

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No.: W-1297, Sub 14

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

MRT-1, LLC,

Complainant,

v.

HARKERS ISLAND SEWER COMPANY,

Respondent.

**STATUS UPDATE BY
PETITIONER MRT-1, LLC**

The above-captioned proceeding was instituted by the filing of a complaint with the Commission on May 2, 2019, by Pinnacle Bank, as successor by merger with Bank of North Carolina, against Harkers Island Sewer Company (Respondent), alleging in relevant part that Respondent unreasonably refuses to provide wastewater treatment services to lots located in that certain parcel of real property at issue herein referred to as the “James Creek Subdivision” in violation of its duties as a regulated public utility.

On June 14, 2019, Respondent filed answers and responses to the Complaint. On June 17, 2019, Respondent filed amended answers and responses to the same.

On October 21, 2019, MRT-1, LLC (Complainant) filed a reply to Respondent’s Answers and Responses, and filed a motion requesting to be substituted in as the Complainant, as Pinnacle Bank’s successor in interest.

On October 22, 2020, the Commission entered an Order allowing MRT-1, LLC’s motion to be substituted in as the Complainant in the above-captioned matter.

On November 3, 2020, Complainant notified the Commission that Respondent’s Answers and Responses were not satisfactory and requested a hearing on the Complaint.

On December 18, 2020, the Commission issued an Order Scheduling Hearing, Establishing Procedural Schedule, and Adopting Discovery Guidelines. The aforementioned December 18, 2020 Order required, among other things, that the direct testimony and exhibits of Respondent shall be filed on or before Monday, March 29, 2021 and required the rebuttal testimony and

exhibits of Complainant be filed on or before Monday, April 12, 2021. By the same Order, the Commission scheduled this matter for hearing on Tuesday, April 27, 2021.

On February 6, 2021, Complainant filed the Direct Testimony and Exhibits of Dan Timberlake and Tim Ragan.

On March 1, 2021, Complainant filed an additional exhibit.

On April 5, 2021, Respondent filed the Direct Testimony and Resume of James W. "Bill" Forman, as well as the Direct Testimony and Exhibits of Mike Laws.

On April 13, 2021, Respondent filed a motion to continue the scheduled hearing

On April 16, 2021, the Public Staff filed Notice of Intervention, Mediation, and Request for Continuance of the previously scheduled Complaint proceeding. The Public Staff's Intervention is recognized by the Commission pursuant to N.C. Gen. Stat. § 652-15(d), and Commission Rule R1-19e.

On April 19, 2021, the Commission issued an Order continuing hearings, suspending procedural deadlines and requesting status update regarding mediated settlement discussions.

On June 2, 2021, the Public Staff filed a report providing that the mediated settlement discussions were unsuccessful.

On June 15, 2021, the Public Staff requested the Commission hold the above-captioned matter in abeyance to allow Respondent time to continue ongoing discussions regarding a potential sale of Harkers Island Sewer Company's wastewater utility system.

On June 16, 2021, the Commission issued an order holding the above-captioned proceedings in abeyance and requiring a status update.

On September 14, 2021, the public Staff notified the Commission that Respondent had not reached an agreement to sell the Harkers Island Sewer Company's wastewater utility system, and requested the Commission reschedule the hearing in the above-captioned matter.

On October 13, 2021, the Commission issued an order scheduling the above-captioned matter for evidentiary hearing on Tuesday, December 14, 2021.

On October 18, 2021, Complainant filed the rebuttal testimony and exhibits of Dan Timberlake.

On November 29, 2021, the Public Staff filed its recommendations and exhibits.

On December 7, 2021, Respondent filed a motion to continue the hearing scheduled for December 14, 2021, or in the alternative, allow Attorney Clark Wright, counsel for Respondent, to withdraw as counsel and allow Mr. Laws, sole operator and manager of Respondent, to appear

on behalf of Respondent. Mr. Wright informed the Commission that due to a health issue; he is scheduled for in-patient surgery on December 13, 2021, and would not be available to attend the December 14 hearing. All other parties were consulted, and the Commission was informed the Parties agreed to a continuance of the December 14 hearing.

On December 8, 2021, the Commission granted the motion to continue the December 14 hearing.

On December 9, 2021, the Public Staff filed modified recommendations (the Modified Recommendations).

On June 13, 2022, the Commission entered an Order scheduling an expert witness hearing on August 17, 2022 at 10:00 a.m. in the Commission hearing room.

On August 8, 2022, Attorney Michael Genest filed a Notice of Appearance and Substitution of Counsel for Clark Wright as attorney of record for Respondent.

On August 17, 2022, the Complainant argued its case in chief and presented evidence to the Commission. Prior to Respondent presenting any evidence in defense during the evidentiary hearing, the Parties commenced settlement talks, and reached a tentative settlement in principle, which was read into the record. The Commission requested a fully-executed settlement agreement and update on or before October 6, 2022.

The Parties did not execute a Settlement Agreement prior to October 6, 2022, and the Commission held a hearing with the parties and their respective legal counsel on October 6, 2022 for a status update. In the foregoing hearing, the Commission outlined its expectations that the Parties hereto be mindful of any and all deadlines set by the Commission, and to strictly adhere to such. The Commission gave the Parties thirty (30) days to either:

- i) Upload a fully executed settlement agreement, complete with details regarding the construction of a new wastewater treatment system, a schedule for such, and the anticipated costs to construct such; or
- ii) For each Party to upload a separate explanation as to why a fully executed settlement agreement had not been uploaded.

Petitioner's explanation as to why a fully executed settlement agreement has not been uploaded, and its efforts following the October 6, 2022 status hearing, is as follows:

- 1) On October 5, 2022, counsel for Petitioner emailed a draft settlement agreement to counsel for Respondent for consideration.
- 2) On October 6, 2022, counsel for Petitioner emailed counsel for Respondent asking for a quick phone call following the October 6, 2022 status hearing.

- 3) On October 6, 2022, counsel for Petitioner emailed counsel for Respondent outlining the necessity that Petitioner receive the total cost of a new Wastewater Treatment Plant, so that Petitioner's pro-rata costs could be accurately calculated.
- 4) On October 7, 2022, counsel for Petitioner emailed counsel for Respondent requesting information relating to the Respondent's representations to the Commission in response to the recent stop-order sent to Respondent by NC DHHS, and also following up on Petitioner's request to see the engineering plans that Respondent represented to the Commission had been completed.
- 5) On October 8, 2022, Dan Timberlake (as principal for the Petitioner) spoke on the telephone with Mike Laws (as principal of the Respondent), and Mr. Laws informed Mr. Timberlake that Respondent needed nothing from Petitioner in connection with Respondent's plans to pursue a new Wastewater Treatment facility via the "EOP process."
- 6) On October 18, 2022, counsel for Petitioner emailed counsel for Respondent again requesting information relating to the new Wastewater Treatment facility, and requested that such information be inserted into the draft settlement agreement for evaluation by the Commission. Counsel for Petitioner also followed up on the draft settlement agreement that was circulated to counsel for Respondent, to which no comments or response had been provided to date.
- 7) On October 24, 2022, counsel for Petitioner emailed counsel for Respondent again requesting information relating to the new Wastewater Treatment facility so that Petitioner could evaluate its pro-rata costs. Counsel for Petitioner also followed up on the draft settlement agreement that was circulated to counsel for Respondent, to which no comments or response had been provided to date.
- 8) On October 24, 2022, counsel for Respondent called counsel for Petitioner to indicate plans were forthcoming, and to begin discussing items to be included in the proposed settlement agreement.
- 9) On October 25, 2022, Mr. Laws (HISCO) called Mr. Timberlake (MRT-1) to inform Mr. Timberlake that HISCO has received a quote for a new Wastewater treatment system that will have 120k gpd permitted capacity, but 60k gpd operational capacity in two 30k trains with an approx. delivery around late summer / early fall 2023. Mr. Laws insinuated in the same phone call insinuated that HISCO would add a 3rd train (90k gpd operationally) on its footprint.
- 10) On October 25, 2022, counsel for Petitioner emailed counsel for Respondent to outline Petitioner's primary concerns with the system that HISCO outlined: namely, without seeing any of the quoted figures, Petitioner is not comfortable with the proposed breakdown in costs. Petitioner was under the impression that it would be covering the costs for 80% of 28,000 gallons per day, as a pro rata share of a larger system in the neighborhood of 80,00 gallons per day. If the proposed system can be easily upgraded

to a 90,000 gallon per day system, it is Petitioner's position that it should be paying 80% of its allotted 28,800 gallons per day as a pro-rata share of a 90,000 gallon per day wastewater treatment facility.

- 11) On October 31, 2022, counsel for Respondent emailed counsel for Petitioner to indicate that HISCO was finalizing the financial figures, and would be circulating them shortly.
- 12) On November 1, 2022, counsel for Respondent emailed counsel for Petitioner initial plans and budget for a new 60,000 gallon per day wastewater treatment facility and a construction completion date of 8-10 months, but that Petitioner was still waiting on estimates for a full buildout.
- 13) On November 3, 2022, counsel for Respondent emailed counsel for Petitioner additional costs for the full buildout of the proposed 60,000 gallon per day system.
- 14) Petitioner has forwarded all recently received information to its engineer, but its engineer has not been able to review and provide a response in the short timeline available before the Commission's respective deadline for an update to be provided.

Petitioner believes that the Parties are still in a position to resolve all remaining issues in connection with the sizing of the proposed system. Notwithstanding the foregoing, the proposed plans provided by Respondent lack crucial details, such as a deadline for permitting from various governmental entities, a more formal construction schedule with completion dates and goals and, most importantly, a takedown/spending schedule for all funds necessary to construct the full system.

Under the presently proposed construction plan, all Respondent needs to acquire to fund Petitioner's allotted 28,800 gallon per day capacity is \$159,191.00; however, a total sum in excess of \$1,500,000.00 is required to construct the full system as proposed by Respondent. Respondent calculates that Petitioner's share of such costs under the pending 80%-20% agreement to fund Petitioner's allotted 28,800 gallon per day capacity is \$636,763.00.

The Parties need to identify an uninvolved, nonbiased third-party to act as an escrow agent to distribute the funds as certain construction thresholds are met for the buildout of the full system as proposed. As escrowed funds are spent to construct the proposed system, allocations from the escrowed funds need to be made on a pro-rata basis from each Party's respective contributions, such that Petitioner's funds are not the first funds spent and exhausted in the construction of the proposed system prior to completion.

Petitioner believes it will take additional time to iron out the foregoing details, but believes in good faith that a resolution is still possible.

Petitioner hereby requests this matter be placed back on a hearing schedule to complete the evidentiary hearing between the Parties. In the interim, Petitioner shall continue communicating with Respondent on a very regular basis to finalize a fully-executed settlement agreement prior to such evidentiary hearing taking place.

This the 4th day of November, 2022.

Electronically submitted

/s/ Andrew D. Irby, NCSB # 35353
Attorney for MRT-1, LLC

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Status Update on the parties of record by electronic mail or by United States first class mail, postage prepaid, properly addressed to the following:

J. Michael Genest
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Email: jmg@forgelawgroup.com
Attorney for Respondent HISCO

This the 4th day of November, 2022.

Electronically submitted

/s/ Andrew D. Irby, NCSB # 35353
Attorney for MRT-1, LLC