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

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

v.

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

NOTICE OF APPEAL

Pursuant to Rule 203, SCACR, Appellant City of Goose Creek appeals the Declaratory Judgment Order of the Honorable Roger M. Young, Sr., dated October 12, 2020. Appellant received electronic notice of the entry of the Declaratory Judgment Order on October 12, 2020. A copy of the Declaratory Judgment Order is attached hereto.

Pursuant to Rule 59(e), SCRCP, Appellant timely filed a Motion to Reconsider, Alter, and Amend Order on October 22, 2020. According to Rule 203(b)(1), SCACR, the timely filing of a Rule 59 Motion stayed the time for filing an appeal. On November 2, 2020 the Honorable Roger M. Young, Sr. entered an Order Denying Appellant's Motion to Reconsider, Alter, and Amend Order. Appellant received electronic notice of the entry of the Order denying the Rule 59(e) motion on November 2, 2020. A copy of the Order denying the Rule 59(e) motion is also attached hereto.

Upon the entry of the order denying the Rule 59(e) motion, Appellant hereby timely appeals from both orders.

Respectfully submitted,

s/Mitchell Willoughby
Mitchell Willoughby, S.C. Bar No. 6161
Tracey C. Green, S.C. Bar No. 9342
Andrew R. Hand, S.C. Bar No. 101633
WILLOUGHBY & HOEFER, P.A.
930 Richland Street (29201)
Post Office Box 8416
Columbia, SC 29202-8416
(803) 252-3300
mwilloughby@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
ahand@willoughbyhoefer.com

-and-

CLAWSON AND STAUBES, LLC
Timothy A. Domin, S.C. Bar No. 65264
126 Seven Farms Drive
Charleston, SC 29492
Phone: (843) 577-2026
Fax: (843) 722-2867
tdomin@clawsonandstaubes.com

Attorneys for Appellant City of Goose Creek

November 2, 2020
Columbia, South Carolina

Other Counsel of Record:

John T. Lay, Jr., Esquire
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, SC 29202-7368
(803) 724-1800

Lindsay A. Joyner, Esquire
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, SC 29202-7368
(803) 724-1706

Jordan M. Crapps, Esquire
GALLIVAN, WHITE & BOYD, P.A.
Post Office Box 7368
Columbia, SC 29202-7368
(803) 724-1753

Attorneys for Respondent
South Carolina Public Service Authority

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

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

v.

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

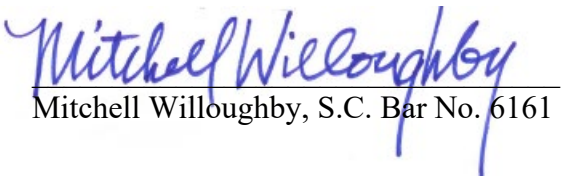
PROOF OF SERVICE

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 **Notice of 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 2, 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: Monday, November 2, 2020 4:19:28 PM
Attachments: 2020-11-02 Filing ltr re NOA - Goose Creek vs SCPSA.pdf
2020-11-02 NOA - 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 Notice of 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@willoughbyhoefer.com

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL**
TRACEY C. GREEN
CHAD N. JOHNSTON
JOHN W. ROBERTS
ELIZABETH ZECK*
ELIZABETHANN L. CARROLL
ANDREW J. D'ANTONI
R. WALKER HUMPHREY, II***
ANDREW R. HAND****
J. JOSEPH OWENS

ELIZABETH S. MABRY
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

OFFICES:

COLUMBIA
930 RICHLAND STREET
P.O. BOX 8416
COLUMBIA, SC 29202-8416

AREA CODE 803
TELEPHONE 252-3300
FAX 256-8062

CHARLESTON
133 RIVER LANDING DRIVE
SUITE 200
CHARLESTON, SC 29492

AREA CODE 843
TELEPHONE 619-4426
FAX 619-4430

November 2, 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 203 of the South Carolina Appellate Court Rules, please find the Notice of 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 $250.00 for the filing fee associated with this Notice of Appeal is being forwarded to your attention via U.S. Mail.

(continued…)

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

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 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 statutes[8] 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 MAA[9] 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

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 CASE NO.: 2020-CP-08-00821 **ORDER DENYING GOOSE CREEK'S MOTION FOR RECONSIDERATION**

The Plaintiff City of Goose Creek filed a motion asking this Court to reconsider its October 12, 2020 Declaratory Judgment Order. Specifically, Plaintiff asks the Court to reconsider four findings within the Order: (1) the interpretation of the statutory and constitutional provisions regarding the right to serve the Mt. Holly Smelter as between Goose Creek and Santee Cooper, (2) the applicability of S.C. Code § 58-27-1360 to this case, (3) the historical basis of Santee Cooper's service to the Mt. Holley Smelter, and (4) the applicability of the delegation of governmental powers doctrine to this case.

STANDARD OF REVIEW

Motions for reconsideration will not be granted absent "highly unusual circumstances." U.S. ex rel. Becker v. Washington Savanah River Co., 305 F.3d 284, 290 (4th Cir. 2002) (stating that simple disagreements with the court's ruling will not support Rule 59(e) relief).[1] Courts have recognized three circumstances in which a court should grant a Rule 59(e) motion: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinston v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993). Importantly, a motion for reconsideration is not a

[1] Rule 59 is substantially the same as the Federal Rule. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E. 2d 772, 779 (2004) ("Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical.").

vehicle to re-litigate previously raised issues or "to raise argument or present evidence that could have been presented prior to the entry of judgment." Dash v. Mayweather, C/A No. 3:10-1036-JFA, 2010 U.S. Dist. LEXIS 95277, *2 (D.S.C. Sept. 13, 2010) (quoting Exxon Shipping Co. v. Baker, 554 U.S. 471, n.5 (2008)). In other words, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995). Nor does "[a] party's mere disagreement with the court's ruling . . . warrant a Rule 59(e) motion." In re Pella Corp. Architect & Designer Series Windows Mktg., Sales Practices & Prods. Liab. Litig., 269 F.Supp. 3d 685, 691 (D.S.C. 2017); *see also* Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015).

After consideration of the issues raised in Plaintiff's motion and the parties' memoranda in support and in opposition, the Court hereby DENIES Plaintiff City of Goose Creek's Motion for Reconsideration.

AND IT IS SO ORDERED.

ELECTRONIC SIGNATURE PAGE TO FOLLOW

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