

**HARKERS ISLAND SEWER COMPANY**

**DOCKET NO. W-1274, SUB 7**

**DIRECT TESTIMONY OF DAN TIMBERLAKE  
ON BEHALF OF MRT-1, LLC.**

**February 26, 2021**

1. Q. PLEASE STATE FOR THE RECORD YOUR NAME, ADDRESS,
2. AND PRESENT POSITION.
3. A. My name is Dan Timberlake. My address is 735 Roslyn Road, Winston-Salem,
4. North Carolina. I am a Member and Manager of MRT-1, LLC, a North Carolina limited
5. Liability company that invests in real estate projects in various stages of development. MRT
6. 1 is the record owner of the James Creek Subdivision at issue in the present NCUC action
7. which is recorded in Plat Book 32, Page 403 in the Carteret County Register of Deeds.
8. Q. HOW DID MRT COME TO PURCHASE THE JAMES CREEK SUBDIVISION?
9. A. Pinnacle Bank, which merged with Bank of North Carolina was actively marketing
10. the property which included all but one of the subdivision Lots in James Creek, Phase I. It
11. was evident the subdivision had serious problems because there was no water or sewer
12. service connections in contradiction to all of the certifications represented on the recorded
13. Map for this subdivision. Upon further investigation with Carteret County, no Performance
14. Bond has ever been submitted to ensure all applicable development activities were
15. completed as required. Therefore, it was impossible to get a building permit for any lot.
16. We felt MRT could take the steps necessary over time to fix all the applicable problems
17. related to utility services.

1. Q. ON WHAT DATE DID MRT BECOME THE OWNER OF THE JAMES
2. CREEK SUBDIVISION?
3. A. We purchased the lots in James Creek, Phase 1 (22 lots), a 2.67 acre tract with 9 boat
4. slips, and 30+ acres adjacent to James Creek on December 30, 2019 via deed recorded in
5. Book 1659, at Page 65 of the Carteret County Registry.
6. Q. PLEASE DESCRIBE THE DUE DILIGENCE PROCESS YOU
7. UNDERTOOK IN PURCHASING JAMES CREEK.
8. A. Bank of North Carolina provided us their complete file on the property so we were
9. obviously aware of this pending action. In addition to reviewing all pertinent
10. documentation including surveys, engineering, title documents, etc..., we reviewed all the
11. Bank's allegations in the complaint with NCUC, the file that was publicly available with
12. the NCUC as well as the publicly available documents related to HISCO's history. We
13. also had a title search conducted and reviewed all relevant documents in the chain of title.
14. The Bank also provided certain communications it had with Michael Laws who was their
15. primary contact for BLE Development which developed James Creek, and which the Bank
16. foreclosed upon, as well as the operating member/manager of HISCO which had certified
17. on the recorded Plat would serve the James Creek subdivision.
18. Q. PLEASE DESCRIBE WHAT YOUR DUE DILIGENCE
19. INVESTIGATION REVEALED.
20. A. The property MRT purchased consisted of three (3) parts which are (1) an undeveloped
21. tract of approximately 32 acres, (2) a 2.67 acre parcel on Oak Hammock Road with a boat

1 ramp and boat slips, and (3) all but 1 (Lot 49) of the lots in James Creek, Phase I subdivision  
2 as shown on the recorded map of same in Plat Book 32, Page 403 in Carteret County  
3 Register of Deeds.

4 Our title search revealed BLE Development acquired the James Creek property in July of  
5 2006 via deed recorded in book 1180, page 36 of the Carteret County Registry. BLE had  
6 a financing relationship with Bank of North Carolina as evidenced by certain deeds of trust  
7 recorded as liens encumbering the applicable property. Phase I plat map, recorded in Plat  
8 Book 32, at Page 403, was recorded on October 7, 2013 where Mr. Laws signed  
9 certifications on behalf of BLE Development (as owner) and on behalf of HISCO to certify  
10 this property would be serviced for sewer utility. Shortly thereafter, Mr. Laws executed  
11 and recorded Declarations of Covenants, Conditions and Restrictions for the James Creek  
12 Subdivision on behalf of BLE Development as owner.

13 In December of 2014, Bank of North Carolina successfully foreclosed upon all the  
14 properties against BLE Development as evidenced by the Trustee's deed conveying the  
15 Property to BNC recorded in book 1496, at Page 98 of the Carteret Registry, and re-  
16 recorded in Book 1497, Page 24. Additionally, our title search revealed a deficiency  
17 judgment in favor of BNC against BLE Development and its Members, including Mr.  
18 Laws, for approximately \$1.5 Million.

19 We purchased the property from Pinnacle Bank, as successor in interest to Bank of North  
20 Carolina following their merger. We were made aware of this proceeding before the NCUC  
21 and given the information we discovered in our due diligence investigation, we elected to  
22 assume their position in this regard. Pinnacle Bank was completely transparent and also  
23 made us aware of issues which prior potential purchasers had discovered during

1. their own due diligence period, specifically providing documents for our review relating to  
2. certain difficulties in establishing sewer service to James Creek Subdivision.

3. Q. WHAT DOCUMENTS DID YOU REVIEW AND RELY ON IN DECIDING TO  
4. PURCHASE JAMES CREEK?

5. A. We reviewed a large volume of documentation, most of which included either public  
6. or private representations by Harkers Island Sewer Company that it was ready, willing and  
7. able to commence providing wastewater service to James Creek Subdivision. This starts  
8. with the Plat Map for Phase One of the Subdivision, which includes a representation signed  
9. by Mike Laws that James Creek, as platted, *“will be served by Harkers Island Sewer*  
10. *Company for a new sewer system, and that said system has been installed in an acceptable*  
11. *manner and in accordance with the requirements of Carteret County and the State of North*  
12. *Carolina.”*

13. The foregoing statement was entirely consistent with the contents of the Declarations that  
14. BLE Development recorded for James Creek, which provides *“Declarant has caused to be*  
15. *created and chartered a public utility company by the name of Harkers Island Sewer*  
16. *Company, LLC (the “Sewer Company”). The Sewer Company has constructed a sewage*  
17. *treatment plant outside of the Development, along with pumps, pipelines, lift stations and*  
18. *other equipment installed and located within reserved easements and properties in the*  
19. *Development... Further, Declarant has labeled a certain site on the recorded Plat of the*  
20. *Development as ‘AREA RESERVED FOR ON-SITE SEWER COLLECTION STATION’*  
21. *[sic] Declarant reserves the right to install other sewage and wastewater disposal systems*  
22. *and facilities within this area to supplement and facilitate the operations of the Sewer*  
23. *Company...”*

1. Those two public representations by HISCO and Mr. Laws appeared to be entirely  
2. consistent with Permit No. WQ0024023 issued by the NC Department of Environmental  
3. and Natural Resources. This permit is enclosed with a letter dated January 7, 2015 to Mr.  
4. Laws from NCDENR, and outlines a three phase schedule to establish and expand services  
5. to the Westbay Subdivision and the James Creek Subdivision. Phase I of Permit No.  
6. WQ0024023 calls for treatment and disposal of 10,080 gallons per day for up to 28 lots in  
7. Westbay Subdivision, and 22 lots in James Creek subdivision via force main. Phase II of  
8. the same permit expands treatment and disposal at the Westbay wastewater treatment  
9. facility to 20,160 gallons per day. Phase III involved construction and expansion of  
10. wastewater treatment capabilities through the to-be-constructed treatment facility in the  
11. James Creek Subdivision. So, it made sense that HISCO had publicly represented that the  
12. proper facilities had been installed and were in place to provide wastewater treatment  
13. services to James Creek when the treatment facility at James Creek had not yet been  
14. constructed. It appeared clear that the first 22 lots of James Creek, essentially James Creek  
15. phase one as platted, was to receive wastewater treatment at the Westbay facility via force  
16. main.

17. HISCO's application to the Utilities Commission to have Westbay and James Creek placed  
18. within its franchise territory appeared to contemplate the two systems as well (page 4 of  
19. that application states that "BLE Development to transfer all equipment, lines, plant real  
20. estate etc. for both projects to BLE Utility Co., LLC." Page 3 of that application  
21. contemplates \$583,804 in plant construction costs to be paid for by the developer, BLE;  
22. however, page 5 provides that there is \$0 anticipated expenditures over the next five years

1. because “BLE Development has already installed all lines, inside Westbay and James  
2. Creek Subdivisions. This includes service lines. Meter connection boxes at each individual  
3. lot. \$136,504 expansion to James Creek is already underway by BLE Development Co.  
4. and will be completed by July 30, 2011.” That same representation is outlined in Exhibit  
5. 4 to that same application, in which BLE Development outlines its intent to install 3900  
6. feet of sewer transmissions between Westbay and James Creek, to provide sewer service  
7. to James Creek at the Westbay wastewater plant, and to include a covenant in the James  
8. Creek Declarations to that effect. Finally, Exhibit 8 of that same application outlines the  
9. phased upgrade of the Westbay plant to accommodate flows from James Creek via force  
10. main. Only when flows approached 20,000 gallons per day would they then commence  
11. construction of a second plant in James Creek. As late as July 30, 2013, the Notice to  
12. Customers located in James Creek outlined a \$65 monthly charge per residential unit, and  
13. a \$2,500 connection fee or “Tap” charge. So, we never believed that construction of the  
14. James Creek plant was necessary for wastewater service to commence for lots in James  
15. Creek. We knew capacity did not exist for the entire subdivision, but we knew that plans  
16. existed to provide service for Phase One.

17. Q. WHAT HAVE YOU LEARNED ABOUT HISCO’S OPERATIONS SINCE  
18. THAT INITIAL APPLICATION?

19. A. Things have changed. In 2014, BNC foreclosed on James Creek. There has been a lot  
20. of back and forth about the letter HISCO sent BNC on November 4, 2014 whereby HISCO  
21. requested the 3 acre lot within James Creek earmarked for a future treatment plant be  
22. transferred to HISCO because otherwise, according to HISCO, BNC would have to build

1. Its own treatment plant at the then-estimated cost of \$950,000.00. But again, we interpreted  
2. that future plant expansion was phase three of a plan that contemplated providing  
3. wastewater service to Phase One of James Creek via force main to Westbay. Nonetheless,  
4. it was a moot point because the bank did not agree to convey that lot to HISCO which  
5. resulted in that plant permit being withdrawn or terminated. Also in 2014, probably by  
6. coincidence, HISCO acquired the Harker's Village treatment plant, which we've referred  
7. to as Harker's Point. Westbay, to the best of my knowledge, is permitted, but not operating,  
8. has never operated, and was likely never intended to operate. We believe all obligated  
9. flows of the wastewater being serviced by HISCO are going to Harker's Point. James Creek  
10. is not included in those flows, because James Creek was never allocated by HISCO.

11. Q. TO YOUR KNOWLEDGE, HAVE ANY OPTIONS BEEN PRESENTED BY  
12. HISCO TO PROVIDE WASTEWATER SERVICE TO JAMES CREEK VIA  
13. HARKER'S POINT OR WESTBAY?

14. A. No, never. In the HISCO letter dated November 4, 2014, Mr. Laws indicated that Bank  
15. of North Carolina would have to build its own treatment plant if the bank did not convey  
16. the 3 acre parcel within James Creek to HISCO. We understand that Tyson Reilly, who  
17. worked for a property development company known as DRAPAC, also entered into a  
18. contract to purchase James Creek prior to us but terminated it when he was told by HISCO  
19. the estimated cost to expand HISCO's plant was between \$1.1 Million and \$1.2 Million.  
20. Additionally, and this troubles us, Mr. Laws stated he was only willing to work with  
21. DRAPAC on sewer plant expansion if the bank would release him and his business partner  
22. from the judgment BNC obtained against him. We have been provided with similar  
23. estimates regarding plant expansion from HISCO of approximately \$1.1 Million.

1. Q. IS THIS AN ESTIMATE TO EXPAND CAPACIY AT HARKER'S POINT, OR TO  
2. BUILD A NEW PLANT?

3. A. That's unclear. We believe that only three of the four drain fields have been constructed  
4. at Harker's Point. We've requested but, as of the date hereof, have not been provided or  
5. reviewed any estimates or budget to expand current capacity to provide service to James  
6. Creek, Phase One, which is only 22-25 lots. We've obtained estimates to construct a new  
7. plant to serve James Creek, and our estimated costs are substantially lower than the \$1.1  
8. Million we've heard.

9. Q. ARE THE FIGURES THAT HAVE BEEN PROVIDED TO EXPAND EXISTING  
10. CAPACITY, OR TO REBUILD THE WHOLE SYSTEM/PLANT THAT IS SERVING  
11. OTHER COMMUNITIES?

12. A. That's also unclear. We've asked for a breakdown of how much of that \$1.1 Million  
13. plant expansion figure would be allocated to MRT, specifically Phase I of James Creek and  
14. future development of our acreage, but Mr. Laws has indicated we'd be obligated to cover  
15. the whole amount. It's our informed opinion and belief that a substantial portion of that  
16. figure would strictly benefit HISCO's existing customer base. We also need to clarify the  
17. distinction between the adequacy of HISCO's existing facilities (it's capability) and  
18. HISCO's capacity. MRT does not dispute that, ordinarily, new subdivisions must create  
19. an expansion of capacity, but (and this is key) James Creek is not a new subdivision. It is  
20. literally one of the first two subdivisions placed within HISCO's franchise territory when  
21. it was first established as a public utility. Yes, the Bank's foreclosure occurred in 2014,  
22. and the permit for construction of a new treatment facility within James Creek was



1. intentionally terminated by HISCO in 2015, but ever since this foreclosure, BNC, and  
2. thereafter Pinnacle Bank, at least one other prospective developer of James Creek, and now  
3. MRT has been requesting to commence services to any lot, or fewer than all lots, within  
4. James Creek, and those requests have been summarily denied. We know that since 2014,  
5. HISCO has expanded its flows and customer base. On May 11, 2018, HISCO filed a  
6. request with the NCUC to have its bond reduced. As justification for the request, HISCO  
7. stated that *“On July 30, 2013 HISCO was granted a franchise by the commission, after its*  
8. *application to serve Westbay Subdivision on Harkers Island and its 32 lots. In the following*  
9. *four years and 9 months, HISCO has successfully added subdivisions; Harkers Village,*  
10. *Harkers Pointe, Cape Pointe, Beach Hammock, by The Bay subdivisions to its applied for*  
11. *and approved territories. In addition, HISCO has added commercial services to Fish Hook*  
12. *Grille, Harkers Island RV Park, Sand Bar Club, and most notably Cape Lookout National*  
13. *Seashore... Currently, HISCO has expanded to cover with its sewer main extensions the*  
14. *entire island, along Island Road Ease and West, and several extensions on north and south*  
15. *roads. HISCO can serve with its current sewer mains approximately 60 percent of the*  
16. *Island’s existing and future homes, and businesses. Harkers Island consist of*  
17. *approximately 1,200 existing homes and businesses. HISCO [sic] current established*  
18. *territories, along with contiguous territory possibly served by HSCO [sic] represents*  
19. *approximately 460 more homes and businesses than its existing 140 current users. HISCO*  
20. *acquired a 2<sup>nd</sup> wastewater treatment plant permitted for 60,000 GPD when it established*  
21. *Harkers Village and Harkers Pointe as served territories. The 6 ½ acre facility contains*  
22. *some of the highest in elevation land and best soils on the island for drain fields current*

1. *and future.*” It is our position that this whole letter is disingenuous. If the contents of this  
2. communication to the NCUC were accurate, there should be no demand for HISCO to  
3. require MRT-1 construct a new, \$1.1 Million wastewater treatment facility to  
4. accommodate flows from 22-25 residential lots.

5. In fact, throughout the entire period in which HISCO was adding new territories, new  
6. subdivisions, and new customers, it has been actively denying ANY service to ANY lots  
7. within James Creek. I am aware of numerous requests to provide piecemeal service to lots  
8. within James Creek based on HISCO’s capacity, each such request being denied. By letter  
9. dated December 1, 2017, Pinnacle Bank sent HISCO a request for service to James Creek  
10. lots. We know that, at the time, HISCO had capacity to provide service to at least some of  
11. those residential lots. HISCO had available taps to sell. Despite this, the request was  
12. denied. I do not believe it is proper or lawful to deny such a request. As a public utility, if  
13. HISCO had residential taps available to sell based on its existing capacity, the owner of  
14. James Creek, being in HISCO’s territory, was entitled to purchase as many as it could up  
15. to HISCO’s available capacity. We believe that all such requests were denied in bad faith.

16. After MRT acquired James Creek, we had hoped we could work with HISCO since we  
17. were not involved in any of the prior foreclosure issues. Despite our efforts and requests,  
18. MRT has never been provided any material information or communication regarding  
19. potential options to expand capacity without having to totally upgrade HISCO’s  
20. infrastructure. The only information provided thus far has been a figure in excess of \$1.1  
21. Million, which we once again believe in good faith is for upgrading HISCO’s overall plant  
22. capability, not simply an expansion of capacity.

1. Q. DO YOU DISPUTE ANY OF THE OBLIGATED FLOW OR CAPACITY
2. FIGURES PROVIDED BY HISCO?
3. A. We actually have not been provided any of that technical information from HISCO.
4. We've asked for it. It's possible we will receive it in the course of discovery or in testimony
5. here today. We know the information HISCO has provided to the NCUC and to NCDENR.
6. The answer to the question is, no. This case is not about disputing HISCO's current
7. capacity. We believe Mr. Laws' self-dealing through BLE Development, BNC's
8. foreclosure, deficiency Judgment in favor of BNC, etc. while also being the owner and
9. operator of HISCO is the sole reason for the issues before NCUC at this time.
10. Logically and collectively taken, the history of information publicly available on HISCO
11. coupled with our due diligence on James Creek's evolution and Mr. Laws direct
12. involvement has created reasonable questions in our minds regarding the facts and figures
13. that have been presented. However, if HISCO and Mr. Laws testifies regarding its
14. obligated flow rates and current capacity, we will accept those figures because we view
15. this case being about HISCO's behavior to date. Essentially, from and after the Bank's
16. foreclosure in 2014, we believe HISCO's actions evidence a repeated and consistent denial
17. of service to the James Creek Subdivision while they expanded service to other
18. subdivisions. We believe HISCO had capacity to provide service to at least some of the
19. lots within James Creek Phase One, but elected to demand a new plant in lieu of allowing
20. James Creek to commence development of at least some of its lots. We believe this is a
21. blatant violation of its duty as a public utility to operate in good faith. Also, this case is
22. about the estimates provided by HISCO to expand capacity. We believe HISCO has and is

1. demanding funds primarily designed to benefit its current facilities and existing customer  
2. base which MRT is not obligated to fund. MRT can establish its own capacity for much  
3. less than the amount being demanded by HISCO.

4. Q. WHAT RELIEF ARE YOU SEEKING FROM THE NCUC?

5. A. One of the main things a public utility should do is to accurately disclose the availability  
6. and costs of services. Here, Mr. Laws, through recording the Plat Map of Phase One of  
7. James Creek indicated sewer services were available and publicly represented the same in  
8. recording of the subdivision's Declaration. Both publicly recorded documents violates the  
9. adequate and accurate disclosure of availability of sewer services. Additionally, we believe  
10. it is clear at several points in time subsequent to BNC's foreclosure, HISCO had ample  
11. capacity to provide service to Phase One of James Creek (or at least to a certain number of  
12. lots within James Creek Phase One), and Mr. Laws intentionally denied service preferring  
13. to work with other new customers. We can only speculate as to why these decisions were  
14. made. Regardless of the reason, we also believe his actions, and those of HISCO, were a  
15. clear violation of a public utility's duty. We're asking for the following, to the extent the  
16. NCUC believes they're reasonable or possible:

17. 1) We'd like Mr. Laws to be removed as the operator of HISCO. We believe Mr. Laws has  
18. withheld information, and not acted in good faith as a proper public utility with regard to  
19. its treatment of the James Creek Subdivision;

20. 2) Alternatively, we'd respectfully request James Creek be removed from HISCO's  
21. franchise territory. HISCO has had ample opportunity to commence providing services  
22. within James Creek, and has willfully opted to deny service until such time as its capacity

1. to serve was eliminated. Now, having expressed that no capacity exists, MRT should be  
2. allowed to explore relationships with other operators and alternative options in an arm's  
3. length manner to determine the most efficient manner within which to provide wastewater  
4. services;

5. 3) Alternatively, if forced to remain in HISCO's franchise territory, we'd respectfully  
6. request permission to establish our own capacity and, if necessary, turn operations over to  
7. HISCO once that capacity has been established. This option should include, but not be  
8. limited to, allowing MRT to explore constructing its own treatment facility to be turned  
9. over to HISCO to operate. MRT should not be obligated to build the system that HISCO  
10. dictates be constructed. Rather, MRT should be allowed to construct a system (fully  
11. permitted and with NCUC's and NCDENR's approval, as well as with the approval of any  
12. other State or local governmental entity so required) that provides adequate capacity to  
13. serve James Creek subdivision, and then to turn over such system to HISCO. We believe  
14. we have at our disposal the ability to construct our own system at a lower cost than has  
15. been quoted by HISCO.

16. Q. DOES THIS COMPLETE YOUR TESTIMONY AT THIS TIME?

17. A. Yes.

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing Testimony on the parties of record by electronic mail, properly addressed to the following:

I. CLARK WRIGHT, JR.  
DAVIS HARTMAN WRIGHT, PLLC  
209 Pollock Street  
New Bern, NC 28560  
Email: icw@dhwlegal.com  
Attorney for Respondent HISCO

This the 26th day of February, 2021.

Electronically submitted

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

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