

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-000300

Commission Docket No. 2017-292-WS

In Re: Application of Carolina Water Service, Inc.
for Approval of an Increase in its Rates for
Water and Sewer Services

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APR 25 2019

S.C. SUPREME COURT

SUPPLEMENT TO MOTION TO REMAND TO THE SOUTH CAROLINA
PUBLIC SERVICE COMMISSION

On March 22, 2019 Appellant Carolina Water Service, Inc. (“CWS”) filed a motion pursuant to Rule 240 SCACR asking this Court to remand this action to the South Carolina Public Service Commission (“Commission”). By that motion, CWS sought an opportunity for the Commission to consider a Petition for Reconsideration (“Petition”) that CWS had filed with the Commission. CWS now submits this supplemental memorandum to provide additional information about a recent development that is relevant to the pending motion to remand.


The Petition that CWS seeks to have the Commission rule on relates to the recovery in utility rates of expenses relating to litigation in which CWS was a party. See Exhibit B to Motion to Remand. That litigation was entitled *Riverkeeper v. Carolina Water Service*. (“*Riverkeeper*”). At the time that the Petition was filed with the Commission CWS was able to inform the Commission that there were discussions about settling the *Riverkeeper* litigation but CWS was not able to provide the Commission with any information about the terms of the settlement. The

Riverkeeper case has now been settled and the settlement has been approved by the Federal Court. See Exhibit 1 – Consent Order and Final Judgment and Exhibit 2 – Final Settlement Agreement.

CWS believes that the terms of the *Riverkeeper* Settlement Agreement should be reviewed by the Commission as part of its consideration of the CWS Petition for Reconsideration. Under the applicable statutory provision that allows for reconsideration of decisions by the Commission, events and facts occurring after the order being reconsidered are expressly allowed to serve as a basis for reconsideration. See S.C. Code Ann. §58-5-330. Should this Court issue an order remanding this action to the Commission, CWS plans to supplement its Petition by submitting the approved Settlement Agreement to the Commission as additional support for the Petition. CWS submits that the Commission should have an opportunity to consider the issues stated in the Petition as supplemented with the *Riverkeeper* Settlement Agreement.

CWS respectfully submits that the settlement of the litigation that is at the center of the dispute in this action provides an additional reason why the Motion to Remand should be granted.

Dated this 25th day of April, 2019.



Frank R. Ellerbe, III (Bar No. 1866)
Samuel J. Wellborn (Bar No. 101979)
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Attorneys for Carolina Water Service, Inc.

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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION**

<p>CONGAREE RIVERKEEPER, INC.</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>CAROLINA WATER SERVICE, INC.</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">C.A. No.: 3:15-cv-194-MBS</p> <p style="text-align: center;">CONSENT ORDER AND FINAL JUDGMENT</p>
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Upon consideration of the parties' agreement, evidenced by the endorsements of the parties in the Settlement Agreement found at ECF No. 129-2 and incorporated herein by reference, and it otherwise appearing proper to do so, it is hereby:

ORDERED that the agreement and settlement documented in the Settlement Agreement executed by the Plaintiff Congaree Riverkeeper, Inc. and Defendant Carolina Water Service, Inc. is hereby approved;

ORDERED that the revised joint motion to enter consent order and final judgment, ECF No. 129, is granted, and the joint motion to enter consent order and final judgment, ECF No. 128, is denied as moot;

ORDERED that this Court expressly reserves personal and subject matter jurisdiction to enforce the Settlement Agreement against all of the parties named in the Settlement Agreement, and their affiliates, representatives, assigns and successors;

ORDERED that this Court expressly incorporates the terms of the Settlement Agreement as part of this Order; AND

ORDERED that this Court finds that there is no just reason for delay pursuant to Federal Rule of Civil Procedure 54(b), and hereby enters final judgment as to Plaintiff Congaree Riverkeeper, Inc.'s claims against Defendant Carolina Water Service, Inc.

SO ORDERED AND ENTERED this 11th day of March, 2019.

s/Margaret B. Seymour
Margaret B. Seymour
Senior United States District Judge

Columbia, South Carolina

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EXHIBIT 2

FINAL SETTLEMENT AGREEMENT

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into this 14th day of February, 2019, by and between Plaintiff Congaree Riverkeeper, Inc. (“CRK”) and Defendant Carolina Water Service, Inc., now known as Blue Granite Water Co. (“CWS”) (collectively sometimes hereinafter referred to as the “Parties”) with respect to that certain action styled *Congaree Riverkeeper, Inc. v. Carolina Water Service, Inc.*, pending in the United States District Court for the District of South Carolina, Case No. 3:15-CV-194-MBS (the “Action”).

RECITALS

WHEREAS, CRK brought, and the Parties have been litigating, the Action, which is a citizen suit under 33 U.S.C.A. § 1365 alleging violations of the federal Clean Water Act (“CWA”) arising out of the permitted discharge of treated wastewater into the Lower Saluda River by CWS from its I-20 wastewater collection, treatment and disposal system serving certain portions of Lexington County, South Carolina (“I-20 System”);

WHEREAS, summary judgment has been granted to CRK in orders issued by the United States District Court (“Court”) in the Action, which orders CWS would appeal if the Action is not otherwise resolved through settlement;

WHEREAS, pending in the Court are further proceedings for determination of any penalty for the Court’s finding of liability for CWS’s inability to obtain a connection from the Town of Lexington (“the regional facility”) for the I-20 System and on the amount of attorney’s fees for CRK;

WHEREAS, CRK maintains that the Court properly concluded that CWS had violated the CWA due to its failure to connect the I-20 System to the regional facility and eliminate its

discharge, and the Court would have imposed significant penalties as a result of these violations and granted CRK its attorneys' fees, CRK has nonetheless concluded, after analyzing the facts and law applicable to the Action, and taking into account the burdens, risks, uncertainties, and expense of litigation, that this Agreement is fair, reasonable, adequate, and in its best interest; and

WHEREAS, CWS maintains that it was lawfully operating the I-20 System under a valid NPDES permit and believes that it has not committed a violation of the CWA due to the unavailability of the regional facility to eliminate the permitted discharge from the I-20 System and its actions to eliminate the discharge, and without admitting that any such violation exists from its inability to connect to the regional facility, CWS has similarly concluded that this Agreement is desirable in order to resolve finally and completely this Action in both the best interest of its shareholders and customers.

NOW, THEREFORE, it is stipulated and agreed by CRK and CWS that the Action shall be fully and finally settled, resolved, and ended on the terms and conditions set forth below.

I. NON-MONETARY SETTLEMENT TERMS

A. Covenant Not to Sue

CRK agrees that it will not institute, bring, establish, or assert in any manner in any action, proceeding (including condemnations), claim, cause of action, suit, demand, penalty, fine, or enforcement effort, whether of a legal, equitable, administrative, executive, legislative or other nature ("Future Claim"), pertaining to or arising out of the fact that the CWS Watergate wastewater collection and disposal system serving certain portions of Lexington County ("Watergate System") has not been connected to the Town of Lexington's ("Town") regional facility, and/or the CWS Friarsgate wastewater collection and disposal system serving certain

portions of Richland County ("Friarsgate System") has not been connected to the City of Columbia's ("City") regional facility. CRK's release of its claims regarding CWS's failure to connect its Watergate and Friarsgate facilities shall be applicable for only 5 years from the date of the execution of this agreement. CRK further agrees that it will not suggest, encourage, counsel, advise, or in any other manner support any other person or groups of persons (including but not limited to (i) incorporated or unincorporated associations or organizations, (ii) courts, (iii) Federal, state, regional, or local governmental agencies, (iv) political subdivisions of the governing bodies thereof, (v) Federal, state, regional or local government executives or legislators, or (iv) persons or entities of any other type, form, or nature whatsoever) to threaten, support, institute, bring, establish, or assert in any manner any such Future Claim regarding the fact that the Watergate System and Friarsgate System are not connected to the Town's and City's regional facilities.

B. Connection of Watergate System

CWS agrees that it will undertake the following steps with respect to the elimination of the current discharges from the Watergate System:

1. CWS is seeking a wholesale service agreement from the Town for submission to the Public Service Commission of South Carolina ("PSC") for approval. Upon PSC approval of a connection agreement between CWS and the Town, and completion of this connection, CWS will eliminate the discharge from the Watergate System into Fourteen Mile Creek and operate the approved connection.

2. In the event that the Town refuses to offer wholesale treatment service to CWS for purposes of giving effect to the connection contemplated herein, or the PSC withholds approval of the contract pertaining to same, CWS agrees that it will not file

an action objecting to the Town's right to take the Watergate System through a condemnation proceeding.

C. CRK Support for Connection of Watergate System

CRK agrees that it will publicly support CWS's efforts to connect the Watergate System to the Town's regional facility and to eliminate the discharge as contemplated above. To comply with its obligations in this regard, CRK shall not be required to become a party to any judicial or administrative proceedings. However, CRK will provide an appropriate public statement of support for the applicable CWS initiative to achieve elimination of this discharge for dissemination to the media.

D. Non-Disparagement/Communications about the Settlement

The Parties agree that they will not communicate about this Agreement or the Action until the Court's approval of the Settlement Agreement. Once the Settlement Agreement is approved, the parties agree that if they desire to communicate about this Agreement or the Action, they may do so only to the extent those communications are consistent with the terms set forth in Exhibit A.

II. MONETARY SETTLEMENT TERMS

CWS will make the following payments within 30 days of the Court's approval of the Settlement Agreement.

A. Payment to CRK's Counsel

Via wire transfer, CWS will pay to CRK's counsel, Southern Environmental Law Center, the sum of Three Hundred Eighty-Five Thousand and no/100ths Dollars (\$385,000.00).

B. Donation to the Central Midlands Council of Governments

In furtherance of CRK's mission and purpose, CWS will donate to the Central Midlands Council of Governments ("CMCOG") the sum of Three Hundred Fifty Thousand and no/100ths Dollars (\$350,000.00) to be used for the following purposes:

1. \$250,000.00 to support water quality monitoring initiatives of the Midlands Rivers Coalition; and
2. \$100,000.00 to support the CMCOG's revisions to, and implementation of, its Section 208 Water Quality Management Plan.

Two checks from CWS payable to CMCOG in these amounts will be jointly presented to CMCOG by CRK and CWS.

C. Payment to the United States Treasury

CWS will pay into the United States Treasury Twenty Three Thousand and no/100ths Dollars (\$23,000.00) in full satisfaction of any obligation owed by CWS resulting from the operation of the I-20 System.

III. EFFECT OF THE COURT'S APPROVAL OF THE SETTLEMENT AGREEMENT

CRK agrees that the Court's approval of the Settlement Agreement will constitute, and have the identical effect, of a full and complete release of CWS from any and all liability with respect to the matters raised or that could have been raised regarding the I-20 System in the Action.

IV. REPRESENTATIONS AND WARRANTIES

A. CRK represents and warrants that it has all requisite corporate power and authority to execute, deliver, and perform this Agreement, that its signatory below is fully

authorized to enter into same, and that no further or additional authorization is needed for its counsel to execute and deliver this Agreement. The execution, delivery, and performance by CRK of this Agreement and the consummation by it of the actions contemplated herein have been duly authorized by all necessary corporate action. This Agreement has been duly and validly executed and delivered by CRK and constitutes its legal, valid, and binding obligation.

B. CWS represents and warrants that it has all requisite corporate power and authority to execute, deliver, and perform this Agreement, that its signatory below is fully authorized to enter into same, and that no further or additional authorization is needed for its counsel to execute and deliver this Agreement. The execution, delivery, and performance by CWS of this Agreement and the consummation by it of the actions contemplated herein have been duly authorized by all necessary corporate action. This Agreement has been duly and validly executed and delivered by CWS and constitutes its legal, valid, and binding obligation.

V. MISCELLANEOUS

A. Neither this Agreement, nor any exhibit, document, or instrument delivered as part of this Agreement, nor any statement, transaction, or proceeding in connection with the negotiation, execution, or implementation of this Agreement is intended to be or shall be construed as or be deemed to be evidence of any admission or concession by CWS of any liability or wrongdoing, or of the truth of any allegation in the Complaint, or that CWS does not have viable grounds to challenge the Court's grant of summary judgment in favor of CRK, or that the Court would not have denied penalties or limited attorneys' fees consistent with the arguments that CWS made in the pending briefing, had the parties not entered into this Agreement. Nothing in this Agreement, nor any exhibit, document, or instrument delivered as part of this Agreement, nor any statement, transaction, or proceeding in connection with this

Agreement is intended to be or shall be construed as evidence of any admission or concession by CRK that the Court would not order penalties or attorneys' fees consistent with arguments that CRK made in the pending briefing had the parties not entered into this Agreement. Notwithstanding the foregoing, CWS shall have the absolute and unfettered right to use the filed Settlement Agreement in any proceeding, judicial, administrative, legislative or otherwise, to establish that the Action has ended after the Court's finding of liability but before the resolution of penalties and attorneys' fees, except that CWS or its agents and/or owners may not use this Agreement to seek vacatur of the Court's March 30, 2017 summary judgment order or of any other final order issued by this Court.

B. This Agreement, including all Exhibits attached hereto, constitutes the entire agreement by and among the Parties with regard to the subject of this Agreement, and shall supersede any previous agreements and understandings between the Parties with respect to the subject matter of this Agreement. This Agreement may not be modified or amended except in writing signed by all Parties hereto.

C. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same document.

D. Any notice, request, instruction, or other document to be given by any party to this Agreement to any other party to this Agreement shall be in writing and delivered personally, or sent by overnight delivery service, or by United States Postal Service Priority Mail, Signature Confirmation Requested, as follows:

For CWS:

John M. S. Hoefler, Esquire
Chad N. Johnston, Esquire

Ms. Catherine E. Heigel
President, Carolina Water Service, Inc.

Willoughby & Hoefler, P.A.
P.O. Box 8416
Columbia, SC 29202-8416

130 S. Main Street, Suite 600
Greenville, SC 29601

Rita Bolt Barker, Esquire
Wyche, P.A.
P.O. Box 728
Greenville, SC 29601

with copy to:
Laura K. Granier, Esquire
Vice President and General Counsel
Utilities, Inc.
2335 Sanders Road
Northbrook, IL 60062

For CRK:

Catherine Wannamaker, Esquire
Blan Holman, Esquire
Southern Environmental Law Center
463 King Street, Suite B
Charleston, SC 29403

with copy to:
Bill Stangler
Congaree Riverkeeper
1001 Washington Street, Suite 201
Columbia, SC 29201

E. This Agreement shall be construed in accordance with South Carolina law without regard to its choice of law rules. In the event that a dispute with respect to this Agreement shall arise after the Court's approval of the Settlement Agreement, the Parties agree that the matter may be submitted to this Court for resolution under a breach of contract cause of action and no other. The Parties further agree that they shall bear their own costs in the event

that a disputed matter under the Agreement is submitted for resolution under the terms of this section.

F. The recitals set out in the preamble herein shall be deemed to have the same legal effect as if they had been set forth in the body of this Agreement and constitute consideration for terms and conditions set out herein. The headings herein, however, are used for the purpose of convenience only and are not meant to have legal effect.

G. The waiver by any Party of any breach of this Agreement or any term or condition hereof by any other Party shall not be deemed a waiver of any other prior or subsequent breach of this Agreement or any term or condition hereof.

H. This Agreement shall not be construed more strictly against one party than another merely by virtue of the fact that it, or any part of it, may have been prepared by counsel for one of the Parties, it being recognized that it is the result of arm's-length negotiations between the Parties and all parties have contributed substantially and materially to the preparation of this Agreement.

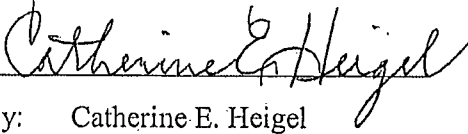
I. The Parties shall in good faith fully cooperate with each other in discharging the duties and implementing the terms of this Agreement.

J. In addition to the acts recited in this Agreement, the Parties agree to perform or cause to be performed on the date of this Agreement or thereafter any and all such further acts as may be reasonably necessary to consummate the transactions contemplated hereby.

WHEREUPON, having fully set forth their agreement, the Parties have set their hands and seals on the date first stated above.

Blue Granite Water Co.

Congaree Riverkeeper, Inc.



By: Catherine E. Heigel

Its: President

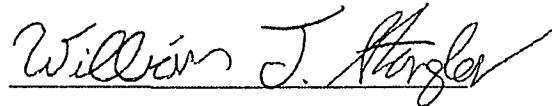
By: Bill Stangler

Its: Executive Director

WHEREUPON, having fully set forth their agreement, the Parties have set their hands and seals on the date first stated above.

Blue Granite Water Co.

Congaree Riverkeeper, Inc.



By: Catherine E. Heigel

By: Bill Stangler

Its: President

Its: Executive Director

EXHIBIT A
COMMUNICATION POINTS

1. Congaree Riverkeeper, Inc. ("CRK") and Carolina Water Service, Inc., now known as Blue Granite Water Co. ("Blue Granite") have resolved the dispute between them that has been the subject of an action in the United States District Court of the District of South Carolina under the federal Clean Water Act ("Act").
2. Blue Granite disagrees with the Court's finding that it was liable for failing to connect to the Town of Lexington's regional facility or that Blue Granite could be lawfully enjoined from continuing to operate and discharge under its NPDES permit for the I-20 facility and would have appealed that decision but for this settlement. Blue Granite further believes that the Court could not have lawfully imposed penalties or attorneys' fees based on the arguments it has made about its good faith efforts to comply with the Act and inability to obtain a connection without the Town of Lexington's willingness and cooperation.
3. CRK believes that the Court properly found Blue Granite to be liable for failing to connect to the regional facility but has settled the remaining penalty and attorneys' fees issues in an effort to conclude this litigation and to ensure that penalties are spent on important water quality issues in South Carolina.
4. As part of the resolution of the dispute between CRK and Blue Granite, Blue Granite will make the following payments: (a) \$385,000 to CRK's counsel, Southern Environmental Law Center, (b) \$350,000 to the Central Midlands Council of Governments ("CMCOG") to be used to support water quality monitoring initiatives of the Midlands Rivers Coalition and CMCOG's revisions to, and implementation of, its Section 208 Water Quality Management Plan; and (c) \$23,000 to the United States Environmental Protection Agency.
5. In any communications about the Action or this Agreement, either party may reference facts established in any public document filed with the Court, including either parties' pleadings, exhibits, or other official records.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Appellate Case No. 2019-000300

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S.C. SUPREME COURT

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC, have served the **Supplement to Motion to Remand to the South Carolina Public Service Commission** on the parties below by placing a copy of same in the United States Mail, postage prepaid, in envelopes addressed as follows:

The Public Service Commission of
of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Laura P. Valtorta, Esquire
Valtorta Law Office
903 Calhoun Street
Columbia, SC 29201

Jeffrey M. Nelson, Esquire
Andrew M. Bateman, Esquire
Steven W. Hamm, Esquire
Office of Regulatory Staff
1401 Main Street, Suite 900
Columbia, SC 29201

James S. Knowlton
306 Brookside Drive
Fort Mill, SC 29715

Dated this 25th day of April, 2019.

