

**MINUTES
WESTMINSTER CITY COUNCIL
Regular Scheduled Meeting
Tuesday, January 11, 2022**

The City Council of the City of Westminster met in a regular scheduled meeting on Tuesday, January 11, 2022 at 6:00 pm at the Westminster Depot with Mayor Brian Ramey presiding. Those in attendance were:

Brian Ramey
Jimmy Powell
Brad Chastain

Dale Glymph
Danny Duncan

Rusty Cater
Yousef Mefleh

City Administrator, Kevin Bronson
Rebecca Overton
Utility Director, Leigh Baker
Police Chief, Matt Patterson
Fire Chief, Michael Smith
City Attorney, Andrew Holliday
Members of the public and press

Notice of the meeting and the agenda was posted on a window at the Depot and at westminstersc.org twenty-four hours prior to the meeting and all persons, organizations and local media requesting notification and the agenda were notified by email.

Call to Order

Mayor Ramey called the meeting to order at 6:00 pm.

Invocation and Pledge of Allegiance

Mr. Rod Lyda, Pastor of Crossroads Baptist Church led the Council in the invocation and pledge.

Certification of Quorum

Rebecca Overton certified a quorum.

Public Comments

1. Attorney Rick McDuff addressed Council with concerns about the AMI fee. He asked Council to rescind the fee and refund the taxpayers. He informed Council his client was ready to proceed with legal action if they do not remove the fee.
2. Rod Lyda, pastor of Crossroads Baptist Church asked Council for approval for a Passion Service on April 15th and suggested they be allowed to use the Depot parking lot or the Retreat Street Park area. He also said they were planning to feed

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- the community and suggested it would be a time to unite people while spreading the good news of Jesus.
3. Frankie Pearson thanked Council for what they do. He stated he believes a terrible wrong has been done to citizens by still charging the AMI fee. He said he also believed that everyone should pay the same amount for all services, regardless of whether they are inside or outside city limits. He asked Council to step up and do what is right.
 4. Adam Dunn reminded Council that he is trying to build a Mother-in-Law suite and said he had tried to get the property rezoned to allow it, but the rezoning did not pass. He asked Council to consider changing the city ordinance to allow a detached unit on his property and that the neighbors have no issues.

Comments from the Mayor and Council

Mayor Ramey addressed Mr. Dunn and stated that in order to give him the rezoning like he had wanted, they would have opened the door for potential mobile home parks. Mr. Ramey also addressed the AMI fee and stated that Council had already voted on a first reading to remove the AMI fee. He stated that if a second reading goes through then the fee will be removed and an audit of the AMI project will be conducted to determine credits or refunds.

Danny Duncan stated that Council should have done what they said they were going to do concerning the AMI fee and reduced it. He stated he is in favor of having Mr. Bronson come up with a solution to give money back to the customers.

Mr. Mefleh stated that customers feel like they were over charged and that Council needs to do what is needed to make it right.

Presentation by the Westminster Special Events Committee

Lacey Watkins and Jessica Glymph were present to give updates and address some concerns about the Special Events Committee. Jessica stated that the Committee assists with City events and other outside vendor events. She stated that the Committee asks for money each year and for the most part, it is about the same each year. She said as the Committee gets involved in more events, the bigger the need is for more money. She asked Council to consider writing the Committee expenses as a regular line item expenditure in the annual budget. She also asked Council to consider making a separate budgeted line item expense for commercial decorations for Christmas, Fall, etc. She said this would free up some of the expenses for the Committee as currently they are buying noncommercial grade decorations and they just do not hold up. Jessica also asked Council to consider appointing the Committee a designated storage area that would only be accessible to them to store all of the supplies and decorations. She also asked Council to consider a more permanent structure of public restrooms so that they could save a good portion on rented facilities.

Old Business

1. Second Reading of Ordinance #2022-01-11-01; Budget Amendment #3 to amend the FY2021/2022 Annual Budget.

The FY2021/2022 Westminster Utility Budget includes a Meter Fee, which is charged to all customers using the Automated Meter Reading System. The fee is \$7.00 for each water meter and each electric meter. In the event a water and electric meter are on the same account, then only one fee is charged. If there are multiple locations then multiple \$7.00 fees are applied. That fee is charged to inside and outside City Customers. The budgeted revenue for this fee is \$308,119. The average monthly revenue is \$25,677.

In order to remove the fee, the following usage increases are proposed:

Inside City:

- 1) remove the Meter Fee
- 2) no rate increase

Outside City:

- 1) remove the Meter Fee
- 2) 10% increase to the base fee
- 3) 24.95% increase to the per/1000 gallons

Mr. Bronson reminded Council this was a second reading of a previous passed Ordinance and that if passed would not go into effect until the March 2022 billing. He also advised Council that if passed it would be appropriate to do an audit of revenue and expenses of the AMI project to determine what amount of credit or refund was justified. He stated that he would ask Financial Advisor Jason White to assist with this audit.

Mr. Duncan stated that he felt it was essential to do the audit because customers deserve an exact figure and asked everyone to be compassionate and understanding regarding the City trying to fix water problems through the old lines.

Mr. Chastain expressed concern about understanding how the rate increase was going to make up the revenue after the AMI fee was removed. Mr. Bronson assured him the math and calculations used to determine the increase was carefully considered and calculated.

Mr. Cater wanted to clarify that the Ordinance does two things – it removes the AMI Fee and passes the rate increase. He suggested a no vote for the Ordinance for rate increase purposes would indeed leave the AMI fee active. Mr. Bronson verified this explanation as correct.

Mr. Ramey reminded Council that they had discussed on other occasions the expensive costs associated with covering over 130 miles of outside city limit lines. He stated removing the fee and implementing the rate increase was the only way to make up the revenue the fee was generating.

Upon a motion by Mr. Ramey and seconded by Mr. Glymph, the motion **to approve Ordinance #2022-01-11-01, amending the FY2021/2022 Budget**, failed.

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Member	Motion	Vote
Ramey	Motion	Yes
Cater		No
Glymph	Second	Yes
Chastain		No
Duncan		No
Mefleh		No
Powell		Yes

New Business

1. Appointment of a Mayor Pro Tempore for 2022

Upon a motion by Mr. Cater and seconded by Mr. Chastain, the motion **to nominate Danny Duncan as Mayor Pro-Temp for 2022** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Motion	Yes
Glymph		Yes
Chastain	Second	Yes
Duncan		Yes
Mefleh		Yes
Powell		Yes

2. Appointment of a new Board Member for the Fire Department 1% Local Board of Trustees

Upon a motion by Mr. Chastain and seconded by Mr. Duncan, the motion **to nominate Mr. Cater as the new Board Member for the Fire Department 1 % Local Board of Trustees** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph		Yes
Chastain	Motion	Yes
Duncan	Second	Yes
Mefleh		Yes
Powell		Yes

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3. Appointment to the Sewer Board

Upon a motion by Mr. Chastain and seconded by Mr. Ramey, the motion **to appoint Kevin Bronson and Leigh Baker to the Sewer Board** passed unanimously.

Member	Motion	Vote
Ramey	Second	Yes
Cater		Yes
Glymph		Yes
Chastain	Motion	Yes
Duncan		Yes
Mefleh		Yes
Powell		Yes

4. Appointment to the PMPA Board

Currently, Mr. Bronson is the PMPA Board Director and Mr. Chastain is the Alternate Director.

Upon a motion by Mr. Powell and seconded by Mr. Cater, the motion **to appoint Brian Ramey as Alternate Director to the PMPA Board** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Second	Yes
Glymph		Yes
Chastain		Yes
Duncan		Yes
Mefleh		Yes
Powell	Motion	Yes

Upon a motion by Mr. Powell and seconded by Mr. Cater, the motion **to pass the PMPA Alternate Director Resolution** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Second	Yes
Glymph		Yes
Chastain		Yes
Duncan		Yes
Mefleh		Yes
Powell	Motion	Yes

5. Appointment to the Oconee Economic Alliance

Currently Mr. Bronson serves on the Oconee Economic Alliance but there is another seat available.

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Upon a motion by Mr. Mefleh and seconded by Mr. Duncan, the motion **to appoint Mr. Powell to the Oconee Economic Alliance** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph		Yes
Chastain		Yes
Duncan	Second	Yes
Mefleh	Motion	Yes
Powell		Yes

6. Appointment to the Local Development Board

Currently Mr. Duncan is on the Local Development Board and all Council Members agreed that he continue to serve.

7. Appointment to the Special Events Committee

Mr. Duncan asked the City Attorney if it would be a conflict of interest of Mr. Glymph served on the Committee since his wife Jessica is currently on the Committee. Mr. Bronson clarified that the conflict may arise from HTAX monies that are allocated for the Committee and Mr. Glymph being on Council who oversees the allocation. He suggested having the Attorney draft a letter to the Ethics Commission and ask them for a definitive answer on the issue. Mr. Cater agreed with asking the Ethics Commission for an opinion on the matter and asked that Mr. Glymph abstain from any votes regarding the Events Committee or Big Foot Festival.

After discussion, it was agreed to wait on voting on Mr. Glymph until after an opinion is received from the Ethics Commission.

At this point, Mr. Mefleh stated that when the vote was taken earlier on the Budget Amendment and AMI Resolution that he did not fully understand the ramifications of his vote. Mr. Holliday informed Mr. Mefleh that in order for the topic to be discussed then he would need to make a motion to reconsider the item.

Upon a motion by Mr. Mefleh and seconded by Mr. Glymph, the motion to **reopen discussion on Ordinance #2022-01-11-01** passed.

Member	Motion	Vote
Ramey		Yes
Cater		No
Glymph	Second	Yes
Chastain		No

Duncan		No
Mefleh	Motion	Yes
Powell		Yes

Mr. Mefleh clarified that he wanted the \$7 AMI Fee to be taken off and did not realize when he voted no on the Ordinance earlier that the fee would remain.

Upon a motion by Mr. Mefleh and seconded by Mr. Glymph the motion to **approve Ordinance #2022-01-11-01 as presented** passed.

Member	Motion	Vote
Ramey		Yes
Cater		No
Glymph	Second	Yes
Chastain		No
Duncan		No
Mefleh	Motion	Yes
Powell		Yes

8. Consider Adoption of Safety Policy Statement

The Safety Policy Statement is adopted annually as a measure to lower our risk rating for renewal with the MASC Insurance Program.

Upon a motion by Mr. Duncan and seconded by Mr. Ramey the motion to **adopt the Safety Policy Statement as presented** passed unanimously.

Member	Motion	Vote
Ramey	Second	Yes
Cater		Yes
Glymph		Yes
Chastain		Yes
Duncan	Motion	Yes
Mefleh		Yes
Powell		Yes

9. Law Enforcement Assistance and Support Agreement: West Union

Upon a motion by Mr. Duncan and seconded by Mr. Chastain the motion to **approve the Law Enforcement Assistance and Support Agreement: West Union** passed unanimously.

Member	Motion	Vote
Ramey	Second	Yes
Cater		Yes
Glymph		Yes
Chastain	Motion	Yes
Duncan		Yes
Mefleh		Yes
Powell		Yes

10. Consider Bid Award for Installation/Construction of a Raw Water Intake Pump House

The scope of this project includes the construction/installation of a building to house two pumps and the installation of necessary electrical components to operate the raw water intake. This project is to be funded from the Oconee County ARP Funds.

Upon a motion by Mr. Duncan and seconded by Mr. Chastain the motion to **award the bid to Sterling Structure & Design in the amount of \$262,000.00** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph		Yes
Chastain	Second	Yes
Duncan	Motion	Yes
Mefleh		Yes
Powell		Yes

11. Consider Two Bid Awards for Emergency Repairs to the Sewer System

These bids are for emergency repairs to the sewer lines along Retreat Street and Mimosa Road as well as the 300 block of Retreat Street. Projects will be paid with the State ARP Funds.

Upon a motion by Mr. Duncan and seconded by Mr. Mefleh the motion to **award the bid for emergency repairs for sewer line pipe bursting along Retreat Street and Mimosa Road in the amount of \$37,344.19 to Roper Brothers Inc. General Contractors** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph		Yes

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Chastain		Yes
Duncan	Motion	Yes
Mefleh	Second	Yes
Powell		Yes

Upon a motion by Mr. Mefleh and seconded by Mr. Cater the motion to **approve the use of Roper Brothers Inc. General Contractors daily rate schedule for emergency repairs to sewer lines along the 300 block of Retreat Street** passed Unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Second	Yes
Glymph		Yes
Chastain		Yes
Duncan		Yes
Mefleh	Motion	Yes
Powell		Yes

12. Consider Bid Award to Replace Two Sludge Pumps

The Water Treatment Plant has two sludge pumps. One that has been inoperable for more than 10 years. The other pump has had extensive repairs in the last five years and needs replacing. This project will be funded from Oconee County ARP Funds.

Upon a motion by Mr. Duncan and seconded by Mr. Chastain the motion to **award the bid to Electric Motors and Drive Inc. for \$18,670.00 to replace two sludge pumps** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph		Yes
Chastain	Second	Yes
Duncan	Motion	Yes
Mefleh		Yes
Powell		Yes

13. Consider Resolution supporting Appalachian Regional Commission grant match, 50% or \$34,000.00

Upon a motion by Mr. Chastain and seconded by Mr. Cater the motion to **approve the resolution committing the City of Westminster to providing a local match for the Appalachian Regional Commission (arc) funds**

managed by the South Carolina Department of Commerce Grants Administration passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Second	Yes
Glymph		Yes
Chastain	Motion	Yes
Duncan		Yes
Mefleh		Yes
Powell		Yes

14. Consider Approval of the FY 2023 Budget Calendar

Mayor Ramey notated that a correction would need to be made to the City Council Priority Setting Workshop. The Budget Calendar reflects a meeting for January 26th but that meeting should be on January 25th.

Upon a motion by Mr. Duncan and seconded by Mr. Glymph the motion to **approve the FY 2023 Budget Calendar** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater		Yes
Glymph	Second	Yes
Chastain		Yes
Duncan	Motion	Yes
Mefleh		Yes
Powell		Yes

15. Consider Conserfund Amendment 3

The Conserfund Loan Agreement is between the City of Westminster and the SC Energy Office and is an ongoing Water Plant project that is being extended.

Upon a motion by Mr. Duncan and seconded by Mr. Cater the motion to **approve Conserfund Loan Amendment No. 3** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Second	Yes
Glymph		Yes
Chastain		Yes
Duncan	Motion	Yes
Mefleh		Yes

Powell		Yes
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Routine Business

1. Approval of the December 9, 2021 Regular Meeting Minutes

Upon a motion by Mr. Cater and seconded by Mr. Duncan the motion to **approve the December 9, 2021 Regular Meeting Minutes** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Motion	Yes
Glymph		Abstain
Chastain		Yes
Duncan	Second	Yes
Mefleh		Yes
Powell		Yes

2. Approval of the January 4, 2022 City Council Swearing-In Minutes

Upon a motion by Mr. Cater and seconded by Mr. Duncan the motion to **approve the January 4, 2022 City Council Swearing-In Minutes** passed unanimously.

Member	Motion	Vote
Ramey		Yes
Cater	Motion	Yes
Glymph		Yes
Chastain		Yes
Duncan	Second	Yes
Mefleh		Yes
Powell		Yes

3. Comments from the Utility Director

Mr. Baker informed Council that crews has smoked sewer lines and found some issues to fix. He also stated that he was seeing a reduction in the I & I flow.

Mr. Baker addressed the water breaks on Hall Road and said that he had been speaking to the engineer on how to resolve those issues and hopefully would be able to do some repairs soon using some of the ARP funds.

Mr. Baker informed Council he had recently hired a Water/Sewer Supervisor. He also informed Council that there are some concerns with

Anderson Park and the fencing there. Mr. Baker also stated that he was looking into putting cardboard recycle dumpsters in the parking lot of the Police Department. This is still being discussed and trying to be worked out.

Mr. Baker also informed Council the electric crew had wrapped some poles with squirrel guard and that he had recently hired a line trimmer.

4. Comments from City Administrator

Mr. Bronson informed Council that Larry Brandt and Pope Flynn Law Firms were asked to give a legal opinion on the City of Seneca letter and their intention to file a lawsuit concerning voting rights with the OJRSA. This letter is included with these minutes.

Mr. Bronson addressed Council on the recent vote by the OJRSA Board to pass a 20% rate increase. He stressed to Council that this increase would need to be passed onto City customers as there was no way the City could absorb an increase like this. He advised that called meetings would need to be scheduled for first and second readings.

Mr. Bronson informed Council that Judy Caywood with the Senior Outreach Program was asking the City to deed the recently leased Pool property over to the Senior Program so that they could apply for State Grants. He asked Mr. Holliday to work up a sale document that would deed this over to the group. Council expressed concerns that should the Senior Program ever cease or decide to do something else with the building and property that it could fall into the hands of someone with other intentions. Council advised Mr. Holliday to address this in the deed documents that should the building and property ever not be wanted by a Senior Program that it would be given back to the City.

Mr. Bronson informed Council that Seamon Whiteside is ready to present the conceptual plan on the Hall Street property.

Executive Session

Upon a motion by Mr. Duncan and seconded by Mr. Cater, the motion ***to enter into an executive session for the purpose of:***

a discussion of negotiations incident to proposed contractual arrangements and proposed sale or purchase of property, the receipt of legal advice where the legal advice relates to a pending, threatened, or potential claim or other matters covered by the attorney-client privilege, settlement of legal claims, or the position of the public agency in other adversary situations involving the assertion against the agency of a claim and a discussion of employment, appointment, compensation, promotion, demotion, discipline, or release of an employee, a
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student, or a person regulated by a public body or the appointment of a person to a public body pursuant to S.C. Code Ann. 34-4-70(1) (2)

- a. *Oconee Joint Regional Sewer Authority – legal advice concerning threatened litigation*
- b. *Piedmont Municipal Power Agency – legal advice concerning ongoing litigation*
- c. *Personnel Matters related to the potential Staff Organizational Structure of the City Organization*

Upon motion by Mr. Chastain and seconded by Mr. Mefleh, the motion **to exit executive session and re-enter open session** passed unanimously.

At this time, Mr. Cater submitted his resignation effective January 31st and he left the meeting at 9:23pm. Mr. Duncan then submitted his resignation effective immediately. Mr. Chastain said that he would submit his resignation the next day.

Adjourn

Upon a motion by Mr. Mefleh and seconded by Mr. Powell, the motion **to adjourn the meeting at 9:40 pm** passed unanimously.

(Minutes submitted by Rebecca Overton)

Mayor Brian Ramey

Date



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Columbia, SC 29201
PHONE 803.354.1900
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Memorandum

PRIVILEGED AND CONFIDENTIAL
ATTORNEY CLIENT COMMUNICATION

TO: OCONEE JOINT REGIONAL SEWER AUTHORITY, SOUTH CAROLINA

FROM: POPE FLYNN, LLC

DATE: JANUARY 5, 2022

RE: ANALYSIS OF CLAIMS CONCERNING COMMISSION COMPOSITION AND VOTING RIGHTS

I. Background.

A. *Formation of the Joint Authority*

The Oconee Joint Regional Sewer Authority, South Carolina (the "**Authority**") is a "Joint Authority Water and Sewer System" (a "**Joint System**") as such term is used and defined in the Joint Authority Water and Sewer Systems Act, codified at Title 6, Chapter 25 of the Code of Laws of South Carolina 1976, as amended (the "**Act**"). The Authority was created under the provisions of the Act by its three member-municipalities (collectively, the "**Members**"): the City of Seneca, South Carolina ("**Seneca**"), the City of Walhalla, South Carolina ("**Walhalla**"), and the City of Westminster, South Carolina ("**Westminster**").

The Authority was established, and is now governed, by the provisions of an agreement entitled "Inter-Municipal Agreement and Joint Resolution Creating a Joint Authority Water and Sewer System . . . Pursuant to Chapter 25, Title 6, South Carolina Code of Laws as Amended by Act No. 59, South Carolina Acts and Joint Resolutions, Effective June 6, 2007, and Assignment of Rights, Privileges, Duties and Obligations Previously Agreed to by the Parties, and Agreement of the Authority to Provide Sewer Services," by and among the Members, and filed in the offices of the Clerk of Court of Oconee County as of October 31, 2007 (the "**Authority Agreement**"). The Authority is governed by a commission consisting of nine commissioners (the "**Authority Commission**"). Pursuant to Article 4, Section (a) ("**Article 4(a)**") of the Authority Agreement, the Authority Commission is composed of four members appointed by Seneca, two members appointed by Walhalla, two members appointed by Westminster, and one member jointly appointed by Walhalla and Westminster (each a "**Commissioner**").

The Authority is, in effect, a successor to the Oconee County Sewer Commission (the "**Sewer Commission**"). The Sewer Commission was established by Oconee County, South Carolina (the "**County**") through Ordinance No. 78-2, enacted on February 28, 1978 (the "**Sewer Commission Ordinance**"). The Sewer Commission Ordinance established the composition of the

nine-member Sewer Commission and allowed Seneca to designate three members, Walhalla to designate two members, Westminster to designate two members, and the County to designate the remaining two members.

There are numerous agreements and memoranda of understanding among the Sewer Commission, the County, and the Members of the Joint Authority (including the Town of West Union, South Carolina). Several of these agreements are incorporated by reference into the Authority Agreement in numerous provisions, both in general terms and with respect to specific matters¹ (collectively, the “*Incorporated Agreements*”): namely, an Intergovernmental Agreement dated April 18, 2006; an Intergovernmental Agreement (SWAG) dated February 28, 2005; a Memorandum of Understanding dated March 10, 2004 (the “*2004 MOU*”); a Memorandum of Understanding dated February 24, 2005 (the “*2005 MOU*”); and an Intergovernmental Agreement dated April 18, 2006. In addition to various obligations and commitments concerning the use of the Sewer Commission’s facilities and services, the Incorporated Agreements contain some provisions concerning the composition of the Sewer Commission and circumstances under which its composition may change over time.

B. *Seneca’s Claims*

By letter dated November 9, 2021 (the “*Seneca Letter*”), Seneca, through its legal counsel, informed the Authority and the remaining Members that it believes that these parties are in breach of the Authority Agreement. Specifically, Seneca claims that the Authority Agreement and provisions of the Incorporated Agreements require that the “voting rights of [the Authority’s] members . . . would mirror the number of customers for each member and adjustments to voting rights would ensue as customer bases changed over time.”² In support of this claim, Seneca points to Article 4, Section (c) of the Authority Agreement (“*Article 4(c)*”) and a provision of the 2005 MOU, both of which are discussed below.

According to the Seneca Letter, Seneca’s customers account for 65.1% of the combined customers of all Members, and Seneca’s payments to the Authority represent 68% of all of the Authority’s revenue; however, Seneca’s voting rights amount to 44% of the votes that may be cast by the Commissioners. Seneca claims that under the terms of the Authority Agreement, the voting rights of the Commissioners should be adjusted to reflect these percentages. Seneca demands that the Authority and the remaining Members “(1) cease and desist from moving forward with any further votes on any item related to, impacting or affecting [the Authority]; until (2) any and all steps necessary to realign the voting rights of [the Authority’s] members occurs.” Seneca further demands that the Authority institute action against Walhalla and Westminster seeking specific performance of these obligations if these Members refuse to take action to realign the Authority Commission’s voting rights.³

¹ See Authority Agreement, Preamble at 15; *Id.*, Article 11, §(e); *Id.*, Article 13, §(a); *Id.*, Article 15, §§(a) and (b).

² The Seneca Letter also contains a claim that the Authority and its remaining Members have breached certain inflow and infiltration provisions of the Authority Agreement, a discussion of which is beyond the scope of this memorandum.

³ The Seneca Letter also makes allegations regarding violations of the infiltration and inflow (I&I) provisions of the Authority Agreement. Such allegations are beyond the scope of this memo and have not been addressed.

II. Questions Presented

The Authority has asked Pope Flynn, LLC (“*Pope Flynn*” or the “*Firm*”) to provide its reasoned opinion of the legitimacy of the governance claims and arguments contained in the Seneca Letter; specifically, may Seneca:

- (1) unilaterally demand a change in the composition of the Authority Commission or a reallocation of the voting power of its members; or
- (2) compel the remaining Members to take action to authorize amendments to the Authority Agreement to implement such any such change?

III. Relevant Law and Agreements

A. *The Provisions of the Act*

The Act authorizes two or more “authorities” (generally, cities, counties, or special purpose districts) to join together to form a Joint System. The Act contains specific steps that authorities must undertake before filing an application for incorporation of a Joint System with the South Carolina Secretary of State. Once incorporated, the authorities are considered to be the members of the Joint System.⁴ A Joint System is governed by a commission, which must contain at least one representative of each of its members.⁵ Pursuant to the Act, prior to filing for incorporation, “[t]he governing bodies of the members of a joint system shall form an agreement specifying the number of commissioners each member may appoint to a commission created to govern the joint system pursuant to Section 6-25-60 [of the Act].”⁶ Section 6-25-60(A) of the Act charges this commission with the management and control of a Joint System, and further provides, “[a] commissioner has one vote and may have additional votes as a majority of the members of the joint system determines.”

The members of a Joint System are not given the unconditional power to structure the composition of its commission, make changes to the commission or reallocate voting rights, in any manner they see fit. The agreement that they reach, and any mechanism for altering the composition of the commission or the reallocation of its voting rights, must comply with the applicable provisions of the Act.

B. *The Provisions of Relevant Agreements*

1. Authority Agreement

Article 4(a) prescribes the current composition of the Authority Commission set forth above. The Authority Agreement does not contemplate or authorize weighted voting among the Commissioners. Therefore, in the absence of any provision to the contrary, pursuant to Section 6-

⁴ S.C. Code Ann. § 6-25-30(A).

⁵ S.C. Code Ann. § 6-25-60(A).

⁶ S.C. Code Ann. § 6-25-50(A).

25-60(A) of the Act, each Commissioner is entitled to cast one vote on matters under the Authority Commission's control.

The language of Article 4(c) is the primary basis of Seneca's claim. Article 4(c) provides as follows:

It is recognized that as the population of Oconee County increases, and the demographics change, it will be necessary to change the make-up of the Authority. It is agreed that after the initial five (5) year period the make-up of the Authority may be changed so that the number of Commissioners appointed by each Member may be representative of the number of customers each Member has and the payments made by each Member to the Authority for the treatment of effluent.

There is no provision of the Authority Agreement that allows for automatic changes to the composition of the Authority Commission or the establishment of weighted voting among the Commissioners.

2. 2005 Memorandum of Understanding⁷

In support of its claims the Seneca Letter also references the provisions of the 2005 MOU. Although not expressly stated, the 2005 MOU appears to clarify provisions of the 2004 MOU, including provisions related to the composition of the Sewer Commission.⁸ Although the 2004 MOU is also an Incorporated Agreement, it is largely superseded by the 2005 MOU.

The Seneca Letter quotes small excerpts from the relevant section of the 2005 MOU; however, reference to the entirety of the section is helpful in understanding its intent and context:

The current makeup of the Sewer Commission is set forth in Oconee County Ordinance 78-2. The current make-up of the Sewer Commission is intended to reflect representation based on the users of the system. The parties agree and understand that as the sewer system expands in the unincorporated areas of the County, it may be necessary to increase representation on the [Sewer] Commission to include parties involved in new sewer systems. The parties agree that in the event that the makeup and/or number of representatives on the Sewer Commission is changed, the Sewer Commission shall be constituted in accordance with the percentage of users connected to the City systems as they bear to the whole as closely as possible. At no time shall representation of the cities collectively be less percentage wise as they bear to the whole.⁹

Placed in context, this provision takes on a different meaning than the interpretation in the Seneca Letter. The 2005 MOU contemplates that the composition of the Sewer Commission may require

⁷ While other of the Incorporated Agreements include references to the composition of the Sewer Commission, none include any provisions concerning how the composition of the Sewer Commission may be changed.

⁸ See 2005 MOU, Preamble.

⁹ 2005 MOU, §2 (emphasis added).

adjustment if new parties are added to the Sewer Commission, not as a result of changes in the relative customer counts among the then-current parties.

IV. Analysis

Given that Authority Agreement incorporates by reference the provisions of the Incorporated Agreements, which by the express terms of some Incorporated Agreements are intended to supersede and amend others, and which also incorporate by reference agreements put in place prior to the Incorporated Agreements, it is challenging to parse all relevant provisions to determine with certainty the rights and obligations of the Authority and its Members. However, despite the claims concerning the 2005 MOU contained in the Seneca Letter, it does not appear that the 2005 MOU or any other Incorporated Agreement has any bearing on the legitimacy of Seneca's claims. The provisions of the 2005 MOU cited in the Seneca Letter, when taken in the full context of the section, appear to apply to a scenario where the membership of the Sewer Commission is changed to add new parties.¹⁰ While it is not certain whether this concept should be applied to the Authority Commission, if it were applicable, the most reasonable interpretation is that the language requires the composition of the Authority Commission to be adjusted based upon the relative percentages of the customer bases or payments of the Members only where a new member is added to the Authority. That is not the current scenario, and therefore, the 2005 MOU should have no bearing on this analysis.

Setting aside the provisions of any Incorporated Agreement, in order for the claims in the Seneca Letter to be given legitimacy and credence, we must revisit the questions posed by the Authority, which are: (1) is Article 4(c) self-executing or automatic such that Seneca may unilaterally demand changes to the composition of the Authority Commission or reallocate the voting rights of the Commissioners, or (2) does Article 4(c) mandate that the Authority and the Members take action to amend the Authority Agreement. Based upon our analysis of Article 4(c) and the Act, it is our reasoned opinion that the interpretation of Article 4(c) in the Seneca Letter is incorrect and that both of these questions should be answered in the negative.

A. Is Article 4(c) self-executing?

On September 7, 2007, Seneca adopted a resolution to approve its participation in the Joint System, enter into the Authority Agreement and approve the methodology for Seneca's appointment of Commissioners. Thereafter, and in keeping with the Act, Seneca adopted a resolution dated October 4, 2007, wherein Seneca agreed to and ratified the appointment methodology under the Act, appointing its four initial Commissioners to the Authority Commission. During this same period, Walhalla and Westminster adopted similar approval and appointment resolutions. None of the various other approval and appointment resolutions of the

¹⁰ Particularly, the language of the 2005 MOU states that "it may be necessary to increase representation on the [Sewer] Commission to include parties in new sewer system" (Emphasis added). Reading this language from the 2005 MOU in concert with Article 4(c), there is an argument that adjustments to the composition of the Commission could only be made upon the inclusion of new members to the Authority, which is contemplated with respect to West Union in Article 14, Section g of the Authority Agreement, wherein West Union is entitled to become a member when it reaches certain discharge levels into the Authority's system. That said, there is no methodology in the Authority Agreement to automatically make West Union a member or to grant it a position on Authority Commission; however, and as mentioned *supra*, the Act requires that each voting member be entitled to appoint a commissioner to the commission.

Members contains language similar to that of Article 4(c) or otherwise contemplate future adjustments to the composition of the Authority Commission or the reallocation of the voting rights of Commissioners.

The Act does not expressly authorize the members of a Joint System to agree to automatically change the composition of a commission for any reason, including in response to changes in the relative customer counts or payment obligations among the members of the Joint System. Rather, the Act only contemplates that the voting power of commissioners may be weighted by allowing commissioners to cast different numbers of votes.¹¹ In such a case, the Act expressly requires the approval of a majority of the members of a Joint System for any commissioner to be authorized to cast more than one vote¹² and the Authority Agreement (as well as the aforementioned resolutions) is silent as to any scheme for weighted voting.

However, assuming the Act permits members of a Joint System to agree to automatically change the composition of a commission, we do not believe that Article 4(c) can fairly be interpreted to require any such automatic change. There are several bases for this conclusion. First, Article 4(c) speaks in general and perhaps contradictory terms concerning the basis for any such change, i.e., (1) on the basis of “the number of customers each Member has,” presumably as a percentage of the total of all Members’ customers, and (2) on the basis of “the payments made by each Member,” presumably as a percentage of the payments made by all Members. While these metrics, as applied to Seneca, appear to be fairly close to one another (64.1% of customers verses 68% of payments), it is certainly possible that these numbers could vary considerably for individual Members from time to time. If a Member represented 40% of total customers but 60% of total payments, it is not clear which metric should be used to determine voting rights.¹³ Second, Article 4(c) does not contain any mechanism for instituting such a change or a time frame during which such metrics would be revisited.¹⁴ It is left undetermined whether this process should be triggered annually, upon the demand of a Member, or for any other reason. Where an agreement allows for such a significant change in the voting power among its parties one would expect some particulars around how, when and how often such a change could be instituted. Finally, the language of Article 4(c) speaks in permissive rather than compulsory terms: “the make-up of the Authority may be changed” (emphasis added). The Authority Agreement is reasonably consistent with its usage of “may,” with respect to actions or rights of the parties that are permissive or optional, and “shall,” with respect to obligations of the parties that are compulsory. In this context, it is reasonable to conclude that the intentional use of “may” (versus shall in other contexts) in Article 4(c) is an indication that the provisions of Article 4(c) are permissive rather than compulsory.

¹¹ S.C. Code Ann. § 6-25-60(A).

¹² *Id.* Further, it is beyond the scope of this memorandum to consider whether the Act allows members of a Joint System to agree to the automatic reallocation of voting rights as relative customer counts or payment obligations change over time.

¹³ Without any stated basis for doing so, Seneca chooses to 68% as the correct percentage of its voting power on the Authority Commission.

¹⁴ Excepting the restriction on any consideration being made during the first five years of the Authorizing Agreement.

With all of this in mind, we do not believe that Article 4(c) is self-executing such that the provision could fairly be interpreted to require any automatic changes to the Authority Commission.¹⁵

2. Does Article 4(c) Create an Obligation to Act?

The Seneca Letter implies that the Authority and the remaining Members have an obligation under Article 4(c) to take action to amend the composition of the Authority Commission. However, as noted above, Article 4(c) provides little guidance as to the basis for any change to the composition of the Authority Commission that the Members may be compelled to approve, any time frame during which such action may be demanded, or any mechanism for doing so. Nor does the Authority Agreement contain any guidance to compel the Members to take action to reallocate the voting rights of the Commissioners. As a result, Seneca's claim is tantamount to requiring that an amendment be made to the Authorizing Agreement. Pursuant to Article 16 of the Authority Agreement, the Authority Agreement may only be "amended, changed, modified, or terminated by [a]greement of all of the Members." The South Carolina courts are loath to find that municipalities have the power to enter into contracts that would compel future legislative action.¹⁶ On this basis, we are unconvinced that the Members are somehow obligated to take legislative action to effect an amendment to the Authority Agreement.

In our opinion, Article 4(c) is most accurately interpreted as an agreement to agree.¹⁷ Under this interpretation, the parties to the Authority Agreement would be barred from revisiting the composition of the Authority Commission for the first five years of its existence. After that period, any Member could request that the other Members authorize an amendment to the Authority Agreement to change the composition of the Authority Commission. That request would likely include a specific basis for the change, which may include either approach discussed in Article 4(c) or some calculated combination of the two. The Members would then have the option of accepting or rejecting the request through a formal amendment to the Authorizing Agreement - a result that is highly unlikely to be compulsory to the Members.

V. Conclusion

For the reasons discussed above, and based upon current South Carolina law, the documents referenced herein, and the facts known to the Firm at this time, we are of the reasoned opinion that a court of competent jurisdiction, properly briefed, would determine that Seneca may

¹⁵ While not discussed in this memorandum, a consortium of the Authority Commission attempted to hold a vote of the Commissioners at the Authority's regular meeting on November 1, 2021 to implement the changes to the composition of the Authority Commission under Article 4(c). Absent any self-executing authorization, or at minimum the approval of all Members, as required for additional voting rights, it is uncertain how any changes to the composition of the Authority Commission could be legally implemented by a simple majority of the Authority Commission. That said, it seems reasonable that a majority for the Authority Commission could initiate a request for the Members to consider changes to the composition of the Authority Commission under the amendment provisions in Article 16 to the Authority Agreement.

¹⁶ See Piedmont Pub. Serv. Dist. v. Cowart, 319 S.C. 124, 132 (Ct. App. 1995).

¹⁷ An agreement to agree "does not amount to a contract under South Carolina law." BCD LLC v. BMW Mfg. Co. LLC, 360 Fed. Appx. 428 (4th Cir. 2010), citing Trident Const. Co. v. Austin Co., 272 F. Supp. 2d 566 (D.S.C. 2003), citing Blanton Enterprises, Inc. v. Burger King Corp., 680 F. Supp. 753 (D.S.C. 1998).

not unilaterally require a change in the composition of the Authority Commission or a reallocation of the voting power of the Commissioners, nor may Seneca compel the remaining Members to take action to authorize amendments to the Authority Agreement to implement any such change. The opinions and conclusions that are expressed in this memorandum are not a guarantee of any particular result if litigation were to ensue regarding these matters, and are solely the judgment of Pope Flynn, acting through the attorneys drafting this memorandum.

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