

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1297, SUB 14

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

MRT-1, LLC,

Complainant

v.

Harkers Island Sewer Company,

Respondent

CONSENT ORDER

BY THE PRESIDING COMMISSIONER: This Order is entered with the express consent of MRT-1, LLC (Complainant), Harkers Island Sewer Company (Respondent or HISC), and the Public Staff.

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, 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 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 10, 2022, the Parties jointly filed with the Commission a list of witnesses and estimated cross examination times of each witness.

On August 12, 2022, in accordance with a request by the Commission, Complainant served potential cross-examination exhibits, numbered sequentially as MRT-1 through MRT-200, and served such on counsel of record via email.

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 Parties' settlement in principle adopted relevant portions of the Public Staff's Modified Recommendations, as follows:

- 1) The Parties shall hereby accept the following methodology to apportion costs with regard to addition of capacity for Respondent's wastewater treatment facilities to meet the Complainant's request for 28,800 daily gallons of capacity to be reserved for the James Creek Subdivision: Fifty Percent of the costs to expand capacity for Respondent's wastewater treatment facilities shall be contributed by Complainant; Thirty Percent of the costs to expand capacity for Respondent's wastewater treatment facilities shall be contributed by Complainant, but shall be recovered by

Complainant through “tap fees” collected by Complainant from purchasers of lots within the James Creek Subdivision; Twenty Percent of the costs to expand capacity for Respondent’s wastewater treatment facilities shall be paid for by Respondent, or Respondent’s successors and assigns;

- 2) The expansion of Respondent’s wastewater treatment facilities shall not add less than 28,800 gallons per day of treated capacity, such amount providing Complainant with wastewater treatment services. The foregoing calculation is based on the present plans to construct Eighty (80), three-bedroom houses within the James Creek Subdivision. Notwithstanding the foregoing, Complainant shall be authorized to alter its design plans for the James Creek Subdivision, and to make use of its allotted 28,800 gallons per day of treated wastewater capacity, in its sole and absolute discretion;
- 3) Respondent, or Respondent’s successors and assigns, shall have the option of expanding wastewater treatment capacity beyond 28,800 gallons per day of treated capacity, but any expansion of capacity beyond 28,800 gallons per day of treated capacity shall be funded entirely by Respondent. To the extent Respondent opts to construct a larger wastewater treatment facility, or opts to construct a larger expansion of its existing facilities, the Parties acknowledge such expansion will not only add capacity for the purposes of providing wastewater treatment services to Complainant, but would also serve to replace Respondent’s existing capacity, which serves its existing customer base;
- 4) Solely by way of example, in the event Respondent opts to construct a wastewater treatment facility designed to treat 100,000 gallons per day of wastewater at a total estimated installation cost of \$2,000,000.00, Complainant shall initially contribute the sum of \$460,800.00, such amount constituting 80% of the 28,800 gallons per day of treated wastewater allotted to Complainant. Thereafter, Complainant shall recover in tap fees the sum of \$172,800.00, such amount constituting 30% of the 28,800 gallons per day of treated wastewater allotted to Complainant. All other sums shall be provided by Respondent;
- 5) In addition to the foregoing, nothing in this Consent Order shall preclude the Parties from separately agreeing to allow Complainant to provide funds to fund construction of more than the presently anticipated 28,800 gallons per day of treated wastewater capacity;
- 6) Respondent’s engineer shall work and coordinate with Complainant’s engineer to ensure a wastewater treatment facility or expansion is presented in an appropriate and cost-effective manner. Each party shall pay for its own engineer(s) professional time;

- 7) Complainant acknowledges that Respondent and its engineer, have an obligation to construct and operate the anticipated additional wastewater treatment facilities in a safe and appropriate manner to serve the needs of all within its service area, and any design and construction methods will be required to meet that standard.
- 8) Both parties anticipate that their engineers and advisors will work together harmoniously; however, in the unlikely event that the Complainant's engineer and the Respondent's engineer cannot agree on correct or appropriate methods to execute the anticipated addition, a duly qualified third engineer, to be paid by the Respondent and unrecoverable in sewer utility rates, will be sought as a "tie breaker."
- 9) On or before October 6, 2022, Respondent shall submit an application to the Commission to approve Respondent's request to assume debt for the purposes of constructing the expansion to its wastewater treatment capacity as contemplated hereinabove.

On or before October 6, 2022, the Parties shall provide a status update to the Commission regarding the status of the tentative settlement outlined hereinabove for the purposes of confirming the settlement process is moving forward as contemplated herein.

The presently pending evidentiary hearing has been held in recess until October 6, 2022 at 1:00 p.m., at which time the pending evidentiary hearing was scheduled to resume in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina. Upon entry of this Consent Order, the evidentiary hearing shall be further held in abeyance until such time as construction has commenced for the purposes of increasing capacity of Respondent's wastewater treatment facilities; however, in the event construction has not commenced on or before August 17, 2023, the Commission shall re-schedule the presently pending evidentiary hearing to be completed.

At any time, any Party who has a good-faith basis for understanding Respondent will be unable to secure funding as provided herein, or who otherwise has a good faith basis for believing that construction to increase capacity of Respondent's wastewater treatment facilities will not commence in a timely manner, may file a Motion to re-schedule the presently pending evidentiary hearing to be completed.

Beginning with November 1, 2022, and on or before the first day of each month thereafter, through August 1, 2023, the Parties shall file with the Commission regular status reports outlining the progress the Parties have made in fulfilling the tentative settlement as outlined herein.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the ____ day of September 2022.

NORTH CAROLINA UTILITIES COMMISSION

A. Shonta Dunston, Chief Clerk