

Exhibit A

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Snee Farm Lakes Homeowner's)
 Association, Inc., individually and on)
 behalf of those similarly situated,)
)
 Plaintiff,)
)
 vs.)
)
 The Commissioners of Public Works for the)
 Town of Mount Pleasant d/b/a Mount)
 Pleasant Waterworks,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2764

ORDER GRANTING PLAINTIFF'S
 MOTION FOR CLASS
 CERTIFICATION

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 JULIE J. ARMSTRONG
 CLERK OF COURT

FILED

This matter came before the Court May 31, 2019 on Plaintiff Snee Farm Lakes Homeowner's Association, Inc.'s Motion for Class Certification. After consideration of the parties' arguments, including their briefs in support and opposition, and as set forth more fully below and herein, this Court now grants Plaintiff's Motion for Class Certification and certifies the Plaintiff Class.

INTRODUCTION

This case involves Plaintiff's refund claim for excessive Basic Facility Charges ("BFC") charged by Defendant Commissioners of Public Works for the Town of Mount Pleasant d/b/a Mount Pleasant Waterworks ("MPW"). MPW is a municipal water and sewer authority established pursuant to ordinance of the Town of Mount Pleasant and governed by Sections 5-31-210-270 of the South Carolina Code. It is a government entity that enjoys a monopoly in its service area for providing water and sewage services to Plaintiff and other commercial customers.

Plaintiff is a non-profit homeowners' association that owns, manages, and maintains the common elements identified in Snee Farm Lakes' restrictive covenants. The Snee Farm Lakes

development has a single water meter, and MPW bills Plaintiff monthly for water and sewage service. Plaintiff is the MPW customer, not the individual owners in the Snee Farm Lakes development.

MPW charges its customers, including Plaintiff, monthly BFC in addition to traditional volumetric rates based on meter readings. According to MPW's Cost Recovery Policy 7.2 (April 2015 version), BFC "provide equity and stability" by recovering MPW's "fixed costs" including, but not limited to, renewal and replacement debt service, capital costs, operating and maintenance costs, and general administrative costs.¹

BFC are calculated based on the number of Residential Equivalent Units ("REU") assigned to each account. One REU is equal to 300 gallons per day (9,000 gallons per month). MPW assigns each customer a certain number of REU prior to establishing service based on consumption demand assumptions administered and ultimately accepted by MPW. The customer pays MPW a one-time "impact fee" based on the number of REU assigned to the account. MPW then uses this same consumption demand estimate (the REU assignment) to calculate BFC on an ongoing monthly basis thereafter. Specifically, MPW calculates each customer's BFC charge by multiplying the number of assigned REU by the prevailing BFC rate (\$X per REU).

Plaintiff alleges its and the Class's actual water use has for many years been much less than their assigned REU projections, and as a result, they have paid excessive BFC. And Plaintiff contends Defendant knew of these overcharges since at least November 2014, when it received a memorandum from an outside consultant, CDM Smith, Inc., which concluded "approximately 700

¹ Policy 7.2 was amended in June 2018, after this lawsuit was filed, by adding the following language: "The BFC is a charge for the reservation of capacity based on the total active REUs assigned to a property. To ensure the purchased capacity remains available, all BFCs must be paid." Nowhere does Policy 7.2 (April 2015 version) speak to the concept of "reservation of capacity," a concept discussed extensively by MPW in its opposition to class certification.

customers used less than their allocated REUs in 2013” and there were 4,400 REU (or 475.2 million gallons) allocated to commercial accounts that were “unused.” Although shortly thereafter MPW notified 60 customers they had *insufficient* REU in 2014 (and were underpaying BFC), MPW did not notify customers with excessive REU (who were overpaying BFC) until early 2018 when it notified 288 accounts with excessive REU based on an internal 2017 audit. These notification letters offered no refund of any kind, only an administrative process whereby customers could request a REU reduction prospectively.

The thrust of Plaintiff’s claims is that MPW owes a non-delegable duty to charge just and reasonable rates based on actual use, and its practice of overcharging customers based on inaccurate, outdated REU assignments is unlawful. See S.C. Code Section 5-31-250 (“The board of commissioners of public works of any city or town . . . may supply and furnish water to citizens of the city or town . . . and may require payment of such rates, tolls and charges as it may establish for the use of water . . .”) (emphasis added); *Simons v. City Council of Charleston*, 181 S.C. 353, 187 S.E. 545 (1936) (holding municipal water rates must at all times be “reasonable”).

Besides failing to notify customers of these overcharges until 2018, Plaintiff alleges MPW never periodically adjusted Plaintiff’s and other customers’ REU assignments to ensure they remain consistent with actual use. According to Plaintiff, this caused the overcharges at issue in this case. MPW contends it is the customer’s responsibility to petition MPW for REU reductions if the customer wants to be charged only for the water it actually uses. Plaintiff responds by claiming, as a matter of law, MPW cannot skirt its obligation to charge just and reasonable rates based on actual use by delegating the duty to adjust REU assignments to customers; MPW is better positioned than customers to perform this function based on its possession of the data, technical expertise, and incentive to project accurate demand; and customers face paying excessive use

charges and expensive impact fees if REU are dropped too low. Set forth below are the findings of fact and conclusions of law in favor of class certification.

STANDARD OF REVIEW

Rule 23(d)(1), SCRCF provides: "As soon as practicable, after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." The Supreme Court of South Carolina "has expressed the viewpoint that class actions are favored in this state[.]" *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2010). Undergirding this sentiment is the rationale that "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Id.* (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

A party seeking class certification must demonstrate:

- 1) the class must be "so numerous that joinder of all members is impracticable;"
- 2) there must be "questions of law or fact common to the class;"
- 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;"
- 4) "the representative parties [must] fairly and adequately protect the interests of the class;"
- and 5) "the amount in controversy [must] exceed[] one hundred dollars for each member of the class.

Gardner v. S.C. Dep't of Revenue, 353 S.C. 1, 20–21, 577 S.E.2d 190, 200 (2003) (alterations in original) (quoting Rule 23(a), SCRCF). "The first four criteria are often referred to as the requirements for numerosity, commonality, typicality, and adequacy of representation." *Id.* Whether a class should be certified rests in the discretion of the trial court. *King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009). In reviewing a motion to certify a class, the Court should accept the allegations in the pleadings as true and may not look to the merits of the

claims. *Anselmo v. West Paces Hotel Grp., LLC*, 2011 WL 1049195 at *19 (D.S.C. 2011); *Middleton v. SunStar Acceptance Corp.*, No. CIV.A. 98-CP-07-1131, 2000 WL 33385388, at *3 (S.C. Ct. Comm. Pleas Jan. 13, 2000).

Class Definition

The Class is defined as all current and former MPW commercial customers who paid excessive BFC in excess of \$100, defined as a customer's average daily usage from January 1, 2014 (or any later date of service inception) to present being less than that customer's assigned REU. Excluded from the Class are:

- a. Defendant, its legal representatives, elected officials, officers, directors, assigns, and successors;
- b. The judge, magistrate, and any special master to whom this case is assigned, and any member of their immediate families; and
- c. To the extent the class certification order permits exclusion, all account holders that timely submit proper requests for exclusion from the plaintiff class.

Rule 23 Requirements Are Met

As a threshold matter, Defendant asserts Plaintiff lacks standing to bring this claim because it has suffered no injury. I find this contention wholly without merit.

A party bringing suit may acquire standing by statute, through the rubric of Article III standing, or under the public importance exception.² *ATC S., Inc. v. Charleston Cnty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008). Under a constitutional standing analysis: (1) a party must "have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest[.]" (2) "a causal connection must exist between the injury

² There is no suggestion Plaintiff has standing pursuant to statute or under the public importance exception; therefore, the Court's analysis is confined to Article III standing.

and the challenged conduct[,]” and (3) “it must be likely that a favorable decision will redress the injury.” *Youngblood v. S.C. Dep’t of Soc. Servs.*, 402 S.C. 311, 317–18, 741 S.E.2d 515, 518 (2013).

Defendant claims Plaintiff has not suffered an “injury-in-fact” because the cost of water is allegedly passed on to the unit owners through regime fees. However, this assertion misses the point. Plaintiff is a MPW customer that receives monthly water bills. According to Plaintiff’s lawsuit, the bills it received—and paid—included excessive BFC for years and therefore it is entitled to a refund for this overcharge. The individual unit owners in the Snee Farms Lake development, however, are *not* MPW customers, have no direct relationship with MPW, and therefore, have no standing to bring this case. Whatever other contractual agreements Plaintiff may have with its members do not undermine Plaintiff’s standing as an overcharged MPW customer for purposes of this case and class certification.³

I. Numerosity

The Class is so numerous that joinder of all members as plaintiffs is impracticable. No specific number of potential class members is required to satisfy numerosity. *Brady v. Thurston Motor Lines*, 726 F.2d 136, 145 (4th Cir. 1984). However, “[g]enerally, classes consisting of forty

³ Furthermore, even if I were to accept Defendant’s analysis, Plaintiff would have associational standing to bring suit for its member owners. “The three part test for associational standing requires that an association’s members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass’n*, 407 S.C. 67, 76, 753 S.E.2d 846, 851 (2014). Here, Defendant asserts the homeowners would possess any potential claim. As to the interests at issue, Plaintiff’s purpose is to provide amenities to its owners, including water and wastewater services, and therefore the claims are aligned with its function. Finally, the claims asserted do not require the involvement of any owner, because the issue raised is the charge relative to Plaintiff’s overall usage rather than use by a single owner.

or more members are considered sufficiently large to satisfy the impracticability requirement.” *Am. Sales Co., LLC v. Pfizer, Inc.*, 2017 WL 3669604 (E.D. Va. 2017) (citing *Meijer, Inc. v. Warner Chilcott Holdings, Co., Ltd.*, 246 F.R.D. 293, 301 (D.D.C. 2007)).

“[T]he size of the class is not the only consideration relevant to the impracticability inquiry.” *Am. Sales Co., LLC.*, 2017 WL 3669604 at *9-10. Instead, courts should consider other factors such as judicial economy, financial resources of class members, the overlapping or duplicative nature of the potential claims, and, given the economics of litigation, whether class members would be effectively barred from pursuing their claims absent certification. *Id.*

The Class includes all commercial customers who paid excessive BFC based on their average daily usage records since January 1, 2014. Plaintiff’s definition of “excessive” mirrors the average daily use methodology MPW uses when calculating impact fees and assigning REU at service inception. Plaintiff claims that, as defined, the Class includes over 400 accounts. Defendant argues that each customer’s claims are factually distinct and render the numerosity requirement impossible for Plaintiff to meet. This Court disagrees. As discussed more fully *infra*, the Class and its attendant claims are addressed to commercial customers charged excessive BFC. MPW’s own 2017 Audit, which used a more conservative highest quarter average definition of “excessive,” found 288 accounts had excessive REU based on the last three years of actual use records. Consequently, I find the number of members makes joinder impracticable in satisfaction of Rule 23(a)(1).

II. Commonality

Common questions of law and fact exist as to all members of the Class. Rule 23(a)(2) requires that a party seeking to certify a class demonstrate that “there are questions of law or fact common to the class.” Practically, “this means the party must articulate the existence of significant

common, legal, or factual issues which bind the proposed class together.” *Gardner v. S.C. Dep’t of Revenue*, 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003) (internal quotation marks omitted). However, commonality does not demand that *every* issue in the case be common to all class members, but instead would be met where the class shares a determinative issue. *Id.* at 21, 577 S.E.2d at 200–01. “In fact, a single common issue will suffice if it is important enough.” *McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 158 (Ct. App. 1986) (citing H. Lightsey & J. Flanagan, *South Carolina Civil Procedure* 198 (2d ed. 1985)).

In this case, Plaintiff alleges the Class’s claims arise from a uniform course of conduct involving common questions of law and fact. These issues include, but are not limited to:

- a. Whether under the facts and circumstances of this case, state law prohibits MPW from imposing and collecting excessive BFC based on REU estimates that exceed actual usage.
- b. Whether Plaintiff and the Class members have suffered financial damages and MPW owes refunds associated with its imposing and collecting excessive BFC based on REU estimates that exceed actual usage.
- c. Whether MPW can continue charging BFC based on REU estimates that exceed actual usage, as it has traditionally done.

The critical issues dominating the claim of every Class member are (1) whether MPW can legally charge BFC based on REU assignments inconsistent with actual use, and (2) who has the burden of periodically adjusting each customer’s REU assignment to ensure customers are not overcharged. MPW argues BFC are “reservation of capacity” charges that do not have to be connected to actual use. Plaintiff disputes this notion by, among other things, observing the language “reservation of capacity” was only added to the definition of BFC after this lawsuit was filed.⁴ MPW further argues it has no legal obligation to monitor usage to ensure accurate REU

⁴ Footnote 1, *supra*.

assignments, and customers have the obligation to petition for reductions or increases. Plaintiff disagrees, arguing state law requires that MPW at all times charge just and reasonable rates based on the “use” of water.⁵

Whether Plaintiff or Defendant is right about these two core issues is for another day. However, for the purposes of class certification, this Court recognizes both questions are embedded in the claims of every Class member. Resolution of these questions all but resolves each Class member’s claim. The class action mechanism was designed to efficiently resolve cases like this where common issues are present amongst hundreds of potential plaintiffs. For these reasons, I find that based upon the common questions presented, Plaintiff has met its burden as to commonality as required by Rule 23(a)(2).

III. Typicality.

The tenets of commonality and typicality are often dealt with as one in terms of class certification. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (“The commonality and typicality requirements of Rule 23(a) tend to merge.”). “To establish the typicality requirement, the ‘claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.’” *Pope v. Heritage Cmty., Inc.*, 395 S.C. 404, 422, 717 S.E.2d 765, 774 (Ct. App. 2011) (alterations in original) (quoting Rule 23(a)(3)). Decisions construing

⁵ I also reject Defendant’s argument that possible statute of limitation defenses would vary among the Class and defeat commonality. Simply stating that a customer may have known that it was overpaying BFC is not the same as that customer recognizing it had a claim against a municipal authority. Plaintiff’s case is based on an allegation that MPW has acted illegally and contrary to its statutory obligations. A customer is allowed to presume the government is acting lawfully. *See S.C. Nat. Bank v. Florence Sporting Goods, Inc.*, 241 S.C. 110, 115–16, 127 S.E.2d 199, 202 (1962) (“[P]ublic officers are presumed to have properly discharged the duties of their offices and to have faithfully performed the duties with which they are charged.”). In any event, class certification is not a ruling on MPW’s defenses, which can be raised and resolved on a class wide basis as the litigation proceeds.

Rule 23(a)(3) have given it a liberal construction, holding that a claim is typical if it arises from the same events, practices, or course of conduct that gives rise to the claims of other class members, and if the claims are based on the same legal theories. *See* H. Newberg, *Newberg on Class Actions* § 3:29 (5th ed. 2011) (collecting cases). Generally, “[w]here the class representatives’ claims are such that they will have to prove the same elements as the remainder of the class, then typicality should be found notwithstanding factual differences between various members of the class.” *Brown v. Cameron-Brown Co.*, 92 F.R.D. 32, 38 (E.D. Va. 1981).

Defendant focuses much of its attention on how initial REU assignments are processed, an observation that the Class would potentially include hospitals, restaurants, and other business that may operate differently than an HOA, and the allegation that some customers may have decided to maintain excessive REU and pay excessive BFC. I find these distinctions fail to demonstrate that Plaintiff’s claims are atypical of the Class.

Plaintiff’s case does not involve an attack on the initial REU assignment or seek any impact fee refunds. Nor do Plaintiff’s claims relate to whether certain Class members decided to purchase additional REU at the impact fee stage for business purposes.⁶ Rather, Plaintiff challenges MPW’s practice of basing BFC on the initial REU assumptions and never periodically adjusting REU assignments to ensure they remain consistent with actual use. Fundamental legal questions over whether and under what circumstances REU adjustments must be made and who must make them predominate the Class. Of course, hospitals, restaurants, and HOAs use water services differently, but that is irrelevant to this case. All implicated customers who comprise the Class, like Plaintiff, would have a refund claim for past excessive BFC.⁷

⁶ For this reason, the affidavit submitted by Jason Ward with Landmark Enterprises, Inc. does not defeat class certification. Notably, Mr. Ward takes no position on whether refunds for past excessive BFC should be paid.

⁷ Defendant also attempts to draw distinctions in the fact that Plaintiff never sought a reduction of

Given the foregoing, Plaintiff's claims arise from the same nucleus of operative facts and are intended to correct and prevent the same improper conduct that has impinged identically on Plaintiff and members of the Class. I therefore find Plaintiff's claims are typical of the Class in satisfaction of Rule 23(a)(3).

IV. Adequacy of Representation.

To satisfy the Rule 23(a)(4) requirement that that named plaintiff fairly and adequately protect the interests of the class, the Court must examine: "(1) whether class counsel are qualified, experienced, and generally able to conduct the proposed litigation; and (2) whether Plaintiff[s] claims are sufficiently interrelated with and not antagonistic to the class claims as to ensure fair and adequate representation." *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 561 (D.S.C. 2000). "The kind of antagonism that will defeat the maintenance of a class action is the kind which relates to the subject matter in controversy, as when the named representative has a claim which conflicts with the economic interests of the class." *Waller v. Seabrook Island Prop. Owners Ass'n*, 300 S.C. 465, 468, 388 S.E.2d 799, 801 (1990).

Defendant does not challenge the adequacy of counsel, and this Court finds counsel for the Class are professionally competent to conduct this particular litigation. Plaintiff's counsel have significant collective experience prosecuting complex and class litigation, and they are qualified to prosecute the claims of all Class members.

However, Defendant takes issue with Plaintiff as an adequate representative of the Class, revisiting many of the challenges to commonality and typicality the Court has already rejected within this Order. Defendant's assertions that the Class members have distinct claims and interests

its REU and cannot show that other commercial customers chose not to reduce their REU for the same reasons. As discussed regarding commonality, Defendant's assertions assume its customers had the burden of regulating their own rates. This is a core legal question Plaintiff's suit seeks to address.

all assume MPW is not legally required to monitor and regulate REU assignments and make customary adjustments as part of charging a reasonable rate. It is the validity of this legal assumption that lies at the heart of Plaintiff's claims and is typical of the Class—all of whom have claims predicated on whether the law allows MPW to charge them in this manner, and if not, whether they are entitled to a refund.

MPW also suggests Plaintiff lacks sufficient understanding of the case to serve as Class representative. Plaintiff is not required to be so conversant with the facts and legal theories of the case to brief its own arguments. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) (holding as “hornbook law” that “[i]n a complex lawsuit, such as one in which the defendant’s liability can be established only after a great deal of investigation and discovery by counsel against a background of legal knowledge, the representative need not have extensive knowledge of the facts of the case in order to be an adequate representative.” (alteration in original) (internal quotation omitted)). Having reviewed the Rule 30(b)(6) deposition testimony of Plaintiff submitted by Defendant with its opposition brief, I find that Plaintiff, aided by its experienced counsel, will adequately represent and protect the interests of the Class. Plaintiff understands the basis of the BFC refund claim and the Class it seeks to represent. All members of the Class sustained damages arising out of Defendant’s uniform conduct toward Plaintiff and all members of the Class. Plaintiff is committed to pursuing this action, and Plaintiff’s claims benefit and are coextensive with those of all Class members. Contrary to MPW’s argument, Plaintiff need not be in a position to declare what other Class members’ REU assignments ought to be. A core legal, and disputed, issue in this case is whether customers even have this responsibility at all.

V. The Amount in Controversy.

The final prong of Rule 23 requires that each class member have a claim in excess of \$100.

Here, the proposed Class is comprised of MPW commercial customers that have paid excessive BFC in excess of \$100. As a result, this element is satisfied.

CONCLUSION

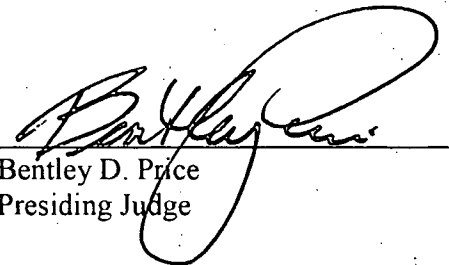
As set forth herein, this Court finds Plaintiff has met its burden of demonstrating that each requirement for class certification is satisfied. Although Defendant artfully challenges the motion, focusing on individual customers as evidence that any claims are distinct, I find that the overarching issues predominating the class are whether (1) MPW can legally charge BFC based on REU assignments inconsistent with actual use and (2) whether MPW is required to monitor and adjust REU assignments as part of its duty to charge reasonable BFC. If Plaintiff is right, then any individual action by Class members regarding REU adjustments are irrelevant. If MPW is right, then the claims of the Class all but fall apart and this issue will be one decided for all customers that follow. Accordingly, I find that class certification promotes the interests of judicial economy, efficiency, and fairness to all parties.

IT IS HEREBY ORDERED THAT:

1. The Class is certified on all causes of action;
2. Snee Farm Lakes Homeowner's Association, Inc. is appointed Class representative;
3. Clayton B. McCullough, Ross A. Appel, James L. Ward, Jr., and Ranee Saunders are appointed Class Counsel.

AND IT IS SO ORDERED.

DATED: June 14th 2019


Bentley D. Price
Presiding Judge