. The utility
11 would -- no. I said it's very easy for REUs to
12 be right-sized. I mean, you could -- with MPW's
13 billing system, you could probably just write a
14 script, and it would do it automatically for
15 you.

16 **Q. Just for the transcript, what is this that you**
17 **have shared on your screen? What is this on**
18 **your screen?**

19 **DEFENDANT'S EXHIBIT 4 MARKED FOR IDENTIFICATION**
20 PURPOSES (213 pages - Mount Pleasant Waterworks'
21 Annual Budget, 2021)

22 A. This is a -- this is from the MPW's actual
23 2021 Annual Budget document that actually has a
24 -- that not only shows the BFC history, but also
25 provides a nice graph just showing how

1 astronomical the BFC increases have been over a
2 very short period of time.

3 **Q. Is there a movement of some parts of the water**
4 **utility industry to shift fees to a BFC that can**
5 **be a more stable source of revenue?**

6 A. Lately, with the pandemic, I've actually had a
7 mixed bag. Some people have -- some utilities
8 have said, "Yeah, with the pandemic and with
9 reduced usage, we should probably increase our
10 revenue stability." Others are more concerned
11 about low income affordability and actually
12 support, and possibly even lowering the --
13 affordability is a huge topic in the utility
14 industry, and certainly one way to address
15 affordability is to reduce BFCs.

16 **Q. What are some things you consider when you are**
17 **-- or not you maybe -- that utilities should**
18 **consider? Are there a number of factors that**
19 **utilities should consider when they are setting**
20 **their rates -- in their rate structure?**

21 A. I do think that -- yes; yes, many things. Above
22 all, it should be -- the rates need to be fair
23 and reasonable, and just about all states have a
24 statute that says that your rates have to be
25 fair and reasonable; and so, you know, that's

1 the first and foremost mission. But certainly
2 we can -- revenue stability is a common
3 consideration. Low income affordability is a
4 consideration, and unfortunately, revenue
5 stability and low income affordability are often
6 conflicting objectives. And then certainly,
7 water conservation is another common objective.
8 There's a lot of different things that we look
9 at in determining rate recommendations that
10 would be acceptable to the customers.

11 **Q. Is there any such thing as a perfectly fair**
12 **system?**

13 A. I mean, one could argue that maybe a perfect
14 system would have a single volumetric rate where
15 everyone pays the same charge for all the usage
16 that they use. But that, of course, doesn't
17 address the need for some sort of level of
18 revenue stability, which is what the base charge
19 provides.

20 **Q. What about -- I mean, is there more to water**
21 **service than just water usage? In other words,**
22 **do some customers require additional service**
23 **more than just the actual water usage?**

24 A. What kind of additional service?

25 **Q. You know, I mean, getting the pipes and the**

1 have to be able to -- you know, in a court
2 setting -- with anything you do in this kind of
3 environment, you just need to be able to defend
4 in a court setting that what you've done is fair
5 and equitable.

6 **Q. Okay, but there's not a specific definition?**

7 A. Yeah, I mean, it is open to interpretation. And
8 again, it has to be -- and I mean, the issue is
9 whatever is done, would it be legally defensible
10 with respect to what is fair and equitable.

11 **Q. Do you think it is somehow unfair to put the**
12 **onus on the customer to right-size the REU?**

13 A. No, I do think it's unfair, and again, I'm just
14 going to talk about that chart that I was just
15 showing, where it just shows that in a short
16 period of time, the BFCs were increased. The
17 water BFCs were increased by 152 per cent, and
18 the wastewater BFCs were increased by 86
19 percent. I mean, with those kinds of massive
20 increases in a short period of time, you put the
21 customers in a very awkward position where
22 they're having to -- and in accordance with
23 MPW's policies, if they reduce their number of
24 REUs, they also reduce their capacity in the
25 system which I don't agree with. And so I do

1 **Q. Do you agree with that statement?**

2 A. Again, if the REUs are periodically right-sized,
3 I think it can be a very fair rate structure.

4 **Q. Do you think it's more fair than water meters?**

5 A. If it's periodically right-sized where it's
6 really tied to a customer's usage, I think it
7 can be very fair -- a very fair structure.

8 **Q. Do you think it is more fair than the water
9 meter sized structure?**

10 A. "Fair" as we've talked about, is a relative
11 concept, but I do think it can be a very fair
12 and possibly more fair structure. And again, it
13 depends upon how the utility sets up the
14 structure and the specifics of the service area
15 characteristics because each utility is
16 different.

17 **Q. So even though you believe it has the potential
18 for being more fair than the water meter sized
19 structure, you have never recommended this type
20 of structure to any of your clients. Is that
21 correct?**

22 A. I have not. And I do show -- I think it's
23 important to point out that it -- in determining
24 one of the things, a key consideration when
25 determining whether -- you know, in determining

1 would be superceded by any state laws or local
2 laws.

3 **Q. Okay. Do you know of any state or local laws**
4 **that have excluded any BFCs?**

5 MR. APPEL: Object to form.

6 A. No, I'm not aware of any laws, as such.

7 **Q. Let's refer down to your document here. And you**
8 **say, "Most utilities charge rates that have a**
9 **fixed charge component and a volumetric charge**
10 **component." Why is it important to have a fixed**
11 **charge component as a part of a water utilities'**
12 **rate structure?**

13 A. Primarily revenue stability because salaries and
14 benefits, as well as debt service, are all fixed
15 costs that the utility has to pay for regardless
16 of customer usage.

17 **Q. In fact, I mean, you can't just turn off -- I**
18 **mean, you can't fire people, or you can't just**
19 **simply turn off some of those fixed charges, can**
20 **you?**

21 A. That's correct.

22 **Q. Even if water usage drops. Correct?**

23 A. That is correct. It's not --

24 **Q. So it's important to -- go ahead.**

25 A. Yeah, go ahead.

1 Q. So it's important to have a rate structure that
2 is not tied solely to usage. Correct?

3 A. It's important to have a rate structure that
4 would be considered fair and equitable.

5 Q. Okay. So you've said that before, but what
6 you've written here is that there are fixed
7 costs that require servicing regardless of water
8 usage. Correct?

9 A. Yes.

10 Q. So if water usage dips, the utility still has to
11 pay these fixed costs. Correct?

12 A. Yes.

13 Q. So it would be important to have a part of your
14 rate structure not be tied solely to water
15 usage, because if it's solely tied to water
16 usage, then your revenue stream is going to dip
17 along with a dip in water usage. Correct?

18 A. I mean, there are some utilities that don't have
19 a base facility charge. The base facility
20 charge, as I mentioned, is considered to be a --
21 I mean, a utility has the option of whether to
22 have a base charge. There are still some
23 utilities out there that just have a pure
24 volumetric charge for all usage.

25 Q. Do you recommend utilities have some sort of

1 **fixed revenue stream --**

2 A. Sure, absolutely.

3 **Q. -- not tied to water usage?**

4 A. I believe that the overall system -- again, I
5 mean, I believe that the overall system of rates
6 and charges has to meet the reasonable and
7 equitable provations [ph], and how the utilities
8 accomplish that, it -- you know, and whether --
9 you know, that the key is to come up with
10 something that would be -- that you know, would
11 -- that you could smile in court over.

12 **Q. Okay, but I -- you know, you said that before,**
13 **but that really isn't my question. My question**
14 **is, you said there are some utilities who are**
15 **solely -- base their rate structure on**
16 **volumetrics, on use?**

17 A. Yes.

18 **Q. Yet there are fixed charges -- fixed expenses**
19 **for these utilities that are not tied to use.**
20 **Correct?**

21 A. That's correct.

22 **Q. So do you recommend to people that you consult**
23 **with to have some type of rate structure that is**
24 **not tied to use so that they can still meet**
25 **their expenses if usage drops?**

1 A. Yes, I do. I do typically recommend base
2 charges.

3 **Q. And by "base charges" you mean a charge not tied**
4 **to use. Correct?**

5 A. Base charge not tied to use. Yeah, I mean, it's
6 a fixed cost per month, but the amount of base
7 --

8 **Q. But that has nothing to do with how much water**
9 **you use. Correct?**

10 A. But the amount of the base charge must be
11 considered fair and equitable.

12 **Q. Okay, but the base charge -- I mean, the base**
13 **charge can simply be \$100 dollars. I mean, it**
14 **can be just a flat charge just on your bill that**
15 **has nothing to do with anything. Correct?**

16 MR. APPEL: Object to form.

17 A. I mean, you can have all sorts of systems of
18 base charges and how you charge the base charge,
19 but the key, again, is if it would meet the
20 reasonable and equitable standard and would be
21 defensible in court.

22 **Q. Okay, but if both the volume -- the volumetric**
23 **charge is based on use. We all agree with that.**
24 **Correct?**

25 A. Uh-huh (affirmative response).

1 **Q. And then if you have a fixed charge that is also**
2 **tied to use, are you accomplishing a steady**
3 **revenue stream?**

4 A. Right. I mean, basically, you have to recover a
5 certain amount of revenue, and show -- you're
6 just trying to, you know, accomplish a goal of
7 revenue stability by making a certain amount of
8 the charges fixed. But as far as tying it to
9 use, what I normally do in rate studies is, I
10 will take the base charge and volumetric charges
11 paid, and then divide it by the total usage to
12 see what the customers' effective cost per 1,000
13 gallons is. So I try and make sure that there's
14 not a -- that when I consider both the base
15 charges and the volumetric charges, that there's
16 not a huge difference in the overall effective
17 cost per 1,000 gallons.

18 **Q. Yeah, but is that --**

19 A. So when I do rate setting, I do consider the
20 overall charges to the customer divided by the
21 customers' usage, and that includes both the
22 base charges and the volumetric charges.

23 **Q. And I appreciate that's a consideration that you**
24 **make, and you look at that. But when you're**
25 **setting up a rate structure, isn't it -- I mean,**

1 sales to customers can vary month to month, and
2 yet most of a water, or wastewater utilities'
3 operating expenses do not typically increase or
4 decrease proportionally with changes in water
5 sales." So as a result, there needs to be a
6 part of the rate structure that is fixed, not
7 tied to water usage. Correct?

8 A. Well, again, I mean, it's not tied to water
9 usage, but it is -- but again, I -- you know, in
10 my practice, I do tie it to usage. So I mean,
11 that's ...

12 Q. So you tell your customers that their fixed rate
13 should be tied to water usage, and thus, it
14 would dip up and down based on water usage?

15 A. I mean, the fixed costs are the fixed costs, but
16 I do try and make sure that the overall charge
17 per 1,000 gallons --- when you look -- when you
18 consider both the base charge and the volumetric
19 charge added together, and then divided by the
20 customers' usage, that the cost per -- the over
21 -- the effective cost per 1,000 gallons is
22 within a reasonable range among customer
23 classes.

24 Q. You consider that, and you look at that, but the
25 fixed charge, again, is not tied to water usage.

1 A. It is a fixed --

2 MR. APPEL: Object to the form.

3 A. It's a fixed cost per month. I mean, that --
4 yes, regardless of how much you use, you have to
5 pay it.

6 Q. And we talked a little bit about this before,
7 but let me make sure I appreciate it. What is
8 the difference between demand versus usage? Can
9 you have a high demand but a low water usage?

10 A. High demand but a low water usage; I'm not sure
11 what that means. I mean, usage is usage.

12 Q. Is usage different than demand?

13 A. I think we had talked about how they were
14 synonymous, previously. So again, you know, go
15 back to my -- you know, I think that rates
16 should be tied to usage. So that's ...

17 Q. Let's turn to page two here. You have here
18 that, "It's very easy for a customer to
19 overstate the number of REUs needed." What do
20 you mean by that?

21 A. You don't know when customers are at the
22 planning stage. They don't -- you know, they
23 can assume that it's just a certain -- that the
24 development is going to be using a certain
25 amount of gallons, but how much that gallon --

1 A. Yeah, I believe so.

2 **Q. Do any of your water meter sized rate customers**
3 **allow for something similar?**

4 A. Well, most customers -- for impact fee
5 determinations, most impacts fees, or capacity
6 fees, or whatever you want to call them, are
7 charged on a per ERC basis. And there are
8 several accepted methodologies for determining
9 the number of ERCs at the impact fee stage. But
10 when it comes to actually setting up a system of
11 user charges, at that point, I would say most
12 utilities I work with just charge -- have a
13 meter based system.

14 **Q. Okay, but that really wasn't my question. My**
15 **question was, you know, we just talked about**
16 **that MPW allows customers to sort of re-evaluate**
17 **their REUs within the first two years --**

18 A. Uh-huh (affirmative response).

19 **Q. -- of their service, and even provides the**
20 **ability for a refund. Do the systems that you**
21 **work with, where the customer selects the water**
22 **meter size, if they determine that that water**
23 **meter size is too large, do your customers allow**
24 **this -- I mean, do your water utilities that you**
25 **work for, do they allow the customer to get a**

1 **refund based on a need for a smaller water meter**
2 **size?**

3 A. No, but they do have the ability to downsize
4 their meter.

5 **Q. At their cost. Correct?**

6 A. At their cost.

7 **Q. And the cost --**

8 A. And I will say one thing about MPW's policy is
9 that, I mean, I think you have a three year
10 grace period. And it is possible that during --
11 you know, the development may not have
12 significantly materialized during that three
13 year period. And so, at that point, the
14 customer may not really know what their ultimate
15 demand is going to be, so they may not know
16 whether they should seek a refund or not.

17 **Q. So in your opinion, are you saying three years**
18 **is too short?**

19 A. I don't know what the proper -- again, I can't
20 make general statements about all utilities
21 because every single utility is different, and
22 each one has to develop policies that are right,
23 and equitable, and fair for their
24 purposes.

25 **Q. Let me refer you to your definition of**

1 the general practice is to charge wastewater
2 based on water flow.

3 **Q. So here you're saying that basically the**
4 **customer is paying rates and generating revenue**
5 **for MPW that exceeds the customers'**
6 **proportionate share of MPW's cost. How is this**
7 **different than the water meter size?**

8 COURT REPORTER: I'm so sorry, Ms. Hill.
9 Can you repeat that again?

10 MS. HILL: Sure.

11 COURT REPORTER: I had a briefly unstable
12 internet connection.

13 MS. HILL: I'm sorry.

14 DIRECT EXAMINATION RESUMED BY MS. HILL:

15 **Q. How is this different from the water meter size?**

16 A. Well, if your actual usage reflects 100 REUs,
17 but you're being charged 200 REUs, then your
18 base charge is going to be disproportionate. If
19 base charges are intended to recover a portion
20 of the utility's fixed costs, then charging an
21 unrealistic base charge means that the customer
22 is going to pay an unfair share of the
23 utilities' fixed costs.

24 **Q. I mean, would that also be the case if a**
25 **customer has the largest meter size, but yet,**

1 you know, their business is greatly diminished
2 for the past year? Would they likewise be
3 paying a disproportionate amount based on their
4 water usage?

5 A. Sure, and it would probably make sense for that
6 customer to downsize their meter size.

7 Q. But again, that's up to the customer to figure
8 that out. Correct?

9 A. Yes.

10 Q. Let me refer to Exhibit C.

11 (Screen shared)

12 DEFENDANT'S EXHIBIT 11 MARKED FOR IDENTIFICATION
13 PURPOSES (1 page - Draft Questions and Answers,
14 2/14/19; Exhibit C, Sample Evaluation of Rate Design
15 Criteria; Excerpt Regarding Rate Equity from AWWA
16 Publication Entitled "The Basics of Water
17 Ratemaking")

18 Q. What is this document, and why did you include
19 it as an exhibit to your Questions and Answers
20 document?

21 A. Can you --

22 Q. I'm going to see if I can make it a little bit
23 smaller so you can see the whole document on the
24 screen -- or can you see the whole document?
25 Maybe you can. Is that too small?

1 I mean, you -- each customer would pay for
2 whatever they use, and some utilities do still
3 just have a pure volumetric without a base
4 charge.

5 **Q. But as we discussed earlier, you don't recommend**
6 **simply a pure volumetric rate?**

7 A. Right, because I recognize the need for revenue
8 sufficiency.

9 **Q. To the extent that there is a need for revenue**
10 **sufficiency, does there have to be some portion**
11 **of the bill that is not related to pure**
12 **volumetrics, which means necessarily there is**
13 **somebody being subsidized to some degree, if**
14 **you're fully basing it on use? Right?**

15 A. Right, right. I mean, the policy of AWA, as I
16 mentioned, is to, you know, try and avoid
17 subsidization. But as you mentioned, I mean,
18 there's none of the -- most rate structures are
19 not perfect.

20 **Q. All right. So I guess that leads us to another**
21 **question I had. Is there a perfectly equitable**
22 **rate structure out there?**

23 A. Well, I would say that, you know, a pure
24 volumetric charge where a customer pays for
25 exactly what they use, I think that's probably

1 about as equitable as you could possibly get.

2 **Q. But yet that -- you know, you don't recommend**
3 **that to your customers?**

4 A. Right.

5 **Q. Getting back to document number 10, which is**
6 **that February 14th, 2019, Questions and Answers**
7 **that you put together; was this designed to be**
8 **your report?**

9 A. I wasn't really tasked to do a report. I was --
10 we decided to put together something, you know,
11 called Questions and Answers and provided it
12 over to MPW.

13 **Q. Was it provided to anyone else?**

14 A. I mean, I provided it to Ross, and I mean,
15 whoever he provided it to is -- my understanding
16 is that it was provided, you know, to MPW, and
17 so all I know -- my correspondence on this
18 document has been with Ross alone.

19 **Q. Do you know if Ross or anyone else provided it**
20 **to anyone other than MPW?**

21 A. I have no idea.

22 **Q. Do you intend to draft a report in the future?**

23 A. I have not been tasked with doing that.

24 **Q. Has anybody asked you specifically not to draft**
25 **a report?**

1 A. Yes.

2 **Q. You take no issue with the fact that they are**
3 **increasing their rates. Correct?**

4 MR. APPEL: Object to form.

5 A. Yes, my issue is with equitability and
6 reasonableness.

7 **Q. So your issue is how those rates are distributed**
8 **among the classes rather than the fact that they**
9 **are raising their rates. Is that fair?**

10 A. Yes. Who pays for -- what's a fair way to
11 distribute the utilities' cost among the
12 customer base.

13 **Q. And again, you know, that touches on a point**
14 **that now is probably as good a time as any to**
15 **talk about. When we were talking about**
16 **distributing the rate, I mean, we have a set**
17 **amount that the -- in very simplistic terms, we**
18 **have a set amount that the utility has to**
19 **recover. Correct?**

20 A. Yeah, the revenues have -- yeah, the analysis is
21 done to determine what the expenditure needs or
22 expenditure transfer needs of the utility are,
23 and then so that determines how much revenue is
24 needed. And then the question is how do we
25 recover that revenue among our -- from our

1 customer base, the fairest way to do that.

2 **Q. And so when Snee Farm Lakes initiates this**
3 **lawsuit, what they're really saying is not that**
4 **Mount Pleasant Waterworks collected too much.**
5 **What they're really saying is, "You collected**
6 **too much from us. You should have collected**
7 **more from another customer." Is that correct?**

8 A. Sure. It's a subsidization issue.

9 **Q. So there's no -- I mean, just to be clear, I**
10 **mean, you're not saying that Mount Pleasant**
11 **Waterworks has collected too much money**
12 **overall?**

13 A. That's correct. What we're challenging is the
14 way the money was collected.

15 **Q. And from which customer it was collected. Is**
16 **that right?**

17 A. Yes, which customers it was collected from.

18 **Q. So do you know of anyone else in the industry**
19 **that runs this total cost per 1,000 gallons**
20 **analysis?**

21 A. Well, Raftelis does because I was trained at --
22 and you know, was introduced to the concept
23 while I was working for Public Resources
24 Management Group, and they talked about -- PRMG
25 -- it was acquired by Raftelis in 2019.

1 of relationship --

2 Q. But, I mean, it --

3 A. -- with actual usage.

4 Q. But it doesn't in the end. I mean, I can have a
5 large meter size, and yet, you know, maybe my
6 building is no longer a restaurant; maybe I'm
7 living in it. I mean, you know, that's not --
8 my usage can go down tremendously, but I'm going
9 to be charged the same, because you're charging
10 me based solely on my meter size, not by how
11 much water actually flows through that meter.
12 Correct?

13 A. Uh-huh (affirmative response).

14 Q. So I mean, the water meter sized BFC is not
15 related to usage -- to actual usage, is it?

16 MR. APPEL: Object to form.

17 Q. You can answer the question. Is it related to
18 actual usage?

19 A. It should be, and as you mentioned -- as you
20 talked about, you know, the customer would need
21 to determine if the meter size is proper for
22 determining -- you know, what meter is
23 appropriate for their usage.

24 Q. Why is it okay for a customer to have to decide
25 what size meter it should have, but yet it is

RECEIVED

Jul 06 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2018-CP-10-02764
Appellate Case No. 2021-001395

Snee Farm Lakes Homeowner's Association, Inc., individually and on behalf of those similarly situated.....Appellant,

v.

The Commission of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks.....Respondent.

CERTIFICATE OF COUNSEL

I certify that this Record on Appeal contains all of the material proposed to be included by Respondent and Appellant and not any other materials, pursuant to Rule 210(g), SCACR.

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