THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Shirley C. Robinson, Administrative Law Judge

Case No. 16-ALJ-07-0082-CC

A.O. Smith Corporation..... Appellant,

v.

South Carolina Department of Health and Environmental Control and Town of McBee..... Respondents.

INITIAL BRIEF OF RESPONDENT TOWN OF MCBEE

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2. Do DHEC regulations require an analysis of capacity and demand where construction permits do not involve water system expansions to serve new customers?

STATEMENT OF THE FACTS

Like many local governments, the Town of McBee operates a public water system that serves residential, commercial, and industrial customers. Its most important single customer is A.O. Smith, whose plant adjacent to the Town represents 60% of the Town's water revenue. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee (Sept. 8, 2015) at 1.) The plant was located in McBee in 1983. (R. p. ___; Affidavit of Jeff Barron at 1.) To support the plant's requirement for fire protection, the Town constructed a 250,000 gallon elevated storage tank and installed a high-volume well adjacent to the A.O. Smith site. (R. p. ___; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 3; Letter from Town of McBee to A.O. Smith (Oct. 10, 2013).) The Town has provided A.O. Smith with water service since that time.

In 1999, at a time when several members of Town Council were Alligator employees, the Town Council voted to outsource operational control of the water system to Alligator Rural Water and Sewer Company ("Alligator"). (R. p. ___; Review of Town of McBee PER (June 10, 2011).) The Town also entered a 40 year wholesale water supply contract with Alligator. (R. p. ___; Water Purchase Agreement.) From 1999 to 2002, Alligator operated McBee's system using McBee's wells. In 2002, Alligator abandoned McBee's wells and began using water it produced to supply the Town. (R. p. ___; Affidavit of Joseph W. McGougan at 2.) There has never been a time when McBee's wells have been in violation of state or federal drinking water standards. (R. p. ___; *id.* at 4-5.)

In the ensuing years, the relationship between McBee and Alligator deteriorated. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee at 2.) In 2008, the Town set about to reclaim control of its water system. Sometime in 2010 or earlier, the Town applied for a permit from the South Carolina Department of Health and Environmental Control ("DHEC") to authorize the Town to resume operational control of its water system from Alligator, which had let the Town's earlier permit lapse. On June 14, 2011, DHEC issued a Public Water System Operating Permit to the Town. (R. p. ___; Water System Operating Permit 131004.) McBee then applied for a permit necessary to refurbish its wells which was required because of their disuse. (R. p. ___; Statement of DHEC Staff Position (Feb. 12, 2016) at 2.) To ensure that there would never be quality issues with the Town's well water, the Town agreed to install a granulated activated carbon filtering system to filter all water it provides.

The timeline of this permitting process is as follows:

a. In **December 2010**, the Town submitted a Preliminary Engineering Report to DHEC to support its operating permit application. (R. p. ____; Preliminary Engineering Report (Dec. 6, 2010).)

b. In **June 2011**, DHEC issued a Public Water System Operating Permit that restored operating control of the system to the Town. (R. p. ___; Water System Operating Permit 131004.) No one challenged that permit.

c. In **November 2012**, DHEC issued Construction Permit 28475-WS to the Town that authorized it to install a new high-capacity submersible pump in Well No. 2, which is one of the wells that would be used to supply water to the Town's water system. (R. p. ___; Construction Permit 28475-WS.) No one challenged that permit.

d. By letter dated **October 10, 2013**, McBee notified A.O. Smith that the Town was working with DHEC to place its two wells back into service and encouraged A.O. Smith to ask questions and voice concerns. (R. p. ___; Letter from Town of McBee to A.O. Smith (Oct. 10, 2013).) The Town received no response.

e. In **June 2014**, DHEC issued Construction Permit 29779-WS to the Town that authorized it to install granulated carbon filtering systems for its wells to ensure

that, if needed, the Town's water would be filtered for any potential contaminants. (R. p. ___; Construction Permit 29779-WS.) No one challenged that permit.

f. In **January 2016**, DHEC received a letter from the Town's engineer, as required by S.C. Code Ann. Reg. 61-58.1.K certifying that the Town had completed the construction work authorized by Construction Permits No. 28475-WS and Construction Permit 29779-WS. (R. p. ___; Statement of DHEC Staff Position (Feb. 12, 2016) at 2-3.)

g. On **January 12, 2016**, DHEC issued its final approval for the Town to place its refurbished well and granulated carbon filtering system into operation. (R. p. ___; Final Approvals to Place into Operation.)

More than four years after the DHEC issued Construction Permit 28475-WS to the Town, and more than 20 months after Construction Permit 29779-WS had been issued, A.O. Smith appeared for the ***first time*** in these regulatory proceedings filing for a board review of two construction permits. (R. p. ___; Request for Contested Case Hearing.)

By letter dated February 17, 2016 and a corresponding Staff Statement, the Director of DHEC's Drinking Water Protection Division rejected A.O. Smith's objections as both "time barred" and "without merit as they are not supported by the law, and the facts and circumstances relevant to this matter." (R. p. ___; Statement of DHEC Staff Position at 6 (Feb. 12, 2016); Letter from DHEC to Nexsen Pruet (Feb. 17, 2016).)

On September 9, 2016, the Administrative Law Court likewise dismissed A.O. Smith's Request for Contested Case Hearing related to the Board's actions. (R. p. ___; Order Granting Respondent's Motion to Dismiss (Sept. 9, 2016).)

ARGUMENT

I. The Administrative Law Court correctly dismissed this case because A.O. Smith did not timely appeal the operating permit or construction permit.

A party who seeks review of a decision must timely appeal the decision; appellate bodies do not have authority to extend the time for appeal. *Burnett v. S.C. State Highway Dep't*, 252 S.C. 568, 570, 167 S.E.2d 571, 572 (1969). "As with appeals in civil and criminal matters, the

time for service of the notice of appeal in administrative matters is jurisdictional and cannot be extended by the appellate courts. Likewise, an administrative tribunal lacks the authority to extend the statutorily authorized time limit for filing an internal appeal." *Jean Hoefer Toal, et al., Appellate Practice in South Carolina* 299 (3d ed. 2016) (internal citations omitted); *see also Hill v. S.C. DHEC*, Docket No. 10-ALJ-07-0625-CC, 2010 SC ENV LEXIS 71, at *7–9 (S.C. Admin. Law Ct. Dec. 9, 2010) (applying the reasoning that a court cannot enlarge a time frame within which a party must trigger the court's jurisdiction to the statutory timing requirements for seeking a contested case).

Regarding the issuance or denial of permits by DHEC, S.C. Code Ann. § 44-1-60(E)(2) provides that "[t]he staff decision becomes the final agency decision fifteen calendar days after notice of the staff decision has been mailed to the applicant, unless a written request for final review accompanied by a filing fee is filed with the department by the applicant, permittee, licensee, or affected person." S.C. Code Ann. § 44-1-60(E)(2). Contested case review before the Administrative Law Court is allowed only based on the action or inaction of the board of the department upon a valid request for final review. S.C. Code Ann. § 44-1-60(G). Therefore, a permit becomes final and unappealable if a request for board review is not received within 15 days of its issuance and notice to "affected persons who have requested in writing to be notified." *Id.* § 44-1-60(E)(1).

No request for board review was ever made for any of the three permits issued by the Department to the Town of McBee:

(1) Public Water System Operating Permit 131004 (issued June 2011);

(2) Construction Permit 28475-WS (issued November 2012); and

(3) Construction Permit 29779-WS (issued June 2014).

Therefore, these permits are beyond the scope of further review as a matter of jurisdiction. S.C. Code Ann. § 44-1-60(E)(2).

There are good policy reasons why the law makes an unappealed DHEC construction permit final and beyond further review. Public water system operators commit hundreds of thousands and in some cases millions of dollars to construct and improve water treatment lines, plants and associated equipment on the basis of these permits. Bonds are often issued, and loans are often incurred to finance that construction. Customers ultimately pay the costs of those projects. All this is done on the strength of the DHEC construction permits that authorize the public water system to construct the assets in question and to put them in service when completed. To say that these permits can be subject to judicial review after construction is complete is to create unreasonable risks for critical infrastructure projects and unreasonable costs for customers. It makes the reliance of banks and other lenders on 'final' DHEC permits unreasonable.

Accordingly, the Administrative Law Court has ruled that parties may not use a recent agency action that incorporates a prior agency decision as a vehicle to reach backwards in time to challenge the original agency decision. For instance, in *Hubbard v. S.C. DHEC*, Docket No. 07-ALJ-07-0594-CC, 2008 SC ALJ LEXIS 85 (S.C. Admin. Law Ct. May 2, 2008) (M. Kittrell, C.A.L.J.), the petitioners waited until a tattoo parlor sought to renew a license-to challenge DHEC's original decision to grant the license one year earlier. The Administrative Law Court rejected their attempt to bootstrap an earlier DHEC licensing decision into a subsequent proceeding and held that the "Petitioners failed to invoke the Court's jurisdiction by timely requesting a contested case hearing with regard to the initial licensing" decision by DHEC. *Id.* at

*15–19. This barred subsequent contested case review on that point. The same outcome should result here.

The rule making permits unappealable after the time for requesting board review has expired is consistent with the general rule that "[l]imitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 352, 103 S. Ct. 2392, 2397, 76 L. Ed. 2d 628 (1983). A similar rule applies in equity: "It would be contrary to equity and good conscience to enforce . . . rights when a defendant has been led to suppose by the word, silence or conduct of the plaintiff that there was no objection to his operations." *Archambault v. Sprouse*, 215 S.C. 336, 340, 55 S.E.2d 70, 71–72 (1949); *see also Mazloom v. Mazloom,* 382 S.C. 307, 319, 675 S.E.2d 746, 753 (Ct. App. 2009), aff'd, 392 S.C. 403, 709 S.E.2d 661 (2011) ("Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or to enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights.")*)* (quoting *Chambers of S.C., Inc. v. County Council for Lee County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993)).

A.O. Smith did not intervene or raise any complaint while the Town spent approximately $450,000 in public money to construct the improvements authorized under those permits. By its delay, A.O. Smith led the Town to believe, as any prudent party would, that it could act with confidence on the basis of final and unappealed permits from DHEC. A clearer case of sleeping on rights to the detriment of others can hardly be imagined. If A.O. Smith has its way in this litigation, the investments that the Town made while A.O. Smith slept on its rights will become practically worthless.

A.O. Smith seeks to avoid the jurisdictional bar of S.C. Code Ann. § 44-1-60(E)(2) by asserting that it is not challenging Public Water System Operating Permit 131004 (issued June 2011); Construction Permit 28475-WS (issued November 2012); or Construction Permit 29779-WS (issued June 2014). Instead, A.O. Smith argues that it is only challenging the "Final Approvals" issued by DHEC in January 2016 related to the latter two of these three permits. That Final Approval is based on a letter from the permittee's engineer certifying that construction is complete and fully conforms with applicable design and engineering requirements. *See* S.C. Code Ann. Reg. 61-58.1.K. As DHEC stated, "A.O. Smith's "challenge of the Department decision to issue Final Approval for the Construction Permits is futile since the only issue decided by the Department in issuance of the Approvals is whether the work performed by the Town was done in accordance with the requirements of the previously issued Construction Permits." (R. p. ___, Statement of DHEC Staff Position at 3 (Feb. 12, 2016).)

An agency's interpretation of its own regulations is entitled to great deference. *See, e.g., S.C. Coastal Conservation League v. S.C. DHEC,* 363 S.C. 67, 75, 610 S.E.2d 482, 486 (2005) ("Courts defer to the relevant administrative agency's decisions with respect to its own regulations unless there is a compelling reason to differ."). The South Carolina Supreme Court has provided, "As repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" *Kiawah Development Partners, II v. S.C. DHEC*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014) (quoting *S.C. Coastal Conservation League*, 363 S.C. at 75, 610 S.E.2d at 486)); *see also, e.g., Faile v. S.C. Employment Sec. Comm'n*, 267 S.C. 536, 540, 230 S.E.2d 219, 222 (1976) (stating that an agency's interpretation will not be overruled "without cogent reasons").

The Administrative Law Court correctly recognized that the Final Approvals are analogous to issuing a Certificate of Occupancy after a house has been built. Like a Certificate of Occupancy, the Final Approvals are issued once it has been determined that the construction authorized by the underlying permits was completed in conformity with the building permits issued previously. (R. p. ____; Order Granting Respondent's Motion to Dismiss at n. 3.) Both DHEC and the court correctly reasoned that after construction is complete, the only relevant issue for permitting purposes is whether the construction complies with the permits that were issued. (R. p. ___; Order Granting Respondent's Motion to Dismiss; Statement of DHEC Staff Position at 3.)

In fact, if A.O. Smith were only challenging the Final Approvals, all it could logically challenge would be the determinations that DHEC staff actually made in issuing the Final Approvals. Therefore, the final review would be limited to the issue of whether construction in fact had been completed and whether it conformed to the operative engineering requirements required by the construction permits. *See* S.C. Code Ann. Reg. 61-58.1.K. None of these issues were raised in A.O. Smith's Request for Final Review. The grounds that A.O. Smith in fact raised all concern matters that should have been considered and reviewed, if at all, in issuing Public Water System Operating Permits 131004; Construction Permits 28475-WS; or Construction Permit 29779-WS. (*See* R. p. ___; Request for Final Review (Jan. 27, 2016).) But as discussed below, the issues A.O. Smith raised in seeking board review would not have been relevant to the Construction Permits even if they had been raised in a timely way. As DHEC staff determined, the regulations A.O. Smith cites do not apply to Construction Permits that do not involve expansions to serve new customers. (R. p. ___; Statement of DHEC Staff Position (Feb. 12, 2016) at 4-5.)

Instead, as is clear from the face of its petition, A.O. Smith is attempting to challenge steps in the administrative process that predate the November 2012 and June 2014 permits. A.O. Smith did not timely seek review of those decisions years ago when the opportunity to do so was available. Those decisions are unreviewable now. *See, e.g.*, *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (holding that the law-of-the-case doctrine precludes appellate review of intermediate determinations that could have been, but were not, timely appealed).

Because those permitting determinations are now final and unreviewable, the Administrative Law Court lacks jurisdiction over this matter. Lacking jurisdiction, it correctly dismissed A.O. Smith's Request for Contested Case Hearing.

II. The Administrative Law Court correctly dismissed this case because there is no legal basis for A.O. Smith to challenge the permits.

This Court should affirm the Administrative Law Court's dismissal because it lacks jurisdiction over A.O. Smith's untimely request. However, this Court may also affirm the dismissal on any other additional sustaining grounds. Rule 220(c), SCACR; *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 417-18, 526 S.E.2d 716, 721-22 (1999). As discussed below, this Court may also affirm the Administrative Law Court's decision on the ground that the court correctly dismissed this case because there is no legal basis for A.O. Smith to challenge the permits.

A. The capacity analysis that A.O. Smith asserts is required before a construction permit is issued does not apply where there is no expansion to serve new customers.

A.O. Smith repeatedly—and incorrectly—cites S.C. Code Ann. Reg. 61-58.2(B)(1)(b) as establishing capacity requirements the Town's water system must meet in order to receive a construction permit. However, as DHEC has clearly ruled, S.C. Code Ann. Reg. 61-

58.2(B)(1)(b) applies only when new, greenfield water systems are proposed. (*See* R. p. ___; Statement of DHEC Staff Position at 4.) The capacity of existing systems is actually regulated under S.C. Code Ann. Reg. 61-58.7.C(12) and 61-58.7.D(12), which impose capacity requirements on all existing public water systems and do so entirely independent of construction permitting. (*Id.*)

Under DHEC's drinking water regulations, all applicants for construction permits must demonstrate that their plans meet applicable design and engineering standards and when built will produce or deliver water that meets DHEC drinking water standards. S.C. Code Ann. Reg. 61-58.1. No one disputes that the Town's system meets these standards.

A capacity analysis, however, is only required when an entirely ***new*** public water system is proposed or when the owner of an existing system seeks to expand its system to serve ***new*** customers. *See* S.C. Code Ann. Reg. 61-58.2(B). In such cases, it makes sense to measure the demands of the new customers against the capacity of the assets serving them. But where new customer service is not proposed, a capacity analysis under S.C. Code Ann. Reg. 61-58.2(B) is not required. (R. p. ___; Statement of DHEC Staff Position (Feb. 12, 2016) at 4.)

As DHEC properly found, "although the Town sought a modification of its system, the modification was for adding additional sources and not an expansion of the system. Therefore, the modification requested by the Town did not trigger the capacity requirements set forth in R.61-58.2(B)." (R. p. ____; Statement of DHEC Staff Position (Feb. 12, 2016) at 4.) This is quite logical. Construction permits are required for all sorts of modifications of public water systems, many of which have no bearing on capacity or customer demands whatsoever. DHEC's regulations quite logically require a capacity analysis only where expansions to serve new

customers are proposed. To do otherwise is to impose unnecessary burdens on the regulatory process and unnecessary cost on public water systems and the customers who pay their rates.

But this does not mean that DHEC does not enforce capacity standards on existing systems. To the contrary, the regulations impose capacity requirements on existing public water systems which apply at all times, regardless of whether a given public water system is seeking a construction permit or not.

Specifically, the Town operates a groundwater system, and so the capacity standard that applies to it is found in S.C. Code Ann. Reg. 61-58.7.D(12). That regulation reads as follows:

> The capacity of a public water system which uses groundwater as its only drinking water source, shall be based on all operable wells pumping 16 hours a day or all operable wells minus the largest well pumping 24 hours a day, whichever is less. . . . . If the capacity of the system is exceeded on a consistent basis during the peak water use months, the system shall submit a preliminary engineering report to the Department within ninety (90) days addressing in detail any upgrade necessary to keep up with any growth in demand on the system. . . . . In addition, the Department may elect not to issue any construction permits for new water line construction until the capacity of the system is increased.

S.C. Code Ann. Reg. 61-58.7.D(12). Later in this brief, the Town will demonstrate that it fully complies with this standard. However, the fact remains that the capacity requirements under which the Town operates are those of S.C. Code Ann. Reg. 61-58.7.D(12). These requirements apply completely independently of construction permits, as DHEC properly found. Indeed, DHEC went as far as regulatory policy and practice allows by referencing the requirements of S.C. Code Ann. Reg. 61-58.7.D(12) in the Final Approvals that it granted in this proceeding. (R. p. _____; Final Approvals to Place into Operation.) In so doing, DHEC properly noted the concerns about this issue, and signaled that it would enforce the applicable capacity requirements of S.C. Code Ann. Reg. 61-58.7.D(12) in its ongoing review and regulation of the Town's system. Nothing more was required or possible. Such review is outside of the scope of the issues

presented in this appeal, which concerns only the facts and legal issues surrounding two DHEC construction permits.

This also means that A.O. Smith has failed to exhaust its administrative remedies. *See, e.g.*, *Smith v. S.C. Dep't of Health & Envtl. Control*, 296 S.C. 514, 517, 374 S.E.2d 498, 499 (Ct. App. 1988) (affirming an order dismissing an action because appellant had not exhausted her administrative remedies); *see also Bradley v. State Human Affairs Comm'n,* 293 S.C. 376, 380, 360 S.E.2d 537, 539 (Ct. App. 1987) ("Relief in the courts is generally not available to one who has not exhausted administrative remedies."); *Meredith v. Elliott*, 247 S.C. 335, 343, 147 S.E.2d 244, 248 (1966). Multiple avenues exist outside of the appeals of these construction permits to ensure that the capacity requirements of S.C. Code Ann. Reg. 61-58.7.D(12) are met. Like the other standards that apply to public water systems, the capacity standards under S.C. Code Ann. Reg. 61-58.7.D(12) are enforced by DHEC as part of its regular Sanitary Surveys of such public water systems. *See* S.C. Code Ann. Reg. 61-58.16(D). Such surveys are regularly scheduled, comprehensive audits and inspections of public water systems to ascertain compliance with all applicable regulatory standards. Therefore, the requirements of S.C. Code Ann. Reg. 61-58.7.D(12) are subject to active regulatory monitoring and enforcement on an ongoing basis.

In addition, if entities like A.O. Smith have valid capacity concerns, they may ask DHEC staff to inquire into them at any time, or may petition the DHEC Board to order such a review. In this regard, A.O. Smith has the same rights and standing as any customer to see that that the public water system serving it complies with all applicable DHEC regulations, including S.C. Code Ann. Reg. 61-58.7.D(12). There is no record that A.O. Smith has ever exhausted its remedies under this regulation.

Furthermore, under S.C. Code Ann. Reg. 61-58.7.D(12), a capacity shortfall is actionable only if the capacity standard "is exceeded on a consistent basis during the peak water use months." There is no evidence that this has occurred. If that does occur, then "the system shall submit a preliminary engineering report to the Department within ninety (90) days addressing in detail any upgrade necessary to keep up with any growth in demand on the system." S.C. Code Ann. Reg. 61-58.7.D(12). This would be the appropriate means to address and correct any capacities deficiencies on the Town's system, if there were any. And a fix is very possible. The affidavit of Mayor Campolong makes it clear that the Town can correct any deficiency in water supply—and the Town reiterates that the facts show that there is none—by drilling an additional well at a cost on the order of $250,000 to $500,000. (R. p. ____; Affidavit of John Campolong, Mayor of Town of McBee (Sept. 8, 2015) at 7.) The Town is ready to undertake such a project if it is in fact required. However, as the Mayor's affidavit indicates, A.O. Smith has never approached the Town to discuss capacity concerns or asked the Town to take any action to correct them. (R. p. _____; *Id.* at 4.) A.O. Smith's refusal to take reasonable steps to work with the Town to raise and resolve its capacity concerns casts doubt on the sincerity of its capacity concerns.

B. A.O. Smith's Capacity Concerns are Specious.

A.O. Smith first raised the capacity issues it brings before this Court approximately four years after the initial construction permit for the well improvements had become final and unappealable, and approximately 20 months after the second permit for the GAC system became final. In challenging these permits, A.O. Smith did not provide DHEC with evidence supporting its contentions that adequate capacity did not exist. A.O. Smith's only contribution to the record before DHEC was a three page letter signed by its attorneys raising legal issues on which it sought review by the DHEC Board. It raises these issues in a conclusory and unsubstantiated

way. (R. p. _____; A.O. Smith Corporation's Request for Final Review (Jan. 27, 2016).) Accordingly, the evidence related to the capacity issues is found not in the agency record but in affidavits submitted in the subsequent court proceedings.

In that regard, the Town submitted the affidavits the Town's Mayor, John Campolong; the system engineer, Joseph McGougan, P.E.; and the licensed system operator for the Town's system, Joey Oliver. (R. p. _____; Affidavit of John Campolong, Mayor of Town of McBee (Sept. 8, 2015); Affidavit of Joseph W. McGougan (Sept. 9, 2015); Affidavit of Joey Oliver (Sept. 9, 2015).)

Mr. McGougan is a licensed professional engineer specializing in water and wastewater systems with over 33 years of experience. (R. p. ____; Affidavit of Joseph W. McGougan at 1.) He has served as the Town's engineer since 2008. (*Id.*) With the Town's permission he helped prepare the engineering studies for A.O. Smith's review of fire protection needs and capabilities that took place in approximately 2012. (R. p. _____; Affidavit of John Campolong, Mayor of Town of McBee at 5.) No concerns about capacity or fire suppression were raised with the Town at the time of that study. (*Id.*)

Mr. McGougan testified that he first learned of A.O. Smith's "concerns about the Town's system related to fire protection and future raw water supply" when they were raised "in a meeting A.O. Smith's lawyers held with the Town's lawyers on September 3, 2015." (R. p. ____; Affidavit of Joseph W. McGougan at 1.) This was several months after Alligator was discovered building a line to A.O. Smith to by-pass[1] the Town and after suit to stop that line had

[1] The bypass here is akin to the bypass of natural gas systems by large industrial customers who "seek to buy cheaper gas directly from the trunk system or nearby interstate pipelines." "How Natural is Monopoly? The Case of By-Pass in Natural Gas Distribution Markets," H. Broadman, and J. Kalt, 6 *Yale Journal of Regulation* at 181, 182 (1989). Here, Alligator's nearby water line serves the same function as an interstate gas transmission line. In as much as Alligator's overall

been filed. (R. p. ____; Affidavit of John Campolong, Mayor of Town of McBee (Sept. 8, 2015) at 4.) Mr. McGougan stated:

> A.O. Smith's failure to raise these issues before now is a matter of concern. If there are operational problems that jeopardized the safety of the A.O. Smith plant and the future reliability of our system, we would have expected A.O. Smith's engineers and plant management to have raised them before now.

(R. p. ____; Affidavit of Joseph W. McGougan at 1-2.) His testimony is consistent with that of Mayor Campolong:

> The first time that the Town learned that A.O. Smith was dissatisfied with its service from the Town was when we saw that construction crews were in the field installing a line to by-pass the Town's system and connect A. O. Smith's system directly to Alligator's system. We only learned the substance of A.O. Smith's concerns was when A.O. Smith agreed to have a discussion with us, albeit lawyer to lawyer.
>
> A.O. Smith has never communicated with me as mayor, or with any of our utility operations and engineering personnel, about these matters.

(R. p. ____; Affidavit of John Campolong, Mayor of Town of McBee at 4.) The failure to bring fire suppression or capacity concerns to the Town's attention and give the Town an opportunity to find a resolution to them is cogent evidence that these concerns are not being advanced with candor and sincerity.

In his affidavit, Mr. McGougan provides a full and detailed analysis of the Town's water delivery capacity as it currently stands. (R. p. ___; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 2-3.) He considers both approaches that S.C. Code Ann. Reg. 61-58.7.D(12) provides for measuring capacity requirements and resources.

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rates exceed those of the Town, this bypass attempt falls into the form of utility by-pass, known as "inefficient by-pass," where a customer "finds an alternative supplier (or self-generation) that [is not] actually lower cost than the utility, but offered a lower price." https://energyathaas.wordpress.com/2015/08/24/the-decline-of-sloppy-electricity-rate-making/ accessed December 15, 2016; *see also* (R. p. ___; Affidavit of Mayor Campolong at 6.) "The impact of bypass is destructive, the degree of harm being dependent on the size of the revenue loss." R. Conking, *Energy Pricing: Economics and Principles* at 59 (2011).

One such approach is based on "all operable wells pumping 16 hours a day." S.C. Code Ann. Reg. 61-58.7.D(12). The Town's average daily demand is 230,088 gallons per day (gpd). The capacity of its two wells "is 576,288 gpd when pumped for 16 hours a day or 250% of average daily demand." (R. p. _____; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 3.) Clearly this is sufficient capacity.

The other standard is "all operable wells minus the largest well pumping 24 hours a day." S.C. Code Ann. Reg. 61-58.7.D(12). The smaller of the Town's wells, Well No. 2, if pumped 24 hours a day "can supply in excess of 288,000 gpd, or 125% of average daily demand." (R. p. ____; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 3.) This too represents sufficient capacity.

In addition, the Town has two water tanks with a combined storage capacity of 325,000 gallons, or more than 140% of the average daily demand. (R. p. ___; *Id.*) Accordingly, if it were to lose its larger well, then with Well No. 2 and storage at 100%, the Town would begin with resources equal to as much as 265% of its average daily demand. This analysis does not take into account the effect of water usage restrictions that could be expected to be imposed if a crisis were to occur on the system and could be expected to reduce demands on the system once they were communicated to customers.

As to fire suppression, the Town maintains two elevated storage tanks. "The larger of these two tanks, Tank No. 2, was specifically engineered and constructed to provide fire flow reserves for A.O. Smith. It is located adjacent to the plant. Well No. 2 was placed adjacent to Tank No. 2 to allow it to efficiently serve A.O. Smith's fire protection reserves." (R. p. ___; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 3.) The Town's total storage capacity of

325,000 gallons is divided between 75,000 gallons in Tank No. 1 and 250,000 gallons in Tank No. 2. (R. p. ___; Affidavit of Charles K. Parnell (Apr. 5, 2016) at 2.)

As Mr. McGougan stated:

> In my engineering opinion, and based on my knowledge of the Town's system, with the two wells in operation, the Town will be fully capable of meeting 100% of all customers' requirements, including fire protection service for A.O. Smith. This is true both under normal operating conditions and in emergency conditions when Well No. 1 is out of service.

(R. p. ___; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 3.)

A.O. Smith presented the affidavit of an engineer, Mr. Parnell, who stated that the required fire flow for A.O. Smith is 1,500 gallons per minute, and the plant manager, Mr. Barron, who stated that this required fire flow is necessary for two hours. (R. p. ___; Affidavit of Charles K. Parnell (Apr. 5, 2016) at 3; R. p. ___; Affidavit of Jeff Barron (Apr. 5, 2016) at 2.) A quick calculation shows that the Town is entirely able to meet these requirements. A flow of 1,500 gallons per minute over two hours requires 180,000 gallons in total supply. Tank No. 2, located immediately adjacent to the plant, represents a capacity of 250,000 gallons. Tank No. 2 alone, if it is 72% full, is sufficient to meet A.O. Smith's requirements.

In addition to Tank No. 2, Tank No. 1 represents an additional 75,000 gallons of storage capacity that is available on the system. In addition, over a two hour period the Town's two wells represent pumping capacity of approximately 72,000 gallons–approximately 24,000 gallons for Well No. 2 and approximately 48,000 for Well No. 1.[2] So between its tanks and wells, the Town can supply a total of 400,000 gallons of water in two hours, compared to A.O. Smith's fire suppression requirement of 180,000.

[2] This is calculated by taking the 16 hour pumping capacity for the wells as listed in Mr. McGougan's Affidavit at 3 and converting it to a two hour capacity by dividing by eight.

These facts may make it easier to understand why issues related to fire suppression were not raised by A.O. Smith until after its attempt to switch suppliers and by-pass the Town's system was discovered and stopped by a lawsuit. There is simply no substance to these concerns.

As a last resort, Mr. Parnell premises his concerns about fire suppression capability based on the failure of Tank No. 2 to be filled at various times during 2015. (R. p. ___; Affidavit of Charles K. Parnell (Apr. 5, 2016) at 2.) A.O. Smith appears to have forgotten that the pumps and valves that supply water and water pressure to the Town were all operated by Alligator during this time.

Mr. McGougan and Mr. Oliver explain what the failure to fill Tank No. 2 means in detail in their affidavits. As Mr. Oliver stated:

> Alligator supplies bulk water service to the Town, and pressurizes the Town's system through its pumping schedule. . . . .
>
> There is more than enough capacity in the Town's lines and the lines to Alligator to allow the tanks to be kept full. Alligator has a 24" line that connects immediately adjacent to the tank and more than enough pumping and line capacity to ensure that the tank is kept full and regularly cycled.
>
> If the tanks were not full, it was because Alligator decided not to fill them. I am not aware of any other possible explanation. Specifically, there has been no operational problem in the Town's system that would explain the failure of the tank to be kept full. This is a matter which the Town will investigate at once.
>
> If in fact there are problems, it is disturbing that those problems have never been reported to the Town. As I said earlier, this is the first report we have had of them.

(R. p. ___; Affidavit of Joey Oliver (Sept. 9, 2015) at 7.) Mr. McGougan stated:

> Keeping Tank No. 2 filled is the key operating requirement for meeting A.O. Smith's needs for fire suppression capacity. Alligator presently monitors the water level in the . . . tank downtown and is responsible for keeping this tank filled. Due to the proximity of the two tanks and the connection to the Alligator system, if the tank downtown has water, the

> tank at A.O. Smith has water (the level at the A.O. Smith tank would hydraulically be slightly higher than the level downtown).
>
> I have reviewed Mr. Oliver's affidavit concerning the fire suppression service. What he says is completely accurate. Alligator directly meters and controls the water tanks, their levels, and the level in Tank No. 2. There is no engineering or operating constraint on the Town's system that would prevent Alligator from ensuring that Tank No. 2 is properly filled at all times. It is Alligator's operating responsibility to ensure that there is sufficient water in both tanks. If Tank No. 2 has not been filled properly, Alligator failed in its operating responsibilities.
>
> As I mentioned above, this is the first I have heard of this issue. This is a serious issue and accountability needs to be determined.

(R. p. ___; Affidavit of Joseph W. McGougan (Sept. 9, 2015) at 1.)

Accordingly, the failure to fill Tank No. 2 and to ensure fire suppression capacity for A.O. Smith could only be the result of malfeasance or neglect by Alligator. There is no other explanation. This is yet another reason supporting a decision by the Court to deny the requested stay and allow the Town to operate its own system.

A.O. Smith also points to the events of June 2015, which occurred within days of the Town filing suit to stop A.O. Smith's bypass, as evidence of capacity issues with the Town. (R. p. ___;Tr. at 38; Affidavit of Jeff Barron at 2.) However, as the affidavits of Mayor Campolong, Mr. McGougan and Mr. Oliver establish, those events –as hard to accept as it may be—appear to be the result of sabotage and misrepresentation undertaken to support the bypass effort and intended precisely to create a claim in litigation like this that the Town's service is inadequate.[3]

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[3] (*See* R. p. ___; Transcript of Hearing Before Judge Robinson, at 37-38.) When asked why A.O. Smith had concerns about the Town's water capacity such that they were appealing the permits, Mr. Lavender replied "June of 2015, they had a line—the town had a line break. **We don't know what the cause of it was**, we have read their version of it, we don't care. But the fact is, that the plant had no water pressure . . . ." (emphasis added.) But Mr. Oliver's affidavit and Mr. McGougan's affidavit establish that the line break could not have caused a loss of pressure to the A.O. Smith plant, and Mr. Oliver's affidavit establishes that the break had been fully repaired at the time the 'loss of pressure' was reported by A.O. Smith. (R. p. ___; Affidavit

In light of these facts, the Court should look very skeptically at A.O. Smith's claims that its operational requirements and fire suppression requirements will be placed in jeopardy if the Town is allowed to start is pumps and supply its own water. Whatever interests or issues may lie behind these claims, there is no basis to assume that they represent any reason to grant the relief that A.O. Smith requests.

CONCLUSION

As set forth in the Affidavits of Mayor Campolong, Mr. McGougan, and Mr. Oliver, The Town firmly believes, on good evidence, that beginning in 1999, the Town's water system was wrongfully appropriated by the leadership team of Alligator. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee; Affidavit of Joey Oliver.) Alligator did so, the Town believes, for the private gain of those who control it and at a time when Alligator employees had significant control over Town council. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee at 2-3.) In 2010, after a political backlash against Alligator, the Town of McBee began the process of taking back its water system. There is other litigation, *Town of McBee v. Alligator Water & Sewer Company, Inc., Alligator Rural Water Company, Inc., and A.O. Smith Corporation*, Circuit Court Case No. 2015-CP-13-00379, where the Town is seeking to stop Alligator from wrongfully appropriating the Town's largest customer, A.O. Smith, as a means to cripple the Town's plans to emancipate itself from Alligator. (R. p. ___; Verified Complaint.) A.O. Smith represents 60% of the Town's water revenue and is critical to sustaining that system. (R. p. ___; Affidavit of John Campolong, Mayor of Town of McBee at 1.)

In *Town of McBee v. Alligator Water & Sewer Company, Inc. et al.*, Alligator is asserting that contractual provisions and federal law prevent the Town from ever freeing itself from

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of Joey Oliver at 2-5; R. p. ___, Affidavit of Joseph W. McGougan at 6.) Furthermore, the events of June 2015 were triggered when the line to by-pass the Town's service was being constructed. Those events could not have led to A.O. Smith's decision to by-pass the Town.

Alligator, assertions which the Town denies. A.O. Smith intervened in that case to join with Alligator in arguing that Town's system must remain forever dependent on Alligator. For its part, the Town is seeking through amended claims to put the facts of Alligator's long-history of fraud, deception, self-dealing and profiteering before a jury, all as outlined in Mayor Campolong's affidavit.[4] (*See* R. p. ___; Affidavit of Mayor Campolong, Mayor of Town of McBee; *see also* R. p. ___; A.O. Smith's Motion to Intervene.)

The claims in *Town of McBee v. Alligator Water & Sewer Company, Inc. et al.*, are many. But those are not the claims to be decided here. In this case, only two questions are important: Did A.O. Smith have the right to sit back for more than five years while the Town built major water system improvements, and then challenge the DHEC construction permits under which that work was completed? Does S.C. Code Ann. Reg. 61-58.2(B)(1)(b) or 61-58.7.D(12) apply to construction permits where no expansion of service is envisioned? The clear answer to both questions is no.

For reasons of law and equity, the Court should affirm the decision of the Administrative Law Court dismissing A.O. Smith's Request for Contested Case Hearing.

Signature Page Attached

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[4] The latest episode in the conflict between the Town and Alligator involved an issue when Alligator's principal officer, Mr. Glenn Odom, ran to be elected mayor instead of Mayor Campolong. The ensuing election was overturned due to voter fraud. The McBee Municipal Election Commission found that "[r]espondent Odom manipulated and abused the political process in McBee in ways specifically intended and designed to illegally dilute the voting strength of Campolong supporters. The record reflects that Respondent Odom engaged in improper conduct and committed blatant violations of state election laws for the purpose of diluting the votes of his opponent's supporters." Order of the McBee Municipal Election Commission (Sept. 20, 2016) at 3.) The Court may properly take judicial notice of this Order. Rule 201(b), SCRE (explaining that courts may take judicial notice of facts that are "not subject to reasonable dispute"); *id.* 201(f) ("Judicial notice may be taken at any stage of the proceeding."); *see also State v. Squires*, 311 S.C. 11, 15, 426 S.E.2d 738, 740 (1992) (taking judicial notice "that the infrared spectroscopy process utilized by [an infrared breath-testing device] has gained general acceptance in the scientific community").

Respectfully submitted,

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Columbia, South Carolina
December 16, 2016

PROOF OF SERVICE

I, the undersigned Legal Assistant of the law offices of Womble Carlyle Sandridge & Rice, LLP, attorneys for Appellant, do hereby certify that I have served the below parties in this action with a copy of the pleading(s) herein below specified by mailing a copy of the same to the following address(es):

PLEADING: INITIAL BRIEF OF RESPONDENT TOWN OF MCBEE

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December 16, 2016

The South Carolina Court of Appeals
The Honorable Jenny Abbott Kitchings
1220 Senate Street
Columbia, SC 29201

Re: A.O. Smith Corporation v. South Carolina Department of Health and Environmental Control and Town of McBee
Appellate Case No. 2016-002108

Dear Ms. Kitchings:

Enclosed for filing in the case captioned above, please find the Initial Brief of Respondent Town of McBee and its Designation of Matter. Please file the originals and return clocked copies via our courier.

With kind regards, I remain

Very truly yours,

M. Todd Carroll

MTC/dj
Enclosures

cc: W. Thomas Lavender
Joan W. Hartley
Stephen P. Hightower