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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON) FOR THE TENTH JUDICIAL CIRCUIT

West Anderson Water District,)
Plaintiff,)
vs.)
City of Anderson, South Carolina,)
Defendants.)

ORDER INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

C.A. No.: 2012-CP-04-02770

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Richard M. Kirby
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Plaintiff West Anderson Water District (the "District") and the City of Anderson, South Carolina (the "City") are members of what is now the Anderson Regional Joint Water System (the "ARJWS"). The City has been providing potable water and related services to industrial facilities of Michelin North America, Inc. ("Michelin") located on property in Anderson County ("the Michelin Site") since 2002 under the terms of a March 21, 2002 Water Sale and Purchase Agreement (the "Agreement") executed by members of the ARJWS.

In April 2012, Michelin announced that it would construct a new facility (the "New Facility") adjacent to the existing facility (the "Existing Facility") on the Michelin Site. Following the announcement the District objected to the City serving Michelin's New Facility.[1]

In this action the District asks the Court to declare that the City is not entitled to serve the New Facility under the terms of the Agreement. Alternatively, the District asks the Court to find that the District's consent to the City's more than decade-long service to Michelin's industrial facilities under the Agreement is unlawful and void.

[1] At trial counsel for the District stated that the District's Board continues to consent to the City serving Michelin's Existing Facility.

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EXHIBIT A

The City filed an Amended Answer and Counterclaim. The City's pleading includes affirmative defenses of the statute of limitations, waiver, laches, and estoppel. The City's pleading also includes a counterclaim for damages for unjust enrichment and negligent misrepresentation and a request for declaratory relief.

This action was tried before the Court on August 12-13, 2014. At the conclusion of the trial, the Court asked the parties to submit written post-trial arguments. The parties did so on August 25, 2014. Having carefully considered the evidence presented at trial and the arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.[2]

FINDINGS OF FACT

1. Prior to February 20, 2002, Duke Energy Corporation ("Duke") owned and operated a water system that served wholesale and retail water customers located throughout Anderson County (including customers located within the City of Anderson).

2. On February 14, 2000, the District and other water companies, (all of whom were members of the Anderson County Water Association)(the "ACWA"), entered into an Asset Purchase Agreement with Duke pursuant to which the water companies would purchase Duke's water system (wholesale and retail) for some $70,200,000. (DX 2). The members of the ACWA did so for the express purpose of "establishing, pursuant to the South Carolina Joint Municipal Water Systems Act, South Carolina Code Section 6-25 *et seq.*, a joint water system to operate a water system in Anderson County, South Carolina...."

3. On July 3, 2000, Duke entered into a Water Service Agreement with Michelin (the "WSA") and began providing water service to Michelin. (DX 3).

[2] To the extent any Findings of Fact are more appropriately designated Conclusions of Law or any Conclusions of Law are more appropriately designated Findings of Fact, they are adopted as such.

4. On August 1, 2001, the District and the other water companies entered into a First Amendment to Asset Purchase Agreement with Duke pursuant to which the purchase price for Duke's water system (wholesale and retail) was reduced from $70,200,000 to $68,000,000. (DX 7). In the First Amendment, the District and the other water companies waived any objections that they might have to the WSA between Duke and Michelin.

5. During the summer and fall of 2001, an agreement was reached in principle among Duke, the City, and members of the ACWA (including the District) under which Duke would sell its wholesale water system to members of the ACWA (including the District) for roughly $48,000,000 and Duke would sell its retail water system to the City for approximately $16,000,000. At the time the purchasing parties intended for all of the purchasing entities to become members of a joint water system established pursuant to the South Carolina Joint Municipal Water Systems Act as originally contemplated by members of the ACWA.

6. As the fall of 2001 progressed, the water companies who were then organized as "not-for-profit" entities (including the District) took required steps to convert to public service districts. They did so for the express purpose of taking advantage of recent legislative changes that authorized a water company organized as a public service district to participate as a voting member of a joint water system. The District applied on or about October 18, 2001, and became a public service district on or about December 31, 2001.

7. During the latter half of 2001 and early 2002, Duke, the City, and members of the ACWA negotiated the critical details and the key terms of the agreement that they had reached in principle for purchase of the Duke water system. During the same period, the City and members of the ACWA negotiated the critical details and the key terms of the contract between the

ARJWS[3] and its members that would establish and define (a) the rights and the obligations between the joint water system and its members and (b) the rights and the obligations among the members themselves. This latter agreement was ultimately named the Water Sale and Purchase Agreement (the "Agreement") (DX 29).

8. During the course of the foregoing negotiations, John Moore, City Manager for the City, was a key negotiator for the City. Kent Guthrie (a co-Project Manager for the ACWA) and Charlie Gibson were principle negotiators for the ACWA and its members. District Chairman J.T. Hopkins also participated in negotiations on behalf of the District. All sides were represented by various counsel.

9. During the latter half of 2001 and early 2002, negotiations between the City and members of the ACWA focused on two key issues that lie at the heart of this dispute: first, defining the territorial boundaries of the service area that each member of the ARJWS would be entitled to serve; and, second, determining which entity would provide service to sites then occupied by three industrial customers (Michelin, Owens-Corning, and BASF).[4]

10. The latter issue was resolved by December 7, 2001. The District and Starr-Iva agreed in principle that the City would provide service to the sites then occupied by Michelin, Owens-Corning, and BASF.

11. On the first issue, as negotiations continued, the parties to the Agreement never deviated from their intention that the service area that each member would be entitled to serve would be delineated and shown on a territorial map that would be attached to the Agreement:

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[3] In March 2002, the joint water system was named the Anderson County Joint Municipal Water System. For purposes of this Order, the Court will identify the joint water system as the ARJWS (its current name).

[4] The three sites were unique in the sense that the sites were located within the geographical boundaries of either the District or the Starr-Iva Water and Sewer District but Duke included the sites in its retail water system and sold the infrastructure to serve the sites to the City as part of its purchase of Duke's retail water system.

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a. During the summer and fall of 2001, William McCoy, Co-Project Manager for the ACWA[5]; Beeson-Rosier; and Design South worked on preparation of Territorial Maps that would show the service area each member would serve. During September 2001, Mr. McCoy reported that service area maps were nearing completion. (DX 8 & 9).

b. During the period November-December 15, 2001, all drafts of the Agreement prepared by attorney Margaret Pope except the fifth draft dated December 15, 2001 contain a draft of a Territorial Boundaries clause with reference to an attached Territorial Map. The fifth draft for the first time includes, in the "Background and Findings" section, the following prefatory clause confirming that the City will serve Michelin, Owens-Corning, and BASF:

> It is presently intended by the parties hereto that the City of Anderson will serve (1) two industries, BASF and Owens-Corning, located within the boundaries of Starr-Iva Water and Sewer District; and (2) the industrial facilities of Michelin, which are located within the boundaries of West Anderson Water District. Both Starr-Iva Water and Sewer District and West Anderson Water District consent to the City of Anderson's providing such service to these industries. However, such consent is strictly limited to the provision of service to these named industrial customers and no further provision of service by the City of Anderson shall be made to any customer located within the boundaries of Starr-Iva Water and Sewer District or within West Anderson Water District without the written consent of such Purchaser.

The fifth draft, however, deletes the Territorial Boundaries clause with reference to an attached Territorial Map that appeared in prior drafts of the Agreement. (DX 12, 13, 16, 19).

c. During the period December 17, 2001-January 30, 2002, the City demanded that the Territorial Boundaries clause and the Territorial Map be reinserted in the Agreement and that attorneys Pope and Hill include "wording acknowledging City territory to be respected by water companies ...." The other parties agreed and the Territorial Boundaries clause with reference to an attached Territorial Map is included in all later drafts of the Agreement. (DX 20-22 & 23-25).

12. On February 20, 2002, the District, the other water districts who were members of the ACWA, and the newly formed joint water system entered into a Second Amendment to Asset Purchase Agreement with Duke. (DX 26). In the amended agreement the District expressly

[5] Mr. McCoy served as an expert witness and trial witness for the District in this litigation.

approved Duke selling "the retail portion of the water system to the City of Anderson, South Carolina" for a base price of $15,580,000. Included in the amended agreement with Duke is:

a. a narrative "Service Area Boundary Description" for the City's retail service area which includes "all of the Owens Corning Fiber Plant property" and "the BASF Plant property and Michelin Plant property" and

b. a map entitled "Service Area Map Retail Water System City of Anderson" that graphically describes the City's retail service area which encompasses the site on which the industrial facilities of Michelin are located.

13. Also on February 20, 2002, the City entered into an Asset Sale Agreement with Duke whereby the City purchased transmission lines, storage tanks, and related facilities generally comprising Duke's retail water system. (DX 27). As part of the City's purchase, Duke assigned to the City the WSA between Duke and Michelin dated July 3, 2000. Not coincidentally, included in the agreement with Duke is a narrative "Service Area Boundary Description" and a map graphically describing the City's retail service area which encompasses the site on which the industrial facilities of Michelin are located. The "Service Area Boundary Description" and the map are identical to the "Service Area Boundary Description" and the map included as part of the Second Amendment to Asset Purchase Agreement between Duke, the District, and others.

14. On March 21, 2002, the City, the District, and other members of what is now the ARJWS entered into the Water Sale and Purchase Agreement (the "Agreement"). Under the terms of the Agreement, each member of the ARJWS agreed to purchase water from the ARJWS to provide service to customers located within its defined service area. As expressly contemplated by the parties based on negotiations to date and as required by the City as a condition to entering into the Agreement, the Agreement provides:

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> Section 6.02. Territorial Boundaries. In order to successfully plan and finance additions to each Purchaser's System, and to avoid future disputes, the parties have agreed upon a Territorial Map of the territories of the parties to this Agreement in order to set out the areas each intends to serve. The Territorial Map is attached hereto as Exhibit D.

The City's service area shown on the Territorial Map is identical to that shown on the maps attached to both the Second Amendment to Asset Purchase Agreement and the Asset Sale Agreement. The service area assigned to the City on the Territorial Map includes the site on which the industrial facilities of Michelin are located.

15. Based upon City Manager Moore's uncontradicted testimony, the City would not have invested substantial money and made long-term contractual commitments to acquire the infrastructure and the water capacity to serve the Michelin Site if, as District General Manager Wilson suggested:

> a. The City would lose that right if the Existing Facility burned down a month after the City purchased Duke's retail water system and Michelin re-built an identical facility in its place or
>
> b. The City would lose that right if an economic downturn like that in 2008 forced Michelin to close the Existing Facility and some other business began operations at the site or
>
> c. The City did not have the right to receive additional revenues from future expansions on the Michelin Site which the City could use to defray, among others, the long term obligations the City incurred with the joint water system to acquire allocated water capacity for both Michelin's Existing Facility and anticipated future expansions at the site.

Wilson himself conceded that the City would not be making a wise or common-sense investment if the City purchased Duke's retail water system and committed to the long term obligations set out in the Agreement subject to one or more of the risks described above.

16. The only witness that the District presented at trial who actually reviewed drafts of the Agreement and participated in negotiations concerning its terms with the City was William

McCoy. McCoy, Co-Project Manager for the ACWA and expert witness for the District, corroborated the testimony that the City presented from John Moore, who personally participated in negotiations for the Agreement, and Margaret Pope, who drafted the Agreement. McCoy testified that:

a. The Territorial Map attached as Exhibit D to the Agreement was intended to show the service area that each member was entitled to serve and

b. Steve Wilson, General Manager for the District, instructed him to "carve the Michelin Site out" of the District's boundaries and to include it in the City's service area on Exhibit D.

17. The City has been providing potable water and related services to Michelin facilities located on the Michelin Site under the terms of the WSA and the Agreement continuously since 2002. During the period from February 20, 2002 to the present, the City reasonably relied on the District's express consent when the City incurred significant costs and expenses to provide service to Michelin's Existing Facility and future additions on the Michelin Site. Specifically, the City (a) acquired the necessary infrastructure to serve the Michelin Site from Duke, (b) purchased potable water capacity to serve the Michelin Site from the ARJWS, and (c) upgraded the existing water system to serve current and future facilities located on the Michelin Site.

18. In or about April 2012, Michelin announced that it would construct a New Facility to manufacture tires for large construction equipment on the Michelin Site that the City has served since 2002. The New Facility is located within the service area originally allocated to the City and shown on the Territorial Map that is attached as Exhibit D to the Agreement. The City has been providing service to the New Facility since March 12, 2013.

CONCLUSIONS OF LAW

1. The Agreement Is Ambiguous as a Result of Which Extrinsic Evidence is Admissible to Show the Intent of the Parties to the Agreement.

The critical issue here is the proper construction of the terms of the 2002 Water Sale and Purchase Agreement. In Ward v. West Oil Co., Inc., 379 S.C. 225, 665 S.E.2d 618 (Ct. App. 2008), the Court summarized legal principles governing construction of a contract:

> The construction of a clear and unambiguous contract is a question of law for the court. Ward, 379 S.C. at 239 (citation omitted).
>
> If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and its language determines the instrument's force and effect. Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it. Id. at 239 (citation and quotation marks omitted).

Both the District and the City have argued that the Agreement is unambiguous and each asked the Court to construe the Agreement in its favor. The Court, however, concluded that the Agreement is ambiguous because of conflicting language found in the prefatory clause contained in the "Background and Findings" section and in § 6.02 - the Territorial Boundaries clause with Territorial Map attached as Exhibit D to the Agreement.

In Ward the Court addressed the manner in which a court should proceed if a contract is ambiguous:

> "A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear." ... "[A]n ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning."

665 S.E.2d at 626 (citations omitted).

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> Whether a contract's language is ambiguous is a question of law. ... Once the court decides that the language is ambiguous, evidence may be admitted to show the intent of the parties.

Id. (citations omitted)

> The courts, in attempting to ascertain this intention, will endeavor to determine, the situation of the parties, as well as their purposes, at the time the contract was entered." ... [By] doing so, the court is able to avail itself of the same light which the parties possessed when the agreement was entered into so that it may judge the meaning of the words and the correct application of the language."

Id. at 627. In Ward the Court also stated: "Common sense and good faith are the leading touchstones of construction of the provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." Id. at 247 (citation omitted).

2. Based on the Evidence Presented at Trial, the City Is Entitled to Serve the Michelin Site During the Term of the Agreement.

When the evidence presented at trial is considered from a perspective of "common sense and good faith," the parties' intent in entering into the Agreement is readily apparent. From the beginning, the Asset Purchase Agreement that the District and other water companies signed with Duke on February 14, 2000, stated that they did so for the express purpose of "establishing, pursuant to the South Carolina Joint Municipal Water Systems Act, South Carolina Code Section 6-25 *et seq.*, a joint water system to operate a water system in Anderson County, South Carolina...."

The very concept of combining some eight or nine existing water systems into a joint water system necessarily required the members to address and resolve boundary disputes and to agree upon the areas that each member would serve as part of a joint water system. To this end,

during the summer and fall of 2001, William McCoy, Beeson-Rosier, and Design South worked on preparation of Territorial Maps that would show the service area each member would serve. Early drafts of the Agreement included a Territorial Boundaries clause that referenced a Territorial Map.

The problem of addressing and resolving boundary disputes and agreeing upon the areas that each member would serve became, however, more acute after the parties agreed that Duke would sell its wholesale water system to members of the ACWA (including the District) for roughly $48,000,000 and that Duke would sell its retail water system to the City for approximately $16,000,000. The complexity arose because Duke included three industrial customers (Michelin, Owens-Corning, and BASF) in its retail water system and agreed to sell the infrastructure to serve the three sites to the City as part of its purchase of Duke's retail water system even though the three sites were located within the geographical boundaries of either the District or the Starr-Iva Water and Sewer District.

During the Fall of 2001, the City, Starr-Iva, and the District discussed which entity would serve Michelin, Owens-Corning, and BASF and the financial ramifications if an entity other than the City served one or more of the three. By December 7, 2001, the City, Starr-Iva, and the District had agreed that the City, which had agreed to purchase the infrastructure to serve the sites from Duke, would serve all three.

Shortly after that understanding was reached, in a Fifth Draft of the Agreement dated December 15, 2001 (DX 19), Margaret Pope, the attorney drafting the Agreement, added the "Background and Findings" clause but inexplicably deleted the Territorial Boundaries clause and map. When the City discovered the deletion, the City demanded, as a condition to closing the transaction, that the Territorial Boundaries clause and the Territorial Map be reinserted in the

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Agreement and that Ms. Pope include "wording acknowledging City territory to be respected by water companies ...." At a joint meeting held on December 27, 2001, the other parties agreed to the City's demand. As a result, the Agreement, as signed, included:

> Section 6.02. Territorial Boundaries. In order to successfully plan and finance additions to each Purchaser's System, and to avoid future disputes, the parties have agreed upon a Territorial Map of the territories of the parties to this Agreement in order to set out the ***areas*** each ***intends*** to ***serve***. The Territorial Map is attached hereto as Exhibit D.

(Emphasis added).

During this same time period, District General Manager Wilson instructed William McCoy to "carve the Michelin Site out" of the District's boundaries and to include it in the City's service area on the Territorial Map. The Territorial Map that is attached to the executed Agreement as Exhibit D shows just that.

The March 21, 2002 Water Sale and Purchase Agreement was the third part of a complex series of transactions that were necessary to creation of the ARJWS. This agreement followed the two agreements with Duke dated February 20, 2002: one under which the ARJWS and its members (exclusive of the City) purchased Duke's wholesale water system; a second under which the City purchased Duke's retail water system.

Not coincidentally, the City's "territorial boundaries" (service area) shown on the Territorial Map that is Exhibit D to the March 21, 2002 Water Sale and Purchase Agreement are identical to the City's "retail service area" shown on the Service Area Map that is attached to each of the agreements with Duke. Moreover, each of the agreements with Duke contains a narrative description of the City's "retail service area" that is depicted on the Service Area Map that is attached to each of the agreements with Duke. The narrative states that the City's "retail service area" includes the "Michelin Plant property."

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"[I]n the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. Furthermore, where the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole." Ward, 379 S.C. at 244-245 (citations and quotation marks omitted).

A contract should receive a sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results. Holden v. Alice Manufacturing, Inc., 317 S.C. 215, 221, 452 S.E.2d 682 (Ct. App. 1994). Under any "sensible and reasonable construction" of the Agreement, the City is entitled to provide potable water services to the Michelin Site inclusive of both Michelin's Existing Facility and Michelin's New Facility during the term of the Agreement.

To find otherwise would lead to "absurd consequences or unjust results." During the period from February 20, 2002 to the present, the City reasonably relied on the District's express consent when the City incurred significant costs and expenses to provide service to Michelin's Existing Facility and future additions on the Michelin Site. This included the City (a) acquiring the necessary infrastructure to serve the Michelin Site from Duke, (b) purchasing potable water capacity to serve the Michelin Site from the ARJWS, and (c) upgrading the existing water system to serve current and future facilities located on the Michelin Site. The City did so with the expectation that Michelin would be successful and have increased potable water needs in the future. The City undoubtedly would not have incurred this expense had it not known it had the right to serve any and all facilities that might be located on the Michelin Site during the term of the Agreement.

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3. The District's Consent to the City's Provision of Service is Valid.

The District argues in the alternative that its consent to the City's provision of service to Michelin's industrial facilities constitutes an unlawful delegation of governmental authority and is thereby void and unenforceable. The District asserts that the consent it gave more than twelve years ago is void because (a) the Agreement extends beyond the term of the District's then current governing body without statutory authority to do so and/or (b) the District's consent involves a "substantial compromise[]" of its governmental function and authority. After carefully considering the District's arguments, the Court concludes that the District is wrong on both counts. Such consent is specifically authorized by S.C. Code Ann. §§ 5-7-60, 33-36-1310, and 6-25-5 et seq.

As an initial matter, South Carolina Code Section 5-7-60, outlining the powers and functions of municipalities, provides that a municipality

> may perform any of its functions ... in areas outside the corporate limits of such municipality by contract ... except within a designated service area for all such services of another municipality or political subdivision, including water and sewer authorities, [...]. *Provided, however, the limitation as to service areas of other municipalities or political subdivisions shall not apply when permission for such municipal operations is approved by the governing body of the other municipality or political subdivision concerned.*

S.C. Code Ann. § 5-7-60 (emphasis added). The District's consent to the City's provision of service within the District's geographic boundaries is therefore expressly contemplated and sanctioned by the legislature.[6]

[6] In its Pre-Trial Brief the District suggests that S.C. Code Ann. § 5-31-1910 prohibits the City from serving the Michelin site. Section 5-31-1910, however, is clearly not applicable since it does not deal with providing service in another water district's designated service area. Moreover, this section does not apply in the context of the 2002 Water Sale and Purchase Agreement which involves agreements made between members of the Joint Water System to facilitate the purchase of the Duke water system and formation of the joint water system. The Joint Authority

A. THE LEGISLATURE SPECIFICALLY AUTHORIZED A PUBLIC SERVICE DISTRICT TO ENTER INTO LONG TERM CONTRACTS FOR THE EXPRESS PURPOSE OF PARTICIPATING IN A JOINT WATER SYSTEM.

On July 20, 2001, the Governor signed into law Act No. 78 (the "Act"). The Act allowed nonprofit corporations organized for purposes of providing water services to elect to become public service districts. Simultaneously, the Act amended the Joint Water Systems Act to allow these newly converted public service districts to become members of joint water systems. Act No. 78 2001.[7] In promulgating this Act, which was limited to nonprofit corporations organized for the purposes of providing water service, the Legislature found:

> The General Assembly finds, under certain conditions, that the not-for-profit corporations organized under Act 1030 of 1964, for the purposes of providing water services, should be granted the right to elect to become public bodies politic and corporate for reasons including but not limited to, the following: [...] the right to participate in a joint municipal water system as authorized under Chapter 25, Title 6 of the 1976 Code [....].

Act No. 78 2001. S.C. Code Ann. § 33-36-1310(A) ("For the exclusive purposes of participating in a joint municipal water system ..., a nonprofit corporation incorporated for the purposes of providing water and sewer services ... may elect ... to become a public service district.").

The Act established the powers to be enjoyed by the newly converted public service districts:

> The newly converted district has all the rights and powers of a public body politic and corporate of this State including, without limitations, all the rights

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Water and Sewer Systems Act, S.C. Code Ann. 6-25-10. et. seq., was enacted long after § 5-31-1910 and is the controlling statute here.

[7] The act is entitled as follows: "AN ACT TO AMEND CHAPTER 36 OF TITLE 33, CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING ARTICLE 8 SO AS TO PROVIDE THAT THE MEMBERSHIP OF A NONPROFIT CORPORATION ORGANIZED UNDER THE PROVISIONS OF CHAPTER 35 MAY ELECT FOR THE CORPORATION TO BECOME A PUBLIC BODY POLITIC AND CORPORATE; AND TO AMEND SECTION 6-25-20, AS AMENDED, RELATING TO JOINT MUNICIPAL WATER SYSTEMS, SO AS TO INCLUDE AS A VOTING MEMBER A NONPROFIT CORPORATION WHICH HAS BECOME A PUBLIC SERVICE DISTRICT PURSUANT TO ARTICLE 8, CHAPTER 36 OF TITLE 33 AS ADDED BY THIS ACT."

and powers necessary or convenient to carry out and effectuate its purposes including, but not limited to the following rights and powers to:

[...] (9) enter into contracts of **short or long duration**;

[...] (11) make **contracts of all kinds** and execute all instruments or documents **necessary or convenient to carry out the business of the district** [....].

Act No. 78 2001. (emphasis added). These enumerated powers duplicate and are identical to the powers conferred on joint water systems under the then current version of the joint water system statute. (Compare S.C. Code § 33-36-1360 (2003) with S.C. Code § 6-25-100 (2003)).

B. THE WEST ANDERSON RURAL WATER AND SEWER COMPANY, INC. ACTED IN RELIANCE ON THE ACT.

On December 31, 2001, the West Anderson Rural Water and Sewer Company, Inc., converted to a public service district pursuant to S.C. Code § 33-36-1310 et seq. In 2002, the District became a member of what is now the ARJWS.

On March 21, 2002, the City, the District, and other members of the ARJWS entered into the Agreement. Each party, including the District, represented that it had authority to enter into the Agreement:

> **Section 2.04. Representations of Each Purchaser**. Each Purchaser hereby represents that it is a validly created governmental entity and a public body politic and corporate of the State of South Carolina owning and operating such Purchaser's System which is, or will be at the time of the provision of water pursuant to this Agreement, capable of receiving water as contemplated by this Agreement; that *it has all necessary powers and authority to undertake and perform its obligations under this Agreement*; and that it has taken all necessary action to authorize the execution and delivery of this Agreement.
> [...]

The parties agreed to an initial thirty-year term for the Agreement:

> **Section 2.06. Term of Agreement**. This Agreement shall be effective on the date of Seller's acquisition of the System and shall extend for an initial period commencing on such date and extending until July 15, 2032 and thereafter, absent receipt of notice from any Purchaser of its intent not to renew, shall be automatically extended for five periods.

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[...]

Under the terms of the Agreement, each member of the ARJWS agreed to purchase water from the ARJWS to provide service to customers located within its defined service area and to assume certain obligations for payment of ARJWS bonded debt:

> Each of the Purchasers has determined that it is in the best interests of its customers and residents located within its respective service area to participate in the acquisition by Seller of the Duke Facilities by becoming a member of Seller and to purchase certain rights to the use of the Duke Facilities. By joining together, economies of scale can be achieved and each Purchaser will be able to acquire a safe and secure source of potable water. Each Purchaser, recognizing the benefits to be gained by such joint action, has determined, pursuant to the provisions of this Agreement, to purchase the right to receive a specified allocated capacity defined in terms of millions of gallons of potable water per day and to pay for such amount of potable water by assuming the responsibility for a corresponding amount of the debt service on bonds issued by Seller to defray the acquisition of the Duke Facilities.
> [...]

Each member secured its obligation to pay for ARJWS debt by granting the ARJWS a "lien upon the revenues of each Purchaser's System."

C. THE DISTRICT'S ASSERTION THAT IT LACKED AUTHORITY TO BIND SUCCESSOR BOARDS IN 2002 IS IN ERROR.

In an attempt to avoid contractual commitments that it made more than a decade ago, the District argues that its consent to the City's provision of service to the Michelin Site is void under City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority[8] and Cunningham v. Anderson County.[9] The Supreme Court concluded in Beaufort-Jasper that a contract entered

[8] 325 S.C. 174, 480 S.E.2d 728 (1997)

[9] Cunningham, Slip. Op. No. 5972 (Ct.App. Jan. 15, 2013, withdrawn, substituted, and refiled on Feb. 27, 2013). Citing Beaufort-Jasper, the Court in Cunningham found that Anderson County could not enter into a "for cause" employment contract with its County Administrator because the County's enabling legislation did not allow it to enter into contracts extending beyond the term of the current council. Cunningham is distinguishable. In contrast to the vague language relied upon by the plaintiff in Cunningham, the District here was explicitly authorized by statute to enter into long-term contracts.

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into by a water authority was void, in part, because it bound successor governing boards by extending indefinitely beyond the contracting board's term. Beaufort-Jasper, 325 S.C. at 181.

The District's reliance on Beaufort-Jasper is misplaced. The Supreme Court decided Beaufort-Jasper in 1997 - four years before the Governor signed Act No. 78 into law on July 20, 2001. Since enactment of Act No. 78, public service districts such as the District have had the power to "enter into contracts of **short or long duration**" and to "make **contracts of all kinds** and execute all instruments or documents necessary or **convenient to carry out the business of the district.**" S.C. Code § 33-36-1360 (emphasis added).

Act No. 78 was passed against the backdrop of Beaufort-Jasper, which was decided four years earlier. A basic rule of statutory construction is that the legislature is "presumed to be aware of [judicial] interpretation of its statutes." Henry-Davenport v. School District of Fairfield County, 391 S.C. 85, 89, 705 S.E.2d 26, 28 (2011)(citing State v. Coin Operated Video Game Machines, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000)); Wehle v. South Carolina Retirement System, 363 S.C. 394, 611 S.E.2d 240, 245 (2005); State v. Corey D., 339 S.C. 107, 112, 529 S.E.2d 20, 23 (2000)("[T]here is a basic presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects."); Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997); Cowan v. Allstate Insurance Co., 351 S.C. 626, 571 S.E.2d 715 (Ct.App. 2002). Cf. Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)("When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation").

Not only was the legislature aware of Beaufort-Jasper, it obviously intended to change the result for newly converted public service districts by conferring upon them the power to enter

into contracts of "short or long duration" so they could make the contractual commitments necessary to become members of a joint water system. Act No. 78 2001; S.C. Code § 33-36-1360(A)(9). If the legislature had not intended to permit long-term contracts, it would have had no reason to include the "short or long" language in the Act. Courts "must presume the General Assembly did not intend a futile act, but rather intended its statutes to accomplish something." Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (citation omitted). Furthermore, courts "are to construe a statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." 16 Jade St., LLC v. R. Design Const. Co., 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012), *reh'g granted* (May 7, 2012); Hinton v. S.C. Dep't of Probation, Parole and Pardon Servs., 357 S.C. 327, 592 S.E.2d 335, 343 (Ct.App.2004) ("[The Court] should seek a construction that gives effect to every word of a statute.").

Moreover, if the court were to adopt the contrary interpretation, it would effectively dismantle the entire scheme of the ARJWS and undo over a decade of interlocking contractual and loan commitments. For example, in the Agreement, the parties agreed to purchase "the right to receive a specified allocated capacity" and to pay for such water "by assuming the responsibility for a corresponding amount of the debt service on bonds issued by Seller to defray the acquisition of the Duke Facilities." The parties also agreed to grant to the ARJWS a pledge of and lien upon the revenues of each party's system. If the Court were to adopt the District's position, the result would be patently unsound and unfair and fly in the face of economic reality (i.e., the joint water system's long term bond debt obligations).

Joint water systems – like the ARJWS – have statutory authority to enter into contracts "concerning the sale or purchase of capacity and output from a project" for up to fifty years.

S.C. Code § 6-25-128. If a joint water system can validly enter into contracts for a term extending beyond its governing board, it follows that members of the ARJWS, including public service districts, must be able to do the same.

Indeed, the very purpose of the act allowing non-profit water service companies to elect to become public service districts is to facilitate such participation. If public service districts are unable to enter into contracts in the same manner as joint systems, contracts dependent upon multiyear financing schemes and central to the functioning of joint systems – like the Agreement at issue here – would be impossible. Courts must "reject a statutory interpretation when to accept it would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000).

Accordingly, the Court concludes that § 33-36-1360 should be read to sanction contracts entered into by a public service district that extend beyond the term of its current board.

D. THE AGREEMENT DOES NOT "SUBSTANTIALLY COMPROMISE" THE DISTRICT'S GOVERNMENTAL FUNCTION AND AUTHORITY.

In addition to being statutorily authorized to enter into long-term contracts, the Court concludes that the District's consent to the City's provision of service to the Michelin Site is also valid because it constitutes, at worst, a minor delegation of governmental authority and does not "substantially compromise" its discretion or ability to function. In Beaufort-Jasper, a water and sewer authority granted certain municipalities the option of providing water service to a county within the boundaries of the authority in exchange for the municipalities agreeing to purchase water from the authority. Beaufort-Jasper, 325 S.C. at 177. The areas contemplated were within the boundaries of the authority. Under the Agreement, the authority, however, could not provide service to those areas unless the municipalities declined to do so. Id. at 181.

Finding the provision of water and sewer service to be a governmental function, the court stated that the discretion of a governing body or its successor to so provide must be left "relatively unimpaired." Id. The Court found that the right of first refusal in that case constituted an unlawful delegation of governmental authority, "not only because [it bound] future governing boards," but also because of "the nature of the delegation of power itself". Id. at 180-182.

Emphasizing the sweeping authority delegated to the municipalities in that case, the Court found that the "[m]unicipalities are not simply operating Authority's system; rather, they have the power to decide when Authority may provide water to anyone in its own service area." Id. at 182. The Court distinguished such comprehensive delegation from valid "minor delegations of power," which do not "substantially compromise" the primary function of a special purpose district. Id. at 180, n. 4.

In contrast to the broad delegation conferred upon municipalities in Beaufort-Jasper, the scope of the District's consent here is circumscribed. As the Territorial Map graphically depicts, the Michelin Site comprises only a small part of the District's service area. As specifically provided in the Agreement, the District retains the exclusive right to serve customers located elsewhere in its service area. Rather than a right of first refusal, which rendered the water authority's ability to provide service contingent upon the whim of the municipalities, the District here consented only to the City's provision of service to a specifically defined area.

In 2001, the legislature spoke in plain and unequivocal language in Act No. 78. Long-term contracts entered into by public service districts like the District here are not only valid, they are vital to the functioning of joint water systems like the ARJWS. Taking advantage of Act No. 78, the District made long-term contractual commitments to the ARJWS and other members of the ARJWS when it entered into the 2002 Agreement. The District did so to induce

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other members to make similar commitments. Having induced others to commit, the District should not now be heard to say its own commitments are void. As the court in Beaufort-Jasper recognized, it is "disingenuous" for the District – twelve years later - to claim that it lacked the authority to do so. Beaufort-Jasper, 325 S.C. at 177, n. 2.

4. The Court Grants the City's Counterclaim for Declaratory Judgment.

Given the Court's findings and rulings on the District's claims, the Court grants the City's counterclaim for declaratory judgment. Specifically, the Court finds and concludes that the City is entitled to provide potable water and related services to the Michelin Site as that site is shown on the Territorial Map that is attached to the Agreement as Exhibit D during the term of the Agreement. Any further issues raised by the City's counterclaims are moot.

CONCLUSION

For the foregoing reasons, the Court finds and concludes that:

a. the claims asserted by the West Anderson Water District should be dismissed with prejudice;

b. the City of Anderson is entitled to have judgment entered in its favor on the claims asserted by the District;

c. the City's counterclaims against the District are granted to the extent set forth above and are otherwise dismissed without prejudice; and

d. the City of Anderson is entitled to have judgment entered in its favor on its counterclaim for declaratory judgment as set forth above.

AND IT IS SO ORDERED.

R. Keith Kelly
Judge, Tenth Judicial Circuit

September 22, 2014
Greenville, SC

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AND
SESSIONS

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012-CP-04-02770

West Anderson Water District,

PLAINTIFF(S)

City of Anderson, South Carolina

DEFENDANT(S)

Submitted by:	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.**

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: After thorough consideration, the Court hereby denies Plaintiff's timely Motion to Amend. Pursuant to Rule 52(c), SCRCP, the Court issues this ruling without a hearing.

A TRUE COPY

NOV - 5 2014

CLERK OF COURT

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

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The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

R. Keith Kelly
Circuit Court Judge

2165
Judge Code

30 October 2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Nov., 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 6th day of Nov., 2014 to attorneys of record or to parties (when appearing pro se) as follows:

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CLERK OF COURT

Court Reporter: N/A

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

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Haynsworth Sinkler Boyd, P.A.

Date Rec'd 11/7/14
C/M # 13924.0003
Routing BBN, JPP, PRL, JB
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