THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

Case No.: 2012-CP-04-02770
Appellate Case No.: 2014-002488

West Anderson Water District, ... Appellant,

v.

City of Anderson, South Carolina, ... Respondent.

FINAL BRIEF OF RESPONDENT

J. Franklin McClain
401 S. Main St.
Anderson SC 29624-2301
Phone: 864-231-1137

Attorneys for the Respondent
City of Anderson, South Carolina

Frank H. Gibbes, III, SC Bar No. 2461
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, SC 29302
Telephone: 864.327.5000
Facsimile: 864.327.5001

Attorneys for the Respondent
City of Anderson, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that the West Anderson Water District (the "District") could enter into a valid agreement in which the District consented to the City of Anderson (the "City") serving an area located within the District's geographic boundaries during the term of the 2002 Water Sale and Purchase Agreement (the "Agreement")?

2. Did the trial court err in deciding that, under the terms of the Agreement, the City is entitled to serve the site on which Michelin's industrial facilities are located during the term of the Agreement?

STATEMENT OF THE CASE

The District brought this action on August 17, 2012 seeking a determination as to who has the right to provide potable water to a newly constructed manufacturing plant ("Michelin II") located within the geographical boundaries of the District. (Complaint, R. pp. 29-36). The City of Anderson ("City") answered and counterclaimed. The City asked the court to declare that it has the contractual right to serve the property on which Michelin I and II are located (the "Michelin Site") under the terms of the 2002 Water Sale and Purchase Agreement (the "Agreement") entered by the parties and others in connection with the formation of the Anderson Regional Joint Water System (the "Joint System"). (Amended Answer and Counterclaim, ¶ 45, R. p. 45, line 16-p. 46, line 3).

The parties filed cross-motions for summary judgment in which each claimed it had the right to serve Michelin II under the plain and unambiguous language of the Agreement. (Cross-Motions, R. pp. 53-123). Both motions were denied "as being questions of fact." (Order, R. at pp. 1-2).

This matter was tried before the Hon. R. Keith Kelly on August 12 and 13, 2014. Prior to trial, each party submitted a pre-trial brief addressing its legal arguments. (Pre-Trial Briefs, R. pp. 124-180). At the close of the evidence, the District and the City sought a directed verdict based on the arguments raised in their pre-trial briefs and on the arguments made and the evidence presented at trial. The trial court denied the motions. (Tr. at 350:23-353:6, R. p. 494, line 23-p. 497, line 6).

Following the presentation of evidence, the trial court provided the parties the opportunity to submit a letter and a bullet point summary. (Tr. at 353:8-354:3, R. p. 497, line 8-p.498, line 3; Post-trial submissions of the District, R. pp. 181-185, and the City, R. pp. 186-191). After receiving these materials, the trial court issued an order dated September 19, 2014 (the "Order") based on its determinations regarding the Agreement's validity and construction. (Order, R. pp. 3-24). The Order declares 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." (Order at 22, R. at 24). The Order granted the City's request for a declaratory judgment based on the Agreement and dismissed the City's other counterclaims without prejudice as moot.[1]

The District served a timely motion to alter or amend on October 2, 2014. (Motion, R. pp. 192-201). The City opposed the District's motion. (City Opposing Memorandum, R. pp. 202-205). The trial court denied the motion by order dated October 30, 2014. (Order, R. pp. 25-27). The District timely filed this appeal on November 18, 2014.

[1] In its Amended Answer and Counterclaims, the City counterclaimed for damages in the event the Court should rule that the City is not entitled to serve the Michelin Site. At trial the City proved damages in the amount of $391,639.45. (Tr. at 292:6-293:13, R. p. 439, line 6-p. 440, line 13).

FACTS

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). (Tr. at 94:2-10, R. p. 245, lines 2-10).

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. (Tr. 97:3-15, R. p. 248, lines 3-15; Def. Ex. 2, R. pp. 520-569). 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..." (*Id.* at 1, R. at 526).

On July 3, 2000, Duke entered into a Water Service Agreement with Michelin (the "WSA") and began providing water service to Michelin's then new facility (Michelin I). (Tr. at 93:21-94:1, 212:11-14, R. p. 244, line 21-p. 245, line 1, p. 359, lines 11-14; Def. Ex. 3, R. pp. 570-574). The District has never provided water service to Michelin I. (Tr. at 93:17-20, 212:15-18, R. p. 244, lines 17-20, p. 359, lines 15-18).

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. (Def. Ex. 7 at 2, R. p. 579). 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. (*Id.* at 4, §3.3, R. at 581, §3.3; Tr. 72:11-73:10, 98:20-100:1, R. p. 223, line 11-p. 224, line 10, p. 249, line 20-p. 251, line 1).

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. (Tr. at 218:16-219:16, R. p. 365, line 16-p. 366, line 16). 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. (Tr. at 219:17-220:8, R. p. 366, line 17-p. 367, line 8).

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. (Tr. at 65:4-12, 102:1-18, R. p. 216, lines 4-12, p. 253, lines 1-18). 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. (Tr. at 102:1-18, R. p. 253, lines 1-18). The District applied on or about October 18, 2001, and became a public service district on or about December 31, 2001. (Tr. at 66:12-67:1, R. p. 217, line 12-p. 218, line 1; Pl. Ex. 3, R. pp. 508-511).

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. (Tr. at 214:22-217:12, R. at

p. 361, line 22-p. 364, line 12). During the same period, the City and members of the ACWA negotiated the critical details and the key terms of the contract between the Joint System[2] 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. (Tr. at 220:9-221:21, R. p. 367, line 9-p.368, line 21). This latter agreement was ultimately named the Water Sale and Purchase Agreement (the "Agreement") (Tr. 219:17-220:8, R. p. 366, line 17-p. 367, line 8; Def. Ex. 29, R. pp. 1051-1111).

During the course of the foregoing negotiations, John Moore, City Manager for the City, was a key negotiator for the City. (Tr. at 215:5-20, R. p. 362, lines 5-20). Kent Guthrie (a co-Project Manager for the ACWA) and Charlie Gibson were principle negotiators for the ACWA and its members. (Tr. at 95:25-97:2, 158:4-159:17, 215:21-216:10, R. p. 246, line 25-p. 248, line 2, p. 307, line 4-p. 308, line 17, p. 362, line 21-p. 363, line 10). District Chairman J.T. Hopkins also participated in negotiations on behalf of the District. (Tr. at 112:11-113:16, R. p. 263, line 11-p. 264, line 16). All sides were represented by various counsel. (Tr. at 103:13-105:20, R. p. 254, line 13-p. 256, line 20).

During the latter half of 2001 and early 2002, negotiations between the City and members of the ACWA focused on two key issues: first, defining the territorial boundaries of the service area that each member of the Joint System 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). (Tr. at 224:3-

[2] In March 2002, the joint water system was named the Anderson County Joint Municipal Water System. For purposes of this Brief, the City will identify the joint water system throughout the time in dispute as the "Joint System".

227:17, 231:15-22, 232:25-233:13, R. p. 371, line 3-p. 374, line 17, p. 378, lines 15-22, p. 379, line 25-p. 380, line 13). The three sites were unique: each was located within the geographical boundary of either the District or the Starr-Iva Water and Sewer District; Duke, however, 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. (Tr. at 230:15-233:13, R. p. 377, line 15-p. 380, line 13; Def. Ex. 27 at 7, §2.1, R. p. 961, §2.1; Def. Ex. 27 at Ex. A, Schedule 1, R. pp. 991-993).

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. By letter dated December 7, 2001, to counsel for the District and Starr-Iva, the City attorney confirmed this understanding "contingent upon the successful acquisition of the retail system by the City of Anderson and the agreement of the governing bodies of the public entities involved." (Tr. at 236:14-238:11, R. p. 383, line 14-p. 385, line 11; Def. Ex. 17 at 1, R. p. 719).

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:

a. During the summer and fall of 2001, William McCoy, Co-Project Manager for the ACWA[3]; 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. (Tr. at 108:3-112:10, 160:19-164:18, 226:25-227:17, R. p. 259, line 3-p.

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

263, line 10, p. 309, line 19-p. 313, line 18, p. 373, line 25-p. 374, line 17; Def. Exs. 8 and 9, R. pp. 588-591).

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. (Tr. at 233:14-236:8, R. p. 380, line 14-p. 383, line 8; Def. Exs. 12 and 13, R. pp. 594-674). 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. (Tr. at 240:3-241:9, R. p. 387, line 3-p. 388, line 9; Def. Exs. 12, 13, 16, and 19, R. pp. 594-674, 676-718, 723-772).

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. (Tr. at 241:2-248:20, R. p. 388, line 2-p. 395, line 20; Def. Exs. 20-22 and 23-25, R. pp. 773-912).

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. (Def. Ex. 26, R. pp. 913-948). In the amended agreement the District expressly 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. (Tr. 115:1-23, 249:5-250:12, R. p. 266, lines 1-23, p. 396, line 5-p. 397, line 12; Def. Ex. 26 at 2, §2.2, R. pp. 914, §2.2). 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" (Tr. 116:6-119:25, 165:9-168:4, R. p. 267, line 6-p. 270, line 25; Def. Ex. 26 at Ex. A, Schedule 1, R. pp. 924-927); 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. (*Id.*, R. at 927).

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. (Tr. 252:8-254:13, R. p. 399, line 8-p. 401, line 13; Def. Ex. 27, R. pp. 949-1039). As part of the City's purchase, Duke assigned to the City the WSA between Duke and Michelin dated July 3, 2000. (Def. Ex. 27 at Ex. A, ¶ f, R. p. 990, ¶ f; Def. Ex. 27 at Ex. A, Schedule 5, ¶ 6, R. p. 997, ¶ 6). 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. (*Id.* at Ex. A, Schedule 1, R. pp. 991-993). 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. (Tr. at 120:10-122:3, 252:8-254:13, R. p. 271, line 10-p. 273, line 3, p. 399, line 8-p. 401, line 13).

On March 21, 2002, the City, the District, and other members of what is now the Joint System entered into the Water Sale and Purchase Agreement (the "Agreement"). (Def. Ex. 29, R. pp.1051-1111). Under the terms of the Agreement, each member of the Joint System agreed to purchase water from the Joint System to provide service to customers located within its defined service area. (*Id.* at §3.01, R. pp. 1067-1068, §3.01). 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:

> 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.

(Tr. 126:23-130:15, R. p. 277, line 23-p. 281, line 15; Def. Ex. 29 at 35, §6.02, R. p. 1088, §6.02). 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. (Tr. at 92:6-93:9, 168:5-170:22, 256:1-257:3, R. p. 243, line 6-p. 244, line 9, p. 317, line 5-p. 319, line 22, p. 403, line 1-p. 404, line 3).

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 argued:

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.

(Tr. at 259:1-11, 284:8-285:18, R. p. 406, lines 1-11, p. 431, line 8-p. 432, line 18). 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. (*Id.* at 135:9-136:1, R. p. 286, line 9-p. 287, line 1).

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 (*Id.* at 169:4-21, 176:20-177:3, R. p. 318, lines 4-21, p. 325, line 20-p. 326, line 3, p. 462, lines 4-21); and

The City's service area shown on the Territorial map includes the Michelin Site on which both Michelin's old facility and

new facility are located. (*Id.* at 170:9-17, R. p. 319, lines 9-17).[4]

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 facilities located 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 Joint System, and (c) upgraded the existing water system to serve current and future facilities located on the Michelin Site. (*Id.* at 259:12-260:1, 260:2-262:2, 263:23-264:24, 289:4-293:13, 307:16-308:5, R. p. 406, line 12-p. 407, line 1, p. 407, line 2-p.409, line 2, p. 410, line 23-p. 411, line 24, p. 436, line 4-p. 440, line 13, p. 454, line 16-p. 455, line 5).

In or about April 2012, Michelin announced that it would construct a new facility ("Michelin II") to manufacture tires for large construction equipment on the Michelin Site that the City has served since 2002. (*Id.* at 84:14-20, R. p. 235, lines 14-20). 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. (*Id.* at 169:4-

[4]On cross-examination, McCoy denied recalling who instructed him to include the Michelin Site in the City's service area. (Tr. at 171:8-12, R. p. 320, lines 8-12). McCoy was then impeached with his deposition testimony where he admitted that Steve Wilson, General Manager for the District, instructed him that "the Michelin Site was to be carved out" of the District's boundaries and shown as part of the City's service area on Exhibit D. (*Id.* at 171:8-173:14, 177:4-24, R. p. 320, line 8-p. 322, line 14, p. 326, lines 4-24).

170:22, R. p. 318, line 4-p. 319, line 22). The City has been providing service to the new facility since March 12, 2013.

STANDARD OF REVIEW

On appeal from a declaratory judgment action, the Court looks to the basis of the claim for declaratory relief to determine whether the case is legal or equitable in nature. *Gordon v. Colonial Ins. Co.,* 342 S.C. 152, 155, 536 S.E.2d 376, 378 (Ct. App. 2000). Here, the root of the underlying claim is for construction of a contract, and thus, it is subject to review as an action at law. *See Jacobs v. Serv. Merch. Co.,* 297 S.C. 123, 127, 375 S.E.2d 1, 3 (Ct. App. 1988). As such, this Court reviews the trial court's rulings to determine if they are supported by any evidence or governed by an error of law. *Townes Assocs., Ltd v. City of Greenville,* 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

ARGUMENT

On March 21, 2002, after more than two years of intense and often heated negotiations, the District, the City, ten other water providers (municipalities and water companies), and the Joint System entered into the Water Sale and Purchase Agreement (the "Agreement"). (Tr. at 243:12-16, R. p. 390, lines 12-16; Def. Ex. 29, R. pp. 1051-1111). They did so for the express purpose of establishing a joint water system in Anderson County pursuant to the South Carolina Joint Municipal Water Systems Act, South Carolina Code Section 6-25 *et seq*...." (Def. Ex. 29, R. pp. 1051-1111). The complex Agreement set forth both the contractual commitments between each member and the Joint System and the interlocking contractual commitments among the members.

Prior to formation of the Joint System, each municipality or water company operated its own independent water system within its own service area. In forming the Joint System, the members necessarily had to agree upon the areas that each would serve

once the joint system was established. Their agreement is set out in § 6.02 of the Agreement with its attached Territorial Map:

> 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). (Def. Ex. 29 at 35, §6.02, R. p. 35, §6.02).[5] The Territorial Map shows in graphic fashion that the City's service area includes the site (the "Michelin Site") on which Michelin I and II are now located.

No statement in the District's Brief is more telling than the District's concession that it argued at trial that "it provided grudging consent to the City's service of Michelin I so that the Agreement would go through." (Distr. Brf. at 10-11). In short, the District acknowledges that it agreed and gave contractual consent to induce other members to do likewise but makes clear that the District did not like the agreement it made at the time. (Tr. 80:3-81:17, R. p. 231, line 3-p. 232, line 17). In its Brief, the District makes equally clear that it still does not like the agreement it made as a result of which the District asks the Court to declare the Agreement invalid thirteen years after it was signed.

To prevail, the District must show that the trial court's factual findings lack evidentiary support and/or that the trial court's legal conclusions are erroneous. Neither

---

[5] In its Brief, the District complains that § 6.02 "does not contain the phrase 'service area.'" (Distr. Brf. at 7). The phrase "the ***areas*** each ***intends*** to ***serve"*** would seem to be the functional equivalent. Moreover, the Territorial Map attached to the Agreement as Exhibit D contains the express phrase "Service Area Boundary". (Def. Ex. 29 at Ex. D, R. pp. 1110-1111; Def. Ex. 30, R. p. 1112); the map attached to both the Second Amendment to Asset Purchase Agreement and the Asset Sale Agreement uses the term "Service Area Map Retail Water System City of Anderson." (Def. Ex. 26 at Ex. A, Sch. 1, R. pp. 924-927; Def. Ex. 27 at Ex. A, Sch. 1, R. pp. 991-993-1).

is true here. The findings of fact included in the trial court's Order are more than amply supported by competent and compelling evidence in the trial record.[6] For the reasons discussed below, the trial court's conclusions of law are legally correct notwithstanding the District's arguments to the contrary.

While the District implies that "grudging consent" to a fully executed agreement is something less than full consent, the trial court properly rejected this argument:

> 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 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.

(Order at 21-22, R. pp. 23-24). For this reason and the reasons set forth below, the City respectfully submits that this Court should affirm the trial court's Order.

I. THE CITY AND THE DISTRICT ENTERED INTO A VALID AGREEMENT BY WHICH THE CITY ACQUIRED THE RIGHT TO SERVE THE MICHELIN SITE DURING THE TERM OF THE AGREEMENT

In its Brief, the District offers two primary reasons why the District thinks this Court should find the Agreement invalid and permit the District to walk away from the contractual commitments it knowingly and purposefully made thirteen years ago:

---

[6] In its Brief, the District ignores rather than confronts the vast majority of unfavorable evidence in the trial record that supports the trial court's factual findings. (Distr. Brf. at 24-29). The District also summarily dismisses the trial court's factual findings relating to documentary evidence as inaccurate characterizations without discussing the court's actual findings. (*Id.* at 4, fn. 2).

> First, the contractual commitments that the District made "substantially compromise the central, primary function of the District" and constitute an unlawful delegation of governmental power and
>
> Second, the Agreement that the District made cannot stand because it unlawfully binds successor boards.

(Distr. Brf. at 11-12, 14). As the trial court concluded, the District is wrong on both points. (Order at 20-21, 17-20, R. pp. 22-23, pp. 19-22).

A. The District's consent to the City serving the Michelin Site during the term of the Agreement does not constitute an unlawful delegation of governmental authority.

The District relies primarily upon *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 480 S.E.2d 728 (1997) ("*Beaufort-Jasper*"), in making its first argument. The District acknowledges, however, as it must, that the Court in *Beaufort-Jasper* recognized an exception to the general rule "where the 'central, primary function' of a district is not 'substantially compromised'." (Distr. Brf. at 14).

The trial court here first took note of the basis for the Court's decision in *Beaufort-Jasper:* "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.'" (Order at 21, R. at 23). The trial court then noted that the Court in *Beaufort-Jasper* distinguished such comprehensive delegations from valid "minor delegations of power," which do not "substantially compromise" the primary function of a special purpose district. (*Id.* at 21, R. at 23).

The trial court then addressed the situation here:

> 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.

(*Id.* at 21, R. at 23).

In rejecting the District's argument, the trial court concluded that the Agreement is valid because it 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.

(Order at 20, R. at 22).

The District's reliance on *Beaufort-Jasper* and *G. Curtis Martin Invest. Trust v. Clay,* 274 S.C. 608, 266 S.E.2d 82 (1980), is simply misplaced. Both cases are factually distinguishable from the case here. In *Beaufort-Jasper* the Court noted:

> In the present case, the Contested Clauses hamper Authority's discretion. Municipalities 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.

325 S.C. at 182, 480 S.E.2d at 732 (emphasis added). Similarly, in *Clay*, the Court wrote:

> Here, the corporate political entity has given a private party ***the power to arbitrarily approve or disapprove*** potential users of a system belonging to the corporate political entity. The abdication by the commissioners of their statutory and constitutional responsibility to act for the public welfare to a private party who has no duty to give the public welfare any deliberation was improper.

274 S.C. at 612, 266 S.E.2d at 84-85 (emphasis added).

The situation here is diametrically opposed to that in *Beaufort-Jasper* and *Clay*. Here, the District did exercise its power. The District in fact decided which body could provide potable water to the Michelin Site and for how long. By its express contractual consent, the District, in its sole discretion, determined that the City would be permitted to serve the Michelin Site during the term of the Agreement in exchange for the commitments that the City made to the Joint System and its members when the City executed the Agreement.

For the reasons enumerated above, the trial court decided this issue correctly. The City would respectfully ask this Court to do likewise.

B. The City's ability to serve an area outside its corporate limits is expressly permitted by statute.

In its Brief, the District argues that the City's ability to serve outside its corporate limits is limited by statute to narrow situations that are not satisfied here. (Distr. Brf. at 23). In an effort to support this argument, the District states repeatedly that the City's position, articulated and argued at trial, is that the City "purchased" service area (the Michelin Site) from Duke Energy as part of the City's acquisition of Duke's retail system. (Distr. Brf. at 11, 23, 24, and 29).

- "The City argued it purchased as 'service area" the property owned by Michelin at the time of the Agreement. (*See* Tr. at 256:24-25, R. at ___)" (Distr. Brf. at 11).

- "Duke did not and could not sell service areas or territories to the City because Duke received its franchise from the Public Service Commission, which lacks jurisdiction with respect to municipalities." (*Id.* at 23).

- "Moreover, the City could not purchase "service area" outside its boundaries." (*Id.* at 23).

- "If the City 'owned' the territory, why would it need the District's consent to provide water there under any circumstances?" (*Id.* at 24).

The District even states that the trial court ruled that the City purchased service area as part of the transactions: "These statutes show there are numerous problems with the trial court's ruling that the City purchased 'service areas'." (*Id.* at 24).

The District is wrong in all respects. The City did not argue or attempt to establish at trial that it bought service area from Duke. In its Order, the trial court did not rule that the City "purchased" or "owns" the Michelin Site. The City argued and the trial court found that the City has the contractual right to serve the Michelin Site because of the District's express consent to the City doing so found in the 2002 Agreement.

In making these erroneous assertions, the District ignores and mischaracterizes the plain evidence in the record. In its Brief the District states:

> The City argued it purchased as 'service area" the property owned by Michelin at the time of the Agreement. (*See* Tr. at 256:24-25, R. at ___).

(Distr. Brf. at 11). That simply is not what City Manager John Moore said in the cited testimony. Mr. Moore testified:

> Q. That is blown up in court. Based upon your involvement in the negotiations for this Water Sale and Purchase Agreement on behalf of the City, what was your understanding of the extent of the City's right to serve the entire area that is shown in orange on Exhibit D?
>
> A. The City had full rights to serve existing and future customers in the orange area.
>
> Q. And would that include a -- what we referred to as the Michelin site?
>
> A. Yes, sir.

(Tr. at 256:18-257:3, R. p. 403, line 18-p. 404, line 3).

The District similarly mischaracterizes the trial court's order by suggesting that the court ruled "that the City purchased 'service areas'." (Distr. Brf. at 24). The court

did no such thing. Rather, the trial court ruled:

> [T]he 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.

(Order at 22, R. p. 24). In fact the trial court determined - as the City asserted - that the City's right to serve the Michelin Site is limited to the term of the Agreement. This refutes any notion that the court concluded that the City "purchased" the service area.

In its Brief, the District then asserts:

> Here, there are two statutes that allow cities to provide water outside the city limits under limited circumstances. However, neither of these statutes allows a city to acquire territory as found by the trial court. The City can only serve within the District by contract and with the District's consent. *See* S.C. Code Ann.§§ 5-7-60 & 5-31-1910.

(Distr. Brf. at 23-24). Again, the City has not argued and the trial court did not find that § 5-7-60 allowed the City to acquire or purchase territory. Rather, the City argued and the trial court properly found:

> 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.

(Order at 14, fn. omitted, R. p. 16). The District's arguments to the contrary lack merit and should be rejected on appeal.[7]

C. The District's consent to the City serving the Michelin Site during the term of the Agreement is binding on the District's successor boards.

In a further effort to undo the agreement that it made thirteen years ago, the District argues that it cannot consent to the City serving an area within the District's geographic boundaries in such a way as to bind successor boards. (Distr. Brf. at 15-23). In making this argument, the District necessarily acknowledges that there is an exception to the general rule prohibiting a governing body from entering into a contract involving a governmental function that extends beyond the term of the members of the governing body.

> The Supreme Court has noted an additional exception to the general rule prohibiting governmental bodies from binding successor bodies concerning governmental functions. *Cowart II* at 241, 478 S.E.2d at 838. This exception, first noted in *Newman,* applies "where the enabling legislation clearly authorizes the local governing body to make a contract extending beyond its members' own terms." *Cowart II* at 241, 478 S.E.2d at 838 (citing *Newman* at 23, 46 S.E.2d at 255).

(Distr. Brf. at 15).

After stating that the Order entered by the trial court cites three statutes - S.C. Code Ann. §§ 5-7-60, 33-36-1310, and 6-25-5 *et seq* (Order at 14, R. p. 16), the District affirms that § 33-36-1310 is the enabling legislation under which the District became a public service district and dismisses the other two statutes as legally irrelevant. (Distr. Brf. at 16). The District then asserts that the language found in § 33-36-1360(A)(9) and

---

[7] As the City argued in its post-trial submittal and as the Court concluded in its Order, § 5-31-1910 is not applicable for multiple reasons – primarily because the statute does not address a municipality's right to provide service in another water district's designated service area. (City Letter to Court dated August 25, 2014 at pg. 2, R. p. 187; Order at 14, fn. 6, R. p. 16, fn. 6).

(11) of the enabling legislation "falls short of 'clearly authorizing' a contract 'regarding a governmental function' that goes 'beyond the terms' of the District's board members." (Distr. Brf. at 17).

In making this argument, the District relies upon *Beaufort-Jasper, Piedmont Pub. Serv. Dist. v. Cowart*, 324 S.C. 239, 478 S.E.2d 826 (1996), and *Cunningham v. Anderson Cnty.*, 402 S.C. 434, 741 S.E.2d 545 (Ct. App. 2013). The District's reliance is misplaced. None of the enabling statutes involved in the three cases has a clause addressing the duration of a contract regarding a governmental function. The enabling statute under which the District became a public service district does. S.C. Code Ann. § 33-36-1360(A)(9) states that entities like the District may enter into contracts "of short or long duration."

In its Order the trial court rejected the District's argument and concluded:

> 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 and Cunningham v. Anderson County. The Supreme Court concluded in Beaufort-Jasper that a contract entered 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.

(Order at 17-20, R. pp. 19-22)(footnotes omitted). Unlike the District, the trial court considered Act No. 78 against the backdrop of *Beaufort-Jasper* in proper historical context.[8] As a result the trial court correctly decided that the legislature enacted Act No. 78, among other reasons, to permit a public service district to enter into long term contracts necessary for the district to participate in a joint water system.

---

[8] In its Brief, the District similarly takes selected trial testimony by City Manager Moore out of chronological context and suggests that the City recognized that future District Boards might challenge the validity of the 2002 Agreement when it signed the Agreement. Specifically, the District relies on a December 29, 2001 document that is not reflective of the Agreement signed on March 21, 2002. (Distr. Brf. at 19). The District also ignores the testimony that Moore gave immediately following the cited part where he explained that the City did not file an objection to the District becoming a special purpose district with the Secretary of State because the District expressly consented to the City serving the Michelin Site in the Agreement. (Tr. at 283:18-284:21, R. p. 430, line 18-p. 431, line 21).

II. THE CITY HAS A CONTRACTUAL RIGHT TO SERVE THE MICHELIN SITE INCLUDING MICHELIN II.

The District asks this Court to reverse the trial court's decision and to find that the City is not entitled to serve Michelin II. (Distr. Brf. at 30). To accomplish this result, the District asks the Court to put blinders on, to focus on a single letter from the City's attorney and a single clause in the 2002 Agreement, and to ignore the mountains of other evidence in the trial record that more than amply support the trial judge's conclusion that the City is entitled to serve the Michelin Site (inclusive of Michelin I and II) under the terms of the Agreement. (Distr. Brf. at 4, fn. 2, 24-29).[9] The Court should refuse to do so because the trial court's findings of fact are supported by competent evidence and the trial court's rulings on matters of law are correct under applicable law.

A. The trial court properly considered the applicable canons of construction and the language of the Agreement in reaching its decision.

In its Brief, the District makes the twice-rejected argument that the Agreement is not ambiguous. (Distr. Brf. at 27). The District first erroneously states that the trial court "disregarded" the prefatory clause contained in the "Background and Findings" section (the "Prefatory Clause") and focused "exclusively" on § 6.02 - the Territorial Boundaries clause with Territorial Map attached as Exhibit D to the Agreement. (Distr. Brf. at 28). The District then basically asks this Court to do the same thing in reverse – to focus on

[9] In a footnote in its Brief, the District complains that the Court's Order is overbroad because it references industrial sites in Starr-Iva's service area and the relief granted encompasses the Michelin Site rather than individual plants. (Distr. Brf. at 11, fn. 6). As to the former, the industrial sites located in Starr-Iva's service area were an integral part of negotiations for the 2002 Agreement and properly part of trial proof; as to the latter, the relief granted is the relief sought by the City in its Counterclaim and is amply supported by the trial record. (Tr. at 236:14-238:11, R. p. 383, line 14-p. 385, line 11; Def. Ex. 17 at 1, R. p. 719; City Amended Answer and Counterclaim, pp. 9-10, R. pp. 45-46; Tr. at 241:2-248:20, R. p. 388, line 2-p. 395, line 20).

the Prefatory Clause while ignoring § 6.02 and the attached Territorial Map. (Distr. Brf. at 28).

In fact, the trial court considered both the Prefatory Clause and § 6.02 in making a core ruling.

> 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.

(Order at 9, R. p. 11).

The District also argues that the trial court failed to consider applicable canons of construction in reaching its decision. (Distr. Brf. at 28). The District is wrong. The legal principles and canons of construction that the trial court included in its Order are both legally correct and applicable here. For example:

> 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).
>
> > 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)."

(Order at 9-10, R. pp. 11-12).

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).

(Order at 10, R. at 12). While the District suggests that the trial court misapplied canons of construction, the District's real complaint is that the trial court admitted evidence that showed the parties' clear intent that the City be permitted to serve the Michelin Site during the term of the Agreement.

B. The trial court properly decided that the City has the contractual right to serve the Michelin Site during the term of the Agreement.

As noted above, in an effort to obtain the ruling it wants, the District wants this Court to focus on a single letter from the City's attorney and a single clause in the 2002 Agreement to the exclusion of all other evidence in the trial record. The clause is the Prefatory Clause. (Distr. Brf. at 24-25). The letter is a letter from the City Attorney to counsel for the District and the Starr-Iva Water District. (Distr. Brf. at 25; Def. Exh. 17, R. pp. 719-720).

In its Brief, the District implies that the letter and discussions about the Prefatory Clause were concurrent and reflect the intent of the parties at the time they executed the Agreement dated March 21, 2002. (Distr. Brf. at 24-25; Def. Ex. 29, R. pp. 1051-1111). The District, however, does not include the date of the letter, omits critical language from the letter, does not include the date on which the Prefatory Clause was first added to a draft of the Agreement, and fails to discuss evidence as to how negotiations for the final Agreement unfolded. In short, the District relies on a very few isolated facts taken out of context to try to prove a point that is contrary to the trial court's ruling and runs counter to the overwhelming weight of the evidence offered at trial.

- The letter is in fact dated December 7, 2001 – some 3 ½ months before the March 21, 2002 Agreement is finalized and signed. (Def. Ex. 17, R. pp. 719-720).

- The letter characterizes the understanding about the City serving Michelin as an agreement "in principle" that is "contingent upon the successful acquisition of the retail system by the City of Anderson and the agreement of the governing bodies of the public entities involved." (Def. Ex. 17 at 1, R. p. 719).

- The Prefatory Clause was not added to a draft Agreement until the fifth draft dated December 15, 2001. (Tr. at 233:14-236:8, 240:3-241:9, 241:2-248:20, R. p. 380, line 14-p. 383, line 8, p. 387, line 3-p. 388, line 9, p. 388, line 2-p. 395, line 20; Def. Exs. 12, 13, 16, and 19, R. pp. 594-619, 620-674, 676-718, 723-772).

- Every draft of the Agreement between November 20, 2001 and March 21, 2002, except the fifth draft, contains a draft of a Territorial Boundaries clause with reference to an attached Territorial Map. (Tr. at 233:14-236:8, 240:3-241:9, 241:2-248:20, R. p. 380, line 14-p. 383, line 8, p. 387, line 3-p. 388, line 9, p. 388, line 2-p. 395, line 20; Def. Exs. 12, 13, 16, 19, 23, 24, and 25, R. pp. 594-619, 620-674, 676-718, 723-772, 781-824, 825-868, 868-912)

The December 7, 2001 letter that the District relies heavily upon to support its position represents nothing more than a report on on-going negotiations at a single point in time well before negotiations were finalized and the Agreement signed.

When the evidence as a whole is considered, it is abundantly clear, as the trial court found, that the parties to the Agreement always intended for each member of the Joint System to serve the area shown for that member on the Territorial Map attached to the Agreement as Exhibit D.

> 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. (Order at 10, R. p. 12).
>
> 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. (Order at 11, R. p. 13).

[A]s 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:

a. During the summer and fall of 2001, William McCoy, Co-Project Manager for the ACWA[10]; 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. (Def. Ex. 8 and 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: ... The fifth draft, however, deletes the Territorial Boundaries clause with reference to an attached Territorial Map that appeared in prior drafts of the Agreement. (Def. Ex. 12, 13, 16, and 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. (Def. Ex. 20-22 and 23-25).

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

(Order at 5-6, R. pp. 7-8).

> 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:
>
> > 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.

(Order at 6-7, R. pp. 8-9).

At trial, City Manager John Moore gave much of the testimony about the parties' intent that the trial court relied upon in its Order. Moore was the City's chief negotiator and participated in most, if not all, negotiations related to the terms of the Agreement. (Order at 6-7, R. pp. 8-9; Tr. at 215:5-20, R. p. 362, lines 5-20). 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. (Order at 7-8, R. pp. 9-10; Tr. at 112:11-113:16, R. p. 263, line 11-p. 264, line 16). McCoy, Co-Project Manager for the ACWA and expert witness for the District, corroborated Moore's testimony. Specifically, 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 (Tr. at 169:4-21, 176:20-177:3; R. p. 318, lines 4-21, p. 325, line 20-p. 326, line 3); and

b. The City's service area shown on the Territorial map includes the Michelin Site on which both Michelin's old facility and new facility are located. (Tr. at 170:9-17, R. p. 319, lines 9-17).

In short, the only two witnesses who actually participated in negotiations for the 2002 Agreement gave unrefuted testimony that the District and the City intended for the City to be entitled to provide potable water service to the Michelin Site during the term of the Agreement.

CONCLUSION

For the reasons stated above, the Respondent City of Anderson, South Carolina respectfully requests that the Court affirm the Order entered by the trial court.

Respectfully submitted,

GIBBES BURTON, LLC

Frank H. Gibbes, III, SC Bar No. 2461
308 East Saint John Street
Spartanburg, SC 29302
Telephone: 864.327.5000
Facsimile: 864.327.5001

Attorneys for the Respondent
City of Anderson, South Carolina

July 13, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

Case No.: 2012-CP-04-02770
Appellate Case No.: 2014-002488

West Anderson Water District, ... Appellant,

v.

City of Anderson, South Carolina, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Frank H. Gibbes, III, SC Bar No. 2461
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, SC 29302
Telephone: 864.327.5000
Facsimile: 864.327.5001

Attorneys for the Respondent
City of Anderson, South Carolina

July 13, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly

Case No.: 2012-CP-04-02770
Appellate Case No.: 2014-002488

West Anderson Water District, ... Appellant,

v.

City of Anderson, South Carolina, ... Respondent.

PROOF OF SERVICE

The undersigned, Brian R. Edwards, certifies that he is an employee of Gibbes Burton, LLC and on the 13th day of July 2015, he served copies of the following:

1. Final Brief of Respondent City of Anderson, South Carolina; and

2. Certificate of Counsel

by depositing in the United States mail, with due and proper postage affixed thereto, a copy of the same addressed to:

Ms. Sarah P. Spruill
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602

July 13, 2015

Brian R. Edwards