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PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

To: Oconee Joint Regional Sewer Authority, South Carolina

From: Pope Flynn, LLC

Re: Options for Future Reorganization; Next Steps

Date: November 26, 2024

I. Background

Based on funding from the South Carolina Rural Infrastructure Authority, Oconee Joint Regional Sewer Authority, South Carolina (the “**Authority**” or “**Joint Authority**”) engaged a team comprised of W.K. Dickson & Co., Inc., Willdan Financial Services, and Bolton & Menk, Inc. (the “**Consultant Team**”) to prepare a regional feasibility planning study, which was formally adopted by the Commission (as defined below) on September 9, 2024 (the “**Study**”). The purpose of the Study was to determine long-term sewer service options within Oconee County, South Carolina (the “**County**”). Contemporaneously with the Study, the Joint Authority also undertook its “Oconee County and Western Anderson County Sewer Master Plan” (the “**Master Plan**”). Major infrastructure recommendations in the Master Plan include: developing plans to expand the Coneross Creek Wastewater Reclamation Facility (the “**Coneross WRF**”); updating the regulatory checkbook to gain permitted capacity at Coneross WRF; reducing pump station infrastructure and wastewater travel time; and working with Members (as defined below) to improve collection infrastructure.

The Joint Authority is a body politic and corporate, and a joint authority sewer system organized under Title 6, Chapter 25 of the Code of Laws of South Carolina 1976, as amended (the “**Joint Authority Act**”). The Authority was created in 2007 under the provisions of the Joint Authority Act by its three member-municipalities (collectively, the “**Members**”)¹: the City of Seneca, South Carolina (“**Seneca**”), the City of Walhalla, South Carolina (“**Walhalla**”), and the City of Westminster, South Carolina (“**Westminster**”). The Authority, by application to the South Carolina Secretary of State dated December 14, 2007, submitted the required information necessary to obtain the corporate certificate and incorporate. The Secretary of State issued a certificate of incorporation on December 19, 2007, which has not been amended.

¹ For purposes of the reconstituted Joint Authority, such term would also include the County once or if it is added as Member.

The relationship between the Joint Authority and the Members is 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**” or “**Commission**”).

The Authority is, in effect, a successor to the Oconee County Sewer Commission (the “**Sewer Commission**”). The Sewer Commission was established by 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 matters² (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; a Memorandum of Understanding dated February 24, 2005; 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.

II. Summary of Findings and Recommendations from Study

The Study identified three options for the future: (1) do nothing and maintain the *status quo*; (2) complete revision of Authority governance documents, requiring a reconstitution of the Joint Authority; and (3) consolidation with a regional provider. The Study strongly suggests that option (1) is not viable. Accordingly, this memorandum will focus on options (2) and (3).

III. Option 2 – Complete Revision of Authority Governance Documents

1. Recommendations

To implement Option 2, the Study recommends the following changes related to governance:

² See Authority Agreement, Preamble at 15; *Id.*, Article 11, §(e); *Id.*, Article 13, §(a); *Id.*, Article 15, §§(a) and (b).

- (1) Adding the County as a Member;
- (2) A five-member Commission, including at least one representative from: the County, Seneca, Walhalla, and Westminster. The method of appointment of fifth member is to be determined;
- (3) Per capita voting as a rule, with weighted voting for debt matters only;
- (4) Establish parameters for debt, including preapproval for financing of certain scopes of work, and clear mechanisms for member approval of other debt;
- (5) Establish clear parameters and mechanisms for the addition of new members;
- (6) Establish power for the Authority to provide retail sewer service;
- (7) Establish an equitable rate structure;
- (8) Establish how growth will be funded; and
- (9) Establish a new operating agreement (with a minimum term of 40 years).

2. *Recommended Actions*

In order to implement the recommendations in the Study, we recommend amending and reconstituting the Joint Authority, and starting over with entirely new documents from beginning to end.³ This additionally includes rescission all of the Incorporated Agreements. To the extent there are additional counterparties to the Incorporated Agreements, other than the Members (such as the City of West Union), termination of, or substantial amendments to, such agreements will also be necessary.⁴

Reconstitution may be accomplished through a single ordinance of each Member (including the County, who is recommended for addition in the Study) and should be done *only* after all parties have come to a mutual understanding of the desired scope of the Joint Authority's capital improvement plan and its cost.⁵ Once those matters are known with a high-level of certainty, we would recommend each of the Members enact an ordinance that:

- authorizes imposition of new incorporation documents;
- authorizes a governance agreement among the Members as to how many commissioners (referred to herein as a "*Commissioner*" or "*commissioner*") each Member shall be entitled to appoint, and includes proposed bylaws (the "*Governance Agreement*"); and
- authorizes a new agreement regarding capacity, operations, and financial matters between the Joint Authority and its Members (the "*Operating Agreement*").

³ In lieu of amendment and reconstitution, the Joint Authority could be administratively dissolved and created from scratch under the Joint Authority Act. While the practical effect of this approach is the same, the amendment and reconstitution process likely avoids the onerous task of transferring or conveying the various sewer system assets to the newly created entity.

⁴ Dissolution would also necessitate the rescission of the Incorporated Agreements, and the consent or approval of counterparties other than the Members.

⁵ This should correspond to the various Capital Improvement Plans prepared by each Member, and the follow-on financial model and cost of service study contemplated under and recommended under the "Next Steps" provisions of the Study.

i. Amended Incorporation Documents

Amended incorporation documents should be drafted (i) to provide for any changes in membership, and (ii) to remove any incorporation restrictions. Restrictions, if any, should be addressed in the Governance Agreement or in the Operating Agreement. Including restrictions in the incorporation documents when the same subject matter is addressed by either the Governance Agreement or the Operating Agreement may recreate the inconsistencies and circuitous references prevalent in the current documents.

To amend and replace the current incorporation documents, all commissioners should execute and file an amendment to the incorporation documents with the South Carolina Secretary of State that specifies or includes: (1) the names of all proposed members of the reconstituted Commission; (2) a certified copy of each proposed Member’s ordinance determining it is in the entity’s best interest to participate in or join, as applicable, the reconstituted Joint Authority; (3) a certified copy of the ordinance or resolution of each entity appointing that Member’s commissioners; (4) a statement that the proposed Members desire that the Joint Authority continue to be organized as a public body corporate and politic under the Joint Authority Act; (5) confirmation of the name of the Joint Authority; and (6) revision to the purpose for the creation of the Joint Authority that conform to the scope of the Joint Authority Act. The Secretary of State will then review the proposed amendment and issue an amended corporate certificate with the names of all voting members, the name of the Joint Authority, and the purpose of the Joint Authority.

ii. Reconstitute Commission Composition

The Study found that the membership and voting process for the Commission should be revised to achieve its mission. New participants could provide financial resources and insight into future sewer demand, and revisions to the voting procedure and membership qualifications could better align the Commissioners with the purpose of the Joint Authority and improve governance.

The Study found that the County should join the Joint Authority because “they are the one . . . stakeholder with the most ability from a financial perspective to generate significant revenues from multiple sources that could be used for sewer . . .”, and it has control over land use planning and economic development in the unincorporated areas of the County, which are “two . . . of the primary drivers of the need for expanding sewer.”⁶

The Study also cited feedback from stakeholders indicating that “having multiple representatives and the majority of those being either elected officials or employees of the municipality was recognized to present challenges for the good of the whole”⁷ due to conflicting

⁶ Study, p. 60.

⁷ Study, p. 60.

duties of officials or employees as between the Member they represent and the Joint Authority they are charged with governing as a Commissioner.⁸

The Study proposes a new five-member Commission with designated representatives from each of the Members:⁹ the County, Seneca, Walhalla and Westminster. The Study does not identify the fifth Commissioner, but contemplates appointment by the County or the Oconee County legislative delegation. A delegation appointment is not practicable because the Joint Authority Act specifically contemplates that only the Members, acting through their respective governing bodies, can appoint Commissioners. As a result, thoughtful consideration should be given to the fifth Commissioner and their method of appointment. If the City of West Union were added as a Member, then they could be given a Commission appointment. However, the Study also notes that they are small, financially disadvantaged and generally not recommended for inclusion. As a result, the best option is likely granting the appointment authority for the fifth Commissioner to the County, with particular requirements or conditions in the Governance Agreement as to qualifications for such Commissioner.

In addition to the structure and composition of the Commission, there are a number of considerations around the qualifications, and certain restrictions South Carolina law imposes on Commissioners, as follows:

- The office of a Commissioner is created under Section 6-25-60 of the Joint Authority Act.¹⁰ Under Article XVII, Section 1 of the Constitution of the State of South Carolina, 1985, as amended, “[n]o person shall be elected or appointed to any office in this State unless he possess the qualifications of an elector.”¹¹ An elector must be resident within the jurisdiction from which he is appointed and registered to vote therein.¹² Accordingly, it is clear that a Commissioner must be resident of and registered to vote within the boundaries of the Member appointing him.¹³
- The South Carolina Attorney General has similarly opined that because the office of a Commissioner is a public office for constitutional purposes, the prohibition on dual office-holding applies.¹⁴ There is some thought that an elected or appointed official

⁸ An analysis or determination of whether the Commissioners are fiduciaries to the Commission is beyond the scope of this memorandum. However, the Joint Authority Act does contemplate that each Commissioner shall undertake an oath to “execute the duties of his office faithfully and impartially....”

⁹ The Joint Authority Act requires a minimum of five members.

¹⁰ S.C. Code Ann. § 6-25-60.

¹¹ S.C. Const. art. XVII, § 1.

¹² 2022 WL 3279345, at *4 (S.C.A.G. Aug. 2, 2022)(“our Supreme Court interpreted article XVII, section 1 to imply a residency requirement even when one is not specified by the Legislature”).

¹³ § 6-25-60(A) also states that “[a] commissioner serves at the pleasure of the governing body by which he was appointed.” While we are unaware of any challenge to this provision, the discretionary nature of such provision is troubling in light of Article VI, Section 1 of the South Carolina Constitution 1895, as amended. Article VI, Section of the Constitution provides that “the terms of all officers must be for some specified period” As a result, there may be a constitutionality question as to the discretionary terms of Commissioners under § 6-25-60(A).

¹⁴ 2002 WL 31341804, at *2 (S.C.A.G. Aug. 19, 2002)(“Unquestionably, a member of the Commission [under the Joint Authority Act] holds an office for dual office holding purpose.” “In this instance, presuming the person is elected to county council, he would vacate the office of member of the Joint Water and Sewer Commission upon assuming

from a Member may serve *ex officio* based on the elected office held at the Member.¹⁵ However, in a 2002 opinion, the South Carolina Attorney General opined that this was improper because “[t]here is no *ex officio* correlation between those two positions.”¹⁶ The law recognizes an “*ex officio*” or “incidental duties” exception where “there is a constitutional nexus in terms of power and responsibilities between the first office and the ‘*ex officio*’ office.”¹⁷ Said another way, a Commissioner can serve if the office from which the appointment springs if the underlying office is properly characterized as incidental to service on the Commission.

- We note that the Supreme Court has found that the provision of water and sewer service is a key “governmental function.”¹⁸ And the legislative findings in the Joint Authority Act explicitly provide that “the creation of a joint system is an alternative method whereby a [Member] may obtain the benefits and assume the responsibilities of ownership in a project.”¹⁹ We think it is arguable that service on the Commission is incidental to the duties of a Mayor (if under the strong-mayor form of government) or City Manager.²⁰

- Additionally, the Joint Authority Act previously provided that the Commission representative “may be an officer or employee of the member and may also serve *ex officio* as a member of the Commission.” However, the Joint Authority Act was amended in 2007 (Act No. 59 of 2007), and this provision was deleted. Such amendment creates further questions regarding the legality or propriety officers or employees of any Member serving as a Commissioner.

In light of foregoing, and the conflicting roles/duties of the existing Commissioners noted in the Study, we strongly recommend that any new Commissioners be a resident of the appointing Member and not be officers (Mayor or council members) or employees of the Member. Each Member should select a Commissioner meeting the qualifications of an elector for that Member that does not already hold a public office or serve as an employee of the Member. Instead, Members should look to appoint unaffiliated electors that will serve faithfully and impartially, acting in the best interest of the Commission.

the office of Council member”). But see, 2022 WL 17541133, at *4 (S.C.A.G. Nov. 22, 2022)(Based on an analysis of the factors delineated in *State v. Crenshaw*, 274 S.C 475, 266 S.E.2d 61 (1980) to determine whether a position constitutes an office, the Attorney General overruled a prior opinion (see 1985 WL 165972 Jan. 4, 1985) and determined that “the Darlington City Manager does not hold an office for purposes of dual office holding”).

¹⁵ It is noted that the current Commission includes a number of members who also serve as elected representatives of their cities.

¹⁶ *Id.*

¹⁷ *S.C. Pub. Int. Found. v. S.C. Transp. Infrastructure Bank*, 403 S.C. 640, 646, 744 S.E.2d 521, 524 (2013).

¹⁸ *City of Beaufort v. Beaufort-Jasper Cnty. Water & Sewer Auth.*, 325 S.C. 174, 180, 480 S.E.2d 728, 731 (1997)

¹⁹ S.C. Code Ann. § 6-25-128.

²⁰ 2022 WL 17541133, at *4 (Utilization of *Crenshaw* factors to determine whether an official is exercising sovereign powers of the State).

iii. Voting Procedure

The Study recommends “that for matters not related to debt, each [Commissioner] would receive one vote, with all votes being equal.”²¹ The Study further recommends that for matters related to debt, the new [Governance Agreement] must determine the most equitable manner in which to apportion votes. It is recommended that this be based on something such as the proportionate flow of each stakeholder to the Coneross WRF, a fixed capacity allocation, or an annual process of determining an equitable allocation for specific votes.”²²

The Joint Authority Act provides that “[a] commissioner has one vote and may have additional votes as a majority of the members of the joint system determines,”²³ except that with regard to the election of chairman, vice-chairman, secretary, and treasurer of the Commission, each Commissioner shall have one vote.²⁴ The Joint Authority Act also provides that the Joint Authority cannot undertake a project for which bonds will be issued without the approval of a favorable vote of two-thirds of all Commissioners following unanimous approval of the governing bodies of all Members. Practically speaking, this means the Operating Agreement, which should include preauthorization of borrowing for the near-term capital plan and the maintenance of the system, must be approved by two-thirds of all Commissioners. The approval of the bond resolution, the provisions of which actually implement the borrowing plans, may be subject to a different threshold (including weighted voting as discussed below) at or in excess of a majority of a quorum.

The Joint Authority Act provides that each Commissioner may receive “additional votes as a majority of the members of the joint system determines.” While the Study contemplates weighted voting for debt issuances, additional consideration should also be given to weighted voting for other financial matters (rates and charges), amendments to the Bylaws or other governing matters. Options can be drawn from other joint authorities, which include weighted voting options based on capacity,²⁵ flow,²⁶ or customer count,²⁷ or the Joint Authority can determine its own weighting metrics. The decision whether to utilize weighted voting, how/when to utilize weighted voting and the methodology for weighted voting should be discussed by the ad hoc committee (as contemplated in the study), and if determined for use, should be memorialized in the Governance Agreement and bylaws.

²¹ Study at 78.

²² Study at 79.

²³ S.C. Code Ann. § 6-25-60(A).

²⁴ S.C. Code Ann § 6-25-60(B).

²⁵ Anderson Regional Joint Water System.

²⁶ Pickens Regional Joint Water System; Piedmont Municipal Power Agency (using a hybrid option with a fixed amount of voting shares, plus additional shares based upon a proportionate share of base billing demand).

²⁷ Lowcountry Regional Water System.

iv. Rescind and Replace All Prior Agreements

The Study noted that the Authority Agreement and the Incorporated Agreements impede action and that “inaction is not an option.”²⁸ This is because sewer service in the County is at a point where inaction “will ultimately result in negative impacts to the things that all county citizens prioritize – quality of life and protection of abundant and natural resources.”²⁹

A new Operating Agreement that says the same thing as the existing Authority Agreement and the Incorporated Agreements will not serve the Joint Authority well in the future. Our firm regularly works with several other joint authorities created under the Joint Authority Act and there are key provisions in each of their respective operating agreements that allow for their operational success and ability to access the bond market. As mentioned above, we think the best way to do this is through an omnibus ordinance by each Member that approves a new Operating Agreement and rescinds all prior agreements. The new Operating Agreement should provide for the following:

- a defined “Project,” which may be expansive or limited in scope, for which the Members can preauthorize the issuance of debt to construct and to provide for capital maintenance and regulatory compliance, and to extend the useful life of the Project
- the method or methodology for determining the apportionment of operating costs (usually on the basis of relative flows) and capital costs (usually on the basis of capacity)³⁰
- define the components of each Member’s monthly payment, which should include (at minimum) the following components of Member charges along with clear methodologies for calculating and apportioning them:
 - capital charge
 - operation and maintenance charge
 - depreciation charge
 - debt service charge
- define the payment obligation of the Members as “absolute and unconditional” and provide for a “step-up” provision providing for Members to jointly and severally stand-behind any debt obligation
- provide for capacity allocation, including adjustments and transfers

²⁸ Study at 77. Additionally, in its most recent monitoring report dated October 1, 2024, RIA informed OJRSA that “[t]he efforts to act on the recommendations and reorganization efforts outlined in th[e] [P]lan may be a consideration in evaluation for future funding requests for Oconee Joint Regional Sewer Authority and the participating systems” (Emphasis added).

²⁹ *Id.*

³⁰ This is something that should be reviewed and considered in the “Financial/Rate Cost of Service Study” as recommended in the “Next Steps” section of the Study at 84.

- provide a defined mechanism for all or a portion of the Members to finance additional capacity and expansion apart from the initial pre-authorized “Project”
- provide that each Member include sewer charges on water bills
- ensure that Members’ individual revenue bond obligations are structured on a net revenue (as opposed to a gross revenue) basis, whereupon payment obligations to the Joint Authority are prioritized
- determine whether collection infrastructure will be owned, operated or maintained by the Joint Authority
- mandated compliance and associated penalties for failure to comply with Joint Authority’s sewer use policy

IV. Option 3 – Consolidation with an Existing Entity

Consolidation with an existing entity trades self-determination for financial relief. This trade-off may be worth it in the short to medium term, but aside from an initial agreement specifying certain near-term activities, the Members would have no say in policy matters regarding who is served in the future.³¹ This option abdicates responsibility for sewer in the County. Given the condition of the various systems this may appear attractive, but rehabilitation and expansion costs will be paid by the ratepayers at the end of the day.

Further, a review of consolidation options requires a fact-specific analysis. The process for consolidation of the Joint Authority into a municipality versus a special purpose district is very different. The practical considerations of any consolidation option should be analyzed once and if a consolidation candidate is identified.³²

V. Conclusion

While the above covers a great deal of ground, the pieces will fall into place if the Members can determine:

- the composition of the Commission
- weighted voting
- the scope and cost of the pre-authorized capital plan
- an acceptable rate structure and methodology

If these matters can be determined with adequate definition, we would then propose that the Joint Authority and each Member adopt a resolution and ordinances, respectively, reincorporating the Joint Authority, reconstituting the Commission, and rescinding and replacing all existing

³¹ This is according to State law.

³² Such arrangement would require a separate memorandum to identify and describe the consolidation process.

Agreements. From our perspective those actions are straightforward once the Members determine the matters set forth above.

In the absence of such determinations, or a failure by some or all of the Members to act, options for the potential consolidation of the Joint System should be considered and candidates for such consolidation should be reviewed, vetted and stress-tested.