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November 20, 2023

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street
Dobbs Building, Fifth Floor
Raleigh, NC 27603

Re: In the Matter of Application of Old North State Water Company, Inc. for Authority to Adjust and Increase Rates for Water Utility Service in All Its Service Areas in NC
Docket No. W-1300 Sub 60
Brief of Old North State Water Company, Inc. Addressing Legal Questions Raised by the Commission at the October 9, 2023, Hearing

Dear Ms. Dunston:

Old North State Water Company, Inc. (ONSWC) herewith provides this Brief to address the legal questions raised by the Commission at the October 9, 2023, hearing in the above referenced matter.

This Brief will also be provided in native format to Briefs@ncuc.net.

Please do not hesitate to contact me with any questions or concerns regarding this filing.

Sincerely,

/s/ Elizabeth S. Hedrick

Elizabeth S. Hedrick

cc: Parties and Counsel of Record
Commission Staff – Legal
NC Public Staff

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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1300, SUB 60

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of: Application by Old North State Water Company, Inc., 3212 6th Avenue South, Suite 200, Birmingham, Alabama 35222, for Authority to Adjust and Increase Rates for Water Utility Service in All of Its Serve Areas in North Carolina	)))))))	BRIEF OF ONSWC ADDRESSING LEGAL QUESTIONS RAISED BY COMMISSION AT OCTOBER 9, 2023 HEARING

NOW COMES Old North State Water Company, Inc., ("ONSWC"), through undersigned counsel, and addresses the questions raised by the Commission at the October 9, 2023, hearing in this docket.

INTRODUCTION

At the October 9, 2023 hearing in this docket, the Commission asked ONSWC and the Public Staff to address four specific questions (Tr Vol 5 pp 63-64):

1. The circumstances that would permit the Commission to consider John McDonald as a public utility under NC General Statute Section 62-3(23)a., and c.;

2. The legal requirements for the Commission voiding or reforming, in part or in whole, the loan documents between Old North State Water Company, Inc. and other entities under common ownership;

3. Whether voiding or reforming loan documents entered into by a public utility under the facts and circumstances presented by the evidence in this case would violate the 14th Amendment's due process clause; and

4. The meaning of the word "affiliate" as used in NC General Statutes Sections 62-153 and 62-160, including whether the term has a different meaning than the term "public utility" in NC General Statute

Section 62-3(23)a. and c.

As more fully detailed in the Argument Section, the short answers to these questions are as follows:

1. A person can only be considered a public utility if the person "own[s] or operat[es] in this State equipment or facilities for" (in relevant part) "furnishing water . . . or operating a public sewerage system for compensation." N.C. Gen. Stat. § 62-3(23)a.2. Because Mr. McDonald does not own or operate any equipment or facilities furnishing water or operating a sewer system, Mr. McDonald is not a utility and cannot be regulated as such.

2. Pursuant to N.C. Gen. Stat. § 62-170(a), loan documents "shall not be invalidated because issued or assumed without [Commission] authorization . . . having been first obtained."

3. "The due process clause of the Fourteenth Amendment safeguards against the taking of private property, or the compelling of its use, for the service of the public without just compensation." *Public Serv. Comm'n of Montana v. Great Northern Utilities Co.*, 289 U.S. 130, 135 (1933). A taking extends well beyond a physical taking (e.g., invasion of land) and extends to any regulation that limits the use of private property in a way that deprives the owner of all economically reasonable use or value of their property. Thus, any order purporting to void any loan documents or to reform them in such a way as to deprive the lenders of their contractual right to repayment without just compensation would violate the Fourteenth Amendment.

4. Chapter 62 of the North Carolina General Statutes only defines the term "affiliate" in a narrow context applicable only to electric power suppliers. *See* N.C. Gen. Stat. § 62-126.3(1) (defining affiliate as any entity "directly or indirectly controlling or controlled by or under direct or indirect common control with an electric power supplier"). Thus, the definition of the word as used in §§ 62-153 and 62-160 is unclear. Notwithstanding, the Commission has broad authority to review contracts with both affiliates and non-affiliates to ensure they are just and reasonable. Further, ONSWC remains willing to provide information and transparency into the relationships with Integra and its subsidiaries, rendering the question irrelevant here.

ARGUMENT

I. There are no present circumstances that would permit John McDonald to be treated as a public utility under N.C. Gen. Stat. §§ 62-3(23)a or 62-3(23)c.

A utility subject to Chapter 62 is defined, in relevant part, as the person who "own[s] or operat[es] in this State equipment or facilities for . . . furnishing water to or for the public for compensation, or operating a public sewerage system for compensation." N.C. Gen. Stat. § 62-3(a)(23)a.2. Mr. McDonald simply does not meet this definition. Mr. McDonald does not own or operate any systems; ONSWC does. Mr. McDonald's ownership of ONSWC is irrelevant. "A corporation is an entity distinct from the shareholders who own it." *Bd. of Transp. v. Martin*, 296 N.C. 20, 28, 249 S.E.2d 390, 396 (1978). The corporate form cannot be disregarded absent extreme circumstances not present here. *See Green v. Freeman*, 367 N.C. 136, 144-45, 749 S.E.2d 262, 270 (2013).

Section 62-3(23)c extends the definition of a utility to include the utility's "parent or subsidiary *corporation*" to the extent the Commission finds the affiliation has an effect on rates or services. N.C. Gen. Stat. § 62-3(a)(23)c (emphasis added). Although Mr. McDonald is the sole owner of ONSWC, he is an individual, not a corporation. His position is that of shareholder of a C Corporation whose formation and corporate formalities have been proper and consistently observed. The statutory definition plainly does not extend to him as an individual owner/shareholder/officer of the corporation.

In the hearing, the Public Staff suggested that there was authority to treat Mr. McDonald as a *de facto* utility under a docket involving Monteray Shores. (Tr.

Vol. 3, p. 134). However, there, the Commission and the Court of Appeals only recognized that an entity that meets the statutory definition of a public utility is a *de facto* utility even if they have not been formally granted authority by the Commission. *State ex rel. Utilities Com'n v. Buck Island*, 162 N.C. App. 568, 581, 592 S.E.2d 244, 253 (2004). In that case, Buck Island and Monteray Shores had developed neighboring residential areas and entered into a Utility System Operating Agreement with CWS. CWS obtained title to the water mains and lines, but Buck Island and Monteray Shores retained title to the "backbone" facilities, consisting of the treatment plants. CWS operated the system under authority granted by the Commission.

When a neighboring development wanted to connect to the system and have CWS operate, CWS was willing but unable because to do so would require expansion of the backbone facilities and CWS had no right to expand them. Upon review, the Commission concluded that both Monteray Shores and Buck Island met the definition of a utility because they owned an interest in the facilities used to produce water and treat sewage and received tap fees. Thus, as *de facto* utilities, the Commission had authority to order them to take certain steps as it related to the utility operations.

The distinction posed by the facts in *Buck Island* is key: a person who meets the statutory definition of a utility *through ownership* of utility assets but who is ***not*** named in the CPCN may be recognized as a *de facto* utility. Simply owning the company that ***is*** named in the CPCN but having *no ownership* of utility property is not comparable. As such, there is no basis to recognize Mr. McDonald as a *de*

facto utility.

II. Statute prohibits the Commission from voiding the loan documents between ONSWC and other entities under common ownership

Nothing in Chapter 62 authorizes the Commission to void or modify the loans between ONSWC and Integra or its affiliates. To the contrary, N.C.G.S. § 62-170(a), which expressly addresses this scenario, specifically precludes invalidating securities or obligations assumed without Commission authorization. Instead, the Commission may fine a utility up to $10,000 and only upon finding that the utility willfully violated the requirement that it first obtain permission from the Commission as provided for in Section 62-161 of Chapter 62, Article 8. N.C. Gen. Stat. § 62-170(d).

Here, there is no evidence that ONSWC intentionally failed to obtain the necessary permission such that any remedy is appropriate. Nor would a fine work to the benefit of the utility's customers. The loans themselves benefited the public as they helped ONSWC maintain operations when its margins were insufficient to do so alone. (*See, e.g.*, Tr. Vol. 4, p. 12, 88-89, 120-21, 133-34, 152, 160-61). ONSWC has acknowledged its unintentional failure to obtain permission and has promised to obtain permission prior to any loans in the future. (*See, e.g.*, Tr. Vol. 5, p. 40-42). Adding further financial burden on the utility would benefit no one.

III. Depriving Integra or its affiliates of their rights under the loan documents would constitute a taking in violation of the Fourteenth Amendment

If the Commission were nonetheless to conclude it were appropriate to void or reform the loan documents, any change that would deprive Integra or the Integra Affiliates of their rights to recover their funds would pose problems under the

Fourteenth Amendment. A general tenet of due process requires that any governmental taking of private property must be accompanied by just compensation. *See Public Serv. Comm'n of Montana v. Great Northern Utilities Co.*, 289 U.S. 130, 135 (1933). Actions by regulatory authorities that are functionally equivalent to the classic taking are likewise subject to the Fourteenth Amendment. *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 94-95, 780 S.E.2d 187, 197-98 (2015). This includes regulatory actions that "deny an owner all economically beneficial or productive use of property." *Id.* at 95, 780 S.E.2d at 198. The U.S. Constitution itself specifically precludes the states from retroactively impairing contracts. *See* Const. Art. I, § 10; *Ogden v. Saunders*, 25 U.S. 213, 222-26 (1827).

To the extent the Commission were to void the loan documents, the effect would be to deprive Integra and the Integra Affiliates of *all* the money owed to them by ONSWC. Similarly, any change that deprives Integra or its subsidiaries of any amount (for example, lowering the payback amount or removing interest charges) would deny Integra and the Integra Affiliates all economically beneficial use of those dollar amounts and impair the contracts that these parties had negotiated. Such actions would require just compensation.

IV. Whether ONSWC and Integra are affiliates does not affect the Commission's authority here

N.C.G.S. § 62-153 requires public utilities to file copies of contracts with "affiliated" holding, managing, operating constructing, engineering, financing, or purchasing companies. Similarly, N.C.G.S. § 62-160 prohibits a public utility from pledging assets for the benefit of its stockholders or any other business interest

with which "it may be affiliated." However, Chapter 62 does not define "affiliate" or "affiliated" except in the narrow context of the Distributed Resources Access Act (Chapter 62, Article 6B) that applies to solar energy facilities. Thus, there is no statutory definition of "affiliate" that directly applies here.

However, the definition of a public utility includes "all persons *affiliated* through stock ownership with a public utility . . . as a parent corporation or subsidiary corporation to such an extent that the Commission shall find that such affiliation has an effect on the rates of service of such public utility." N.C. Gen. Stat. § 62-3(23)c (emphasis added). Arguably, it is this type of affiliation that the other statutes in Chapter 62, like N.C.G.S. §§ 62-153 and 62-160, are intended to address because it is these affiliates over which the Commission is expressly granted some authority (to the extent that the affiliation has an effect on rates). Under this definition, Integra and its affiliates are *not* affiliates of ONSWC.

Nonetheless, whether ONSWC and Integra are affiliates has no impact on the Commission's authority to review ONSWC's contracts with Integra to ensure that they are just and reasonable. For example, in addition to its general supervisory authority over public utilities under N.C.G.S. § 62-30, the Commission has express authority in N.C.G.S. § 62-34 to investigate utilities, which necessarily includes review of contracts and loans. Moreover, a utility's loan agreements affect its costs and expenses, which are subject to review for reasonableness under N.C.G.S. § 62-133 for ratemaking purposes. Regardless of the Commission's authority to review agreements among public utilities and related companies, ONSWC has and remains willing to voluntarily provide the Commission with copies

of the Integra loan documents, any agreements to waive interest payments, the Support Services Agreement between ONSWC and Integra, and any other similar related company information. Given the reach of the Commission's jurisdiction regarding contracts, costs and expenses, and the commitments made by ONSWC in this docket, resolving the legal question of the definition of "affiliates" is not necessary to address the issues in this docket.

This the 20th day of November, 2023.

FOX ROTHSCHILD LLP

/s/ Elizabeth Sims Hedrick

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing document upon all parties of record in this proceeding by emailing the parties, or their counsel of record, an electronic copy or by causing a paper copy of the same to be hand-delivered or deposited in the United States Mail, postage prepaid, properly addressed to each.

This the 20th day of November, 2023.

Electronically Submitted
/s/ Elizabeth Sims Hedrick