

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2020-CP-08-00821

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Nov 03 2020

SC Court of Appeals

City of Goose Creek,.....Appellant,

v.

South Carolina Public Service Authority,.....Respondent.

MOTION TO EXPEDITE APPEAL

Pursuant to Rule 240, SCACR, Appellant City of Goose Creek (“Goose Creek” or the “City”) respectfully moves to expedite the proceedings in this case because the outcome of these proceedings will have an immediate and significant effect on the livelihoods of thousands of people in the state. If this case is not decided before the end of the year, a large aluminum smelting facility which directly employs 300 people in Berkeley County will close permanently, depriving the state of this valuable economic resource and job-generating engine in the middle of a pandemic. Goose Creek therefore respectfully requests that this case be argued and decided before the end of the year in order to prevent this harm.

The issue in this case is whether Goose Creek has the right to provide municipal electrical service to the Mt. Holly Aluminum Smelter (the “Mt. Holly Smelter” or “Smelter”), a current customer of the South Carolina Public Service Authority (“Santee Cooper”), following annexation

by Goose Creek of the land on which the Smelter sits. The Circuit Court incorrectly held that Goose Creek is prohibited from providing such service on the grounds that (1) “Santee Cooper has the exclusive right to provide electrical service” to the Smelter pursuant to S.C. Code Ann. § 58-31-440, and (2) Goose Creek is prohibited from providing such service unless and until it “follows the requirements of S.C. Code Ann. § 58-27-1360 which mandates the only way a municipality may oust a current service provider from its statutorily assigned service territory.” (Exhibit A, Order at 21). Furthermore, the Circuit Court also erroneously declared *sua sponte* that Goose Creek improperly delegated governmental authority to the Smelter’s owner in the agreement to annex the land on which the Smelter sits, thereby barring the annexation from proceeding. In so holding, the Circuit Court reached the opposite conclusion as the Federal Energy Regulatory Commission (“FERC”), which, just weeks prior to the Circuit’s Court’s decision, issued its own decision determining that Goose Creek has the right to serve the Smelter under both federal and South Carolina law. (Exhibit B).

The Circuit Court’s ruling, left undisturbed, will leave the Smelter without an economically feasible supply of electricity, which will force it to close at the end of the year. The Smelter is a long-standing economic engine in Berkeley County that, when operating at full capacity, directly provides about 600 high-paying blue-collar jobs, hundreds more indirect jobs, and nearly \$1 billion in annual economic impact. Now, due to the Circuit Court decision, the owner of the Smelter, Century Aluminum of South Carolina, Inc. (“Century”), has issued a notice pursuant to the Worker Adjustment and Retraining Notice (WARN) Act to its employees and the City that the Smelter will permanently close at the end of the year. (Exhibit C). The loss of the Smelter will have a profoundly negative economic impact on the state at large, while directly and significantly harming the local economies of Goose Creek and Berkeley County in particular. It is imperative to Goose

Creek that these jobs and economic activity not be lost due to a delay in review of the erroneous decision of the Circuit Court on these legal issues.

BACKGROUND

A. Formation of the Goose Creek Municipal Utility.

The Mt. Holly Smelter is located in unincorporated Berkeley County, adjacent to the City of Goose Creek, and has been an integral part of the local community and economy since 1980.¹ Due to the energy-intensive nature of aluminum smelting, the Smelter annually uses the same amount of power as approximately 250,000 homes when operating at full capacity. Thus, the cost of electric power is the single most important input in determining the economic viability of the Smelter. The Smelter receives its electricity from the state-owned utility Santee Cooper, and the rate Santee Cooper charges the Smelter for electricity is nearly double the price of power on the open market. The Smelter has tried for years to find a solution to the problem of Santee Cooper's uneconomic rates, but Santee Cooper has blocked these efforts at every turn. Thus, in 2015, as a direct result of Santee Cooper's intransigence, Century was forced to shut down half of the Smelter's operations, putting approximately 300 people out of work and resulting in hundreds of millions of dollars in annual economic loss to Goose Creek and the surrounding community. Furthermore, Century has publicly announced that—due to Santee Cooper's exorbitant power rates—it will have to permanently close the Smelter when its current service contract with Santee Cooper expires on December 31, 2020.

Recognizing the devastating impact the closure of the Smelter would have on the local community, the leadership of Goose Creek and the Mt. Holly Smelter worked together to develop

¹ The Smelter was previously owned for many years by the Alcoa Corporation and is still often referred to as the Alcoa plant.

a plan for Goose Creek to annex and provide electrical service through creation and operation of a municipal utility to the 5,000-acre tract of land on which the Smelter sits. The first and immediate purpose of the Goose Creek plan is to prevent the closure of the Smelter by providing it with much lower-priced electric service than is being provided by Santee Cooper. However, the opportunity to attract and support new and additional commercial and industrial development in the newly annexed areas is also a primary purpose in forming the municipal utility. Indeed, Century has announced that, upon the successful result of this action and the commencement of operations by the City's municipal electric utility, it will reinvest in and reopen the half of the Smelter it was forced to close in 2015, which would almost double the number of current jobs at the facility and result in an infusion of hundreds of millions of dollars of additional annual income into the region at a time when the Coronavirus pandemic has battered the South Carolina economy.

In December 2019, the citizens of Goose Creek overwhelmingly approved—by a more than two-to-one margin—a referendum to form a municipal electric utility, despite fierce opposition from Santee Cooper taken for the self-professed purpose to delay, obstruct, and kill the Goose Creek municipal utility. (Exhibit D).

B. Goose Creek's Steps to Serve the Smelter.

As noted, the Smelter currently sits in an unincorporated area of Berkeley County adjacent to Goose Creek. Under the statutory regime discussed below, once the Smelter agrees to annexation, Goose Creek is permitted to supply power through a municipal utility.

To provide for Goose Creek electric service by the municipal utility to the annexed area, the City and Century entered into a Master Annexation Agreement (“MAA”) which sets the terms under which Century will permit Goose Creek to annex its property under S.C. Code Ann. § 5-3-150(3). The MAA includes a series of conditions for annexation which must be fulfilled by

December 31, 2020 in order for annexation to occur, which is also the date that Century's service agreement with Santee Cooper expires.

Among the conditions for annexation is that Goose Creek and Century reach an agreement for conveying an electrical substation located adjacent to the Smelter from Century to Goose Creek for use in delivering electricity to the Smelter and future customers of the municipal utility. This substation is owned by Century and receives electricity from lines operated by Santee Cooper. Because the substation is currently owned by Century and not Santee Cooper, Goose Creek will provide electricity service to the Smelter without the need to acquire any Santee Cooper property. On August 26, 2020, Goose Creek and Century successfully reached an agreement for Goose Creek to lease this substation from Century, and, if necessary, to purchase it outright.

The MAA also requires Goose Creek to reach an agreement to purchase power and transmission services from suppliers in the interstate competitive power market and also purchase transmission services from Santee Cooper at rates and terms provided for by federal law. However, Santee Cooper refused to provide this service to Goose Creek based, in part, on its argument that state law gave it the exclusive right to provide electricity service to the Mt. Holly Smelter.

As a result, Goose Creek was forced to initiate an action with the FERC requesting that the agency order Santee Cooper to provide the transmission service required by federal law. Recognizing the need for state court resolution of the state law arguments raised by Santee Cooper, Goose Creek also filed the instant case in the Court of Common Pleas of Berkeley County on March 31, 2020, seeking a declaratory judgment that it has the right and authority under the laws and the Constitution of the State of South Carolina to provide electric utility service to the Mt. Holly Smelter after annexation.

C. The FERC Decision.

On August 27, 2020, the FERC, after reviewing and rejecting all of Santee Cooper's arguments (including the same state law arguments Santee Cooper asserted in the instant action), issued an order requiring Santee Cooper to provide transmission service to Goose Creek. In response to Santee Cooper's argument that state law prohibited Goose Creek from serving the Smelter, the FERC stated:

While Santee Cooper is correct that S.C. Code section 58-31-440 provides for it to continue serving the Mt. Holly Smelter, the immediately preceding section 58-31-420 makes clear that Goose Creek's right to serve the Mt. Holly Smelter under section 5-31-610 supersedes any authority provided to Santee Cooper under section 58-31-440. Section 58-31-420 expressly states that 'any provisions of this article inconsistent with other laws are not applicable within the municipal limits.' For these reasons, we find that section 58-31-440 is indeed inconsistent with Goose Creek's right to serve the Mt. Holly Smelter under section 5-31-610 and is thus superseded by Goose Creek's right to serve customers within its municipal limits.

(Exhibit B ¶ 84). The FERC also rejected Santee Cooper's position that this Court's decision in *City of Abbeville v. Aiken Electric Cooperative, Inc.*, 287 S.C. 361, 338 S.E.2d 831 (1985), barred Goose Creek from serving the Smelter:

Second, we disagree with Santee Cooper's argument that the South Carolina Supreme Court's finding in *Abbeville* preserves Santee Cooper's right to serve customers after those customer premises are annexed by a municipality. *Abbeville* addressed the question of whether Article VIII, section 16 of the South Carolina Constitution, which provides for the formation of municipal utilities, is a limitation on the legislature's power to regulate utility service areas. Here, unlike in *Abbeville*, Goose Creek does not seek an absolute right to serve in contravention of statute. Rather, it relies on explicit statutory language that preserves its right to serve customers within municipal limits to the exclusion of Santee Cooper. Because Goose Creek relies on explicit authorization from the legislature, it does not seek to limit the legislature's right to regulate utility franchises and *Abbeville* is inapposite.

(Exhibit B ¶ 85). Based on this decision, the FERC is prepared to order Santee Cooper to provide Goose Creek with transmission access, needing only a final determination of the state law issue to do so.²

D. The Circuit Court Decision.

Prior to the FERC decision, Goose Creek filed motions for summary judgment and for judgment on the pleadings in the state court declaratory judgment action. The Circuit Court heard argument on the motions on September 17, 2020, requested post-hearing briefing on certain issues, and rendered a declaratory judgment on October 12, 2020.

In its Declaratory Judgment Order, the Circuit Court concluded, in direct conflict with FERC, that Goose Creek did not have a right to serve the Smelter after annexation. This holding was based on the mistaken conclusion that Santee Cooper's service rights under S.C. Code Ann. § 58-31-440 did not conflict with the municipal service rights provided in S.C. Code Ann. § 5-31-610 and S.C. Const. art. VIII, § 16, because those provisions "are silent on the questions of: (1) who a municipal electric utility may serve; and (2) whether a City may annex and furnish electric service to premises being served by another supplier of electricity." (Exhibit A, Order at 12).

The Circuit Court further, and erroneously, held that "when a municipality creates a § 5-31-610 municipal utility and annexes premises being served by another supplier of electricity like Santee Cooper, there is only one method by which it can replace the current supplier and serve those newly annexed premises itself: S.C. Code § 58-27-1360." (Exhibit A, Order at 14). Thus,

² The FERC observed that "given the fact that Goose Creek's petition for declaratory judgment remains pending in South Carolina's Court of Common Pleas for the Ninth Judicial Circuit, we acknowledge that, as a general matter, state courts are better positioned to analyze the specific questions at issue in this proceeding arising under state law, and emphasize that the Commission may reconsider this determination prior to issuing a Final Order in this proceeding, in light of the outcome of Goose Creek's petition." (Exhibit B ¶ 83).

the Circuit Court held “that Goose Creek must follow the procedure outlined in S.C. Code § 58-27-1360 in order to displace Santee Cooper as the service provider to the Century Facility.” (*Id.*)

Finally, the Circuit Court also held that Goose Creek service to the Smelter was barred for the separate reason that the “MAA agreement between Goose Creek and Century illegally binds future actions of the City of Goose Creek and unlawfully delegates powers to Century which can only be exercised by the City Council of Goose Creek, and is therefore void as contrary to the public policy of South Carolina.” (Exhibit A, Order at 17–18).

Goose Creek timely moved for reconsideration of the Order, which the Court denied on November 2, 2020. Goose Creek immediately filed a notice of appeal the same day.

ARGUMENT

This Court should expedite the proceedings in this case because the Circuit Court’s decision was erroneous, and the unfortunate effect of that error will be that hundreds of South Carolinians will lose their jobs, and the Goose Creek community will lose a valuable generator of economic activity, in the middle of already challenging economic times. Goose Creek submits that this error should not be allowed to stand in these circumstances. The reasons why the lower court’s decision was erroneous are outlined in brief below.

First, in holding that Goose Creek did not have the right to serve the Smelter after annexation, the Circuit Court disregarded the General Assembly’s clear directive that the service rights granted Santee Cooper under S.C. Code Ann. § 58-31-440 “shall not repeal or modify other laws applicable to electric service within municipal corporate limits, and any provisions of this article inconsistent with other laws are not applicable within the municipal limits.” S.C. Code Ann. § 58-31-420. The Court erred in failing to recognize—as the FERC correctly did—that a reading of Section -440 to bar Goose Creek service to the Smelter after annexation would both “modify”

and be “inconsistent with” S.C. Code Ann. § 5-31-610 and Article VIII, Section 16 of the Constitution, which give municipalities the right to form an electric utility and serve all of their inhabitants. *See* § 5-31-610 (“Any city or town may: (1) Construct, purchase, operate and maintain waterworks and electric light works within or without, partially within and partially without, their corporate limits **for the use and benefit of such city or town and the inhabitants thereof**” (emphasis added)); S.C. Const. art. VIII, § 16 (granting cities the right to form and operate a municipal electric utility).

The Circuit Court attempted to resolve the conflict between municipal service rights and Santee Cooper’s service rights by noting that S.C. Code Ann. § 5-31-610 and S.C. Const. art. VIII, § 16 “are silent on . . . whether a City may annex and furnish electric service to premises being served by another supplier of electricity.” (Exhibit A, Order at 12). But this is a quintessential example of begging the question, because those provisions cover the broader issue—that cities have the right to serve their inhabitants unless otherwise limited by statute. As the Supreme Court has recognized before, while municipal service rights can be limited by the General Assembly, the right exists unless specifically limited by statute. *See Berkeley Elec. Coop., Inc. v. S.C. Pub. Serv. Comm’n*, 304 S.C. 15, 402 S.E.2d 674 (1991) (holding that S.C. Code Ann. § 58-27-670(1) does not limit the right of cities to annex and provide service in the “corridors” of electrical utilities because such “corridor” areas are not assigned by the South Carolina Public Service Commission such that the limits of S.C. Code Ann. § 58-27-670(1) would apply).

Second, the Circuit Court committed additional legal error by injecting the “ouster” statute, S.C. Code Ann. § 58-27-1360, into its service rights analysis. The right of ouster is the right of cities “to condemn and purchase the facilities” of existing electricity providers “by the exercise of eminent domain.” *City of Abbeville v. Aiken Elec. Coop., Inc.*, 287 S.C. 361, 364, 338 S.E.2d 831

(1985). In 1984, the General Assembly amended S.C. Code Ann. § 58-27-1360 to provide that “condemnation may be instituted only after a PSC finding that existing [] service is inadequate, undependable or unreasonably discriminatory.” *Id.*; *see also* S.C. Code Ann. § 58-27-1360 (“[T]he city or town . . . has the right to acquire the property of a supplier of electricity brought within corporate limits upon a finding by the commission . . . that inadequate, undependable, or unreasonably discriminatory service is being provided and upon payment of just compensation.” (emphasis added)).

In finding that Goose Creek must follow the eminent domain procedure defined in S.C. Code Ann. § 58-27-1360 in order to serve the Smelter, the Circuit Court made the fundamental error of interpreting S.C. Code Ann. § 58-27-1360 as a requirement a city must meet in order to serve existing customers of another supplier of electricity in an annexed area even when it does not annex the supplier’s property rather than what it is: a right of cities to acquire property of another supplier of electricity through eminent domain powers. In finding that the procedures of S.C. Code Ann. § 58-27-1360 must be followed any time a city wishes to serve customers of another supplier of electricity even when it does not annex the supplier’s property, the Circuit Court ignored the plain language of the statute that only requires a city to use the Section -1360 process when a city is acquiring property of an existing electricity supplier in order to provide such service, which does not apply in this case. *See* S.C. Code Ann § 58-27-1360. The Circuit Court’s resort to cost-based policy reasons to justify its holding was not only legal error, but also misplaced as Santee Cooper has a mechanism to recover costs—to the extent it will actually suffer this type of loss—under federal law before the FERC, which Santee Cooper is currently pursuing. (Exhibit B at 47 (citing 16 U.S.C. § 824k(c))).

Finally, the Circuit Court also mistakenly *sua sponte* held that the City had unlawfully delegated governmental power in a circumstance where this doctrine had no application because state law itself grants the landowner discretion to determine whether to allow its land to be annexed. *See* S.C. Code Ann. § 5-3-150(3) (“[A]ny area or property which is contiguous to a municipality may be annexed to the municipality by filing with the municipal governing body a petition signed by all persons owning real estate in the area requesting annexation”). Recognizing the inapplicability of the doctrine, Santee Cooper itself had not even raised the issue.

While the parties disagree on the merits of these legal issues, what cannot be denied is the immediate and direct impact the Circuit Court’s decision will have on the Goose Creek community. Hundreds of South Carolinians should not lose their jobs based on manifest legal error. This would be a profoundly unfortunate outcome, and it can be avoided by an expedited review of these issues in this Court. Goose Creek therefore respectfully requests that the proceedings in this appeal be expedited, with a decision issued before the end of the year.

CONCLUSION

For the foregoing reasons, Goose Creek respectfully requests that the Court expedite this appeal and issue a decision in this matter before the end of the year. Goose Creek stands ready to comply with any briefing and argument schedule the Court finds appropriate in order to accomplish this expedited resolution.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,

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November 3, 2020

Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

City of Goose Creek,

Plaintiff,

vs.

South Carolina Public Service Authority,
Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

C/A#: 2020-CP-08-00821

DECLARATORY JUDGMENT ORDER

Before the Court are Plaintiff City of Goose Creek's ("Goose Creek") Motion for Judgment on the Pleadings and Defendant South Carolina Public Service Authority's ("Santee Cooper") Motion to Dismiss and Counterclaims. Essentially, both parties seek a declaratory judgment on the legality of Goose Creek's plan to provide electrical power to an industrial customer it plans to annex into the city limits. The matter was extensively briefed, and the Court heard oral arguments on the motions on September 17, 2020. After the oral arguments this Court asked for and received further briefing on two issues. Based upon the pleadings and the record presented, the Court finds that Santee Cooper has the exclusive right to provide electrical power to the industrial customer known as Century Aluminum of South Carolina, Inc. ("Century") and that Goose Creek's newly formed municipal electrical utility cannot provide service to Century without taking additional actions mandated by state law. The Court also finds that the agreement Goose Creek has entered into with Century to facilitate the future operations of the provision of the electrical service is void because it violates the public policy of the State of South Carolina.

BACKGROUND

This litigation arises out of a dispute between Goose Creek and Santee Cooper over the right to serve electricity to Century's Mt. Holly aluminum smelter (the "Facility"). Currently, Santee Cooper serves the Facility. Goose Creek seeks a declaratory judgment that it has the right and authority to provide electric utility service within its corporate limits, including areas that are to be annexed into the City—specifically to Century Aluminum and the Mt. Holly smelter. It also seeks to enjoin Santee Cooper from taking further action inconsistent with the declaration it requests. Conversely, Santee Cooper seeks a declaratory judgment that: (1) Goose Creek has not properly created a municipal utility under state law; (2) it has the exclusive right to provide electrical power to the Facility; and (3) an agreement that Goose Creek and Century which governs the terms by which Goose Creek would service the Facility is illegal and void.

At the heart of this matter is Century's attempt to secure access to retail electric markets so that it can negotiate a better rate than that offered by Santee Cooper. Century and Santee Cooper have previously been involved in litigation over related issues. In January 2017, Century brought an antitrust action against Santee Cooper in the United States District Court for the District of South Carolina generally alleging Santee Cooper was leveraging its statutory monopoly service right to force Century to purchase a quarter of its electricity at supra-competitive prices. United States District Court Judge Richard M. Gergel entered an order dismissing the action, finding the "only reasonable construction of the South Carolina law providing that Santee Cooper's service area 'must be exclusively served by' Santee Cooper is that it is South Carolina's policy for Santee Cooper to have monopoly power in that service area. Santee Cooper's monopoly power in its exclusive service area therefore is the clearly articulated

and affirmatively expressed policy of South Carolina.” Century Aluminum of S.C., Inc. v. S.C. Pub. Svc. Auth., 278 F. Supp. 3d 877, 888 (D.S.C. 2017).

On December 3, 2019, Goose Creek held a referendum asking its residents to vote on the question: “Shall the City Council of the City of Goose Creek, as the governing body of the City of Goose Creek, South Carolina, be authorized to acquire by initial construction or purchase, and thereafter establish, improve, operate and maintain an electric utility system to furnish electric power?” Voters approved the referendum, and as a result Goose Creek now has the ability to operate an electrical utility system which provides electrical power to its citizens and businesses within its corporate limits, subject to certain limitations which are discussed below.¹ For its first electrical service customer, Goose Creek seeks to serve the Facility which is owned and occupied by Century, but which is not yet annexed into the City, although they plan to annex it by December 31, 2020, depending on the outcome of this lawsuit.

Following the referendum, Goose Creek and Century entered into a Master Annexation Agreement (“MAA”). The MAA details certain conditions that must be satisfied prior to the annexation, among them succeeding in this lawsuit. The MAA also provides Century discretion and control over Goose Creek’s ability to purchase wholesale power, Goose Creek’s transmission agreement with Santee Cooper, and the rates Goose Creek would charge Century.

In February 2020, Goose Creek submitted an application to Santee Cooper for transmission service necessary to provide power to the Facility. Later, Goose Creek filed a complaint with the Federal Energy Regulatory Commission (“FERC”) requesting that the FERC

¹ Santee Cooper argues that Goose Creek has failed to sufficiently take enough steps to have even created a municipal electric utility. Goose Creek argues it has met the sole requirement to operate a municipal utility: its citizens have approved a referendum to form a municipal utility. The Court agrees. This is all it needs to have done at this point in time. South Carolina law does not include any requirements on how a municipal utility goes about setting up a municipal utility, other than the requirement that a referendum must be held. S.C. Code § 5-31-610 says municipal utilities “may” perform certain acts; however, those acts are not prerequisites to the formation of a utility.

order Santee Cooper to provide the transmission service requested. The FERC action sought to address the transmission application denial.² *See* Compl. at ¶ 26 (“As a result, Goose Creek has instituted a challenge to Santee Cooper’s rejection of its request for transmission service in appropriate proceedings before FERC, which has jurisdiction over such disputes.”). Three days following the initiation of the action at the FERC, Santee Cooper denied Goose Creek’s application for transmission service.

In response to Goose Creek’s Complaint filed on March 31, 2020, Santee Cooper timely filed a Motion to Dismiss on various grounds including Rules 12(b)(1), (6), and (8) of the South Carolina Rules of Civil Procedure. On July 13, 2020, Goose Creek filed a Motion for Summary Judgment. At the direction of the Court, on August 7, 2020, Santee Cooper filed an Answer subject to and without waiving its previously filed Motion to Dismiss. Further, and also at the direction of the Court, Goose Creek filed the currently pending Motion for Judgment on the Pleadings on August 17, 2020 in lieu of their previously filed Motion for Summary Judgment.

On August 27, 2020, FERC issued a proposed order which, if finalized, would grant Goose Creek access to Santee Cooper’s transmission infrastructure (the “Proposed Order”). The Proposed Order found that “Goose Creek’s applications would not be inconsistent with any South Carolina law governing utilities’ retail marketing areas...” However, the Proposed Order went on to state:

However, given the fact that Goose Creek’s petition for declaratory judgment remains pending in South Carolina’s Court of Common Pleas for the Ninth Judicial Circuit, we acknowledge that, as a general matter, state courts are better positioned to analyze the specific questions at issue in this proceeding arising under state law, and emphasize that the Commission may reconsider this

² The FERC action is docketed as EL20-33-000.

determination prior to issuing a Final Order in this proceeding, in light of the outcome of Goose Creek's petition.

(Proposed Order ¶ 32). Realizing the effect of the Proposed Order on the pending Motions, the Court permitted the parties to supplement their briefing on the pending motions, and Santee Cooper timely filed an Amended Answer and Counterclaims as well.

APPLICABLE LEGAL STANDARDS

The Circuit Court may issue a Declaratory Judgment under SCRCP 57 and advance the matter for a speedy hearing and resolution. SCRCP 12(c) provides “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” “When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment.” Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Any factual issues raised in the pleadings must be viewed most favorably as to the nonmoving party as those facts are deemed admitted by moving party. *See, e.g., Russell*, 305 S.C. at 89, 406 S.E.2d at 339. The nonmoving party's pleadings “should be construed liberally so that substantial justice is done between the parties” – particularly because “a judgment on the pleadings is considered to be a drastic procedure by our courts.” *Id.*

Pursuant to Rule 12(b)(6), dismissal is warranted for failure to state facts sufficient to constitute a cause of action. A motion to dismiss should be sustained if facts alleged and reasonable inferences derived therefrom would not entitle the plaintiff to any relief on any theory of the case. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995).

THE FERC PROPOSED ORDER

As an initial matter, this Court will address FERC's Proposed Order and its effect on these proceedings. The Proposed Order analyzed and determined aspects of South Carolina law

as it is applied to the Federal Power Act (“FPA”). However, in its Proposed Order the FERC acknowledged this Court is “better positioned to analyze the specific questions at issue in this proceeding arising under state law.” The FERC specifically noted it “may reconsider” such state law determinations based upon this Court’s resolution of this declaratory judgment matter. (Proposed Order ¶ 83).³ Additionally, while arguing in support of the Proposed Order, Goose Creek acknowledges that the Proposed Order is not binding on this Court’s determination of South Carolina state law. (Goose Creek Reply, August 28, 2020, at 8).

The Proposed Order does not address the MAA. Although the MAA was submitted to the FERC one day before the FERC issued its Proposed Order, the Proposed Order did not analyze or discuss the MAA provisions at all, mentioning only it was filed.⁴ Thus, the Proposed Order does not purport to advise this Court on the issues the MAA raises under South Carolina law.

ISSUES PRESENTED

I. Whether Goose Creek’s newly formed municipal utility has the right and authority under South Carolina law to provide electric utility service to the Century Facility.

For the following reasons, this Court finds that Santee Cooper is the statutorily designated service provider to the Century Facility, and no current state law authorizes Goose Creek to displace Santee Cooper except as provided in S.C. Code Ann. § 58-27-1360.

A. South Carolina law provides Santee Cooper the exclusive right to serve the Facility.

When it passed S.C. Code Ann. § 58-31-440, the South Carolina General Assembly re-affirmed Santee Cooper’s exclusive right to serve the Century Facility, which Santee Cooper

³ Santee Cooper is in the process of petitioning the FERC to reconsider its Proposed Order.

⁴ “On August 26, 2020, Goose Creek filed an executed lease agreement for the Mt. Holly facilities.” (Proposed Order, ¶ 61)

already had prior to July 1, 1984. The language of the statute is unequivocal: “premises served by the lines on July 1, 1984, must continue to be so served.” *Id.* Goose Creek’s interpretation of this statute is not proper as it ignores the word “must” altogether. To paraphrase the United States Supreme Court in Simmons v. Himmelreich, 136 S. Ct. 1843, 1848 (2016), “we presume [the General Assembly] says what it means and means what it says.” This Court finds § 58-31-440 mandates the Century Facility “must continue to be so served” by Santee Cooper.

A bit of history is useful to understand how this came to be. Santee Cooper’s right to exclusively serve the Century Facility evolved through three phased actions by the General Assembly: (1) in Act 1934 (38) 1507, the General Assembly created the Santee Cooper as a utility “for the benefit of all of the people of the State,” (*see* S.C. Code Ann. § 58-31-80)⁵, yet allowed Santee Cooper to compete for the right to serve customers; (2) in 1973, in passing Act No. 412, the General Assembly decided Santee Cooper should be assigned certain areas, premises, and customers it had the right and obligation to serve without competition (generally referred to in this litigation as “service territory”), and (3) in 1984, in passing Act No. 399, the General Assembly saw fit to preserve the *status quo*, but also carved out certain premises Santee Cooper was then serving from other utilities’ territories and mandated those premises “must continue to be so served” by Santee Cooper. Two facts are not in dispute here: (1) the Century Facility had already been receiving electricity from Santee Cooper since 1980; and (2) the Century Facility is one of those certain premises identified in § 58-31-440 that must continue to be so served by Santee Cooper. (*See, e.g.*, 8/17/20 Plaintiff’s MJOP Memo at 12-14 (acknowledging both undisputed facts but arguing annexation appropriates the right to serve)).

⁵ *See also*, S.C. Code Ann. § 58-31-110 stating that the South Carolina Public Service Authority is a corporation that is “completely owned by and to be operated for the benefit of the people of this State.”

One of the questions raised by the Court after oral arguments—how did it come to be that Santee Cooper has the authority to deal with a customer that at first glance appears to be within the service area of Berkeley Electric Cooperative (“BEC”)—can be answered by explaining how the Century Facility began receiving electricity from Santee Cooper in 1980 in the first instance. On this issue, the parties have a slightly different perspective; however, as explained below, this is a distinction that does not change the outcome.

According to Goose Creek, this “arrangement” for Santee Cooper’s service came to be when the Century chose Santee Cooper to serve the Facility in 1980. *See id.* at 13.⁶ Perhaps the biggest problem with accepting Goose Creek’s interpretation of the pre-1984 status is that if they are correct, then after December 31, 2020, the service territory rights would appear to revert back to Berkeley Electric Cooperative. BEC has shown no interest in this lawsuit, and it would seem that if they were to have any service territory rights to the Century Facility after December 31, 2020, they would certainly want to voice that opinion. Their silence is interesting.

Santee Cooper points out that until 1984, Santee Cooper’s service territory included all of Berkeley County, except for a portion assigned to SCE&G. *See* S.C. Code Ann. §§ 59-19 and 59-20 (1962 & Supp. 1973). Pursuant to 1973 Act No. 412, the service area of Santee Cooper consisted “of the counties of Berkeley, Georgetown and Horry.” An exception to Santee Cooper’s Berkeley County service area consisted of a portion being served by South Carolina Electric and Gas Company (“SCE&G”). *Id.* at § 59-20. No one has ever contended that the Century Facility was in the area assigned to SCE&G. Thus, Santee Cooper contends that from

⁶ (“The Smelter began receiving electricity from Santee Cooper in 1980 based on a then-existing provision of law that allowed it to choose to receive service from either BEC or Santee Cooper. *See* Act No. 412 of July 9, 1973 § 1 (“The Public Service Authority shall also have the right, if chosen by the customer, to serve any load of 750 KW or larger, within any territory which now, or in the future, is assigned by the South Carolina Public Service Commission to any of the cooperatives that are members of the Central Electric Power Cooperative, Inc.”)).

1973 until 1984, the Facility's premises were in that part of Berkeley County previously assigned by 1973 Act. No. 412 to Santee Cooper. This appears to be the more plausible answer to the question.

Regardless of how Santee Cooper came to serve those premises, it undisputedly served the Facility premises when it began operating in 1980 and, most importantly, on July 1, 1984. In 1984, the General Assembly passed Act No. 399 which further defined Santee Cooper's service areas in Berkeley County. The Act excluded not only a portion served by SCE&G but also a portion assigned to BEC. *See* S.C. Code Ann. § 58-31-330(1). By this time, Santee Cooper had erected lines (among other investments) and was serving the Century Facility, which was then operated by Alumax. Because 1984 Act 399 was intended to preserve the *status quo* where one utility was serving customers in the service area assigned to another, it is a natural and obvious conclusion that the General Assembly intended Santee Cooper would be allowed to continue to serve the Century Facility premises since it had already erected and maintained lines, and was at the time of passage serving the Facility, even if it was located in BEC's service territory.⁷ No

⁷ Earlier in 1984, prior to the passage of Act No. 399, Santee Cooper and BEC were involved in negotiating a service area agreement. As stated in the introductory language of Act No. 399, the General Assembly provided a purpose of the Act was

to provide for [Santee Cooper's] powers within designated service areas and also to enumerate areas to be served by particular electric cooperatives in Berkeley, Georgetown, and Horry Counties; to specify what jurisdiction the Public Service Commission is entitled to exercise over these service areas and **to authorize the continued operation and maintenance of lines of [Santee Cooper] and electric cooperatives when lines of these suppliers are in the service area of another; to provide criteria for the service of customers from lines located in the service area of another in Berkeley, Georgetown, and Horry Counties . . .**

(emphasis added). While 1984 Act No. 399 would have placed the Century Aluminum Facility within BEC's service area, Section 58-31-440 was created to provide Santee Cooper's lines extending into BEC's service area could continue to be operated and maintained by Santee Cooper, and "premises" served by Santee Cooper's lines on July 1, 1984, must continue to be so served.

time constraints apply: “premises served by the lines on July 1, 1984, must continue to be so served.” S.C. Code Ann. § 58-31-440. Thus, although the Century Facility geographically would have otherwise been in BEC’s service area, the 1984 Act, through § 58-31-440, carved it from BEC’s service area since Santee Cooper was already serving it. The most reasonable explanation is that by passing § 58-31-440, the General Assembly, consistent with its policy of granting monopolies to electric service providers, desired to establish a permanency to the existing service arrangements. After July 1, 1984, neither the will of the customer nor the will of the provider can terminate the mandate; only the General Assembly can alter or abrogate the exclusive right and obligation to serve and receive electricity (absent a proceeding brought pursuant to S.C. Code Ann. § 58-27-1360 which will be discussed below).

This interpretation of S.C. Code Ann. 58-31-440 is consistent with the state policy of perpetuating a uniform electric market in the same way 1973 Act No. 412 did: in consideration of a utility’s investment in generation, transmission, distribution, and other facilities to provide electric service, the General Assembly granted each utility a monopoly to serve designated territories, premises, and customers. The 1973 Act, for the first time, brought Santee Cooper within the regulated electric market, and legislatively established the territories, customers, and premises Santee Cooper would serve. Because Santee Cooper had invested in generation, transmission, distribution, and other facilities, the 1973 Act provided Santee Cooper got to continue to serve “all premises, customers, and electric cooperatives served by it on July 9, 1973.” S.C. Code Ann. § 59-19 (1962 & Supp. 1973). Similarly, because by 1984 Santee Cooper had made investments and was already serving customers in Berkeley, Georgetown, and Horry Counties, Santee Cooper’s service area in those counties was redefined to address those service territories that were otherwise assigned to BEC, Santee Electric Cooperative, and

Horry Electric Cooperative. 1984 Act No. 399 specifically provided that Santee Cooper was allowed to continue to serve customers in those areas that it was already serving as of July 1, 1984 (such as Century's Facility). Although Century and Santee Cooper still entered into a service agreement, the purpose of the agreement is to determine rates, customer load requirements, and any infrastructure improvements. This service agreement is not the source of Santee Cooper's right and obligation to serve the Century Facility. The agreement merely memorializes the terms of service. It does not create the right or obligation to serve, as this had already been done by statute. In South Carolina, an industrial customer, like a residential customer, generally does not get to shop for a different provider. This is the energy policy of South Carolina established by the General Assembly. The customer has control over where to locate, but not who will provide its power once there. The service agreement with Century is neither the source nor authority for Santee Cooper's statutory right and obligation to service the Facility. That right and obligation remains beyond the existence of the service agreement.

Section 58-31-440 controls the outcome of this case: no matter how the parties' relationship began, it was cemented by statute in 1984 and continues unless and until the General Assembly changes the law or Goose Creek seeks an ouster of Santee Cooper's service rights under § 58-27-1360. Until either of those things happen, Santee Cooper has the right and the obligation to serve the Century Facility, and Century is required to take its electricity from Santee Cooper at the Facility.

Goose Creek argues that: (1) § 58-31-440 conflicts with both Article VIII § 16 of the South Carolina Constitution and S.C. Code Ann. § 5-31-610; (2) and that § 58-31-420 does not apply to municipalities. These arguments are unavailing. Section 58-31-420 merely states "authority granted in this article [consisting of S.C. Code Ann. §§ 58-31-310 – 460] shall not

repeal or modify other laws applicable to electric service within municipal corporate limits” and “provisions of this article inconsistent with other laws are not applicable within the municipal limits.” However, this Court finds no law inconsistent with the plain terms of Section 440. Article VIII § 16 and § 5-31-610 are silent on the questions of: (1) who a municipal electric utility may serve; and (2) whether a City may annex and furnish electric service to premises being served by another supplier of electricity. Neither provision authorizes a municipality to provide electric service to annexed premises already served by another provider. Those sources only provide authority to “acquire by initial construction or purchase” and “operate . . . public utility systems and plants,” (Article VIII § 16), and to “[c]onstruct, purchase, operate and maintain . . . electric light works within or without, partially within and partially without, their corporate limits for the use and benefit of the such city or town and the inhabitants thereof.” (S.C. Code Ann. § 5-31-610). The language in each of these sections does not conflict with the plain language of § 58-31-440.

While S.C. Code Ann. § 5-31-610 is silent as to the question of a city’s furnishing electric service to annexed premises being served by another supplier, other laws speak expressly to the issues presented when a city annexes and wishes to serve premises being served by another supplier of electricity. At the most fundamental level, § 5-31-610 cannot be construed to confer on Goose Creek an absolute right to serve annexed premises because it contains no language conferring such rights. In addition, the General Assembly passed a law stating “[n]othing in . . . 5-31-610 . . . shall modify, abridge, or repeal Sections 58-27-650, 58-27-670, . . . or 58-27-1360.” *See* S.C. Code Ann. § 58-27-690. These listed statutes⁸ are all restraints on a

⁸ Section 58-27-670 states that regardless of whether the PSC assigned the territory being annexed, “the furnishing of electric service in any area which becomes a part of any municipality after the effective date of this subsection, either by annexation or incorporation . . . is subject to the provisions of Sections 58-27-1360 . . .” S.C. Code Ann. § 58-27-670.

municipality's ability to furnish electric service to annexed premises, and the General Assembly intended for nothing in § 5-31-610 to modify, abridge, or repeal those restraints.

As established in City of Abbeville v. Aiken Elec. Co-op., Inc., 287 S.C. 361, 369–70, 338 S.E.2d 831, 836 (1985), such restraints are constitutional. Section 16 of Article VIII does not limit the power of the General Assembly to regulate, and it is appropriate for the General Assembly to regulate a city's right to annex a new area and displace a statutorily assigned supplier of electricity.

The General Assembly's assignment of the Century Facility to Santee Cooper as established by § 58-31-440 is consistent with the law governing municipalities. It does not repeal or modify other laws, for there is no law that gives Goose Creek the unfettered power to provide service to those premises upon annexation. To the contrary, it is well established there is "no absolute municipal right to operate utilities." City of Abbeville v. Aiken Elec. Co-op., Inc., 287 S.C. 361, 369–70, 338 S.E.2d 831, 836 (1985).

For these reasons, the Court finds Santee Cooper was vested with the exclusive right to serve electrical power to the Century Facility, and that S.C. Code § 58-31-440 mandates the Century Facility "must continue to be so served" by Santee Cooper.

B. South Carolina law does not vest Goose Creek with unlimited power to displace Santee Cooper's exclusive right to serve the Century Facility.

Section 58-27-1360 establishes the one and only way that a municipality may provide electric service to annexed premises where electric service already is being furnished by another provider, including a state agency such as Santee Cooper.

Subsection (B) of § 58-27-650 directly restrains the ability of a municipality to replace another provider on the grounds it can charge lower rates (as Goose Creek claims in this case). Pursuant to this provision, the PSC is to determine whether the existing supplier's service is inadequate, undependable, or discriminatory, **but pricing cannot factor into that determination.** S.C. Code Ann. § 58-27-650(B) ("the commission may not consider rate differentials between the affected electric suppliers or municipality. . . .").

This Court finds South Carolina law does not give a municipal utility unconstrained authority to annex and furnish electric service to an area where electric service is already being furnished by another supplier of electricity. First, there is no absolute right to serve any or every premises that comes within a municipality's boundaries. This is made clear by the plethora of statutory provisions restricting such action and Article VIII, § 14 of the Constitution. Second, the General Assembly has not provided municipalities unlimited power to annex and provide electric service to any customer Santee Cooper serves pursuant to a statutorily assigned, exclusive right to serve. No such power exists in the plain language of either Article VIII, § 16 of the Constitution or S.C. Code Ann. § 5-31-610—the two sources upon which Goose Creek relies. Nor is there a conflict between the plain language of § 5-31-610's authority to construct or purchase a municipal utility system and § 58-31-440's grant to Santee Cooper of a continued right to serve the Century Facility. As announced in Article VIII, § 14 of the South Carolina Constitution, a municipality cannot unilaterally upend South Carolina's statewide platform of monopoly host utilities. Instead, when a municipality creates a § 5-31-610 municipal utility and annexes premises being served by another supplier of electricity like Santee Cooper, there is only one method by which it can replace the current supplier and serve those newly annexed premises itself: S.C. Code § 58-27-1360. Absent a statutory change to long-established legislative territorial service designations, this Court holds that Goose Creek must follow the procedure outlined in S.C. Code § 58-27-1360 in order to displace Santee Cooper as the service provider to the Century Facility.

C. The South Carolina General Assembly has provided the exclusive mechanism to annex and oust an incumbent utility provider in S.C. Code Ann. § 58-27-1360.

For Goose Creek to accomplish what it wants with its newly formed municipal utility, it would have to follow the procedure set forth in S.C. Code Ann. § 58-27-1360:

When an area in which electric service is being furnished at wholesale or retail by a supplier of electricity, including municipal corporations, ***public or governmental agencies***, and electric cooperatives, . . . ***is annexed*** to an existing incorporated city or town, the city or town . . . has the right to acquire the property of a supplier of electricity brought within corporate limits upon a finding by the commission pursuant to subsection (B) of Section 58-27-650 that inadequate, undependable, or unreasonably discriminatory service is being provided and upon payment of just compensation. The supplier of electricity having property or facilities in areas . . . annexed into an existing city or town has the right to compel the city or town . . . to purchase the facilities and properties and to compel the payment of just compensation.

S.C. Code Ann. § 58-27-1360 (emphasis added).

This restriction on municipalities' powers includes areas being served by Santee Cooper, as the statute applies "[w]hen an area in which electric service is being furnished" by a supplier, **"including . . . public or governmental agencies. . . ."** *Id.* (emphasis added). Absent a legislative reassignment of service territorial rights, the General Assembly has provided relief for a municipality which has become dissatisfied with its service provider; however, there are strict standards and procedures which must be followed before any municipality may replace the current service provider.

It is not difficult to understand why the General Assembly would impose restraints and conditions on a municipality's ability to annex premises served by suppliers of electricity who are already part of the regulated, monopolistic marketplace established by State law. Providing electric services requires a tremendous investment in infrastructure, the cost of which is borne by all ratepayers. Restraint on a municipality's power to annex and furnish electric service to an area assigned by statute or the Public Service Commission to another supplier of electricity is

entirely consistent with the overarching aim of a regulated market for electricity: to ensure efficient, reliable, and cost-effective delivery of power.

As the South Carolina Supreme Court once said, “§ 58-27-1360 dictates ‘such supplier of electricity in the annexed or incorporated area shall have the right to compel such city or town or an electrical utility operating therein . . . to purchase such facilities and properties and to compel the payment of just compensation therefor’” Blue Ridge Elec. Co-op. v. Combined Util. Sys. of City of Easley, 279 S.C. 135, 138, 303 S.E.2d 91, 93 (1983). “We believe the legislative intent was to balance the rights and powers of cities and towns to expand their areas and provide services to those areas against the interest and property rights of suppliers of electricity, including the cooperatives.” *Id.*

Therefore, this Court finds that S.C. Code Ann. § 58-27-1360 provides the exclusive way for Goose Creek’s municipal utility to seek to furnish electricity to Century’s Facility if it annexes the area being served by Santee Cooper. It cannot be done by judicial fiat.

II. Whether Goose Creek’s agreement with Century concerning the rights, obligations and conditions under which Goose Creek would provide electric service to the Facility as well as future areas that may be annexed into the City violates the public policy of South Carolina.

Although Santee Cooper originally challenged the MAA agreement between Goose Creek and Century as a “sham” transaction in its initial responsive pleadings, this Court requested the parties brief the issue of the MAA as being void as a matter of public policy because it illegally binds future actions of the City and unlawfully delegates powers which can only be exercised by the City Council. The Court find this re-framing of the issue more amenable to analysis under South Carolina precedent and the facts at hand.

“It is the general rule that all powers of municipal corporations are held in trust for public use, and that the measure of a municipal council’s fiduciary obligation with the exercise of the means and methods of discharging those powers, unless expressly or impliedly restrained by a legislative grant of power, are good faith and reasonableness, not wisdom or perfection,” tested by “the standard of diligence and prudence that men of ordinary prudence and intelligence in such matters employ in their own like affairs.” State ex rel. Ellis v. Tampa Water Works Co., 56 Fla. 858, 47 So. 358, 19 L. R. A. (N. S.) 183; Haesloop v. City Council of Charleston, *supra*; 26 R. C. L. 1306; *see also* Green v City of Rock Hill, 149 S.C. 234 , 147 S.E. 346 (1929); Stehmeyer v. City Council of Charleston, 53 S.C. 259, 31 S.E. 32 (1898)

Courts will not attempt to control the discretionary powers conferred on duly elected municipal officials in the exercise of their discretionary powers on behalf of the municipality, in the absence of illegality, fraud, or clear abuse of their authority. 28 A. & E. Ency. of Law, 991; 28 Cyc. 1744.” Haesloop v. City Council of Charleston, *supra*.

In applying the foregoing principles to this action, the Goose Creek electorate voted to authorize the establishment of a municipal utility to provide electrical services. Thereafter, Goose Creek’s City Council undertook to provide Century with electrical services pursuant to the MAA⁹ agreement with Century by which the Facility is conditionally annexed into the City and electrical services are thereafter provided. For the following reasons, this Court finds the MAA agreement between Goose Creek and Century illegally binds future actions of the City of Goose Creek and unlawfully delegates powers to Century which can only be exercised by the

⁹ “A court may consider [a document referenced but not attached to the Complaint] in determining whether to dismiss the complaint [when] it was integral to and explicitly relied on in the complaint and because the plaintiffs do not challenge its authenticity.” Phillips v. LCI Int’l, Inc., 190 F.3d 609, 618 (4th Cir. 1999). Goose Creek referenced and relied upon the MAA, and the MAA is integral to Goose Creek’s arguments that this matter is justiciable. Therefore, the Court may consider the MAA without converting Santee Cooper’s Motion to Dismiss into a Motion for Summary Judgment.

City Council of Goose Creek, and is therefore void as contrary to the public policy of South Carolina.

The following general rule concerning when a municipal contract extends beyond the term of the governing members of the municipality entering into the contract was succinctly stated by the South Carolina Supreme in City of Beaufort v. Beaufort-Jasper County Water and Sewer Authority, 325 S.C. 174, 480 S.E.2d 728 (1997) case:

The general rule is that, if the contract involves the exercise of the municipal corporation's business or proprietary powers, the contract may extend beyond the term of the contracting body and is binding on successor bodies if, at the time the contract was entered into, it was fair and reasonable and necessary or advantageous to the municipality. However, if the contract involves the legislative functions or governmental powers of the municipal corporation, the contract is not binding on successor boards or councils. Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 459 S.E.2d 876 (Ct. App. 1995) (citing Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (1948)), *aff'd*, 324 S.C. 239, 478 S.E.2d 836 (1996).

The contract between Goose Creek and Century Aluminum at issue here clearly extends well beyond the terms of the members of the governing bodies that entered into this contract. Therefore, the appropriate question in this case is whether the subject matter involves a governmental or a proprietary function.

South Carolina courts have repeatedly held that a municipality's provision of a utility service to residents and non-residents is a governmental function. *See, e.g., F.W. Sossamon v. Greater Gaffney Metro. Utils.*, 236 S.C. 173, 113 S.E.2d 534 (1960); Looper v. City of Easley, 172 S.C. 11, 172 S.E. 705 (1934), *overruled on other grounds by* McCall v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985); Calcaterra v. City of Columbia, 315 S.C. 196, 432 S.E.2d 498 (Ct. App. 1993); *cf. G. Curtis Martin Invest. Trust v. Clay*, 274 S.C. 608, 266 S.E.2d 82 (1980)

(implying that the provision of sewer service constituted part of the police power—a governmental function—of quasi-municipal sewer district).

As the City of Beaufort court noted, the distinction between governmental and proprietary functions rests on the nature of the government act at issue. The Supreme Court acknowledged that it is often difficult to determine whether a particular function is governmental or proprietary. For purposes of determining the validity of a contract requiring or involving a particular action by a municipality, the test for whether the action is governmental or proprietary should be “whether the contract itself deprives a governing body, or its successor, of a discretion which public policy demands should be left unimpaired.” Cowart, 319 S.C. at 133, 459 S.E.2d at 881. South Carolina courts have struck as invalid many different kinds of contracts binding successor governing bodies. *See, e.g.,* Cowart, 319 S.C. at 136, 459 S.E.2d at 882 (employment contract of public officer); Sammons v. City of Beaufort, 225 S.C. 490, 83 S.E.2d 153 (1954) (invalidating covenant requiring town to maintain on-street parking facilities throughout life of certain municipal bonds, on ground that such a covenant deprives future boards of police power to adopt parking regulations necessary for the public safety and welfare); Newman v. McCullough, 212 S.C. 17, 46 S.E.2d 252 (employment contract of public officer).

The provision of electrical service is a *governmental* function of a municipality or quasi-municipal entity. So is the decision about whether such service may be provided to future residents and businesses, and whether they may be annexed into the City at all. The contract which lays at the heart of this lawsuit goes too far by allowing Century to dictate the terms by which the City may decide whether to annex other properties in the future as well as the terms of other agreements which the City might find necessary or useful in order to provide electrical services to those annexed properties. In other words, this agreement allows Century to veto

future decisions over matters which only Goose Creek's City Council, present and future, may lawfully exercise. Public policy demands that Goose Creek's right to provide electricity to present and future residents of Goose Creek not be limited by Century's consent. As stated in the Clay case, the City of Goose Creek may not "delegate away those powers and responsibilities which give life to it as a body politic. A municipal corporation or other corporate political entity created by state law, to which police power has been delegated, may not divest itself of such power by contract or otherwise." Clay, 274 S.C. at 610, 266 S.E.2d at 83.

The agreement with Century here unlawfully limits the City of Goose Creek, now and in future, of the ability to serve persons they otherwise have the right to serve. This agreement is contrary to public policy as an unlawful delegation of governmental power not only because it binds future city councils, but also because it gives away too much power in itself.

By way of example, under the terms of the MAA, Goose Creek retains no authority to set its own rates for this purported service to the Century Facility—or for any other customer. Rates are the manner in which *a utility sets the price for its own product* including, among other things, to cover the costs of service or debt service obligations associated with operation. *See* S.C. Code Ann. § 5-31-250 (providing that the City Council may "require payment of such rates, tolls, and charges as *it may establish* for the use of water and light") (emphasis added). The MAA, on the other hand, gives Goose Creek's City Council no right to establish rates it deems necessary to continue serving its residents in a cost-efficient manner: Goose Creek can only charge Century a rate in its retail power sale contract that is "*acceptable to [Century] in its sole discretion.*" (MAA, Section 2.B)(emphasis added), regardless of how the rate impacts the City's finances.

Additional examples that Goose Creek retains no right to negotiate contractual rates and prices with third parties without Century's "sole discretion" approval of the terms include:

- Section 2(E) requires a "wholesale purchase contract, subject to approval by the Company in its sole discretion..."
- Section 2(H) requires a "transmission agreement with Santee Cooper, at terms, conditions and rates subject to approval by the Company in its sole discretion..."
- Section 2(I) requires an "interconnection agreement, on terms acceptable to the Company in its sole discretion..."
- Section 2(J) requires resolution of all legal and regulatory issues to the "satisfaction of the Company in its sole discretion"; and
- Section 2(K) requires with respect to legal, regulatory or contractual requirements to do what the Company determines is required "in its sole discretion."

(MAA, Section 2).

Taken together, these provisions make it clear that Goose Creek would have little or no authority to operate its own electric utility system without Century's approval first. The law does not permit a private body to have a veto over a municipality's actions. *See* S.C. Code Ann. § 5-31-250 (providing that the City Council "shall have full control and management"). As such, this agreement is contrary to the public policy of South Carolina and is void.

CONCLUSION

This Court declares that Santee Cooper has the exclusive right to provide electrical service to the Century Facility, and this right continues unless and until Goose Creek successfully follows the requirements of S.C. Code Ann. § 58-27-1360 which mandates the only way a municipality may oust a current service provider from its statutorily assigned service territory.¹⁰

¹⁰ Goose Creek also sought a declaration that Santee Cooper shall not "impede, frustrate, or to attempt to prevent or impair Goose Creek's rights and efforts to supply electricity to customers within its corporate limits, including but not limited to the Mt. Holly Smelter, and shall cooperate with Goose Creek to the extent necessary in order for Goose Creek to supply electricity to its municipal customers." The Court declines to enjoin Santee Cooper

Furthermore, this Court declares that the MAA agreement between Goose Creek and Century illegally binds future actions of the City of Goose Creek and unlawfully delegates powers to Century which can only be exercised by the City Council of Goose Creek, and is therefore void as contrary to the public policy of South Carolina.

DECLARATORY JUDGMENT ISSUED

AND IT IS SO ORDERED.

(Judge's electronic signature to follow)

with such a "declaration". Clearly, if Goose Creek decides to pursue its rights under S.C. Code Ann. § 58-27-1360, Santee Cooper would have the right to challenge it.



Berkeley Common Pleas

Case Caption: City Of Goose Creek VS South Carolina Public Service Authority

Case Number: 2020CP0800821

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

EXHIBIT B

172 FERC ¶ 61,165
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

City of Goose Creek, South Carolina

v.

Docket No. EL20-33-000

South Carolina Public Service Authority

City of Goose Creek, South Carolina

Docket Nos. TX20-2-000
TX20-3-000

PROPOSED ORDER DIRECTING THE PROVISION OF INTERCONNECTION AND
TRANSMISSION SERVICES AND DISMISSING COMPLAINT

(Issued August 27, 2020)

1. In this proposed order,¹ we grant the requests of the City of Goose Creek, South Carolina (Goose Creek) for an order directing the South Carolina Public Service Authority (Santee Cooper) to provide interconnection and transmission service under sections 210 and 211 of the FPA and direct the parties to negotiate rates, terms, and conditions of interconnection and transmission service at the Mt. Holly Smelter substation (Mt. Holly Interconnection), including whether any deviation from Santee Cooper's unfiled Open Access Transmission Tariff (OATT)² is appropriate, within

¹ Section 212(c) of the Federal Power Act (FPA) provides that, before issuing an order under section 210 or 211 of the FPA, the Commission must first issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them. 16 U.S.C. §§ 824k(c)(1-2), 824i, 824j (2018).

² Santee Cooper currently offers non-jurisdictional open access transmission service to transmission customers under the rates, terms, and conditions specified in a

60 days of the date of this order. We also dismiss Goose Creek's complaint under sections 206 and 306 of the FPA³ because Santee Cooper is not a Commission-jurisdictional public utility subject to section 206, and Goose Creek has failed to demonstrate that Santee Cooper violated the FPA as required under section 306.

I. Background

2. Santee Cooper currently provides electric service to the Mt. Holly aluminum smelter (Mt. Holly Smelter) located in Berkeley County, South Carolina and owned by Century Aluminum of South Carolina, Inc. (Century Aluminum). The service contract between Century Aluminum and Santee Cooper is scheduled to expire on December 31, 2020.⁴

3. On December 3, 2019, citizens of Goose Creek, also located in Berkeley County, passed a referendum to establish a new municipal utility. Goose Creek is currently in the process of annexing a 5,000-acre area, including the Mt. Holly Smelter site, into its city limits, and Goose Creek intends to provide the Mt. Holly Smelter with lower-cost electricity through its newly formed utility. Goose Creek explains that the Mt. Holly Smelter will permanently close if it cannot obtain power at competitive prices from Goose Creek. Goose Creek also intends to attract additional commercial and industrial development to the annexed area surrounding the Mt. Holly Smelter and to provide low-cost electricity service to these customers. Goose Creek plans to lease existing substation equipment located inside Century Aluminum's fence line and use this equipment to serve the Mt. Holly Smelter and all potential new customers in the annexed area. All other existing electric customers in the annexed area will continue to be served by Berkeley Electric Cooperative, per the terms of a franchise agreement.⁵

4. In order to procure wholesale energy and deliver it to the Mt. Holly Smelter substation, Goose Creek requires interconnection and transmission service from Santee

document it refers to as an OATT, and that the Commission has neither reviewed nor approved. We refer to this document herein as Santee Cooper's unfiled OATT. *See* Santee Cooper, *Open Access Transmission Tariff*, https://www.oasis.oati.com/woa/docs/SC/SCdocs/Santee_Cooper_Formula_Rate_OATT_IssuedMar_19_EffectiveMay15.pdf.

³ 16 U.S.C. §§ 824e, 825e (2018).

⁴ Santee Cooper, Answer, Docket No. TX20-2-000, (filed April 20, 2020) (Santee Cooper April 20 Answer) (citing Callander Affidavit at 2-3 (Callander Aff.)).

⁵ Goose Creek, Application, Docket No. TX20-3-000, at 4-9, 38 (filed April 23, 2020) (Transmission Service Application).

Cooper. On February 18, 2020, Goose Creek submitted a transmission service application and interconnection request to Santee Cooper's OATT Administrator requesting 205 MW of firm point-to-point transmission service with a point of receipt at the interface between Southern Company and Santee Cooper and a point of delivery at the Mt. Holly Smelter substation. On March 19, 2020, Santee Cooper denied Goose Creek's application, on the basis that Goose Creek is not an Eligible Customer under its OATT.⁶

5. On March 16, 2020, in Docket No. EL20-33-000, Goose Creek filed with the Commission a complaint (Original Complaint), pursuant to sections 206, 210, 211, and 306⁷ of the FPA and Rule 206 of the Commission's Rules of Practice and Procedure,⁸ arguing that Santee Cooper improperly denied it interconnection and transmission services under Santee Cooper's OATT⁹ and requesting that the Commission direct Santee Cooper to provide such services. On March 26, 2020, Goose Creek filed with the Commission an amended and restated complaint (Complaint) substantially retaining arguments it made in the Original Complaint, modifying certain arguments and adding certain new arguments. On March 31, 2020, Goose Creek filed a notice of withdrawal of the Original Complaint, requesting rescission of the Commission's March 17, 2020 noticing of Goose Creek's original complaint.¹⁰

⁶ Goose Creek, Complaint, Docket No. EL20-33-000, at 7-14 (filed March 26, 2020) (Complaint).

⁷ 16 U.S.C. § 825e (2018).

⁸ 18 C.F.R. § 385.206 (2019).

⁹ Both Goose Creek and Santee Cooper refer to Santee Cooper's publicly-available statement of rates, terms, and conditions as Santee Cooper's OATT. However, we note that, while Santee Cooper previously maintained a safe-harbor OATT, it no longer maintains safe harbor status because it failed to submit modifications consistent with the Commission's most recent order regarding Santee Cooper's safe harbor OATT. *See South Carolina Public Service Authority*, 122 FERC ¶ 61,183, at P 30 (2008) (*Santee Cooper*) (stating that "Santee Cooper will not have a safe harbor tariff until it incorporates the modifications discussed above"). We refer to this document as Santee Cooper's unfiled OATT. *See supra* note 2.

¹⁰ Because Santee Cooper did not oppose the withdrawal, it became effective by operation of law. Therefore, this order addresses only the arguments Goose Creek raises in its March 26, 2020 Complaint, the only complaint remaining before the Commission in this proceeding.

6. On March 30, 2020, in Docket No. TX20-2-000, Goose Creek filed with the Commission an application (Interconnection Application), pursuant to sections 210 and 212¹¹ of the FPA and Rule 204 of the Commission's Rules of Practice and Procedure,¹² requesting that the Commission direct Santee Cooper to interconnect with Goose Creek at the Mt. Holly Interconnection.

7. On April 23, 2020, in Docket No. TX20-3-000, Goose Creek filed an application (Transmission Service Application) with the Commission, pursuant to sections 211 and 212 of the FPA and Rules 204 and 212 of the Commission's Rules of Practice and Procedure¹³ and Rule 36.1 of the Commission's Regulations,¹⁴ requesting that the Commission direct Santee Cooper to provide point-to-point transmission service to Goose Creek with a delivery point at the Mt. Holly Interconnection in accordance with the rates, terms, and conditions of Santee Cooper's OATT.

II. Notice of Filing and Responsive Pleadings

A. Docket No. EL20-33-000

8. Notice of Goose Creek's Original Complaint was published in the *Federal Register*, 85 Fed. Reg. 16,332 (March 17, 2020), with answers, interventions, and comments due on or before April 6, 2020.

9. On March 17, 2020, Santee Cooper filed a Motion to Intervene, Motion to Dismiss, and Limited Answer to Goose Creek's Original Complaint (Santee Cooper March 17 Limited Answer). On March 18, 2020, Santee Cooper filed an errata to the Santee Cooper March 17 Limited Answer.

10. Notice of Goose Creek's Complaint was published in the *Federal Register*, 85 Fed. Reg. 18,949 (March 30, 2020), with answers, interventions, and comments due on or before April 15, 2020.

11. On March 27, 2020, Santee Cooper filed a letter stating that Goose Creek's Original Complaint had been superseded and was hence moot, and requesting that the Commission rescind its March 17, 2020 notice. On March 31, 2020, Goose Creek filed a notice of

¹¹ 16 U.S.C. § 824i (2018).

¹² 18 C.F.R. § 385.204 (2019).

¹³ 18 C.F.R. §§ 385.204, 385.212 (2019).

¹⁴ 18 C.F.R. § 36.1 (2019).

withdrawal of the March 16, 2020 Original Complaint and request for rescission of the March 17, 2020 notice.

12. On April 15, 2020, Santee Cooper filed a motion to dismiss and answer (Santee Cooper April 15 Answer) to Goose Creek's March 26, 2020 Complaint.

13. Motions to intervene were filed, jointly, by American Public Power Association and Large Public Power Council (APPA/LPPC), and also by Grand River Dam Authority (Grand River), and National Rural Electric Cooperative Association. APPA/LPPC and Grand River filed protests. Centra Electric Power Cooperative, Inc. (Centra) filed a motion to intervene out-of-time.

14. On April 28, 2020, Goose Creek filed an answer to the Santee Cooper April 15 Answer (Goose Creek April 28 Answer). On May 7, 2020, Santee Cooper filed a motion for leave to reply and reply to the Goose Creek April 28 Answer (Santee Cooper May 7 Answer). On May 11, 2020, Goose Creek filed a motion for leave to answer and limited answer to the Santee Cooper May 7 Answer (Goose Creek May 11 Limited Answer).

15. On May 14, 2020, Santee Cooper submitted a notice of no objection to what it characterized as an unauthorized answer of Goose Creek in the Goose Creek May 11 Limited Answer (Santee Cooper May 14 Notice of No Objection). On May 26, 2020, Santee Cooper submitted a supplement to the Santee Cooper April 15 Answer (Santee Cooper May 26 Supplemental Answer). On June 5, 2020, Goose Creek filed an answer to the Santee Cooper May 26 Supplemental Answer (Goose Creek June 5 Answer).

16. On June 10, 2020, Goose Creek filed a brief factual update (Goose Creek June 10 Status Report) indicating that the City of Goose Creek government had passed the first readings of two ordinances in furtherance of Goose Creek's municipalization efforts. On July 13, 2020, Goose Creek filed an update concerning matters currently pending before the South Carolina state courts and indicating that the South Carolina Supreme Court had denied Goose Creek's petition that it exert original jurisdiction over Goose Creek's pending circuit court petition against Santee Cooper. On July 15, 2020, Goose Creek filed an update (Goose Creek July 15 Status Report) concerning actions taken by the City of Goose Creek government indicating that the second readings of two ordinances had passed, in furtherance of Goose Creek's municipalization efforts. On August 26, 2020, Goose Creek filed an update (Goose Creek August 26 Status Report) noting that Goose Creek executed a lease agreement with Century Aluminum for the Mt. Holly facilities. Goose Creek attached the executed lease agreement to its update.¹⁵

¹⁵ These four updates were filed as well in Docket Nos. TX20-2-000 and TX20-3-000.

B. Docket No. TX20-2-000

17. Notice of Goose Creek's Interconnection Application was published in the *Federal Register*, 85 Fed. Reg. 19,471 (March 31, 2020), with answers, interventions, and comments due on or before April 20, 2020. Centra filed a motion to intervene out-of-time.

18. On April 20, 2020, Santee Cooper filed a motion to intervene,¹⁶ dismiss or hold in abeyance, and answer to the Interconnection Application (Santee Cooper April 20 Answer). On May 5, 2020, Goose Creek filed an Answer to the Santee Cooper April 20 Answer (Goose Creek May 5 Answer).

19. On May 14, 2020, Santee Cooper filed in this docket and Docket No. TX20-3-000 a motion to intervene, hold in abeyance, and answer to Goose Creek's Interconnection Application and Transmission Service Application (Santee Cooper May 14 Answer). On May 29, 2020, Goose Creek filed an answer to the Santee Cooper May 14 Answer (Goose Creek May 29 Answer). On June 5, 2020, Santee Cooper filed a leave to reply and reply to the Goose Creek May 29 Answer (Santee Cooper June 5 Answer).

C. Docket No. TX20-3-000

20. Notice of Goose Creek's Transmission Service Application was published in the *Federal Register*, 85 Fed. Reg. 23,952 (April 24, 2020), with answers, interventions, and comments due on or before May 14, 2020. Centra filed a motion to intervene out-of-time.

21. On May 14, 2020, Santee Cooper filed in this docket and Docket No. TX20-2-000 a motion to intervene, hold in abeyance, and answer to Goose Creek's Transmission Service Application and Interconnection Application (Santee Cooper May 14 Answer). On May 29, 2020, Goose Creek filed an answer to the Santee Cooper May 14 Answer (Goose Creek May 29 Answer). On June 5, 2020, Santee Cooper filed a leave to reply and reply to the Goose Creek May 29 Answer (Santee Cooper June 5 Answer).

III. Discussion**A. Procedural Matters**

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings. We also grant Centra's motion to intervene out-of-

¹⁶ Santee Cooper notes that, as the respondent to Goose Creek's application, it is not clear to Santee Cooper whether it is required to move to intervene.

time given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay. We note that, as the respondent to the Interconnection and Transmission Service Applications, Santee Cooper is automatically a party to these proceedings.¹⁷

23. Rule 213(a)(2) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits answers to a protest or answer unless otherwise ordered by the decisional authority. We accept the answers filed in this proceeding because they have provided information that assisted us in the decision-making process.

B. Commission Authority to Consider a Complaint Against a Non-Jurisdictional Utility

1. Complaint

24. In the Complaint, Goose Creek argues that the Commission has the jurisdiction to enforce the terms of Santee Cooper’s OATT. Goose Creek notes that section 306 of the FPA, which holds that “any person, electric utility, State, municipality, or State commission complaining of anything done or omitted to be done by any licensee, transmitting utility, or public utility in contravention of the provisions of [the FPA],” may be addressed by a complaint or petition with the Commission.¹⁸ Goose Creek adds that Santee Cooper is clearly a “transmitting utility” covered by section 306 since Santee Cooper satisfies the FPA definition of a “transmitting utility,” that is, “an entity . . . that owns, operates, or controls facilities used for the transmission of electric energy—(A) in interstate commerce; (B) for the sale of electric energy at wholesale.”¹⁹

25. Next, Goose Creek argues that, since Santee Cooper maintains a reciprocity OATT on-file with the Commission, pursuant to Order Nos. 888, 1000-A, and 1000-B, the Commission can address the issues Goose Creek raises. Goose Creek states that Santee Cooper has denied Goose Creek service under Santee Cooper’s reciprocity OATT even though Goose Creek clearly is an “Eligible Customer” as defined in Santee Cooper’s reciprocity OATT. Goose Creek states that, by continuing to deny service to Goose Creek, Santee Cooper is acting in contravention of its own tariff and, therefore, the Commission has jurisdiction under section 306.²⁰

¹⁷ See, e.g., *Jacumba Solar, LLC*, 157 FERC ¶ 61,132, at P 8 (2016) (citing 18 C.F.R. § 385.102(c)(2) (2019)).

¹⁸ Complaint at 16-17.

¹⁹ *Id.* at 17 (citing 16 U.S.C. § 796(23) (2018)).

²⁰ *Id.* at 17-18 (citing *Promoting Wholesale Competition Through Open Access Non-*

26. Further, Goose Creek argues that a section 206 complaint is an appropriate vehicle to seek a mandatory wheeling order from the Commission even for pursuing remedial action against a non-public utility's reciprocity tariff.²¹ Moreover, Goose Creek argues that Commission precedent indicates that the Commission's authority to issue transmission or wheeling orders under section 206 is not limited to public utilities, but extends to other transmitting utilities as well. Specifically, Goose Creek asserts that section 206 is an appropriate avenue for relief so long as the relief is provided within the Commission's statutory authority.²² Goose Creek also argues that the Commission may provide relief under section 206 to non-public utilities where jurisdictional rates are impacted²³ and within a transmission service context.²⁴ Taken together, Goose Creek contends, because the complaint asks the Commission to assert its jurisdiction over matters related to the transmission of electric energy in interstate commerce, as granted through sections 210, 211, and 212, and as that offering has been extended by Santee Cooper in its reciprocity OATT, the Commission may act on this Complaint under section 206.²⁵

27. Goose Creek states that, since Santee Cooper has denied Goose Creek's application, Santee Cooper is violating its own OATT and, therefore, Goose Creek appropriately requests that the Commission order Santee Cooper to approve the

Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996) (cross-referenced at 75 FERC ¶ 61,080) ; *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012); *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012)). Goose Creek also asserts that it qualifies as an "Eligible Customer" under Santee Cooper's OATT since Goose Creek is an "electric utility" under the FPA.

²¹ *Id.* at 20.

²² *Id.* at 22 (citing *Transmission Agency of N. Cal. v. FERC*, 628 F.3d 538, 546 (D.C. 2010)).

²³ *Id.* (citing *South Carolina Public Service Authority v. FERC*, 762 F.3d 41 (D.C. 2014) (*Santee Cooper v. FERC*)).

²⁴ *Id.* (citing *Powerex Corp. v. United States Dep't of Energy, Western Area Power Admin.—Sierra Nevada Region*, 138 FERC ¶ 61,188, at PP 32-41 (2012) (*Powerex*)).

²⁵ *Id.* at 24.

Application and provide transmission service to Goose Creek on a nondiscriminatory basis.²⁶

2. Answers

28. Grand River argues that Santee Cooper does not meet the definition of “public utility” as defined by section 201(e) of the FPA, because it is an exempt governmental entity under section 201(f) of the FPA.²⁷ Thus, Grand River argues that the Commission lacks jurisdiction to grant the relief under section 206. Furthermore, Grand River states that section 306 only vests the Commission with the jurisdiction to enforce a violation of the FPA and asserts that, because there is no violation of the FPA that may be enforced pursuant to section 306 (nor could there be), the Commission lacks jurisdiction to grant the relief requested by Goose Creek pursuant to section 306.²⁸

29. Similarly, APPA/LPPC argue that the Commission has no ability to provide relief to Goose Creek under section 306. APPA/LPPC note that, in Order Nos. 888 and 888-A, the Commission conceived the reciprocity tariff condition as an indirect method of encouraging non-public utilities to provide reciprocal open access transmission service to public utilities. However, APPA/LPPC assert, the Commission has been clear that the reciprocity condition does not impose any enforceable requirements on non-public utilities.²⁹ APPA/LPPC also note that none of the Commission precedent which Goose Creek cites supports a finding that the Commission has authority to enforce a reciprocity OATT under section 306.³⁰

30. APPA/LPPC also assert that section 206 is not an appropriate vehicle for an order providing mandatory wheeling service. APPA/LPPC state that section 201(f) is unambiguously restricted to public utilities given that this section provides that “[n]o provision in [Part II of the [FPA]] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, . . . unless such provision makes specific

²⁶ *Id.* at 28.

²⁷ Grand River Dam Authority Protest at 1 (citing *Bonneville Pwr. Admin. v. FERC*, 422 F.3d 908, 911 (9th Cir. 2005) (*Bonneville*) (holding that section 206 of the FPA “carries no reference to non-public utilities”); 16 U.S.C. §§ 824(e), 824(f) (2018)).

²⁸ *Id.* at 2-3.

²⁹ APPA/LPPC Protest at 5-7 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,761; Order No. 1000-A, 139 FERC ¶ 61,132 at P 775; *E. Ky. Power Coop., Inc.*, 144 FERC ¶ 61,063, at P 19 n.17 (2013) (*East Kentucky*)).

³⁰ *Id.* at 9-10.

reference thereto.”³¹ APPA/LPPC state that, since Santee Cooper clearly falls under this definition, there is no language in section 206 that surmounts the jurisdictional exclusion of section 201(f) to grant the Commission authority under section 206 over Santee Cooper’s provision of transmission service.³² Additionally, APPA/LPPC note that the Commission, upon accepting Santee Cooper’s reciprocity OATT, even recognized that, since Santee Cooper is a political arm of the State of South Carolina, the Commission lacks “jurisdiction under the FPA and sections 205 and 206 cannot be applied to the rates, terms or conditions of the transmission service it provides.”³³ APPA/LPPC state that the only logical reading of section 206 is that a complaint may only be filed under section 206 if the complaint seeks relief available under section 206 and the mandatory wheeling Goose Creek seeks is not available under section 206.³⁴

31. In its April 15 Answer, Santee Cooper argues that Goose Creek’s reliance on section 306 is misplaced since Goose Creek fails to cite to any violation of the FPA, or any order thereunder, that it alleges that Santee Cooper has violated. Rather, Santee Cooper contends, Goose Creek’s assertions that a non-jurisdictional OATT is enforceable by the Commission is counter to Commission precedent and the reciprocity framework established by the Commission.³⁵ Santee Cooper states that, pursuant to Order No. 890, its reciprocity OATT serves the Commission’s stated purpose that “conditions the use by a non-public utility of a public utility’s open access services on an agreement to offer non-discriminatory transmission services in return.”³⁶ Santee Cooper notes that, in Order No. 1000, the Commission reaffirmed this finding.³⁷ Thus, Santee Cooper states that Goose Creek’s reliance on *Powerex* is misplaced since those proceedings pertain to entities subject to the Commission’s jurisdiction. Finally, Santee Cooper notes that it no

³¹ *Id.* at 10-11 (citing 16 U.S.C. § 824(f) (2018)).

³² *Id.* at 11.

³³ *Id.* at 12 (citing *S.C. Pub. Serv. Auth.*, 75 FERC ¶ 61,209, at 61,696 (1996)).

³⁴ *Id.* at 12-13 (citing *S.C. Pub. Serv. Auth.*, 75 FERC at 61,696; *Power and Water Resources Pooling Auth. v. Pacific Gas and Elec. Co.*, 130 FERC ¶ 61,045 (2010) (PG&E)).

³⁵ Santee Cooper April 15 Answer at 11.

³⁶ *Id.* at 12 (citing *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, at P 14 (2007)).

³⁷ *Id.* (citing *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011)).

longer maintains a safe harbor OATT with the Commission which, according to Santee Cooper, is reason enough to reject Goose Creek's complaint.³⁸

32. Santee Cooper also argues that, as a matter of law, Goose Creek is precluded from making a section 206 filing against a non-jurisdictional entity like Santee Cooper. Santee Cooper first argues that Commission precedent and the courts have found that non-public utilities are not subject to the Commission's jurisdiction under either section 205 or 206. Santee Cooper states that, in *Bonneville*, the court was clear: "the *unambiguous dictate* of §§ 205 and 206 [is] that those sections apply only to public utilities."³⁹ Second, Santee Cooper addresses Goose Creek's claims that the Commission's jurisdiction extends to non-public utilities when jurisdictional rates are implicated. Santee Cooper states that Goose Creek fails to identify any Santee Cooper practice that affects jurisdictional rates, the essential nexus that served as the lynchpin for *PG&E*.⁴⁰ Third, Santee Cooper asserts that Goose Creek mistakenly relies on a Commission order *rejecting* a section 206 complaint against a governmental utility.⁴¹ Fourth, Santee Cooper argues that Goose Creek is also mistaken by relying on *Santee Cooper v. FERC*. Specifically, Santee Cooper notes that the subject of that proceeding was voluntary regional transmission planning under Order No. 890. Santee Cooper states that it made commitments to the protocols of Order No. 890 as part of its reciprocity OATT and not because Order No. 890 applied to Santee Cooper because its practices may impact Commission-jurisdictional rates.⁴²

33. Regarding Goose Creek's points about its interactions with Santee Cooper in anticipation of forming its own electric utility, Santee Cooper explains that it took steps, consistent with the OATT and in good faith, to provide reciprocal open access transmission service.⁴³ However, Santee Cooper determined that, under its reciprocity OATT, Goose Creek does not fall within the definition of an "electric utility." Specifically, Santee Cooper supports its determination that Goose Creek does not satisfy this definition based on the following factors: (1) that there is no evidence that Goose Creek will control electrical facilities which have been and will continue to be solely used by a single

³⁸ *Id.* at 12-13 (citing *East Kentucky*, 144 FERC ¶ 61,063; *Powerex*, 138 FERC ¶ 61,188).

³⁹ *Id.* at 14 (citing *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005)).

⁴⁰ *Id.* at 15.

⁴¹ *Id.* at 16 (citing *Powerex*, 131 FERC ¶ 61,188 at P 2.).

⁴² *Id.* at 16-17 (citing *Santee Cooper v. FERC* 762 F.3d 41).

⁴³ *Id.* at 32-33 (citing Affidavit of James Stewart (Stewart Aff.)).

industrial customer funding this entire effort; (2) that the so-called utility will not employ professional utility managers; (3) that there is no tariff offering service to the public; and (4) that there are no realistic prospects for customers other than Century Aluminum.⁴⁴ Santee Cooper asserts that by no reasonable accounting can an entity with these characteristics be determined to be an electric utility within the meaning of the Santee Cooper reciprocity OATT.

34. In its answer, Goose Creek argues that Santee Cooper, Grand River, and APPA/LPPC are incorrect in their arguments that Santee Cooper did not act in contravention of the FPA. First, Goose Creek states, Santee Cooper's claims about its reciprocity OATT, namely that it is not enforceable but serves as evidence of Santee Cooper's "open access commitment," are contradictory. Goose Creek charges that Santee Cooper cannot hold out its reciprocity OATT as evidence to an "open access commitment" while, simultaneously, denying any accountability for the terms in its reciprocity OATT.⁴⁵

35. Second, Goose Creek argues that Santee Cooper and APPA/LPPC's reliance on *East Kentucky* is misplaced. Goose Creek states that, since the *East Kentucky* proceeding dealt with a non-public utility cancelling its reciprocity OATT, Santee Cooper's assertions that the Commission cannot enforce a reciprocity OATT ignores at least one remedy relevant here – removing a non-public utility from the Commission's open access regime. To support its position that the Commission intended that non-public utilities offer service on comparable terms and conditions, Goose Creek notes that in both Order No. 888 and an order on Santee Cooper's petition for declaratory order regarding its safe harbor status, the Commission expressed its desire to avoid proceedings under section 211. Specifically, in the order initially granting Santee Cooper safe harbor status, the Commission stated that "case-by-case section 211 proceedings are not a substitute for tariffs of general applicability that permit timely, nondiscriminatory access on request."⁴⁶ In sum, Goose Creek states that the most efficient means to providing the necessary service to Goose Creek is granting the Complaint.⁴⁷

36. Third, Goose Creek argues that Santee Cooper's position here undermines the reciprocity regime by denying business to utilities that provide open access to Santee Cooper. Specifically, as noted by Goose Creek in its filing, Goose Creek plans to obtain, or require its wholesale suppliers to obtain, transmission service from Southern Company

⁴⁴ *Id.* at 34-35.

⁴⁵ Goose Creek April 28 Answer at 2-3.

⁴⁶ *Id.* at 4-5 (quoting *S.C. Pub. Serv. Auth.*, 75 FERC ¶ 61,209 (1996)).

⁴⁷ *Id.* at 6.

to deliver electric energy to the Southern Company-Santee Cooper border. Goose Creek states that, since Santee Cooper is interfering with Goose Creek's efforts, Santee Cooper is also interfering with transmission service from, and denying transmission service revenue to, Southern Company.⁴⁸ Further, Goose Creek argues, if Santee Cooper's position is acceptable to the Commission, Santee Cooper will have obtained a competitive advantage over public utilities by denying an Eligible Customer market access, while retaining its open access to public utilities' transmission systems.⁴⁹ Taken together, Goose Creek argues that Santee Cooper's denial of service constitutes a denial of legitimate actions taken by the Commission under the FPA and, therefore, the Commission can and should act under section 306 to rectify the actions being taken by Santee Cooper.⁵⁰

37. Goose Creek also argues that the Commission and the Supreme Court have affirmed that the Commission has the authority over practices affecting jurisdictional rates by non-public utilities. Specifically, Goose Creek cites the Supreme Court's findings in *FERC v. Electric Power Supply Association* and *Hughes v. Talen Energy Marketing, LLC*, which upheld Commission orders regarding practices that were "affecting" FERC-jurisdictional matters.⁵¹ In *Hughes*, Goose Creek states, the state of Maryland chose to participate in a regime authorized by the Commission, but Maryland was not permitted to dictate the terms of engagement within the Commission-jurisdictional market structure. The Supreme Court found that "Maryland cannot regulate in a domain Congress assigned to FERC and then require FERC to accommodate Maryland's intrusion."⁵² Similarly, Goose Creek states, Santee Cooper cannot exercise a form of "nullification" enabling it to determine which parts of the Commission's reciprocity regime it will obey. Goose Creek explains that, in *EPSA*, the Supreme Court held that the Commission had jurisdiction over the practices at issue that directly affected wholesale rates. Here, Goose Creek argues, Santee Cooper should not be permitted to evade accountability for its actions "affecting" transmission service by denying Commission oversight over the Commission's own reciprocity regime.⁵³

⁴⁸ *Id.*

⁴⁹ *Id.* at 7.

⁵⁰ *Id.* at 7-8.

⁵¹ *Id.* at 8-9 (citing *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 762 (2016) (*EPSA*); *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1291-92 (2016) (*Hughes*)).

⁵² *Id.* at 9 (citing *Hughes*, 136 S. Ct. at 1298 n.11).

⁵³ *Id.* at 10 (citing *EPSA*, 136 S. Ct. at 782).

38. Goose Creek argues that the Commission has accepted and ruled on the merits of complaints against non-public utilities under Section 206. Specifically, Goose Creek states that in *American National Power, Inc.* the Commission ruled on a complaint filed by ANP against the Long Island Power Authority (LIPA) while noting that LIPA is not a public utility as defined by section 206 of the FPA.⁵⁴ Goose Creek similarly asserts that in *TransAlta Energy Marketing (U.S.), Inc.*, the Commission ruled on the merits of a complaint filed against the Bonneville Power Authority (Bonneville), a non-public utility per section 206, that Bonneville was required to maintain certain language in its OATT “in order to ensure that there are no future misunderstandings.”⁵⁵

39. Santee Cooper contests Goose Creek’s reliance on Supreme Court cases and certain complaints filed pursuant to section 206 that dealt with non-public utilities. Santee Cooper argues that *Hughes* is irrelevant to this proceeding since that case dealt with preemption. Santee Cooper states that its denial of transmission service to Goose Creek in no way remotely interferes with Commission regulation of jurisdictional transmission or wholesale sales service.⁵⁶ Santee Cooper argues that *EPSA* has two key features that distinguish altogether the scope of permissible regulation in *EPSA* from Santee Cooper’s non-jurisdictional OATT. First, according to Santee Cooper, the regulated entities subject to the rule on review in *EPSA* were Independent System Operators. Second, Santee Cooper claims, the Court in *EPSA* was careful to limit the extension of Commission authority to rules or practices that “directly affect” jurisdictional wholesale sales rates. Here, Santee Cooper states, Goose Creek provides *no* nexus establishing any link between Santee Cooper’s actions and the Commission’s regulation of jurisdictional matters.⁵⁷

40. Regarding certain complaints made to the Commission pursuant to section 206, Santee Cooper reiterates that it is not subject to the Commission’s jurisdiction. Rather, Santee Cooper states, Goose Creek doubles down on the dubious argument that the Commission has acknowledged its jurisdiction over non-jurisdictional utilities under section 206 in decisions rejecting section 206 complaints against municipal utilities.⁵⁸

⁵⁴ *Id.* at 11 (citing *Am. Nat’l Power, Inc.*, 98 FERC ¶ 61,154, at 61,544 (2002)).

⁵⁵ *Id.* at 11-12 (citing *TransAlta Energy Mktng (U.S.), Inc. v. Bonneville Pwr. Admin.*, 104 FERC ¶ 61,335 at P 39 (2003)).

⁵⁶ Santee Cooper May 7 Answer at 8-9 (citing *Hughes*, 136 S. Ct. at 1297).

⁵⁷ *Id.* at 9-10 (citing *EPSA*, 136 S. Ct. at 776).

⁵⁸ *Id.* at 11.

41. Regarding Goose Creek's arguments that Santee Cooper has violated the terms and conditions of its reciprocity OATT in violation of section 306, Santee Cooper argues that Goose Creek distorts the Commission's reciprocity framework. Specifically, Santee Cooper states that Goose Creek's assertion that East Kentucky suggests "that a remedy vis-à-vis Santee Cooper may be 'removing' it 'from FERC's open access regime' is gibberish."⁵⁹ Here, Santee Cooper states, had Santee Cooper denied transmission service to a public utility from which it sought transmission service, it may be denied transmission service itself, which is the crux of the Commission's reciprocity framework.⁶⁰

42. Further, Santee Cooper contests Goose Creek's assertions that a complaint filed pursuant to section 206/306 can be entertained because "enforcement" of the "reciprocity tariff is the means by which service under Section 211 is effectuated."⁶¹ Santee Cooper argues that Goose Creek's claims that the Commission sought to avoid section 211 proceedings by instead favoring section 206 complaints is also nonsensical.⁶²

43. Next, Santee Cooper notes that it has not taken transmission service from Southern Company while refusing to provide transmission service to Southern Company in return. Santee Cooper states that, had it done so, Southern Company would have the right to refuse to provide transmission service to Santee Cooper.⁶³ Finally, Santee Cooper contests Goose Creek's claims about how a section 206 complaint is the more efficient means for a remedy. Santee Cooper states that, in Order No. 890, the Commission expressly rejected proposals to take generic action under section 211A of the FPA⁶⁴ to require non-jurisdictional utilities to file enforceable open access tariffs.⁶⁵

⁵⁹ *Id.* at 4.

⁶⁰ *Id.* at 3-4.

⁶¹ *Id.* at 4-5 (citing Goose Creek April 28 Answer at 4).

⁶² *Id.* at 5-6.

⁶³ *Id.* at 6-7.

⁶⁴ 16 U.S.C. § 824j-1 (2018).

⁶⁵ Santee Cooper May 7 Answer at 7-8 (citing *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119)).

44. In its May 26 Supplemental Answer, Santee Cooper asserts that the Commission's decision in *Southwest Power Pool, Inc.* further supports that Santee Cooper is not subject to the Commission's jurisdiction pursuant to section 201(f).⁶⁶

45. In its June 10 Answer, Goose Creek notes that Santee Cooper omitted a portion of the quotation from the Commission's order in *Southwest Power Pool, Inc.* Specifically, Goose Creek states that the Commission held that:

[S]ection 201(f) exempts certain entities, such as state- or municipally-owned utilities and cooperative utilities, from Part II of the FPA, 'unless such provision makes specific reference thereto.' With one limited exception, sections 205 and 206 of the FPA do not contain such references and, by their terms, apply only to public utilities. However, the D.C. Circuit has held that when a non-public utility becomes a transmission-owning member of a regional transmission organization (RTO) or independent system operator (ISO) and its revenue requirement becomes a component of the RTO's/ISO's jurisdictional rate, the Commission has jurisdiction to analyze the non-public utility's rates, to the extent that those rates affect jurisdictional transactions, to ensure that the RTO's/ISO's rates remain just and reasonable.⁶⁷

3. Determination

46. Santee Cooper is a public corporation of the State of South Carolina and an entity that, under section 201(f), is exempt from most provisions of the FPA, "unless such provision makes specific reference thereto."⁶⁸ Santee Cooper does not meet the definition of a "public utility" under the FPA.⁶⁹ Because Santee Cooper is not a public

⁶⁶ Santee Cooper May 26 Supplemental Answer at 1-2 (citing *Southwest Power Pool, Inc.*, 171 FERC ¶ 61,142 (2020)).

⁶⁷ Goose Creek June 5 Answer at 2-3 (citations omitted).

⁶⁸ 16 U.S.C. § 824(f) (2018). Section 201(b)(2) of the FPA provides that section 201(f) entities are subject to sections 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 215A, 216, 217, 218, 219, 220, 221, and 222. *Id.* § 824(b)(2).

⁶⁹ Under the FPA, a "public utility" is defined as "any *person* who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 215A, 216, 217, 218, 219, 220, 221, or 222)." 16 U.S.C. § 824(e) (2018)

utility, the Commission has no authority to review Santee Cooper's services to Goose Creek under either sections 205 or 206.

47. As to Goose Creek's arguments with respect to section 306, we find that Goose Creek has failed to identify any provisions of the FPA that Santee Cooper has violated. Section 306 provides that a complaint must set forth the alleged actions or inactions of the respondent licensee, transmitting utility, or public utility that contravene the provisions of the FPA.⁷⁰ Rule 206 of the Commission's Rules of Practice and Procedure provides that a complaint must "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements" and "[e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements."⁷¹ Goose Creek does not allege any FPA violations under sections 210 or 211, in particular. Therefore, we reject Goose Creek's arguments under section 306.⁷²

C. Goose Creek's Interconnection Application and Transmission Service Application

48. Sections 210, 211, 212, and 213 of the FPA outline specific requirements for a Commission order that directs interconnection and/or transmission. Below, we discuss the relevant requirements of each section.

(emphasis added). The FPA defines a "person" as "an individual or a corporation." *Id.* § 796(4). The FPA's definition of a "corporation" specifically excludes "municipalities." *Id.* § 796(3). The FPA defines a "municipality" to include "a city . . . or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power." *Id.* § 796(7). Because Santee Cooper meets the definition of a "municipality" and does not meet the definition of a "person," it does not meet the definition of a "public utility" under the FPA. *See also Bonneville*, 422 F.3d at 915 ("Even though governmental and municipal utilities are public in normal parlance, they are not "public utilities" under the FPA."); *Transmission Agency of N. Cal. V. FERC*, 495 F.3d 663, 674 (2007) (finding that "a municipality is not a public utility").

⁷⁰ 16 U.S.C. § 825e (2018).

⁷¹ 18 C.F.R. § 385.206(b)(1)-(2) (2019).

⁷² *See Citizens Energy Task Force and Save Our Unique Lands*, 144 FERC ¶ 61,006, at P 38 (2013).

1. Requirements for Orders Directing Interconnection and Transmission Services

a. Jurisdiction

49. Pursuant to section 210(a), any “electric utility” may request an order requiring physical interconnection of its facilities with “the transmission facilities of any electric utility.”⁷³ Pursuant to section 211(a), any “electric utility” may request an order requiring a “transmitting utility to provide transmission services.” An “electric utility” is defined under the FPA, in relevant part, as a “person or Federal or State agency . . . that sells electric energy.”⁷⁴ A “transmitting utility” is defined in the FPA as an entity that “owns, operates, or controls facilities used for the transmission of electric energy — (A) in interstate commerce; (B) for the sale of electric energy at wholesale.”⁷⁵

i. Applications

50. In its Interconnection Application, Goose Creek argues that it is an electric utility pursuant to section 3(22) of the FPA and is thus eligible to request interconnection with “transmission facilities of any electric utility” under FPA section 210.⁷⁶ Similarly, in its Transmission Service Application, Goose Creek argues that it is an electric utility eligible to request an order “requiring a transmitting utility to provide transmission services . . . to the applicant” under FPA section 211.⁷⁷ Specifically, Goose Creek explains that the FPA defines an electric utility as “a person or Federal or State agency . . . that sells electric energy,” and contends that this expansive definition includes virtually any state or local government that is selling electricity, including a city such as Goose Creek.⁷⁸

51. Goose Creek cites to the Commission’s considerations in *Prairieland II* as to whether an entity: (1) has established its own rate schedules and terms of conditions of service; (2) takes title to the electric energy it intends to transmit to its customers; (3) owns or controls transmission or distribution facilities to serve its customers; or (4) is

⁷³ 16 U.S.C. § 824i(a)(1)(A) (2018).

⁷⁴ 16 U.S.C. § 796(22)(A) (2018).

⁷⁵ 16 U.S.C. § 796(23) (2018).

⁷⁶ Interconnection Application at 11.

⁷⁷ Transmission Service Application at 15.

⁷⁸ Interconnection Application at 11; Transmission Service Application at 15 (citing 16 U.S.C. § 796(22) (2018)).

a legal entity separate and distinct from the entities to whom it seeks to transmit electric energy.⁷⁹ Goose Creek also cites to the similar criteria laid out in Opinion No. 426-A.⁸⁰ Goose Creek argues that it satisfies each of these factors and will meet the definition of an electric utility under the FPA and applicable Commission precedent on or before January 1, 2021.⁸¹

ii. Answers

52. Santee Cooper argues that Goose Creek does not qualify as an electric utility under the FPA, because Goose Creek has failed to show the essence of a genuine, arms-length sale or that it meets the criteria laid out in the precedent it cites.⁸² Specifically, Santee Cooper cites to the Commission's finding in *Prairieland I* that an entity is not an electric utility if it "is merely an intermediary" for the actual seller.⁸³ Santee Cooper argues that this is precisely the essence of Goose Creek's arrangement with Century Aluminum, the owner of the Mt. Holly Smelter, because: (1) Goose Creek has verifiable plans to serve only Century Aluminum; (2) Century Aluminum is fully funding Goose Creek's municipalization effort; (3) the facilities Goose Creek intends to lease were designed and built solely to serve Century Aluminum, and cannot be used to serve other customer without being substantially supplemented and reengineered; (4) there is no evidence that Goose Creek will control even these limited facilities because no professional management exists to operate the facilities; and (5) Goose Creek has agreed not to serve Berkeley Electric Cooperative's existing customers in the annexed area, leaving only Century Aluminum as the city's one potential customer.⁸⁴ Thus,

⁷⁹ Interconnection Application at 12; Transmission Service Application at 15-17 (citing *Prairieland Energy, Inc.*, 88 FERC ¶ 61,153, at 61,516 (1999) (*Prairieland II*)).

⁸⁰ Interconnection Application at 13; Transmission Service Application at 17-18. (citing *People's Electric Cooperative*, Opinion No. 426-A, 93 FERC ¶ 61,218, at 61,728 (2000)).

⁸¹ Interconnection Application at 12-14; Transmission Service Application at 15-18.

⁸² Santee Cooper April 20 Answer at 7-8.

⁸³ *Id.* at 8 (quoting *Prairieland Energy, Inc.*, 85 FERC ¶ 61,446 at 62,666 (1998) (*Prairieland I*), *reh'g denied*, 87 FERC ¶ 61,006 (1999)).

⁸⁴ *Id.* at 8-9.

Santee Cooper argues that Goose Creek's utility has no identity other than as an agent of Century Aluminum, precisely what the Commission found in *Prairieland I*.⁸⁵

53. Santee Cooper argues that Goose Creek offers nothing but assertions that it meets any of the other criteria laid out in *Prairieland II*, and contends that even if Goose Creek can subsequently demonstrate that it meets these criteria it will be little more than window dressing aimed at concealing the real party at interest – Century Aluminum – with respect to all “so-called” utility activity.⁸⁶

54. In response, Goose Creek contends that Santee Cooper's assertion that Goose Creek is “merely an intermediary” for Century Aluminum is untrue.⁸⁷ Goose Creek argues that its formation of a municipal electric utility is in keeping with a significant project providing an array of benefits to the city.⁸⁸ Specifically, Goose Creek explains that its population has increased by 17% in less than 10 years, and that the mayor and city council have prioritized economic development as a major focus for the city.⁸⁹ Goose Creek states that its comprehensive plan expressly provides that the city “make investments in community facilities and infrastructure . . . to ensure that adequate public services are available for new development.”⁹⁰ Goose Creek contends that the creation of a municipal electric utility, in conjunction with the opportunities presented by the annexation of 5,000 acres of land currently owned by Century Aluminum, conforms to the city's stated goals of investing in infrastructure and expanding opportunities for economic development.⁹¹ Goose Creek explains that the south side of South Carolina Highway 176, opposite the Century Aluminum site, has experienced significant development in recent years, and that Goose Creek intends to continue transforming the Highway 176 corridor by annexing the 5,000 acre site and opening it to development.⁹²

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at 10.

⁸⁷ Goose Creek May 5 Answer at 6.

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 6-7.

⁹⁰ *Id.* at 7 (citing Ex. 3, 2015 Comprehensive Plan of the City of Goose Creek at 1-12).

⁹¹ *Id.* at 7.

⁹² *Id.* at 7-8.

55. Goose Creek explains that annexing the 5,000 acre site and forming an electric utility will enable the city to accomplish the following objectives: (1) increase its tax base through expanding its borders; (2) increase its tax base through construction and development in the annexed area; (3) expand its job base through additional commercial and industrial growth; (4) maintain a large number of jobs by supporting the efforts of a major employer, Century Aluminum, to stay in business; and (5) attract new customers to be served with affordable, reliable electricity by the city's new electric utility.⁹³ Goose Creek contends that Santee Cooper appears to believe that an alignment of interests resulting in a freely negotiated contractual arrangement is the same as being an "agent" or an "intermediary," and argues that Goose Creek is neither.⁹⁴

56. Goose Creek further argues that, while Santee Cooper relies extensively on *Prairieland I*, it fails to explain the core fact of the case: that Prairieland Energy was an intermediary controlled by its parent company to whom it proposed to transmit power.⁹⁵ Goose Creek states that, by contrast, Goose Creek and Century Aluminum are completely unrelated entities, and Goose Creek moved to create the electric utility only after its voters passed a referendum authorizing it to do so.⁹⁶ Furthermore, Goose Creek argues that Santee Cooper has not presented and cannot present any evidence to refute Goose Creek's claim that it will exercise control over the distribution facilities serving the Mt. Holly Smelter and new developed properties in the annexed area.⁹⁷

57. In response, Santee Cooper reiterates its argument that Goose Creek is not an electric utility under the FPA, because it fails to show that the essence of any sales transaction with Century Aluminum would be a genuine, arms-length sale rather than a simple sleeve for Century Aluminum's purchasing decisions.⁹⁸ Santee Cooper also reiterates that the arrangement between Goose Creek and Century Aluminum is exactly what the Commission found disqualifying in *Prairieland I*.⁹⁹

⁹³ *Id.* at 8-9.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.* at 10 (citing Santee Cooper April 20 Answer at 8).

⁹⁶ *Id.* at 10-11.

⁹⁷ *Id.* at 11; Goose Creek May 29 Answer at 17-18.

⁹⁸ Santee Cooper May 14 Answer at 20.

⁹⁹ *Id.* at 20.

58. On June 10, 2020, Goose Creek filed an update reporting that the Goose Creek City Council unanimously passed the first reading of an ordinance providing for the creation of a municipal utility and an ordinance to annex parcels B, C, and D of the Century Aluminum site into its city limits, and delineating the additional steps it has taken to further the creation of the municipal utility.¹⁰⁰ On July 15, 2020, Goose Creek filed a second update noting that the Goose Creek City Council unanimously passed the second and final reading of both ordinances.¹⁰¹ On August 26, 2020, Goose Creek filed a third update reporting that the Goose Creek City Council unanimously adopted a resolution approving the execution and delivery of a lease agreement for the Mt. Holly facilities.¹⁰²

iii. Determination

59. We find that Goose Creek qualifies as an electric utility under the FPA. We also find that Goose Creek meets the criteria to file applications under sections 210 and 211. The FPA defines an electric utility as “a person or Federal or State agency (including an entity described in section 201(f) of this title) that sells electric energy.”¹⁰³ Section 201(f) explicitly includes “any political subdivision of a State.”¹⁰⁴ Goose Creek has acted within its authority as a political subdivision of the State of South Carolina to form a municipal electric utility and thus qualifies as an electric utility under the FPA by the terms of the statute.¹⁰⁵

60. We disagree with Santee Cooper’s claim that Goose Creek would not be engaged in the sale of electric energy because it is simply a “sleeve” or “agent” for Century Aluminum. To make this claim, Santee Cooper relies on the Commission’s finding in *Prairieland I* that Prairieland Energy was not an electric utility under the FPA because it

¹⁰⁰ Goose Creek June 10 Status Report.

¹⁰¹ Goose Creek July 15 Status Report.

¹⁰² Goose Creek August 26 Status Report.

¹⁰³ 16 U.S.C. § 796(22) (2018).

¹⁰⁴ 16 U.S.C. § 824(f) (2018).

¹⁰⁵ See Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,688 (“Thus, as we have previously noted, municipal utilities are electric utilities simply by the terms of the statute.”); see also *Laguna Irrigation District*, 84 FERC ¶ 61,226, at 62,089 (1998) (*Laguna*) (“The fact that, up until now, Laguna has merely been a ‘paper’ utility in no way diminishes the fact that, under California law, Laguna has the right to be an electric utility and now intends to exercise that right.”).

would not be engaged in a genuine sale of electricity to the University of Illinois, its parent and owner.¹⁰⁶ However, Santee Cooper fails to recognize that the finding in *Prairieland I* rested on the fact that *Prairieland* was *wholly owned* by the University of Illinois – the only customer it planned to serve.¹⁰⁷ Here, Goose Creek is independent from Century Aluminum. Thus, Santee Cooper’s reliance on *Prairieland I* is misplaced, and we reject Santee Cooper’s claim that Goose Creek is a mere agent for Century Aluminum.

61. Furthermore, we find that Goose Creek meets or will meet by January 1, 2021, all of the criteria the Commission previously has used to determine whether an entity qualifies as an electric utility. In *Prairieland II* the Commission considered whether the entity: (1) has established its own rate schedules and terms of conditions of service; (2) takes title to the electric energy it intends to transmit to its customers; (3) owns or controls transmission or distribution facilities to serve its customers; or (4) is a legal entity separate and distinct from the entities to whom it seeks to transmit electric energy.¹⁰⁸ On July 15, 2020, Goose Creek passed an ordinance providing for creation of its electric utility that, among other things: (1) requires that electric rates and charges be sufficient to provide for the recovery of all operating costs of the electric utility; (2) requires that a schedule of all rates and charges in effect be maintained and on file in the offices of the City and made available upon request; and (3) authorizes the City Administrator to negotiate contracts and other binding legal documents regarding the sale, purchase, or exchange of electric power and the acquisition of real property assets by purchase, lease or other means.¹⁰⁹ On August 26, 2020, Goose Creek filed an executed lease agreement for the Mt. Holly facilities. These legal authorizations make explicit Goose Creek’s commitment to establish rates, terms, and conditions of service, take title to the electric energy it intends to deliver to customers, and own or control all distribution facilities used to serve its customers. And, for the reasons discussed above, Goose Creek is clearly a separate and distinct entity from Century Aluminum.

¹⁰⁶ See Santee Cooper May 14 Answer (citing *Prairieland I*, 85 FERC at 62,666).

¹⁰⁷ See *Prairieland I*, 85 FERC at 62,665 (explaining that *Prairieland* is wholly owned by the Board of Trustees of the University of Illinois and was created to acquire and sell electricity to the University of Illinois).

¹⁰⁸ *Prairieland II*, 88 FERC, at 61,516.

¹⁰⁹ See Goose Creek July 15 Status Report.

b. Section 212(g)

62. Section 212(g) precludes the Commission from issuing an order under section 210 or 211 if it is inconsistent with any state law which governs the retail marketing areas of electric utilities.

i. Applications

63. Goose Creek argues that an order granting its applications would not violate section 212(g), because Goose Creek qualifies under South Carolina law to establish its electric utility and serve Century Aluminum and other customers in the annexed area.¹¹⁰ Specifically, Goose Creek argues that Article VIII, section 8 of the South Carolina constitution and a corresponding statute allow the annexation of the Century Aluminum site, and that Article VIII, section 16 of the South Carolina constitution and the corresponding statute allow a municipality to establish an electric utility.¹¹¹

64. Goose Creek states that its ability to serve Century Aluminum and new retail customers in the annexed area is established under various provisions of Title 58 of the South Carolina Code (S.C. Code).¹¹² Goose Creek quotes section 58-27-670(2) of the S.C. Code, which states: “No electrical utility, except the annexing or incorporating municipality . . . shall furnish electrical service to any premises first requiring service in an area annexed by a municipality”¹¹³ Furthermore, Goose Creek disputes Santee Cooper’s claim in its OATT denial letter that Goose Creek’s provision of service to Century Aluminum would be “inconsistent with Santee Cooper’s authorizing legislation outlining [its] service territory.”¹¹⁴ Goose Creek points out that, while Santee Cooper has supplied electricity to the Mt. Holly Smelter under various agreements since 1980, the smelter is not within Santee Cooper’s service area, but rather is located within the service territory of Berkeley Electric Cooperative.¹¹⁵

¹¹⁰ Interconnection Application at 22; Transmission Service Application at 26.

¹¹¹ Interconnection Application at 22-23; Transmission Service Application at 26 (citing S.C. Code Ann. §§ 5-31-610).

¹¹² Interconnection Application at 23; Transmission Service Application at 27.

¹¹³ *Id.* (quoting S.C. Code Ann. § 58-27-670(2)).

¹¹⁴ Interconnection Application at 24; Transmission Service Application at 28-29.

¹¹⁵ Interconnection Application at 24-25; Transmission Service Application at 27-28 (citing S.C. Code Ann. §§ 58-31-310 to 330).

65. Moreover, Goose Creek argues that, even if the Mt. Holly Smelter and the remainder of the annexed area are somehow deemed to be within Santee Cooper's service territory, Goose Creek is not prevented from serving customers within its own municipal borders.¹¹⁶ Goose Creek contends that, while Title 58, Chapter 31 of the S.C. Code gives Santee Cooper the right to furnish service "to the exclusion of other electrical utilities," the Chapter 31 definition of "electrical utility" explicitly excludes electric cooperatives and municipalities, preserving a municipality's right to provide service.¹¹⁷ Furthermore, Goose Creek states that section 58-31-420 explicitly provides that the granting of a service area and service rights to Santee Cooper does not modify the laws applicable to service within city limits.¹¹⁸

66. Additionally, Goose Creek argues that the current supply contract between Santee Cooper and Century Aluminum acknowledges that Santee Cooper has no continuing right to serve the Mt. Holly Smelter, as it states explicitly that "[Santee Cooper] shall have no obligation to continue planning for service to [Century Aluminum] after December 31, 2020, unless [Century Aluminum] has entered into a new Service Agreement with [Santee Cooper], or has extended this Service Agreement . . . prior to December 31, 2019."¹¹⁹ Thus, Goose Creek argues that, as a matter of law, Santee Cooper will not have any claim for continuing to provide service to Century Aluminum upon termination of Santee Cooper's contract with Century Aluminum and the annexation of the Century Aluminum site into Goose Creek's municipal limits.¹²⁰

ii. Answers

67. Santee Cooper argues that it has an exclusive right to serve Century Aluminum under Title 58, Chapter 31 of the S.C. Code, and thus that granting Goose Creek's

¹¹⁶ Interconnection Application at 25; Transmission Service Application at 29-30.

¹¹⁷ Interconnection Application at 25; Transmission Service Application at 30 (citing S.C. Code Ann. § 58-31-310(2)).

¹¹⁸ Interconnection Application at 25; Transmission Service Application at 28 (citing S.C. Code Ann. § 58-31-420 ("The authority granted in this article shall not repeal or modify other laws applicable to electric service within municipal corporate limits and any provision of this article inconsistent with other laws are not applicable within the municipal limits.")).

¹¹⁹ Interconnection Application at 25-26; Transmission Service Application at 30.

¹²⁰ Interconnection Application at 26; Transmission Service Application at 30.

application would violate section 212(g).¹²¹ Specifically, Santee Cooper states that this chapter of the S.C. Code makes clear that Santee Cooper's service territory "must be exclusively served by [Santee Cooper]" and that no part of that exclusive territory may be assigned to any electric utility or cooperative.¹²² Santee Cooper states that the South Carolina General Assembly made clear that Santee Cooper has "the right to furnish electrical service to the exclusion of other electric utilities."¹²³

68. Santee Cooper points out that S.C. Code section 58-31-440 contains a specifically negotiated savings provisions related directly to Century Aluminum's Mt. Holly Smelter:

Lines of the Public Service Authority in existence on July 1, 1984, which extend into the service areas of Berkeley Electric Cooperative, Santee Electric Cooperative, and Horry Electric Cooperative, and lines of those cooperatives which extend into the service area of the Public Service Authority may continue to be operated and maintained by the owner of the lines, and premises served by the lines on July 1, 1984, must continue to be so served.¹²⁴

Santee Cooper states that it has continuously served the Mt. Holly Smelter since prior to July 1, 1984, and thus it retains the right to serve the smelter under the provisions of S.C. Code section 58-31-440.¹²⁵

69. Furthermore, Santee Cooper argues that the U.S. District Court for the District of South Carolina affirmed Santee Cooper's right to serve the Mt. Holly Smelter in rejecting an earlier iteration of Century Aluminum's effort to secure retail transmission.¹²⁶ Specifically, Santee Cooper states that the court found that "[t]he only reasonable construction of South Carolina law providing that Santee Cooper's service area 'must be exclusively served by' Santee Cooper is that it is South Carolina's policy for Santee Cooper to have monopoly power in that service area. Santee Cooper's monopoly power

¹²¹ Santee Cooper April 20 Answer at 10-11.

¹²² *Id.*, Addendum at 20 (citing S.C. Code Ann. § 58-31-430).

¹²³ *Id.* (citing S.C. Code Ann. § 58-31-310(2)).

¹²⁴ *Id.*, Addendum at 21.

¹²⁵ *Id.*, Addendum at 21.

¹²⁶ *Id.*, Addendum at 22 (citing *Century Aluminum v. S. C. Pub. Serv. Auth.*, 278 F. Supp. 3d 877 (2017) (*Century Aluminum*)).

in its exclusive service area therefore is the clearly articulated and affirmatively expressed policy of South Carolina.”¹²⁷

70. Santee Cooper argues that, rather than addressing the clear delineation of retail rights stated in the S.C. Code, Goose Creek lists of a series of provisions in South Carolina law that are altogether irrelevant.¹²⁸ Specifically, Santee Cooper contends that: (1) Goose Creek’s right to establish a utility under the South Carolina Constitution is irrelevant to who has the right to serve the Mt. Holly Smelter; (2) Goose Creek’s reference to S.C. Code section 58-27-620 and 58-27-640 is irrelevant, because Santee Cooper’s service territory is not established by the South Carolina Public Service Commission (South Carolina Commission); (3) S.C. Code section 58-27-670(2) is irrelevant because *new* customers are not at issue here, and Santee Cooper’s prior right to serve an existing customer is established by statute; (4) the fact that the Mt. Holly Smelter lies within the territory of Berkeley Electric Cooperative is irrelevant, because S.C. Code 58-31-440 preserves Santee Cooper’s right to serve its existing customers in cooperative territory; and (5) the fact that S.C. Code section 58-31-310 excludes municipalities from the definition of “electrical utility” is irrelevant, because section 58-31-440 preserves Santee Cooper’s right to serve the Mt. Holly Smelter regardless.¹²⁹

71. Thus, Santee Cooper argues that the situation with respect to South Carolina law is quite clear.¹³⁰ Santee Cooper argues that, even if there were any ambiguity, it should be given a degree of deference as the agency charged with interpreting its governing statute, because it is an “agency” within the meaning of the term under the South Carolina Administrative Procedures Act, and thus its interpretation is entitled to great deference.¹³¹

72. In response, Goose Creek argues that Santee Cooper’s assertion that an order granting Goose Creek’s applications would violate section 212(g) is completely in error. First, Goose Creek disputes Santee Cooper’s reliance on the U.S. District Court’s findings in *Century Aluminum*.¹³² Goose Creek contends that the U.S. District Court noted in its decisions that Santee Cooper’s service territory is subject to exceptions, and argues that these exceptions include the municipal exception set forth in S.C. Code section 58-27-670,

¹²⁷ *Id.* (citing *Century Aluminum*, 278 F. Supp. 3d at 888).

¹²⁸ *Id.*

¹²⁹ *Id.*, Addendum at 22-23.

¹³⁰ *Id.*, Addendum at 24.

¹³¹ *Id.*, Addendum at 24.

¹³² Goose Creek May 5 Answer at 12-13.

which provides for a municipality's right to serve new service locations in newly annexed territory – precisely the exception relied on by Goose Creek here.¹³³ Goose Creek states that the municipal exception was not at issue before the court, the parties presented no arguments on this exception, and the court made no findings that its decision preempted or affected the municipal exception in any way.¹³⁴ Thus, Goose Creek argues that Santee Cooper's reliance on *Century Aluminum* should be afforded no merit.¹³⁵

73. Second, Goose Creek contends that state law grants a municipality the right to serve customers within its corporate boundaries, and such right is not superseded by any statutory authority Santee Cooper may have to serve.¹³⁶ Goose Creek reiterates that S.C. Code section 58-31-420 specifically states that “authority granted in this article [including section 58-31-440] shall not repeal or modify other laws applicable to electric service within municipal corporate limits, and any provisions of this article inconsistent with other laws are not applicable within the municipal limits.”¹³⁷ Goose Creek states that Santee Cooper has not made a single argument in any of its myriad filings to dispute the fact that section 58-31-420 preserves the right of municipalities to serve customers within their city limits.¹³⁸ Goose Creek contends that, based on the language of section 58-31-420, it would retain the right to serve customers in the annexed area even if the annexed area were deemed within Santee Cooper's service territory.¹³⁹

74. Third, Goose Creek states that it has affirmed and exercised its right to serve customers within its municipal limits in multiple respects.¹⁴⁰ Specifically, Goose Creek states that its residents authorized formation of the electric utility by referendum and that it has promptly taken all steps to form the electricity utility and negotiate a franchise agreement with Berkeley Electric Cooperative for the annexed area in accordance with

¹³³ *Id.*

¹³⁴ *Id.* at 13.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting S.C. Code Ann. § 58-31-420).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 14.

South Carolina law.¹⁴¹ Furthermore, Goose Creek states that it has taken the step of filing a petition for declaratory judgement in South Carolina's Court of Common Pleas for the Ninth Judicial Circuit to affirm its right to serve customers within its limits, given the urgent need to make all necessary arrangements to serve the Mt. Holly Smelter by January 1, 2021.¹⁴²

75. In response, Santee Cooper reiterates its previous arguments regarding the effect of Title 58, Chapter 31 of the S.C. Code, and the U.S. District Court's finding in *Century Aluminum*.¹⁴³ Additionally, Santee Cooper states that Goose Creek fails to reveal that the South Carolina Supreme Court previously found that, while municipalities have the right to establish utilities, it is the legislature that creates franchises and an annexing municipality cannot simply "oust" any entity currently providing service.¹⁴⁴ Santee Cooper also disputes Goose Creek's argument that S.C. Code section 58-27-670(2), which pertains to premises first requiring service, applies here, because Santee Cooper is currently serving the Mt. Holly Smelter.¹⁴⁵

76. Furthermore, Santee Cooper argues that S.C. Code section 58-31-420, which preserves the effect of other laws applicable within municipal corporate limits with respect to Santee Cooper's service territory, provides no support for Goose Creek's position, because Goose Creek has not and cannot cite any "other laws" with which S.C. Code 58-31-440 would conflict relevant to the exclusive franchise conferred upon Santee Cooper to serve Century Aluminum.¹⁴⁶

77. Finally, Santee Cooper disputes Goose Creek's claim that the terms of the contract between Century Aluminum and Santee Cooper indicate that Santee Cooper does not

¹⁴¹ *Id.*

¹⁴² *Id.* at 3; 14 (citing *City of Goose Creek v. S.C. Pub. Serv. Authority*, No. 2020-CP-08-00821 (S.C. 9th Cir. Mar. 31, 2020).

¹⁴³ Santee Cooper May 14 Answer at 22-25.

¹⁴⁴ *Id.* at 25 n.68 (citing *Abbeville v. Aiken Elec. Coop., Inc.*, 287 S.C. 361, 365 (S.C. 1985) (*Abbeville*) (rejecting the municipality's claim that the South Carolina Constitution granted it "the absolute right not only to refuse consent for new construction and operation but, in addition, to 'oust' any entity providing service in an area at the time of its annexation or incorporation"); *S.C. Elec. & Gas Co., et al., v. Town of Awendaw*, 359 S.C. 29, 36 (S.C. 2004) (*Awendaw*)).

¹⁴⁵ *Id.* at 26.

¹⁴⁶ *Id.* at 26-27.

have a continuing obligation to serve the Mt. Holly Smelter.¹⁴⁷ Santee Cooper states that the provision of the agreement Goose Creek refers to pertains to planning for a constrained transmission pathway for which Century Aluminum has an upgrade obligation, and that Santee Cooper well understood (and understands) that it nevertheless has a traditional sales obligation.¹⁴⁸

78. In its reply, Goose Creek argues that Santee Cooper repeatedly ignores the plain language of relevant statutes or cases it relies on in the misguided hope that the Commission will accept its claims at face value without reviewing the record.¹⁴⁹ Goose Creek reiterates its prior arguments regarding the effect of Title 58, Chapter 31 of the S.C. Code. Additionally, Goose Creek quotes additional clauses of Santee Cooper's service contract with Century Aluminum that it argues demonstrate that Santee Cooper has no continuing obligation to serve.¹⁵⁰

79. Goose Creek reiterates that Santee Cooper fails to note that S.C. Code section 58-31-420, the statutory section immediately preceding the language Santee Cooper relies on, clearly and unequivocally provides that any service area or service rights granted to Santee Cooper *do not supersede* laws applicable to electric service within city limits.¹⁵¹ Goose Creek also asserts that even the title of Santee Cooper's authorizing statute makes clear that municipal territory is excluded from Santee Cooper's territory, stating in relevant part “. . . to amend the 1976 code by adding sections 58-31-420, 58-31-430, and 58-31-440, *so as to exempt electric service within municipal corporate limits from the provisions of this act.*”¹⁵²

80. In response to Santee Cooper's claim that Goose Creek can cite no “other laws” with which S.C. Code section 58-31-440 would conflict and thus S.C. Code section 58-31-420 is not determinative, Goose Creek states that South Carolina law provides Goose

¹⁴⁷ *Id.* at 27.

¹⁴⁸ *Id.* at 27-28. Santee Cooper attaches a letter in which it formally offered continued service to Century Aluminum.

¹⁴⁹ Goose Creek May 29 Answer at 18.

¹⁵⁰ *Id.* at 19 n.59 (citing Santee Cooper May 14 Answer, Attachment 10 at 5 (“In no event shall [Santee Cooper] be required to supply such service to the Mt. Holly Smelter if to do so would jeopardize the reliability of service to [Santee Cooper's] other customers. [Santee Cooper] does not warrant that such service shall be available.”))

¹⁵¹ *Id.* at 19.

¹⁵² *Id.* at 20 (citing S.B. 925, 1984 Leg., 105th Sess. (S.C. 1984)).

Creek with the right to “construct, purchase, operate and maintain . . . electric light works within or without, partially within and partially without, their corporate limits *for the use and benefit of such city or town and the inhabitants thereof*”¹⁵³ Thus, Goose Creek argues that section 58-31-420 makes clear that a city’s right to serve properties within its borders cannot be modified by any statutory rights Santee Cooper may otherwise have under section 58-31-440 of its authorizing legislation.¹⁵⁴

81. In its answer, Santee Cooper states that Goose Creek chooses to ignore Santee Cooper’s reference to the South Carolina Supreme Court’s decision in *Abbeville* holding that the very constitutional provision on which Goose Creek expressly and exclusively rests its position *does not confer service rights*, but rather authorizes municipal operations *where the legislature permits them*.¹⁵⁵ Santee Cooper explains that, in *Abbeville*, the court expressly rejected that municipalities “have an absolute and exclusive right to operate electric utilities, as provided in [South Carolina Constitution Article VIII, section 16].”¹⁵⁶ Santee Cooper argues that *Abbeville* closely parallels the argument Goose Creek advances here; in *Abbeville*, a group of municipalities argued that S.C. Code section 58-27-1360 was unconstitutional because it conferred upon the South Carolina Commission the obligation to determine whether service by a pre-existing electric cooperative is deficient before authorizing service to an annexing municipality.¹⁵⁷ Santee Cooper states that the court rejected this argument, holding that the South Carolina Constitution reserves to the legislature decisions regarding service rights.¹⁵⁸ Santee Cooper argues that, in light of these findings, it is clear that S.C. Code section 58-31-440 provides it with the right to serve the Mt. Holly Smelter.¹⁵⁹

82. Finally, Santee Cooper disputes Goose Creek’s claim that S.C. Code section 58-31-610 is a sufficient “other law” under S.C. Code section 58-31-420 to supersede Santee Cooper’s right to serve under section 58-31-440.¹⁶⁰ Santee Cooper argues that

¹⁵³ *Id.* at 21 (quoting S.C. Code Ann. § 5-31-610).

¹⁵⁴ *Id.* at 21-22.

¹⁵⁵ Santee Cooper June 5 Answer at 7.

¹⁵⁶ *Id.* (quoting *Abbeville*, 287 S.C. at 836).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 7-8.

¹⁵⁹ *Id.* at 8.

¹⁶⁰ *Id.*

section 58-31-610 simply authorizes cities to operate and maintain electrical utilities where service rights have been conferred, but has no bearing on their service rights.¹⁶¹

iii. Determination

83. We determine in this proposed order¹⁶² that granting Goose Creek's applications would not be inconsistent with any South Carolina law governing utilities' retail marketing areas, and thus would not violate section 212(g). However, given the fact that Goose Creek's petition for declaratory judgment remains pending in South Carolina's Court of Common Pleas for the Ninth Judicial Circuit, we acknowledge that, as a general matter, state courts are better positioned to analyze the specific questions at issue in this proceeding arising under state law, and emphasize that the Commission may reconsider this determination prior to issuing a Final Order in this proceeding, in light of the outcome of Goose Creek's petition.

84. First, we address Santee Cooper and Goose Creek's conflicting interpretations of S.C. Code sections 58-31-420 and 58-31-440. Santee Cooper argues that section 58-31-440 provides it with a continuing right to serve the Mt. Holly Smelter, while Goose Creek argues that S.C. Code section 58-31-420 preserves its right to serve customers within its city limits, including the Mt. Holly Smelter. We agree with Goose Creek. S.C. Code section 5-31-610 provides Goose Creek the explicit right to establish a municipal utility "for the use and benefit of . . . inhabitants thereof," including Century Aluminum.¹⁶³ While Santee Cooper is correct that S.C. Code section 58-31-440 provides for it to continue serving the Mt. Holly Smelter, the immediately preceding section 58-31-420 makes clear that Goose Creek's right to serve the Mt. Holly Smelter under section 5-31-610 supersedes any authority provided to Santee Cooper under section 58-31-440. Section 58-31-420 expressly states that "any provisions of this article inconsistent with other laws are not applicable within the municipal limits." For these reasons, we find that section 58-31-440 is indeed inconsistent with Goose Creek's right to serve the Mt. Holly Smelter under section 5-31-610 and is thus superseded by Goose Creek's right to serve customers within its municipal limits.

85. Second, we disagree with Santee Cooper's argument that the South Carolina Supreme Court's finding in *Abbeville* preserves Santee Cooper's right to serve customers after those customer premises are annexed by a municipality. *Abbeville* addressed the question of whether Article VIII, section 16 of the South Carolina Constitution, which provides for the formation of municipal utilities, is a limitation on the legislature's power

¹⁶¹ *Id.* at 8-9.

¹⁶² *See supra* note 1.

¹⁶³ S.C. Code Ann. § 5-31-610.

to regulate utility service areas.¹⁶⁴ Here, unlike in *Abbeville*, Goose Creek does not seek an absolute right to serve in contravention of statute. Rather, it relies on explicit statutory language that preserves its right to serve customers within municipal limits to the exclusion of Santee Cooper.¹⁶⁵ Because Goose Creek relies on explicit authorization from the legislature, it does not seek to limit the legislature's right to regulate utility franchises and *Abbeville* is inapposite.

86. Third, regarding the dispute over the terms of the contract between Century Aluminum and Santee Cooper, we agree with Goose Creek that the terms of the contract indicate that Santee Cooper does not have a continuing obligation to serve the Mt. Holly Smelter. The salient fact is that the contract does not obligate Century Aluminum to purchase electricity from Santee Cooper after December 31, 2020, and thus Century Aluminum will be free to enter into a new contract with Goose Creek.¹⁶⁶

87. Fourth, we disagree with Santee Cooper's claim that the U.S. District Court's findings in *Century Aluminum* indicate that it has an exclusive right to serve the Mt. Holly Smelter to the exclusion of a municipal utility. The court's analysis of Santee Cooper's service rights was limited to whether the state-action immunity doctrine disqualified Century Aluminum's antitrust complaint against Santee Cooper.¹⁶⁷ The court found that Santee Cooper is immune from antitrust claims, in part, because South Carolina has a clearly articulated policy to displace competition in Santee Cooper's exclusive service area.¹⁶⁸ None of the court's findings dispute the fact that South Carolina law maintains a municipality's right to serve customers within its corporate limits where there is a conflict with Santee Cooper's exclusive service area.¹⁶⁹

88. Finally, we note that the Mt. Holly Smelter is located in Berkeley Electric Cooperative's retail marketing area, not Santee Cooper's, and thus there may not be a

¹⁶⁴ *Abbeville*, 287 S.C. at 370.

¹⁶⁵ S.C. Code Ann. § 58-31-420.

¹⁶⁶ We also note that *Abbeville* and *Awendaw* did not address situations where the service contracts were expiring.

¹⁶⁷ See *Century Aluminum*, 278 F. Supp. at 881-91.

¹⁶⁸ *Id.* at 886.

¹⁶⁹ S.C. Code Ann. §§ 58-31-310; 58-31-420.

concern under section 212(g).¹⁷⁰ Moreover, Goose Creek has entered into a franchise agreement with Berkeley Electric Cooperative regarding provision of service within the annexed area. Therefore, there is no conflict regarding Goose Creek's right to serve vis-à-vis Berkeley Electric Cooperative.

c. Section 212(h)

89. Section 212(h)(2) provides, in relevant part, that no order issued under section 210 or 211:

[S]hall be conditioned on or require the transmission of electric energy . . . to, or for the benefit of, an entity if such electric energy would be sold by such entity directly to an ultimate customer unless: (A) such entity is . . . a State or any political subdivision of a State (or an agency, authority, or instrumentality of a State or a political subdivision) . . . ; and (B) . . . would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer.¹⁷¹

i. Applications

90. In its Interconnection and Transmission Service Applications, Goose Creek contends that it meets both criteria laid out in section 212(h)(2)(A), and thus that granting its application would not constitute a sham wholesale transaction in violation of

¹⁷⁰ Additionally, S.C. Code § 58-31-320 states that:

[I]f, after July 9, 1973, any customers, premises, or electric cooperatives located outside the present service area of the Public Service Authority as defined in Section 58-31-330 and being served by the Public Service Authority...ceases or discontinues accepting electrical service from the Public Service Authority, the Public Service Authority may subsequently sell and furnish electrical service to new customers, premises, or electric cooperatives from its major transmission lines.

This provision suggests that customers located outside the present service area may have the option to cease or discontinue accepting service from Santee Cooper.

¹⁷¹ 16 U.S.C. § 824k(h) (2018).

section 212(h).¹⁷² Specifically, Goose Creek states that it meets the requirement to be “a State or any political subdivision of a State” because it is a municipal corporation created and existing under the laws of the State of South Carolina.¹⁷³ Goose Creek also states that it will meet the requirement of section 212(h)(2)(B) that it “utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer” upon transfer of operational control of the distribution facilities used to serve the Mt. Holly Smelter.¹⁷⁴ Goose Creek cites to the Commission’s finding in Opinion No. 426-A and *Laguna* to argue that leased facilities are sufficient to pass this “physical delivery test,” and that a utility’s system does not have to be extensive to qualify.¹⁷⁵

ii. Answers

91. Santee Cooper argues that granting Goose Creek’s applications would constitute a sham wholesale transaction, in violation of section 212(h).¹⁷⁶ Specifically, Santee Cooper disputes Goose Creek’s view that section 212(h) constitutes a formulaic test for determining what constitutes a sham wholesale transactions, and argues that the Commission has rejected this view definitively.¹⁷⁷ Santee Cooper states that, in *City of Palm Springs*, the Commission embraced the view articulated by sponsoring Senator Johnson that under section 212(h) the Commission’s job is to get to the essence of the transmission applicant’s plans, and thus the Commission “has full authority to prohibit transactions that technically might arguably meet criteria for a wholesale sale or transmission transaction, but the underlying intent and effect is to provide retail service to an ultimate customer.”¹⁷⁸ Santee Cooper contends that this approach is the antithesis of

¹⁷² Interconnection Application at 18; Transmission Service Application at 31.

¹⁷³ Interconnection Application at 18-19; Transmission Service Application at 31 (quoting 16 U.S.C. § 824k(h)(2)(A) (2018)).

¹⁷⁴ Interconnection Application at 19; Transmission Service Application at 31-32 (citing 16 U.S.C. § 824k(h)(2)(B)).

¹⁷⁵ Interconnection Application at 19-20; Transmission Service Application at 32-34 (citing Opinion No. 426-A, 93 FERC ¶ 61,218 (2000); *Laguna*, 84 FERC at 62,089).

¹⁷⁶ Santee Cooper April 20 Answer at 11.

¹⁷⁷ *Id.*, Addendum at 25.

¹⁷⁸ *Id.*, Addendum at 25-26 (citing *City of Palm Springs, California*, 76 FERC ¶ 61,127 at 61,701 (1996), *reh’g denied*, 84 FERC ¶ 61,225 (1998) (*City of Palm Springs*)).

Goose Creek's view that access to even the most nominal electrical facilities enables it to surmount the statutory bar laid out in section 212(h).¹⁷⁹

92. Santee Cooper argues that applying the Commission's more nuanced approach demonstrates that granting Goose Creek's applications would constitute a sham wholesale transaction.¹⁸⁰ Specifically, Santee Cooper contends that: (1) Century Aluminum previously sought to obtain retail transmission and now acts ostensibly through Goose Creek; (2) Goose Creek identifies no other customers that it will serve besides Century Aluminum; (3) the only facilities Goose Creek identifies that allegedly comprise its utility are those to be leased from Century Aluminum, and they are not configured to serve any other customers; (4) Goose Creek provides no evidence that it will actually exercise control of the facilities it proposes to lease; (5) Goose Creek has no professional utility management in place; and (6) Century Aluminum is covering all expenditures related to formation of Goose Creek's electric utility.¹⁸¹ Santee Cooper argues that none of this suggests anything other than that Goose Creek is serving as a front for Century Aluminum's effort to secure a retail wheeling order from the Commission.¹⁸²

93. Furthermore, Santee Cooper argues that Goose Creek's support for its simplistic approach to section 212(h) is thin.¹⁸³ Specifically, Santee Cooper argues that Goose Creek fails to reveal that Opinion No. 426 did not involve section 212(h) at all, and rather limited the "physical delivery" test to whether the seller was engaged in a jurisdictional wholesale sale and whether the buyer was an electrical utility reselling power for that purpose.¹⁸⁴ Santee Cooper states that Goose Creek does no better in its reliance on *Laguna*, and argues that the instant filing is distinguished from *Laguna* for a number of reasons.¹⁸⁵ Thus, Santee Cooper argues that the Commission has no option but to

¹⁷⁹ *Id.*, Addendum at 26.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*, Addendum at 26-30.

¹⁸² *Id.*, Addendum at 29.

¹⁸³ *Id.*, Addendum at 30.

¹⁸⁴ *Id.* (citing *People's Elec. Coop.*, Opinion No. 426, 84 FERC ¶ 61,229, at 62,122 n.170 (1998)).

¹⁸⁵ *Id.*, Addendum at 31. Santee Cooper provides the same reasons summarized above. *See supra* P 53.

conclude that, to use Senator Johnston's phrase, "the wholesale sale to the entity is in fact a subterfuge intended to circumvent the ban on retail wheeling."¹⁸⁶

94. In response, Goose Creek argues that Santee Cooper's arguments are essentially based on conjecture and on Santee Cooper's choice to simply not believe what Goose Creek has asserted in its application.¹⁸⁷ Goose Creek disputes Santee Cooper's claim that the distribution facilities Goose Creek will own or control are "capable solely of service to Century's load," and refers to the affidavit of Troy Bredemeier provided in its application demonstrating that the facilities have both the capacity and capability to be configured to serve new customers.¹⁸⁸ Goose Creek notes that even Santee Cooper's own witness acknowledged the possibility that the distribution facilities could be modified to serve other customers.¹⁸⁹

95. Furthermore, Goose Creek argues that the fact that Berkeley Electric Cooperative will continue to serve the handful of existing, non-Century Aluminum retail customers in the annexed area in no way indicates a sham transaction.¹⁹⁰ Goose Creek states that, per the terms of state law and a franchise agreement, Berkeley Electric Cooperative retains the right to serve those five existing customers.¹⁹¹ Goose Creek states that its development project is focused on service to new commercial and industrial establishments as they are developed in the annexed area, and that Goose Creek intends to serve as many customers as it can under state law.¹⁹²

96. In response to Goose Creek's arguments surrounding the adequacy of distribution facilities at the Mt. Holly substation, Santee Cooper notes that: (1) Goose Creek's witness Mr. Bredemeier is a Century Aluminum employee; and (2) Mr. Bredemeier *agrees* with Santee Cooper that significant modifications or reconstruction of the distribution facilities would be necessary to safely and reliably serve additional load.¹⁹³

¹⁸⁶ *Id.*, Addendum at 21 (citing *City of Palm Springs*, 76 FERC, at 61,702).

¹⁸⁷ Goose Creek May 5 Answer at 15.

¹⁸⁸ *Id.* (quoting Santee Cooper April 20 Answer at 11).

¹⁸⁹ *Id.* at 15 n.40.

¹⁹⁰ *Id.* at 16.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Santee Cooper May 14 Answer at 14.

Santee Cooper argues that the modifications required to serve additional load would be *very* significant, and thus there is no reason to believe that such modifications will happen.¹⁹⁴

97. Additionally, Santee Cooper argues that Goose Creek provides no evidence that it will actually exercise control of the facilities it proposes to lease from Century Aluminum, as it must under section 212(h).¹⁹⁵ Santee Cooper notes that Goose Creek has not yet completed the lease agreement, notwithstanding that Goose Creek asserts that the lease will provide for Goose Creek's control of these facilities.¹⁹⁶ Santee Cooper contends that the Commission cannot be certain that Goose Creek will indeed control the equipment, because it has no professional utility management in place, no certain plans to serve any additional customers, and no plan to add any additional facilities.¹⁹⁷ Santee Cooper argues that the fact that Goose Creek offers only an affidavit of a Century Aluminum employee suggests that Goose Creek lacks the expertise to control the relevant facilities within the meaning of the FPA.¹⁹⁸

98. Santee Cooper reiterates that Century Aluminum is covering all costs associated with formation of the electric utility, including the costs of litigation at the Commission and in the South Carolina courts.¹⁹⁹ Furthermore, Santee Cooper notes that an economic study associated with creation of the utility touts *only* the ostensible benefits to Century Aluminum, and that the study was paid for by Century Aluminum.²⁰⁰ Santee Cooper also notes that Century Aluminum has now sued Santee Cooper on the basis that Santee Cooper spoiled its plans with Goose Creek.²⁰¹ Santee Cooper contends that none of these facts suggests anything other than that Goose Creek is serving as a front for Century Aluminum's effort to secure a retail wheeling order from the Commission.²⁰²

¹⁹⁴ *Id.* at 14-15.

¹⁹⁵ *Id.* at 15.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 15-16.

¹⁹⁹ *Id.* at 16.

²⁰⁰ *Id.* at 17.

²⁰¹ *Id.*

²⁰² *Id.* at 18.

99. In response, Goose Creek argues that Santee Cooper's argument is built on conjecture, neglects relevant facts, and fails to apply Commission precedent to the current facts.²⁰³ First, Goose Creek argues that it meets the legal and factual requirements of section 212(h), and that Santee Cooper's central argument is that Goose Creek fails to meet the "substance" of section 212(h).²⁰⁴ Goose Creek argues that the Commission's approach under section 212(h) focuses on applying the actual statutory language, and that the only precedent Santee Cooper relies on for its analysis, *City of Palm Springs*, is clearly distinguishable from the instant case.²⁰⁵ Goose Creek explains that the Commission rejected the application in *City of Palm Springs* because the applicant proposed to meet the statutory requirement of section 212(h) using only duplicate meters placed alongside the existing meters owned by the current utility, and argues that this is not the case here.²⁰⁶ Goose Creek also contends that the facts Santee Cooper chose to emphasize regarding the substance of its application are one-sided or lack context, and provides a number of facts demonstrating its progress toward creation of an electric utility.²⁰⁷

100. Second, Goose Creek argues that, while such a showing is not necessary to meet the requirements of 212(h), it has verifiable plans to serve all new customers in the annexed area.²⁰⁸ In support, Goose Creek points to the franchise agreement between itself and Berkeley Electric Cooperative that requires Goose Creek's utility to serve all new customers in the annexed area.²⁰⁹

101. Third, Goose Creek contends that the fact that facility modifications may be needed to serve new customers is a normal consequence of providing retail electric service and does not signify a sham transaction.²¹⁰ Goose Creek argues that Santee

²⁰³ Goose Creek May 29 Answer at 5.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 6.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 6-8.

²⁰⁸ *Id.* at 8.

²⁰⁹ *Id.* at 8-10.

²¹⁰ *Id.* at 10.

Cooper fails to provide any legal analysis to show why needed modifications to electrical distribution equipment would disqualify its application under section 212(h).²¹¹

102. Fourth, Goose Creek argues that it has the necessary sophistication to manage a municipal electric utility.²¹² Goose Creek provides an affidavit by Randall Halley, a Managing Principal of Summit Utility Advisors, Inc., which states that Goose Creek’s approach of using existing staff for managerial and administrative functions, and outside consultants for technical and operational functions, is not uncommon among municipal electric utilities.²¹³ Goose Creek also points out that it is the eighth largest city in South Carolina, currently employs 256 full-time staff including a Director of Public Works, and is in fact a far larger organization than other municipalities across South Carolina that operate their own municipal utilities.²¹⁴ Goose Creek states that Santee Cooper has presented no evidence that Goose Creek will not “actually exercise control” over its distribution facilities, and contends that it has the ability to exercise such control and will do so to serve customers in the annexed area.²¹⁵

103. Finally, Goose Creek argues that Century Aluminum’s support for formation of the municipal utility does not indicate a sham transaction.²¹⁶ Goose Creek states that Santee Cooper should not be surprised that Century Aluminum supports formation of the utility, because Century Aluminum has clearly conveyed to Santee Cooper that the Mt. Holly Smelter will close unless Century Aluminum obtains access to market-based rates for its power supply.²¹⁷ Goose Creek argues that, notwithstanding the benefits to Century Aluminum, Goose Creek has many reasons to benefit from the electric utility including expanding its borders, expanding its tax base, creating economic development opportunities, retaining hundreds of local jobs, and potentially creating hundreds of new jobs.²¹⁸ Goose Creek argues that Santee Cooper nonsensically ignores these benefits to Goose Creek to conclude that the city is an “agent” of Century Aluminum, despite the

²¹¹ *Id.* at 11.

²¹² *Id.*

²¹³ *Id.* at 11-12 (citing Affidavit of Randall E. Halley at ¶¶ 1-6).

²¹⁴ *Id.* at 12-13.

²¹⁵ *Id.* at 13.

²¹⁶ *Id.* at 14.

²¹⁷ *Id.*

²¹⁸ *Id.*

fact that Goose Creek and Century Aluminum are completely unrelated entities – in contrast to the precedent Santee Cooper cites.²¹⁹

104. In response to Goose Creek, Santee Cooper reiterates that it is the substance of the transaction that is determinative under section 212(h), and argues that Goose Creek’s answer provides little more than talk of Goose Creek’s plans rather than making an effort to satisfy the standard.²²⁰ Santee Cooper reiterates that the fact that Goose Creek has demonstrable plans to serve only Century Aluminum, the same entity that is funding the so-called utility, inevitably leads to the conclusion that this effort is a sham.²²¹ Santee Cooper argues that Goose Creek’s suggestion that it is not the Commission’s responsibility to get to the bottom of this ruse is nonsense.²²²

105. On June 10, 2020, Goose Creek filed an update reporting that the Goose Creek City Council unanimously passed the first reading of an ordinance providing for the creation of a municipal utility and an ordinance to annex parcels B, C, and D of the Century Aluminum site into its city limits, and delineating the additional steps it has taken to further the creation of the municipal utility.²²³ On July 15, 2020, Goose Creek filed a second update noting that the Goose Creek City Council unanimously passed the second and final reading of both ordinances.²²⁴ On August 26, 2020, Goose Creek filed a third update reporting that the Goose Creek City Council unanimously adopted a resolution approving the execution and delivery of a lease agreement for the Mt. Holly facilities. Goose Creek attached the executed lease agreement to its filing.²²⁵

iii. Determination

106. We find that granting Goose Creek’s applications would not violate section 212(h), because Goose Creek has demonstrated that it will comply with the statutory requirements of 212(h) on or before January 1, 2021. Specifically, Goose Creek is clearly a “political subdivision of a State,” in compliance with section 212(h)(2)(A), and

²¹⁹ *Id.* at 15 (citing *Prairieland I*; *Prairieland II*, 88 FERC at 61,515).

²²⁰ Santee Cooper June 5 Answer at 4-5.

²²¹ *Id.* at 5-6.

²²² *Id.* at 6.

²²³ Goose Creek June 10 Status Report.

²²⁴ Goose Creek July 15 Status Report.

²²⁵ Goose Creek August 26 Status Report.

Goose Creek has executed a lease agreement demonstrating that it will utilize distribution facilities that it will own or control to deliver all such electric energy to its ultimate consumer, in compliance with section 212(h)(2)(B).²²⁶

107. Santee Cooper effectively argues for us to ignore the statutory language of section 212(h) to label Goose Creek’s wholesale transaction a sham. While Santee Cooper relies extensively on the Commission’s finding in *City of Palm Springs*, Santee Cooper fails to recognize that *City of Palm Springs* states: “[t]he central question in this case is whether Palm Springs meets . . . the circumstances in 212(h)(2)(B), i.e., whether it . . . ‘would utilize transmission or distribution facilities that it owns or controls to deliver all such electric energy to such electric consumer[s].’”²²⁷ The Commission ultimately found that “we cannot agree that owning duplicate meters which simply measure the flow of power . . . meets the statutory requirement.”²²⁸ Here, the distribution substation Goose Creek will control clearly complies with the plain language of the statute, in contrast to the duplicate meters relied on in *City of Palm Springs*. Thus, we decline to address the various extraneous factors cited by Santee Cooper. What is important is whether Goose Creek will own or control the distribution facilities that will be used to deliver all the electric energy, and here Goose Creek will own or control such facilities.²²⁹

108. Even if we were to attempt to discern intent, as Santee Cooper urges, we would find that granting Goose Creek’s applications would not constitute a sham transaction. Goose Creek held a referendum to form an electric utility, is in the process of annexing a 5,000 acre area zoned for commercial and industrial use, has contracted with rate design consultants, engineers, and legal counsel to form the electric utility, has designated city staff to manage the electric utility, and is in discussions with entities to operate and

²²⁶ 16 U.S.C. § 824k(h) (2018).

²²⁷ *City of Palm Springs*, 76 FERC at 61,695.

²²⁸ *Id.* at 61,701.

²²⁹ See *Laguna*, 84 FERC at 62,089; see also *Cleveland Electric Illuminating Company Cleveland Public Power of the City of Cleveland, Ohio v. Cleveland Electric Illuminating Company, Ohio Power Company*, 82 FERC ¶ 61,254 (1998) (stating “unlike the ‘facilities’ in *Palm Springs*, the lines here will actually be used to deliver (not just measure) power” and further stating “[t]he claim that Ohio Power had a ‘behind-the-scenes’ role in negotiating the sale, even if true, does not change the fact that Cleveland is a legitimate reseller and that this sale meets the criteria of Section 212(h)(2).” *Id.* at 62,108.

maintain the electric distribution facilities. It is clear that Goose Creek's intent to establish and operate a municipal utility is real.

d. Good Faith Request

109. Section 211(a) provides that no order may be issued unless the applicant has made a request for transmission service to the transmitting utility that would be the subject of such an order at least 60 days prior to its filing of an application for such order.²³⁰ Section 213 requires that, when a good faith request is submitted to a transmitting utility, the transmitting utility shall provide a detailed written explanation stating: (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services; and (2) its analysis of any physical or other constraints affecting the provision of such services, within 60 days of receipt of the request.²³¹

110. Goose Creek states that, on February 18, 2020, it submitted to Santee Cooper a good faith transmission service request and an accompanying interconnection request.²³² We find that Goose Creek filed its Transmission Service Application on April 23, 2020, more than 60 days after it submitted its good faith transmission services request to Santee Cooper, as required by section 211. We also find that Goose Creek's good faith request included all components required by Rule 2.20 of the Commission's Rules.²³³ Specifically, Goose Creek included in its good faith request the following: (1) identification information; (2) a statement that Goose Creek will be eligible for transmission service; (3) information indicating that the request was not a request for prohibited mandatory retail wheeling; (4) the character and nature of services requested; (5) the names of any parties likely to provide transmission service to Santee Cooper's grid; (6) the proposed dates of service; (7) the total transmission capacity requested; (8) a request for firm service; and (9) the proposed rates, terms, and conditions of service. Goose Creek also explained the factual circumstances (and Santee Cooper was sufficiently aware of the factual circumstances) to enable Santee Cooper to determine that the good faith request was not in response to a solicitation and would not be duplicative of any other transmission service.²³⁴

111. We note that section 213 requires that, when a good faith request is submitted to a transmitting utility, the transmitting utility shall provide a detailed written explanation

²³⁰ 16 U.S.C. § 824j (2018).

²³¹ 16 U.S.C. § 824i (2018).

²³² Interconnection Application at 3.

²³³ 18 C.F.R. § 2.20 (2019).

²³⁴ Transmission Application at 19-21 and Ex. 8.

stating: (1) the transmitting utility's basis for the proposed rates, charges, terms, and conditions for such services; and (2) its analysis of any physical or other constraints affecting the provision of such services, within 60 days of receipt of the request.²³⁵ Moreover, while section 2.20 allows the transmitting utility to "ask the applicant to provide clarification of only the information needed to evaluate and process a 'good faith' request," we note that Santee Cooper asked, and Goose Creek answered, 16 additional questions unnecessary to Santee Cooper's evaluation and processing of the good faith request. Therefore, Goose Creek has provided all of the information necessary, and more, to satisfy the requirements of section 213.²³⁶

e. Public Interest

112. Sections 210(c) and 211(a) provide that the Commission may issue an order directing interconnection or transmission service if the order meets the requirements of section 212 and would otherwise be in the public interest. In *Kiowa Power Partners, LLC*, the Commission found that "[n]ew interconnections generally meet the public interest test by making transmission service available to new generators and, thus increasing the supply of electricity and improving competition."²³⁷ Further, the Commission previously has determined that, "as a general matter, the availability of transmission service enhances competition in power markets by increasing power supply options of buyers and sales options of sellers, and that this should result in lower costs to consumers."²³⁸ The same principles apply here. Accordingly, we find that the public interest will be served by directing Santee Cooper to provide the requested interconnection and transmission service to Goose Creek.

²³⁵ 16 U.S.C. § 824I.

²³⁶ For example, Santee Cooper requested that Goose Creek: identify anticipated retail customers other than the Mt. Holly Smelter; provide job titles, job descriptions, and an organizational chart for its utility staff; specify whether it intends to construct or acquire transmission or distribution assets in addition to the Mt. Holly facilities; and specify its schedule and process for acquiring or building additional transmission or distribution facilities. Complaint, Exhibit 5.

²³⁷ 99 FERC ¶ 61,251, at P 36 (2002).

²³⁸ *Nevada Power Co.*, 110 FERC ¶ 61,029, at P 17 (2005) (citing *Florida Municipal Power Agency v. Florida Power & Light Co.*, 65 FERC ¶ 61,125, *reh'g dismissed*, 65 FERC ¶ 61,372 (1993), *final order*, 67 FERC ¶ 61,167 (1994), *order on reh'g*, 74 FERC ¶ 61,006 (1996), *aff'd*, 315 F.3d 362 (D.C. Cir. 2003)).

f. Efficiency of Use of Facilities

113. Section 210(c)(2) precludes the Commission from issuing an order unless the Commission determines such order would either encourage overall conservation of energy or capital; optimize the efficiency of the use of facilities and resources; or improve the reliability of an electric utility system to which the order applies.

114. Goose Creek argues that granting its Interconnection Application will encourage conservation of energy and capital and optimize the efficiency of facilities and resources for a number of reasons. First, Goose Creek states that granting its request will avoid the need for duplicative facilities and additional construction projects by allowing Goose Creek to interconnect with Santee Cooper's transmission system at the Mt. Holly Interconnection. Second, Goose Creek states that granting its request will facilitate expanded and continued operation of the Mt. Holly Smelter, and thereby increase the use of electric energy at the smelter the efficient use of Santee Cooper's transmission system. Finally, Goose Creek states that granting its applications will result in increased competition for wholesale supply of electric energy and argues that the Commission has long held that increased competition optimizes the use of existing facilities.²³⁹

115. We agree with Goose Creek and find that granting its applications would encourage overall conservation of energy or capital and optimize the efficiency of the use of facilities and resources.

g. Reliability

116. Section 211(b) precludes the Commission from issuing an order that would unreasonably impair the continued reliability of the affected electric systems. Goose Creek states that it anticipates no impact on reliability for two reasons. First, Goose Creek states it will initially rely on virtually the same amount of transmission capacity on Santee Cooper's system as Century Aluminum does currently through Century Aluminum's current mix of power provided by Santee Cooper and power delivered from outside the Santee Cooper control area. Second, Goose Creek will operate the 34.5 kV interconnection and distribution facilities currently owned and controlled by Century Aluminum.²⁴⁰

²³⁹ Interconnection Application at 16-18 (citing *City of Tacoma*, 118 FERC ¶ 61,202 at P 25 & n.14; *East Kentucky Pwr. Coop.*, 115 FERC ¶ 61,347 at P 19; *Laguna*, 84 FERC at 62,089, *final order*, 88 FERC ¶ 61,164 (1999), *reh'g denied*, 95 FERC ¶ 61,305 (2001), *aff'd sub nom. Pac. Gas & Elec. Co. v. FERC*, 44 Fed. Appx. 170 (9th Cir. 2002)).

²⁴⁰ *Id.* at 25.

117. Further, Goose Creek states that it will hire qualified personnel to operate these facilities or contract out this function. Goose Creek states that facilities added to Goose Creek's distribution system in the future will be studied or evaluated as they occur; if those expansions result in necessary transmission enhancements by Santee Cooper pursuant to the OATT, such expansions will be conducted in accordance with the OATT.²⁴¹

118. Consequently, we find that supplying transmission services at the existing delivery point to Goose Creek, instead of to Century Aluminum, will not impair reliability.

h. Effect on Contracts or Rate Schedules

119. Section 211(c) provides that no order may be issued under section 211 if it would replace electric energy provided to the applicant under a contract with the transmitting utility or a rate schedule on file with the Commission. Goose Creek does not currently purchase electric energy from Santee Cooper. Rather, Goose Creek seeks to interconnect to the Santee Cooper transmission system at the Mt. Holly Interconnection and to thereby receive transmission service.²⁴² In addition, the existing power purchase contract between Santee Cooper and Century Aluminum expires by its own terms on December 31, 2020, and section 211(c)(2)(B) permits an application for an order to be filed prior to the termination of the existing contract or rate schedule. Therefore, we find that section 211(c) does not preclude an order for interconnection and transmission service in this case.

i. Rates

120. Section 212(a) requires that the transmitting utility subject to an order under section 211 provide wholesale transmission services at rates, charges, terms and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services and necessary associated services. Section 212(a) further provides, to the extent practicable, for recovery of such costs from the applicant for such order and not from the transmitting utility's existing wholesale, retail and transmission customers. Goose Creek proposes to take service pursuant to Santee Cooper's unfiled OATT, which provides the relevant rates, terms, and conditions made available to transmission customers.²⁴³

²⁴¹ *Id.*

²⁴² *Id.* at 1.

²⁴³ *Id.* at 1 n.4. As noted above, Santee Cooper previously maintained a safe-harbor OATT with the Commission, but no longer maintains safe harbor status because it failed to submit modifications consistent with the Commission's most recent order regarding Santee Cooper's safe harbor OATT. *See Santee Cooper*, 122 FERC ¶ 61,183

121. Further, Goose Creek states that it is able and willing to compensate Santee Cooper for any reasonable costs that Santee Cooper incurs to provide the requested transmission service. Goose Creek states that it is requesting transmission service to cover the full amount of electric energy currently being purchased by Century Aluminum.²⁴⁴

122. Noting that Santee Cooper currently offers open access transmission service to transmission customers under the rates, terms, and conditions of its unfiled OATT, we direct the parties to negotiate whether any deviation from Santee Cooper's unfiled OATT is appropriate. We will ensure that section 212(a) is satisfied when we issue a final order directing interconnection and transmission services.

j. Further Proceedings

123. Section 212(c) provides that, before issuing an order under section 210, the Commission must first issue a proposed order and set a reasonable time for parties to the proposed interconnection or transmission order to agree to terms and conditions under which such order is to be carried out, including the apportionment of costs between them and the compensation or reimbursement reasonably due to any of them.²⁴⁵

124. We give the parties 60 days from the date of this order to negotiate an interconnection and transmission service agreement reflecting all issues upon which the parties have agreed, and to identify all issues upon which the parties have not agreed and to give their rationale for their final position on those issues on which the parties have not agreed. If the parties are able to agree within the allotted time, the Commission will issue a final order reflecting the agreed-upon terms and conditions in that agreement, if the Commission finds them acceptable. In the alternative, if the parties are unable to agree within the allotted time, the Commission will evaluate the positions of each party and prescribe the apportionment of costs, compensation and other terms and conditions of interconnection, as appropriate. After considering their respective rationales for their final positions, the Commission will issue a final order.

at P 30 (stating that "Santee Cooper will not have a safe harbor tariff until it incorporates the modifications discussed above"). However, Santee Cooper currently offers open access transmission service pursuant to its unfiled OATT. *See supra* note 2.

²⁴⁴ Transmission Application at 22-23.

²⁴⁵ 16 U.S.C. § 824k(c)(1-2) (2018).

The Commission orders:

(A) Goose Creek's Complaint is hereby dismissed, as discussed in the body of this order.

(B) Santee Cooper is hereby directed to provide Goose Creek the requested interconnection and transmission services, as discussed in the body of this order.

(C) Santee Cooper and Goose Creek are hereby directed to follow the procedures discussed in the body of this order.

(D) Within 60 days of the date of this order, Santee Cooper and Goose Creek shall make a filing with the Commission setting forth terms and conditions for carrying out the order, including the apportionment of and compensation for costs, and addressing other matters, as discussed in the body of the order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)

EL20-33-000.DOCX.....1-48

EXHIBIT C

October 20, 2020

VIA EMAIL AND U.S. MAIL

Mayor Gregory Habib
The City of Goose Creek
519 North Goose Creek Boulevard
P.O. Drawer 1768
Goose Creek, South Carolina 29445
ghabib@cityofgoosecreek.com

Johnny Cribb, Supervisor and Council Chairman
c/o Berkeley County
P.O. Box 6122
Moncks Corner, South Carolina 29461
johnny.cribb@berkeleycountysc.gov

Greg Fluke, Rapid Response Coordinator
Department of Employment & Workforce
1550 Gadsden Street, or
P.O. Box 1406
Columbia, South Carolina 29202
gfluke@dew.sc.gov

RE: Conditional WARN Act Notice of Plant Closing

Gentlemen:

In accordance with the Worker Adjustment and Retraining Notification ("WARN") Act, 29 U.S.C. §§ 2101 *et seq.*, Century Aluminum of South Carolina, Inc. ("Century") hereby provides conditional notice of a plant closing at its Mt. Holly Smelter located at 3575 Highway 52, Goose Creek, South Carolina 29445. Because Century cannot determine with certainty whether and to what extent its Mt. Holly Smelter will operate after December 31, 2020, we issue this notice conditionally, under 20 C.F.R. § 639.7(a)(3), as the occurrence or non-occurrence of the plant closing depends on if we can secure competitively-priced power.

For years, the Mt. Holly Smelter has faced financial and operational challenges due mainly to the ever-rising price of electricity. Cost-prohibitive power rates charged by Santee Cooper Electric Cooperative ("Santee Cooper") have led our Mt. Holly Smelter to sustain significant losses. After we were forced to close a potline in 2015-2016 due to Santee Cooper's rates, we worked with the City of Goose Creek on an initiative to save the plant by forming a municipal utility to supply power at a price that would allow the plant to keep operating. But Santee Cooper challenged the City's right to provide power to the plant in a lawsuit in Berkeley County. Unfortunately, Judge Roger M. Young ruled in favor of Santee Cooper, barring the City from supplying power to our plant. At this point, Century is reviewing all options to secure competitively priced power that would allow the plant to remain open. If we cannot find an economically viable power source, then virtually all Mt. Holly employees (except for a small maintenance crew) will be laid off, and the entire Mt. Holly plant will close.

If the plant closing and resulting layoffs occur, they are expected to be permanent. Based on the best information available at this time, we expect the Mt. Holly Smelter to be entirely closed and the vast majority of layoffs to be fully executed on December 31, 2020. We expect this first round of layoffs to affect 282 employees in the following job titles: Air Quality Supervisor, Application Software Specialist, Asst Plantation Manager, Bake Oven Multi-skilled, Bath Technician, CH Inventory Control Specialist, CMT Technician, CS Flow Leader, Carbon Anode Supervisor, Carbon Bake Supervisor, Carbon Plant Electrical Technician, Carbon Plant Manager, Carbon Technical Advisor, Caster, Casthouse Multi-Skilled, Casthouse Supervisor, Casthouse Technical Advisor, Casthouse Technical Supervisor, Casting Assistant, Cost Accountant, Crane Crew Supervisor, Electrical Crew Technician, Electrician 26, Electrician 28, Electrician 30, Emission Control Shift Technician, Environmental Manager, Finance Manager, Furnace

Operator, Green Control Operator, HDC Caster, High Voltage Technician, Homo Operator, Hotside Flow Leader, Human Resources Manager, Human Resources Specialist, Machinist 26, Machinist 28, Maintenance Engineer, Maintenance General Supervisor, Maintenance Manager, Maintenance Supervisor, Maintenance Utilities Technician, Mechanic 26, Mechanic 28, Mechanic 30, Mechanic 32, Mechanical Crew Technician, Metallurgist, Mobile Shop Technician, Mold Shop Technician, Nurse, PEO – ECL, PEO – Tapper, PSO - Cruce Cleaner, PSO - Metal Hauler, PSO - ORE Hauler, Planner, Planner Supervisor, Plant Manager, Pot Operator, Pot Servicer, Pot Servicer - Tapper Helper, Potline Supervisor, Potline Tech & Mech Coordinator, Potroom Technician, Process Control Technician, Process Engineer, Process Technician, Relief Servicer, Rod Operator, Rod Shop Supervisor, Rod Shop Technician, Safety & Health Manager, Safety Specialist, Saw Operator, Scheduling/Shipping Coordinator, Senior Buyer, Senior Financial Analyst, Services Equipment Operator, Services General Supervisor, Services Supervisor, Shipping, Shipping Supervisor, Spectro Chemical Analyst, Storeroom Lead Buyer, Technical Manager, Tool & Equipment Servicer, and Tool & Trench Servicer.

After the first round of layoffs, only 13 employees will be working at the Mt. Holly Smelter. Based on the best information available at this time, we expect a second round of layoffs to occur on January 28, 2021, which will affect seven of the remaining employees from the following job titles: Casthouse General Supervisor, Casthouse Supervisor, Casthouse Manager, Potline General Supervisor, Potline Manager, and Potline Supervisor. These seven employees will have worked for four additional weeks after the Smelter closed, loading trucks, handling shipping paperwork, and pulling pot pads. After this second round of layoffs, a “skeleton crew” of just six employees is expected to stay on staff indefinitely to provide maintenance and security for the plant.

Attached as “Schedule A” to this letter is a list of all job titles that will be affected if the Smelter permanently closes pursuant to this conditional WARN Notice, as well as the number of affected employees in each job. It is possible that, if an affordable power option is presented after the plant closes, Century might consider re-opening the plant; however, that circumstance is unlikely and there is no guarantee that operations will resume. It is also possible that Century might find an economically viable power source before the plant closing ever occurs so that layoffs are avoided altogether; nevertheless, we are giving conditional notice that—based on the best information available at this time—we expect the entire Mt. Holly Smelter to permanently close and virtually all Mt. Holly employees to suffer an “employment loss” as defined by the WARN Act.

Should new circumstances change Century’s plans, we will update you. We know these are difficult and uncertain times, and we regret how this situation impacts our employees and their families. For now, Century will work tirelessly in an attempt to resolve its power issues so the plant can remain open. If you have questions or want more information, please contact Karen Cecil, HR Director North America, (270) 521-7389, 9404 State Route 2096, Robards, Kentucky 42452.

Sincerely,

Dennis Harbath
Plant Manager
Century Aluminum of South Carolina, Inc.

CENTURY ALUMINUM OF SOUTH CAROLINA, INC.
SCHEDULE A FOR WARN ACT NOTIFICATION

Position	Employees
Air Quality Supervisor	1
Application Software Specialist	1
Asst. Plantation Manager	1
Bake Oven Multi-skilled	6
Bath Technician	1
CH Inventory Control Specialist	1
CMT Technician	1
CS Flow Leader	5
Carbon Anode Supervisor	1
Carbon Bake Supervisor	3
Carbon Plant Electrical Technician	1
Carbon Plant Manager	1
Carbon Technical Advisor	1
Caster	8
Casthouse General Supervisor	1
Casthouse Manager	1
Casthouse Multi-Skilled	1
Casthouse Supervisor	4
Casthouse Technical Advisor	1
Casthouse Technical Supervisor	1
Casting Assistant	7
Cost Accountant	1
Crane Crew Supervisor	1
Electrical Crew Technician	1
Electrician 26	8
Electrician 28	2
Electrician 30	2
Emission Control Shift Technician	4
Environmental Manager	1
Finance Manager	1
Furnace Operator	10
Green Control Operator	4
HDC Caster	4
High Voltage Technician	2
Homo Operator	4
Hotside Flow Leader	3
Human Resources Manager	1
Human Resources Specialist	1
Machinist 26	1
Machinist 28	1
Maintenance Engineer	1
Maintenance General Supervisor	1
Maintenance Manager	1
Maintenance Supervisor	4

Maintenance Utilities Technician	1
Mechanic 26	21
Mechanic 28	5
Mechanic 30	1
Mechanic 32	2
Mechanical Crew Technician	3
Metallurgist	1
Mobile Shop Technician	1
Mold Shop Technician	2
Nurse	1
PEO - ECL	7
PEO - Tapper	9
PSO - Cruce Cleaner	4
PSO - Metal Hauler	4
PSO - ORE Hauler	4
Planner	4
Planner Supervisor	1
Plant Manager	1
Pot Operator	15
Pot Servicer	14
Pot Servicer - Tapper Helper	4
Potline General Supervisor	1
Potline Manager	1
Potline Supervisor	4
Potline Tech & Mech Coordinator	1
Potroom Technician	4
Process Control Technician	1
Process Engineer	1
Process Technician	1
Relief Servicer	6
Rod Operator	7
Rod Shop Supervisor	1
Rod Shop Technician	1
Safety & Health Manager	1
Safety Specialist	1
Saw Operator	16
Scheduling/Shipping Coordinator	1
Senior Buyer	1
Senior Financial Analyst	1
Services Equipment Operator	3
Services General Supervisor	1
Services Supervisor	2
Shipping	1
Shipping Supervisor	1
Spectro Chemical Analyst	4
Storeroom Lead Buyer	1
Technical Manager	1
Tool & Equipment Servicer	11
Tool & Trench Servicer	2

EXHIBIT D

Message

From: Pelcher, Steve [/O=D2ORG/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=A4695C271523485D85B5FCA788040715-PELCHER, STEVE]
Sent: 8/27/2019 6:21:12 PM
To: Free, Rene [rlfree@santeecooper.com]
Subject: Rene: Could you discuss this matter with me tomorrow morning? Early?
Attachments: Goose_Creek_Annexation_2019_RLP.pdf
Importance: High

Stephen R. Pelcher | Deputy General Counsel Nuclear and Regulatory Compliance

Santee Cooper | srpelche@santeecooper.com
Physical: One Riverwood Drive, Moncks Comer, SC 29461
Mailing: PO Box 2946101, Moncks Corner, SC 29461-6101
P: (843) 761-4016

From: Pinson, Ray <ray.pinson@santeecooper.com>
Sent: Tuesday, August 27, 2019 6:18 PM
To: Brown, Michael <mike.brown@santeecooper.com>; Wagner, Chris <chris.wagner@santeecooper.com>; Callander, Amanda <AMANDA.CALLANDER@santeecooper.com>; Pelcher, Steve <stephen.pelcher@santeecooper.com>
Subject: City of Goose Creek Annexation/Electric City Formation

Hello and congratulations to you all! Mr. Bonsall has appointed me as the lead POC to work with the City of Goose Creek on this issue and has allowed me free reign to select the "A Team" to formulate our action plan in a very short order. Steve, you may be the only team member in the dark about our project, so I'll brief everyone on the background here:

On August 22, Mayor Habib of Goose Creek and Jake Broom (City Administrator) met with Mark Bonsall and myself to discuss their plan to form an electric city serving one customer Century Aluminum. Currently, the Century Aluminum property comprises over 5,000 acres as shown on the attached .pdf and is not within the city limits. In exchange for receiving 100% of their electric requirements from off-system sources via this new electric city, Century would agree to annex into the City of Goose Creek. Goose Creek would thereby benefit by new tax base, business license fees, and control over any proposed development of the property.

Obviously, this is a bad idea for the City of Goose Creek and has economic impacts to Santee Cooper as well. To convolute matters, Santee Cooper cannot be seen as an obstructionist, nor should we invite a legal battle with a local stakeholder. Our mission, as I see it, is this: 1.) identify as many obstacles on as many fronts as possible in their plan to form an electric city; 2.) quietly relay those obstacles to the Mayor and Administrator; and, 3.) pursue a short-term goal of delaying this process with a long-term goal of killing it.

In terms of timeline, the Mayor intends to roll this plan out to Council members at their regular meeting scheduled for Tuesday, September 10th. I would need to relay our list of concerns to the Mayor and Administrator the week before this meeting (i.e. the 4th or 5th). As such, I need the first draft of obstacles by **Noon, this Friday, August 30, 2019**. I will refine/combine the list into a workable document and route back around. Based on our calendars, we may not get a chance to meet on this face to face before I try to meet with the City on the 4th or 5th, so please be responsive to the email correspondence.

Here are the headings that I think we should work under to pair the obstacles (there may be others, so please add):

- Annexation protections for existing electric suppliers (Amanda)
- Transmission constraints/infrastructure ownership, etc. (Chris)
- Requirements for electric city formation, FERC/NERC responsibilities, etc. (Pelcher)
- Central contract/backstanding liability and risk to the City (Brown)

Here are the rules for your deliverables: We don't need and don't have time for a dissertation on these items. The issues are intricate and do not need to be fully fleshed out right now. We need just enough to summarize the potential issue and make them want to investigate it further, which will (hopefully) defer their rollout. Here's an example:

Annexation:

Annexation may not be construed to increase, decrease, or affect any other right or responsibility a municipality, electric cooperative, or electrical utility may have with regard to supplying electric service in areas assigned by the Public Service Commission in accordance with Chapter 27 of Title 58. Citation: § 58-27-670. Service in area becoming part of municipality; premises located within boundaries of electric cooperative or corridor.

I can't thank you all enough in advance for your help! Please let me know if you have any questions or need additional information. My mobile number is below.

Raymond (Ray) L. Pinson, Jr.

Manager Local Government & Community Relations

(843) 761 8000, ext. 4777

mobile: (843) 860 4398

ray.pinson@santeecooper.com



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
In the Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No. 2020-CP-08-00821

RECEIVED

Nov 03 2020

SC Court of Appeals

City of Goose Creek,.....Appellant,

v.

South Carolina Public Service Authority,.....Respondent.

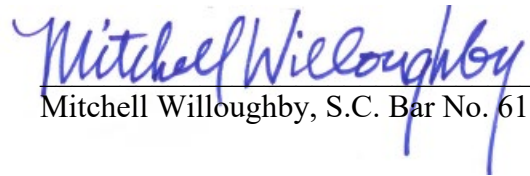
PROOF OF SERVICE

This is to certify that the undersigned counsel, a shareholder with the law firm Willoughby & Hoefer, P.A., has caused to be served this day one (1) copy of Appellant City of Goose Creek's **Motion to Expedite Appeal** via electronic mail at the email address as stated in the Attorney Information System and as set forth below to the following:

John T. Lay, Jr., Esquire
Lindsay A. Joyner, Esquire
Jordan M. Crapps, Esquire
Gallivan, White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202
jlay@gwblawfirm.com
ljoyner@gwblawfirm.com
jcrapps@gwblawfirm.com

Attorneys for Respondent South Carolina Public Service Authority

A copy of the email serving counsel for Respondent, is attached hereto.



Mitchell Willoughby, S.C. Bar No. 6161

November 3, 2020
Columbia, South Carolina

From: [Mitchell Willoughby](#)
To: [John T. Lay](#); [Lindsay Joyner](#); [Jordan Crapps](#)
Cc: [Timothy A. Domin \(tdomin@clawsonandstaubes.com\)](#); [Tracey Green](#); [Andrew R. Hand](#)
Subject: City of Goose Creek v. South Carolina Public Service Authority | C/A No. 2020-CP-08-00821
Date: Tuesday, November 3, 2020 4:59:31 PM
Attachments: [2020-11-03 Filing ltr re Mot to Expedite \(Goose Creek v SCPSA\).pdf](#)
[2020-11-03 Mot to Expedite \(Goose Creek v SCPSA\).pdf](#)

Counsel,

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am herewith serving via email Appellant City of Goose Creek's Motion to Expedite Appeal in the above-captioned matter. Shortly, I will be filing these documents with the Court of Appeals electronically as permitted by part c(6) of the Order, and will attach this email to the certificate of service of same.

Should you have any issues opening the attachments, please let me know. Thank you. With warmest regards,

Mitch



Mitchell Willoughby, Esquire
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
P.O. Box 8416
Columbia, SC 29202
(o) 803.252.3300 | (d) 803.771.2121
mwilloughby@willoughbyhoefler.com

RECEIVED
Nov 03 2020
SC Court of Appeals

Confidentiality Notice: The information contained in this transmittal, including any attachment, is privileged and confidential information and is intended only for the person or entity to which it is addressed. If you are neither the intended recipient nor the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any disclosure, copying or distribution or the taking of any action in reliance on the contents of this transmittal is strictly prohibited. If you have received this transmittal in error, please contact the sender immediately by telephoning the sender at (803) 252-3300 and, also, please delete this transmittal from any computer or other data bank. Upon request, we will reimburse your reasonable costs of notifying us of a transmission error. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. This advice may not be forwarded (other than within the taxpayer to which it was sent) without our express written consent.

WILLOUGHBY & HOEFER, P.A.
ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
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J. PATRICK HUDSON
OF COUNSEL

JOSEPH H. FARRELL, III
SPECIAL COUNSEL

*ALSO ADMITTED IN TEXAS

**ALSO ADMITTED IN WASHINGTON, D.C.

***ALSO ADMITTED IN CALIFORNIA

****ALSO ADMITTED IN NORTH CAROLINA

November 3, 2020

VIA ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1229 Senate Street
Columbia, South Carolina 29201

RE: *City of Goose Creek, Appellant v. South Carolina Public Service Authority,
Respondent.*

Dear Ms. Kitchings:

Attached for electronic filing in accordance with Supreme Court Order 2020-05-29-02, part (c)(6), and pursuant to Rule 240 of the South Carolina Appellate Court Rules, please find the Motion to Expedite Appeal of Appellant City of Goose Creek in the above-captioned matter. As permitted by Order 2020-05-29-02, part (d), no other copies, whether paper or electronic, are being provided.

By copy of this letter, we are serving counsel for Respondent via email as permitted by Order 2020-05-29-02, part (g)(3), and attached is a proof of service to that effect.

A check in the amount of \$50.00 for the filing fee associated with this motion is being forwarded to your attention via U.S. Mail.

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SC Court of Appeals

(continued...)

The Honorable Jenny Abbott Kitchings

November 3, 2020

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If you have any questions or need additional information, please do not hesitate to contact me. With warmest regards, I am,

Very truly yours,

WILLOUGHBY & HOEFER, P.A.


Mitchell Willoughby

MW/lla
attachments

cc: John T. Lay, Jr., Esquire
Lindsay A. Joyner, Esquire
Jordan M. Crapps, Esquire