

STATE OF NORTH CAROLINA
CUMBERLAND COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. _____

PUBLIC WORKS COMMISSION OF
THE CITY OF FAYETTEVILLE;
COMMISSIONER MICHAEL LALLIER
in his official capacity;
COMMISSIONER DARSWEIL ROGERS, in
his official capacity; and
COMMISSIONER LYNNE GREENE, in her
official capacity,

PLAINTIFFS,

V.

THE CITY OF FAYETTEVILLE;
MAYOR NAT ROBERTSON, in his official
capacity; COUNCILOR KADY-ANN DAVY,
in her official capacity; COUNCILOR
KATHERINE JENSEN, in her official
capacity; COUNCILOR HENRY MITCHELL
COLVIN, in his official capacity;
COUNCILOR CHALMERS MCDOUGALD,
in his official capacity; COUNCILOR
ROBERT THOMAS HURST, JR., in his
official capacity; COUNCILOR WILLIAM
JOSEPH LEON CRISP, in his official
capacity; COUNCILOR LARRY O.
WRIGHT, SR., in his official capacity;
COUNCILOR THEODORE W. MOHN, in his
official capacity; and COUNCILOR JAMES
WILLIAM ARP, JR., in his official capacity,

DEFENDANTS.

COMPLAINT FOR
DECLARATORY RULINGS

Pursuant to N.C. Gen. Stat. § 1-253 et seq., and Rules 3, 8, and 57 of the North
Carolina Rules of Civil Procedure, the Plaintiffs, through counsel, hereby file this
Complaint for Declaratory Ruling, and, if necessary, for injunctive relief.

INTRODUCTION

Plaintiffs bring this Declaratory Judgment action seeking a judicial determination as to the duties and obligations of the Public Works Commission of the City of Fayetteville (hereinafter “PWC” or “Commission”), the appointed constituent members of the PWC (“the Commissioners”) in their official capacities, and the City of Fayetteville (“the City”) under the City of Fayetteville Charter, Chapters V and VI. Created by the General Assembly in 1905, PWC is the largest municipal owned electric system in North Carolina, and 36th largest in the nation, providing reliable electric power service to nearly 80,000 customers daily. With over 1,300 miles of electric distribution lines, PWC is the only local public power system in North Carolina to own and operate an electric power generation plant. PWC’s customer service and innovation has been nationally recognized. As of 2012, it was one of only 10 public power utilities achieving the American Public Power Association (“APPA”) Reliable Public Power Provider award, and one of only three utilities in the nation to receive this award three consecutive times. Additionally, PWC received the APPA’s Energy Innovator Award in 2010 and 2012 for demonstrated advances in creative, energy efficient technologies.

In addition to these operational accomplishments, PWC’s financial strength is equally impressive and noteworthy. With an annual budget of \$350 million, over the past 10 years PWC has contributed more than \$95 million to the City of Fayetteville. PWC receives some of the highest bond ratings by Moody’s and Standards & Poors— there are only five public power systems in the United States that have higher bond ratings than PWC. And, its financial reporting has received state and national recognition.

PWC achieves its success through an independent board structure, which the North Carolina General Assembly created when it amended the City of Fayetteville Charter, adding Section VI in 1905 (the “Charter”). Section VI of the Charter provides for a Commission, made up of four Commissioners, appointed by the City Council for their experience and commitment to best serve PWC's customers and the citizens of Fayetteville. The Charter provides that the Commission has “full charge and control and the general supervision and management of the electric utility plant, waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.” Charter, Ch. VI, § 6.3. While the Commission’s governance structure and broad powers are unusual in North Carolina, it is not at all uncommon in other areas of the United States. The large majority of municipal utilities in the United States of comparable size to PWC have the same type of independent structure.

Since 2013, the Defendant City of Fayetteville by and through its City Council has taken a series of concrete steps that have caused confusion and uncertainty as to the Commissioners’ rights and responsibilities to make decisions regarding the utility. Relying on an outside consulting firm, the City passed a resolution wherein the City seeks to consolidate many of PWC’s operations with the City. The City has begun that consolidation by placing restrictions on PWC’s retention of legal counsel and requesting funds from PWC outside the budget process. The City’s actions have created uncertainty and caused the Plaintiffs PWC and Commissioners to be unclear as to their rights and responsibilities the legislature bestowed upon the Commission over a century ago. By this declaratory judgment action, Plaintiffs seek to eliminate the current confusion and

uncertainty and fully and finally settle the parameters of authority set forth by the General Assembly in the City of Fayetteville Charter, Chapter VI, so that all parties will appreciate and understand their rights, duties and obligations.

JURISDICTION AND VENUE

1. Jurisdiction is proper in this Court. *See* N.C. Gen Stat. § 1-253 et seq. (“Declaratory Judgment Act”); N.C. Gen. Stat. § 7A-245(a)(3).
2. This Court has the power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed, and such declaration shall have the force and effect of a final judgment or decree. *See* N.C. Gen. Stat. § 1-253.
3. The purpose of the Declaratory Judgment Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.
4. An action under the Declaratory Judgment Act may be used to determine the construction of a statute and the legal rights of persons under that statute.
5. The Declaratory Judgment Act is to be liberally construed and administered.
6. Venue is proper in this Court because the individual Commissioners’ residences are in Cumberland County, PWC’s primary place of business is in Cumberland County, the Defendant City of Fayetteville is located in Cumberland County, and individual Defendants’ residences are in Cumberland County. *See* N.C. Gen. Stat. § 1-82.
7. An actual, justiciable controversy exists between the Plaintiffs and Defendants at present.

PARTIES

8. Plaintiff the Public Works Commission of the City of Fayetteville (“PWC” or “Commission”) was independently created by the North Carolina General Assembly in 1905. *See* 1905 N.C. Sess. Laws 311.
9. Plaintiff Commission is comprised of four (4) Commissioners appointed by the City Council to serve staggered four (4) year terms. Charter, Ch. VI § 6.1. The Commission, through its four Commissioners, has “full charge and control and the general supervision and management of the electric utility plant, waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.” *Id.* § 6.3. The Commission has the exclusive authority to set rates, hire and fire employees and advisors, manage property, and prepare its budget. *Id.* § 6.10. In addition, pursuant to Charter Chapter VI, § 6.18, the Commission has the right and responsibility to prepare and publish its own budget.
10. The General Assembly has amended the Charter on at least three occasions (the latest in 2008) and has always maintained, and, at times, enlarged the Commission’s legal authority:
 - a. The General Assembly revised the City’s Charter in 1979. *See* 1979 N.C. Sess. Laws 557. In so doing, it kept the PWC’s structure, powers and duties substantially identical to those in the original Charter, Chapter VI. The main change was to establish that the City would operate under a council-manager form of government, but specified that the PWC would not be under the control of the city manager. *Id.* §§ at 5.1, 5.1(1).

- b. In 1981, the General Assembly revised Section 6.1 of the Charter to increase the number of Commissioners on the Commission from 3 to 4, and expand the terms of office from three years to four years. *See* 1981 N.C. Sess. Laws 603.
- c. In 2008, the General Assembly again revised the Charter, including Section VI, giving the Commission investment authority entirely separate from the City “[i]n addition to the authority granted in G.S. 159-30.” *See* 2008 N.C. Sess. Laws 103.

The complete, current Charter Ch. VI from the City Code Book is attached to this Complaint as Exhibit 1 and incorporated herein by reference.

- 11. Plaintiff Commissioner Michael Lallier, in his official capacity, is a duly appointed Commissioner of the PWC and is obligated under the Charter Section 6.2 to perform his official duties in the best interest of the city and its inhabitants. He was appointed for his specific qualifications and to exercise the judgment and expertise necessary for the operation of the utility in the best interest of the city and its inhabitants. He also has a fiduciary duty to ensure that actions taken by the Commissioners are consistent with the charter and the governance structure set forth by the General Assembly.
- 12. Plaintiff Commissioner Lynne Greene, in her official capacity, is a duly appointed Commissioner of the PWC and is obligated under the Charter Section 6.2 to perform her official duties in the best interest of the city and its inhabitants. She was appointed for her specific qualifications and to exercise the judgment and expertise necessary for the operation of the utility in the best interest of the city

and its inhabitants. She also has a fiduciary duty to ensure that actions taken by the Commission are consistent with the charter and the governance structure set forth by the General Assembly.

13. Plaintiff Commissioner Darsweil Rogers, in his official capacity, is a Commissioner of the PWC and is obligated under the Charter Section 6.2 to perform his official duties to the best interest of the city and its inhabitants. He was appointed for his specific qualifications and to exercise the judgment and expertise necessary for the operation of the utility in the best interest of the city and its inhabitants. He also has a fiduciary duty to ensure that actions taken are consistent with the charter and the governance structure set forth by the General Assembly.
14. Defendant City of Fayetteville (the “City”) is a municipal corporation incorporated by the General Assembly in 1893. *See* 1893 N.C. Sess. Laws 153. This Charter established the City’s original board of aldermen, mayor, tax collector, clerk, treasurer, chief of police, engineer and attorney. As a municipal corporation in North Carolina, the City has only such powers as the General Assembly grants in its specific charter or by general laws of the State applicable to all municipalities.
15. Defendant Robertson is the duly elected Mayor, and Defendants Mayor Pro Tem Davy, Jensen, Colvin, McDougald, Hurst, Crisp, Wright, Mohn, and Arp are the duly elected City Council Members, of the City of Fayetteville, with the authority to act on the City’s behalf pursuant to and consistent with the City Charter. They

are named as defendants in this action solely in their official capacities as Mayor and City Council Members respectively.

FACTS

I. The Provisions of Charter, Chapter VI, and Fiscal Operations

16. In 1893, the General Assembly created the City of Fayetteville, North Carolina. *See* 1893 N.C. Sess. Laws 153. Twelve years later, the General Assembly amended the City's Charter and expressly created the Public Works Commission of the City of Fayetteville -- with a separate and distinct board -- fully empowered to manage and operate every aspect of the utility.
17. The legislature's grant of powers to the Commission places the supervision and management of the electric, water and sewer utility systems under the authority of the Commissioners, who are appointed by the City Council, but not the City Council itself.
 - a. The PWC Commission is made up of four Commissioners appointed by the City Council, with each commissioner serving a staggered four-year term. Charter Ch. VI § 6.1
 - b. The Commissioners "shall be persons of recognized ability and good business judgment and standing, who . . . will perform their official duties to the best interest of said city and its inhabitants." *Id.* § 6.2
 - c. The Commission has "full charge and control and the general supervision and management of the electric utility plant, . . . and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same." *Id.* § 6.3

- d. Commissioners can only be removed from office for willfully neglecting or failing to perform any duty required by the Charter or the Commission after conviction. *Id.* § 6.17.

18. In addition to the responsibilities set forth in the Charter, Chapter VI, the Plaintiff Commissioners, as board members, also have a fiduciary duty, which includes the duty of care. The duty of care requires that the Commissioners be diligent and prudent in managing the affairs for the PWC and affords the Commissioners broad freedom of action. The duty of care places an affirmative duty on Commissioners to protect the interests of PWC and the citizens of Fayetteville and to inform themselves of all material information reasonably available before making a business decision. In satisfying the duty of care, a Commissioner may rely upon information provided and reports prepared by certain persons such as engineers, accountants, financial advisors and attorneys who may be experienced in discrete matters beyond the normal business experience of the Commissioners. Charter, Ch. VI, Sec. 6.10.

19. The Charter expressly provides that the Commission, not the City Council, sets utility rates, has control of hiring and firing personnel, can enter into contracts, receive and disburse all revenues, including bond revenue, and has investment authority:

- a. The Commission is authorized to fix all utility rates and rents as the PWC deems is in the best interest of the City. Charter Ch. VI. §6.11
- b. The Commission is also “fully authorized and empowered . . . to employ and discharge all necessary superintendents, clerks, accountants, laborers,

artisan and other help in said management; to prescribe the duties and fix the salaries of each . . .” *Id.* at 6.10

- c. The Commission is also not subject to control of the city manager, “The city manager shall have no right or power to appoint or remove the superintendent, manager, or other employees of the public works commission of the city of Fayetteville.” *Id.* at. § 5.1(1)
- d. The Commission has "charge of and control over . . . the electric light plant, the waterworks plant, and the sewerage plant" and the authority to enter into all necessary contracts for the plants, subject to the requirement that capital expenditures in excess of \$10,000 for "construction, repairing, alteration, or enlargement of plants" must be approved by City Council. *Id.* at § 6.7
- e. The Commission is “fully authorized and empowered to make all necessary contracts in the property management of said public utilities and other property under its management and control...” *Id.* at §6.10
- f. All Commission receipts and disbursements shall be paid to the treasurer of the Commission and disbursement shall only be made by order of the treasurer signed by the secretary and countersigned by the chairman. *Id.* at §6.6.
- g. All bond proceeds and special funds are to be paid to the treasurer of PWC. “The proceeds from the sale of any bonds, and all other special funds to be used in the construction, repairing, alteration or enlargement of any public utilities, building or other property mentioned in Section 6.7,

shall be paid over to the treasurer of said commission, who shall disburse the same as provided in this act.” *Id.* § 6.9

h. “In addition to the authority granted in G.S. 159-30, the Public Works Commission may invest and reinvest any of the Commissioner’s employee benefits funds held in trust, risk reserve funds and capital reserves, as designed from time to time by the Commission, in one or more types of securities or other investments authorized by State law” § 6.21

20. Importantly, the Charter, Chapter VI expressly grants the Commission the power and authority to prepare and publish its own annual budget entirely separate from the City; “Said Commission shall cause to be prepared and published in a newspaper published in Cumberland County a budget in the same manner as is required of the city council.” *Id.* § 6.18 The Commission is also required to publish an annual report “which shall include all financial operations of said commission during the year, and all items, facts and information required by the provisions of this chapter to be reported monthly to said city council.” *Id.* § 6.13
21. The Commission is required to provide reports to the Fayetteville City Council and to “pay over to the treasurer of said city all balances in excess of the necessary expenses and disbursements.” *Id.* § 6.12. The City Council also has the ability to request reports and information from the PWC. *Id.* at §6.12.
22. There are, however, only four areas in which the Charter Chapter VI grants the City Council with powers related to Commission: (1) the City Council appoints the PWC’s commissioners, § 6.1; (2) the City Council sets salaries for the PWC’s commissioners, § 6.15; (3) the City Council must approve PWC capital

expenditures and capital contracts in excess of \$10,000, § 6.7; and (4) the City Council may establish a retirement system for PWC employees, § 6.20. Other than those four areas, PWC, through its Commissioners, controls its operations and may extend its utilities systems and sell electricity, water and sewer service anywhere in Cumberland County. *Id.* at §6.19.

23. And, as a public authority, PWC also complies with the Local Government Budget and Fiscal Control Act (“LGBFCA”), N.C. Gen. Stat. § 159-7 *et seq.* The LGBFCA expressly identifies and defines “Public Authority” as a “local governmental authority, board, commission, council, or agency that (i) is not a municipal corporation, (ii) is not subject to the Executive Budget Act, (iii) operates on an area, regional, or multi-unit basis, and the budgeting and accounting systems of which are not fully a part of the budgeting and accounting system of a unit of local government.” PWC satisfies each of the components of this definition and is therefore a Public Authority under the LGBFCA and complies with its provisions.
24. The Commission determines and budgets its operating expenses and revenue projections based on rates the Commission is exclusively authorized to set. In this way, the Commission develops its own budget each year, pursuant to the Charter, Ch. VI, Sec. 6.13. The Commission then provides its budget to the City yearly and a one-page summary of PWC’s budget is included in the City’s budget when it is approved. Using an agreed upon formula, consistent with Charter Chapter Section 6.12, PWC transfers monies to the City in excess of PWC’s necessary

expenses on a yearly basis, after budgeting for all necessary costs of service, including depreciation, maintenance reserves, emergency reserves, etc.

II. The PWC's Governance Structure is Unusual in North Carolina but Not the United States.

25. Charged with providing electric power, water and sewer services to the citizens of Cumberland County, PWC is the largest publicly owned utility in North Carolina, and the 36th largest in the nation. PWC's governance structure set forth above, whereby the legislature created an independent municipal utility commission to operate and manage the utility, is unusual in North Carolina (only the Greenville Utilities Commission has a similar structure) but is not uncommon across the United States.
26. In the United States, distribution of electric power is, in general, provided to retail customers by three types of electric distribution utilities: publicly owned, investor owned, membership cooperative. Publicly owned utilities comprise approximately 14.5 percent of the electric utility market. *See Public Power's Business Model: A Primer*, American Public Power Association.
27. Approximately sixty-two (62) North Carolina cities provide electric utility service (in addition to water and sewer). In 60 of those cities, there is no separate utility board charged with the operation and management of the utility. Instead, the City Council essentially serves as the board of directors for those utilities.
28. In only two North Carolina cities, Fayetteville and Greenville, the publicly owned utility is operated and managed by a separate independent utilities commission,

not the City Council. Unlike any other publicly owned utility in North Carolina, the Public Works Commission not only operates its electrical lines and sets rates, it also operates the utility's power plant. Ownership of the utility's capital assets is in the name of the City of Fayetteville.

29. Fayetteville PWC legislatively created governance model is found nationwide--approximately 270 utilities across the country have an independent utility board as their primary governing body. Indeed, forty-four percent (44%) of utilities with a customer size similar to PWC operate under the independent appointed board model like PWC. Just like PWC, the vast majority of these independent utility boards have the specific, exclusive powers to: set electric power rates, approve their utility budget, set salaries, make financial investments for the utility, approve purchased power contracts, and hire/fire personnel.
30. Independent utility board structure is an attractive governance model because it de-politicizes the management and operation of the utility, ensuring efficiency and lowering costs, providing long-term stability of utility policies, and making it more likely to adopt long-term, best practices. Commissioners who are selected, for their knowledge and/or background are singularly charged with the utility's operation and therefore develop an expertise that allows them to best serve the utility and the community. Further, it removes the time consuming and detailed governance required for a highly technical operation from the usual other demands of municipal government operations and places it the hands of a commission whose sole responsibility is the management and operation of utilities. An independent board, somewhat insulated from political pressure, is

able to focus on maintaining sufficient operating reserves for emergencies or catastrophic events, as well as planning expenditures for service expansion, capital projects, and routine maintenance for a growing community.

III. PWC is an award winning utility providing exceptional service to the citizens of Cumberland County

31. Under this independent governance model, PWC is extremely well run and provides excellent service and value to the City and the citizens of Cumberland County.
32. PWC provides services to over 112,000 customers. PWC service area includes the City of Fayetteville, as well as other towns in Cumberland County, such as Hope Mill, Stedman, Wade, Falcon, and Eastover. *See* Charter Ch. § 6.19 (PWC authorized and empowered to extend utilities anywhere in Cumberland County.) Service area maps for PWC's water service, sewer service, and electric power service, respectively, are attached hereto as Exhibits 2A, 2B, and 2C.
33. PWC's has nearly 600 employees that live in the communities it serves. PWC employees have a strong track record for safety—having worked over one million consecutive hours with no lost time for injuries for seven out of the last thirteen years. Over the past year, 238 PWC employees have volunteered over 1000 hours while participating in 25 community events. Since 1997, PWC employees have raised or contributed over \$1,000,000 to the United Way agencies in Cumberland County, earning the United Way of North Carolina “Spirit of NC” award eight times since 2003.

34. Over the past ten years, PWC has contributed a total of \$95 million dollars to the City of Fayetteville, including an annual economic development contribution of \$315,000.
35. As of 2012, PWC was one of only 10 publicly owned electric power utilities achieving Diamond level—the highest designation of the American Public Power Association’s (APPA) Reliability Public Power Provider award (RP3). As of 2012, PWC was one of only three utilities to win this award three consecutive times. And, PWC received the APPA Energy Innovator Award in 2010 and 2012 for programs that demonstrate advances in the development or application of creative, energy-efficient techniques or technologies.
36. PWC’s financial strength and strong financial governance have also received state and national recognition. PWC’s annual budget is in excess of \$350 million. PWC’s electric power system assets are valued at nearly \$390 million; its water assets, at \$283 million, and its sewer system, at \$423 million. PWC’s bond rating is among the highest in the nation, with only five other local public power utilities nationwide having higher bond ratings. PWC has earned the Certificate of Achievement for Excellence in Financial Reporting for five straight years, where only 5% of municipalities receive that award. Similarly, PWC has earned the Government Finance Officers Association Distinguished Budget Presentation Award for seventeen consecutive years.

IV. The City's Actions to Consolidate PWC with the City

37. On February 11, 2013, the Fayetteville City Council retained an outside consulting firm, DavenportLawrence (the "Consultant"), to study restructuring and oversight of PWC. Upon information and belief, DavenportLawrence has experience with other municipal utility departments, as commonly found in other North Carolina cities, but had no experience or expertise regarding a public power utility with a separate board, such as Fayetteville PWC, and no legal experience or expertise in analyzing the Charter provisions and governance structure of such a utility.
38. In a report to the City Council on August 5, 2013, the Consultant made conclusions and provided recommendations that the City significantly increase oversight over PWC, including over PWC's finance and treasury function. *See City Council Minutes*, August 5, 2013. In addition, based on the Consultant's report, the Fayetteville City Manager recommended to the City Council that the PWC be consolidated with the City in the following areas: (1) Finance/Treasury/Risk Management, (2) Budget/Capital Planning, (3) Strategic Planning/Performance Management, (4) Human Resources/Organizational Development, (5) GIS/Email/Network, and (6) Call center. *See City Council Minutes* September 3, 2013. Although the Consultant's report may have been well-grounded in the context of a typical North Carolina municipal utility, it did not properly account for the role of the PWC Commissioners or the legal governance structure of the utility, as established by the General Assembly

39. On or about August 21, 2013, Steve Blanchard, the General Manager of PWC, went before the City Council to respond the Consultant's report. Mr. Blanchard's complete responses to the Consultant's report is attached hereto as Exhibit 3 and is incorporated herein by reference. The Consultant's report acknowledged that "The Fayetteville PWC operates effectively and efficiently in the delivery of electric, water and sewer services with competitive rates to other regional utilities." Mr. Blanchard agreed with this statement:

We are proud of Fayetteville PWC's outstanding track record. We deliver safe and reliable utility services. We serve our customers well. And we are financially stable. We play an integral role in the economic development efforts of the region. Our electric rates are among the lowest in the state, and our water and sewer services have helped support the City's growth.

40. The Consultant, however, went on to opine that there were charter violations. The Consultant's report expressed its opinion that "Fayetteville PWC autonomy (operational independence) has expanded beyond, what we believe to be, originally granted (or intended) by charter and what is typical for a municipal utility." The word "typical" illustrates the Consultant's misperception and misunderstanding of the legal governance of Fayetteville PWC. Upon information and belief, the Consultant has no North Carolina attorney on staff.
41. Mr. Blanchard responded by explaining that numerous advisors and attorney had reviewed the relationship between the City and PWC many times and that the charter was not being violated. Mr. Blanchard went on to explain:

Fayetteville PWC's organizational structure, established by the General Assembly and set forth in the Charter, is unique and different from that of other municipal utilities in North Carolina -- a fact the Davenport Lawrence either didn't understand or chose to ignore. While a number of municipalities in North Carolina do provide water/sewer service, most

typical utilities in North Carolina do not provide electrical service to its City and surrounding area. Fayetteville PWC operates the largest municipal electric system, by far, in North Carolina and the 36th largest municipal electric system in the United States. In April 2010 the American Public Power Association conducted its eighth “Governance Survey”. The survey reflects that only 32% of publicly owned electric systems with greater than 50,000 customers are governed by a City Council. The other 68% are governed by an Independent Utility Board with elected (24%) or appointed (44%) members. Our operations are consistent with the Charter and very typical to our peer group of similarly sized public power utilities.

42. In response to the Consultants’ opinion that, “While possessing the assets of minimal transmission service and a generation plant within the electric utility, the Commission does not operate in a manner that is substantially different than its municipal utility counterparts,” Mr. Blanchard responded and explained why PWC is substantially different:

While municipal utilities that operate an electric utility, in general, do not operate substantially different, there are many rules and regulations that apply to larger electric utilities that Fayetteville PWC must comply with (Federal Energy Regulatory Commission, North American Electric Reliability Corporation, Southeastern Electric Reliability Corporation, the North Carolina Utility Commission, cyber security, etc.) Those requirements associated with operating a generation plant are unique to Fayetteville PWC among North Carolina municipal utilities. Fayetteville PWC does not use a third party to handle its regulatory requirements while many smaller municipal electric utilities in North Carolina use the North Carolina Eastern Municipal Power Agency or the North Carolina Municipal Power Agency No. 1 to manage their regulatory requirements and reporting.

43. The Consultant also questioned PWC’s community outreach and messaging, “Fayetteville PWC utilizes its current autonomy to invest in external messaging and community relations beyond what is necessary for the purposes of utilities operations and customer service by a public utility.” In response, Mr. Blanchard stated:

Fayetteville PWC believes that customer information and external communications are not only necessary, but are essential, components of utilities operations and customer service and consistent with high customer expectations. As technology evolves to provide customers with greater flexibility to manage their electric usage and increase energy efficiency, as well as to manage water consumption in ways to lower operating costs, utilities have an obligation to provide regular, current communications to them. Our community relation’s efforts also support economic development and growth of utility operations. Improving emergency preparedness and providing emergency and/or service interruption notifications are also part of Fayetteville PWC’s external messaging function.

44. In response to the Consultant’s opinion that, “The City generally funds operations at a “basic” level, thereby foregoing some efficiency gains, technology leverages, or enhanced customer service,” Mr. Blanchard replied:

Fayetteville PWC is not sufficiently familiar with the City’s operations to comment in detail. While the City may need additional capacity in certain areas, Fayetteville PWC fully utilizes its current staff/personnel and it would be difficult to expand the functional obligations of its personnel at current staffing levels without negatively impacting operations. The efficiency of the utilization of Fayetteville PWC resources can be seen in the following national comparisons:

Fayetteville PWC Financial Performance Comparison With Municipally Owned Electric Utilities	PWC	Median	SE Region Utilities	Utilities Serving 50,000-100,000
Total Operation & Maintenance Expense per retail customer	\$284	\$407	\$341	\$363
Total Administration & General Expense per retail customer	\$83	\$149	\$127	\$133

Moreover, the use of Fayetteville PWC resources for non-utility functions is limited under restrictions on the allowed uses of its funds imposed by the LGC, the North Carolina State Treasurer’s office, and Bond Agreement covenants.

45. And, in response to the Consultant’s opinion that, “Functional alignment between the City of Fayetteville and the Commission will succeed only after the barrier of cooperation (history and culture) are eliminated and both organizations recognize

acting in the best interests of the public transcends independent organizational interests,” Mr. Blanchard responded:

Fayetteville PWC agrees that acting in the best interests of the public should be paramount and should transcend independent organizational interests. The relationship between Fayetteville PWC and the City has been studied many times before — and there’s never been any indication in the past that changing the current structure is necessary or beneficial. We do not believe that there are significant historical or cultural barriers to cooperation, but there are legal parameters – both in the Charter, in LGC regulations, and in bond documents – that govern any alignment of functions.

In many respects, we believe Fayetteville PWC is a model of how a successful community utility should be run. We feel like Fayetteville PWC is a strong organization that is well run and serves our customers well. We don’t see the need for drastic changes. But we’re more than happy to discuss with the city how we all can continue to improve our service and better serve the community. As a preliminary matter, we agree that evaluating the true costs – both financial and operational -- of combining functions (as we have done for purchasing, fleet maintenance, and radio communications) is worthwhile, but until that is done, no one can conclude what, in fact, is beneficial and in the public interest.

46. On September 23, 2013, based on the Consultant’s report and the City Manager’s recommendations, the City Council passed Resolution No. R2013-052 “A Resolution of the City Council of the City of Fayetteville Regarding the Public Works Commission” (“The Resolution”) to substantially increase control by the City Manager and City Council over the Public Works Commission. *See City Council Minutes* September 23, 2013, Resolution R2013-52. The Resolution attached hereto as Exhibit 4 provides in relevant parts as follows:

- a. WHEREAS, the City has delegated a portion of its authority to operate these utilities to a Public Works Commission (“PWC”) appointed by the City Council through terms specified in Chapter VI of the City of Fayetteville Charter (“Charter”) . . .

- b. WHEREAS, the City Council, by operation of law, is the policy making and financial oversight body for all municipal operations of the City of Fayetteville; and . . .
- c. NOW, THEREFORE, BE IT RESOLVED on behalf of the citizens of Fayetteville, that the City Council, through the actions described herewith, shall reinforce its oversight and policy responsibilities inherent in its role as the governing body of the City of Fayetteville; shall reestablish the City's treasury role as defined in the Charter; shall realign oversight for legal, communications and branding; shall revise cost plans and Service Level Agreements for existing joint services; and shall continue the study of support services to identify any efficiencies from possible realignment and consolidation of support services. . .
- d. BE IT FURTHER RESOLVED that the City Manager and Fayetteville PWC are directed to work collaboratively to identify organizational, procedural, and other changes necessary to fully and effectively provide for the City Council to satisfy its fiduciary responsibilities. A review of all accounts held by the Fayetteville PWC shall be conducted to determine which accounts shall be transitioned over to the control of the City's Treasurer (Chief Financial Officer) to manage for the benefit of the utility and administered in accordance with the terms of the City's bond order. Such transition shall be made within the current fiscal year, and shall be done in full consultation with appropriate local government finance authorities, the City Attorney, bond counsel, and in accordance with Generally Accepted Accounting Principles (GAAP) so as to offer full assurance of financial stability while maintaining continuous and reliable utility operations.
- e. BE IT FURTHER RESOLVED that the statutory authority for the appointment of a City Attorney rests with the City Council. The City Attorney is charged with the responsibility of providing legal guidance to the City Council and all operations of the City of Fayetteville. As such, all legal services, including any need for specialized legal services shall be provided through the City Attorney. The City Attorney is directed to develop a Service Level Agreement to describe performance expectations and identify operational and procedural changes necessary to ensure that all City Functions are appropriately supported with legal services and to implement those changes within 90 days.
- f. BE IT FURTHER RESOLVED that the City Council desires a consistent and coordinated overall messaging and branding effort in the community and recognizes that it has an interest in supporting a variety of cultural arts, recreation, and other programs that promote the general welfare, and has the authority to do so under Article 21 and Article 18 of NCGS § 160A. Accordingly, Fayetteville PWC is directed to develop a logo and

utility name transition consistent with the overall City of Fayetteville branding and communicate any new or alternative branding or logos to the City Council for review and approval prior to adoption and implementation. Fayetteville PWC is directed to seek authorization and direction from City Council on all “Legislative Advocacy” issues. Fayetteville PWC is directed to identify and track essential utility public information and education expenditures that are necessary to continue to support utility operations. . .

- g. BE IT FURTHER RESOLVED that the City Council recognizes that it has an interest in supporting economic development activities as set out in NCGS Chapter 158. The City Manager and PWC Commission are directed to develop a transition plan updating the terms of the transfer of financial resources budgeted for economic development activities as soon as practicable within the current fiscal year. A Service Level Agreement should be developed to describe performance expectations. This Agreement should include resource allocations appropriate to advance the utility’s continued interest in supporting economic development insofar as such development supports the continued growth and sustainability of the utility by expansion of the customer base and improvement in the City’s overall economy. . . .

- h. BE IT FURTHER RESOLVED that an appropriate City Council Member(s) will be identified to serve as liaison to PWC and coordinate the study of support services. The City Manager and Fayetteville PWC are directed to work with the Council designee(s) and Davenport Lawrence to review support services departments; to identify any efficiencies from possible realignment and consolidation in the following departments; and to identify and recommend a plan for the realignment and consolidation, and improved coordination, of support services functions to include by way of example and not limitation: human resources, communications, finance and treasury, budgeting and capital planning, information technology, organizational development, strategic planning, audit, procurement, fleet management, call center, emergency management and disaster preparedness, and such other activities as may be in the best interest of the City consistent herewith. Furthermore, the City Manager and the Fayetteville PWC are directed to partner with each other to initiate a second phase of the Study; and are authorized to execute a service contract within budgeted resources.

As explained in greater detail, this Resolution is in conflict with the provisions of the Charter, as enacted by the General Assembly.

47. Relying on City Council Resolution R2013-52, the Fayetteville City Attorney implemented a Legal Policy dated 12/17/2013 controlling PWC's use of legal counsel for any purpose, in apparent contradiction to the Charter. The Legal Policy imposes significant restrictions and oversight on PWC's ability to retain and use legal advisors, and includes the following restrictions/mandates:

- a. All new PWC issues requiring legal services will be vetted through the City Attorney's office.
- b. PWC must submit to the City Attorney a list of all attorneys it currently uses and for what purpose with such list being reviewed by the City Attorney
- c. All future legal outside legal services will be selected and coordinated with the City Attorney.
- d. PWC must provide the City Attorney with a monthly report showing all law firms used and any payments made.
- e. PWC is required to retain the City Attorney for much of its legal services and pay the City Attorney at an hourly rate determined solely by City Attorney.

A copy of the Legal Policy is attached to this Complaint as Exhibit 5.

48. Prior to this Legal Policy, PWC generally handled its own legal needs in the operation and management of the utilities. Legal transactions related to PWC's business were handled by PWC, and the City Attorney was generally not involved. Indeed, if the City Attorney received an action concerning PWC, it was forwarded to PWC to handle independently. PWC retained outside counsel of its

own choosing. And, PWC only informed the City Attorney if issues in a matter were moving towards litigation.

49. In addition to the Legal Policy enacted, the City has also demanded additional monies from PWC outside the budget process and yearly money transfer from PWC to the City under Charter Section 6.12. Specifically, the City has proposed creating a new consolidated budget and audit function for both the City and PWC and demanded that PWC pay \$900,000 for this endeavor over the next two fiscal years. PWC already has a well-functioning budget and audit process of its own—in compliance with its obligations under the Charter and the Local Government Budget and Fiscal Control Act.
50. The City and PWC entered into two agreements dated May 12, 2008, the Formal Operating Transfer Agreement (“Funds Transfer Agreement”) and the Agreement to Fund the Construction of Water and Sanitary Sewer Systems in the Annexed Area Referred to as Phase V (“Phase V Funding Agreement”). In the Phase V Funding Agreement both the City and PWC each agreed to contribute a total of \$90,553,140 over time. Section 3 sets forth a formula for the City’s annual contribution and Section 4 sets forth PWC’s contribution. Section 4 provided that PWC’s initial contribution would be \$1,500,000, escalating each fiscal year by 3% until the maximum annual contribution would reach \$3,000,000. In addition, the Funds Transfer Agreement, agreed to in coordination with the Phase V Funding Agreement, provided that PWC would transfer 3.1% of the total net assets of the Electric Fund to the City.

51. On or about August 12, 2014, during a work session, the City Council indicated that it would no longer honor the terms of the Phase V Funding Agreement and directed the City Manager, to phase out the City's funding commitments as set forth in the agreement.
52. The City's unilateral decision to rescind its payment obligations under the Phase V Funding Agreement would have detrimental consequences on PWC and would create unforeseen and unbudgeted expenses that PWC has not prepared for and has not anticipated.
53. The actions undertaken by the City has caused confusion and uncertainty for the PWC and its Commissioners, which could have far-reaching implications, impacting the rates PWC will charge its customers, as well as PWC's bonding rating, finances, contracts and employee relations. If the City's actions continue in this direction, consistent with Resolution R2013-52, the Plaintiffs are concerned that uncertainty and confusion created by the City's actions could jeopardize the operational and fiscal stability of PWC and the City.

**CONFLICTING PRONOUNCEMENTS OF
LEGAL RIGHTS AND RESPONSIBILITIES**

54. Plaintiffs repeat and re-allege the allegations contained in paragraphs 1-53.
55. The North Carolina Declaratory Judgment statutes, N. C. Gen. Stat. Ch. 1, Art. 26, expressly states:

"Any person . . . whose status or other legal relations are affected by a statute [or] municipal ordinance . . . may have determined any question of construction or validity arising under the . . . statute [or] ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254.

56. The Resolution, paragraph 2 states:

WHEREAS, the City has delegated a portion of its authority to operate these utilities to a Public Works Commission (“PWC”) appointed by the City Council through terms specified in Chapter VI of the City of Fayetteville Charter (“Charter”).

On the other hand, the General Assembly enacted Charter Chapter Section 6.3, which states:

Said commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.

Such conflicting pronouncements as to the source of the Commission’s authority creates uncertainty and confusion as to the PWC and Commissioners' duties, rights, and obligations. This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Declaratory Judgment Act ("the Act") is specifically appropriate and intended to enable judicial declaration to address and resolve.

57. The Resolution paragraph 9 states:

THEREFORE, BE IT RESOLVED on behalf of the citizens of Fayetteville, that the City Council, through the actions described herewith, shall reinforce its oversight and policy responsibilities inherent in its role as the governing body of the City of Fayetteville; shall reestablish the City’s treasury role as defined in the Charter; . . .

On the other hand, the Charter VI, Chapter Sections 6.3, 6.6, 6.9, 6.11, 6.13 and 6.18 place PWC’s treasury and finances solely in the hands of the Commission:

Section 6.3: The commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.

Section 6.6: All funds handled by said commission shall be paid over to the treasurer thereof, and all disbursements by said commission shall only be made by order upon the treasurer, signed by the secretary and countersigned by the chairman thereof, and all orders shall state for what object the same is drawn and a record shall be kept of all such orders.

Section 6.9: Proceeds from the sale of any bonds, and all other special funds . . . shall be paid over to the treasurer of said commission, who shall disburse the same as provided in this act.

Section 6.13: At the end of each fiscal year said commission shall publish a complete report for the year. . .

Section 6.18: Commission shall cause to be prepared and published in a newspaper in Cumberland County a budget in the same manner as is required of the city council.

Such conflicting pronouncements and mandates as to PWC's treasury function create uncertainty and confusion as to the PWC and Commissioners' duties, rights, and obligations. This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Act is specifically appropriate and intended to enable judicial declaration to address and resolve.

58. The Resolution paragraph 9 also states:

NOW, THEREFORE, BE IT RESOLVED on behalf of the citizens of Fayetteville, that the City Council, through the actions described herewith, shall reinforce its oversight and policy responsibilities inherent in its role as the governing body of the City of Fayetteville; . . . shall realign oversight for legal, communications and branding . . .

On the other hand, the Charter VI, Sections 6.3, 6.7, and 6.10 expressly authorizes PWC to manage all personnel, contracts, and management:

Section 6.3: The commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage . . .

Section 6.7: Said commission shall have charge of and control over, and shall supervise the construction, repairing, alternations or enlargement of the electric light plant, the waterworks plant and the sewerage plant with

power and authority to make all necessary contracts relating to the same, .
..

Section 6.10: Said commission is hereby fully authorized and empowered to make all necessary contracts in the property management of said public utilities and other property under its management and control, and to employ and discharge all necessary superintendents, clerks, accountants, laborers, artisans and other help in said management; to prescribe the duties and fix the salaries of each, and to require such bonds of each as said commission may deem proper to the successful management of said property.

Such conflicting pronouncements and mandates as to PWC and the Commissioners' duties, rights, and obligations create uncertainty and confusion.

This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Act is specifically appropriate and intended to enable judicial declaration to address and resolve.

59. The Resolution paragraph 10 states:

BE IT FURTHER RESOLVED that . . . A review of all accounts held by the Fayetteville PWC shall be conducted to determine which accounts shall be transitioned over to the control of the City's Treasurer (Chief Financial Officer) to manage for the benefit of the utility and administered in accordance with the terms of the City's bond order. Such transition shall be made within the current fiscal year, and shall be done in full consultation with appropriate local government finance authorities, the City Attorney, bond counsel, and in accordance with Generally Accepted Accounting Principles (GAAP) so as to offer full assurance of financial stability while maintaining continuous and reliable utility operations.

On the other hand, the Charter Chapter VI, Sections 6.3, 6.6, 6.9, 6.11, 6.13 and 6.18 place PWC's treasury and finances solely in the hands of the Commission.

Section 6.3: Commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.

Section 6.6: All funds handled by said commission shall be paid over to the treasurer thereof, and all disbursements by said commission shall only

be made by order upon the treasurer, signed by the secretary and countersigned by the chairman thereof, and all orders shall state for what object the same is drawn and a record shall be kept of all such orders.”

Section 6.9: Proceeds from the sale of any bonds, and all other special funds . . . shall be paid over to the treasurer of said commission, who shall disburse the same as provided in this act.

Section 6.11: Said commission is hereby full authorized and empowered to fix all rates, rents for water, light and sewage, scales, and all other public property under their control . . .

Section 6.13: At the end of each fiscal year said commission shall publish a complete report for the year. . .

Section 6.18: Commission shall cause to be prepared and published in a newspaper in Cumberland County a budget in the same manner as is required of the city council.

Such conflicting pronouncements and mandates as to PWC’s treasury function create uncertainty and confusion as to the PWC and Commissioners' duties, rights, and obligations. This conflict, uncertainty, and confusion creates a controversy for which the Declaratory Judgment Act ("the Act") is specifically appropriate and intended to enable judicial declaration to address and resolve.

60. The Resolution paragraph 12 states:

- a. “BE IT FURTHER RESOLVED that the statutory authority for the appointment of a City Attorney rests with the City Council. The City Attorney is charged with the responsibility of providing legal guidance to the City Council and all operations of the City of Fayetteville. As such, all legal services, including any need for specialized legal services shall be provided through the City Attorney. The City Attorney is directed to develop a Service Level Agreement to describe performance expectations and identify operational and procedural changes necessary to ensure that all City Functions are appropriately supported with legal services and to implement those changes within 90 days.” And, the Legal Policy subsequently established by the City Attorney gives the City Attorney’s office control over PWC’s selection of counsel and decision to utilize legal services.

On the other hand, the Charter Chapter VI, Sections 6.3, 6.7, and 6.10 expressly authorize the Commission to manage all personnel, contracts, and management of the utilities.

Section 6.3: The commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage . . .

Section 6.7: Said commission shall have charge of and control over, and shall supervise the construction, repairing, alternations or enlargement of the electric light plant, the waterworks plant and the sewerage plant with power and authority to make all necessary contracts relating to the same, . . .”

Section 6.10: Said commission is hereby fully authorized and empowered to make all necessary contracts in the property management of said public utilities and other property under its management and control, and to employ and discharge all necessary superintendents, clerks, accountants, laborers, artisans and other help in said management; to prescribe the duties and fix the salaries of each, and to require such bonds of each as said commission may deem proper to the successful management of said property.

Such conflicting pronouncements and mandates as to PWC and the Commissioners' duties, rights, and obligations create uncertainty and confusion as to the PWC and Commissioners' duties, rights, and obligations. This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Act is specifically appropriate and intended to enable judicial declaration to address and resolve.

61. The Resolution paragraph 16 states:

BE IT FURTHER RESOLVED that . . . The City Manager and Fayetteville PWC are directed to work with the Council designee(s) and DavenportLawrence to review support services departments; to identify any efficiencies from possible realignment and consolidation in the following departments; and to identify and recommend a plan for the realignment and consolidation, and improved coordination, of support

services functions to include by way of example and not limitation: human resources, communications, finance and treasury, budgeting and capital planning, information technology, organizational development, strategic planning, audit, procurement, fleet management, call center, emergency management and disaster preparedness, and such other activities as may be in the best interest of the City consistent herewith.

On the other hand, the Charter places the Commission in full charge and control of all aspects of the utilities, including human resources, finance, budgeting, capital planning, contracting, and management.

Section 6.3: Commission shall have full charge and control and the general supervision and management of the electric utility plant, the waterworks and sewerage, and shall collect all rents and profits accruing therefrom and shall make all disbursements on account of the same.

Section 6.6: All funds handled by said commission shall be paid over to the treasurer thereof, and all disbursements by said commission shall only be made by order upon the treasurer, signed by the secretary and countersigned by the chairman thereof, and all orders shall state for what object the same is drawn and a record shall be kept of all such orders.

Section 6.9: Proceeds from the sale of any bonds, and all other special funds . . . shall be paid over to the treasurer of said commission, who shall disburse the same as provided in this act.

Section 6.10: Said commission is hereby fully authorized and empowered to make all necessary contracts in the property management of said public utilities and other property under its management and control, and to employ and discharge all necessary superintendents, clerks, accountants, laborers, artisans and other help in said management; to prescribe the duties and fix the salaries of each, and to require such bonds of each as said commission may deem proper to the successful management of said property.

Section 6.13: At the end of each fiscal year said commission shall publish a complete report for the year . . .

Section 6.18: Commission shall cause to be prepared and published in a newspaper in Cumberland County a budget in the same manner as is required of the city council.

Charter Chapter § 5.1(1): The city manager shall have no right or power to appoint or remove the superintendent, manager, or other employees of the public works commission of the city of Fayetteville.

The conflicting pronouncements and mandates as to PWC and the Commissioners' duties, rights, and obligations create uncertainty and confusion. This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Act is specifically appropriate and intended to enable judicial declaration to address and resolve.

LEGAL RESPONSIBILITIES UNDER BOND ORDERS

62. The Commission has obligations, separate and apart from the City, under a Bond Order adopted November 5, 1990 authorizing the issuance of Public Works Commission Revenue Bond in the amount of \$62,390,000 (“Bond Order”). The Bond Order provides, *inter alia*, as follows:

- a. “Section 203. Execution: Limited Obligations: . . . Neither the State of North Carolina nor any political subdivision thereof, including the City of Fayetteville, North Carolina, shall be obligated to pay the principal of, premium, if any, or interest on the Bonds or other costs incident thereto except from the revenues, receipts and payments pledged therefor . . .
- b. Section 501. Covenant to Fix Rates and Charges. . . . There will be generated, in each Fiscal Year, sufficient cash to pay in a timely manner all Operating Expenses, Demand Charge Components, Debt Service Requirements, principal of and interest on GO System Bonds
- c. Section 503. Operation and Maintenance: Issuer and the Commission covenant and agree that they will: (a) at all times cause the System to be operated properly, in an efficient manner and in accordance with applicable laws, regulations and rules; cause the System to be operated and maintained, preserved and kept in good repair, working order and condition; cause to be made all necessary and proper repairs, replacements and reconstructions of the System; and cause all affairs of the System to be conducted properly and advantageously and shall appropriate and apply the Revenues to that purpose. . .
- d. Section 508. City Transfers. If money is available therefor and unless a Default has occurred and is continuing, there shall be payable to the Issuer

from moneys held in the General Fund pursuant to Section 602(b)(8) on or before the 20th day of each month an amount mutually determined and agreed upon from time to time by the Issuer and the Commission and budgeted by the Commission in such Fiscal Year as a required transfer from the General Fund to the Issuer's general fund. . . .

- e. Section 601. Establishment of Fund. The following funds are hereby created and established with the Trustee: (a) City of Fayetteville, North Carolina, PWC Revenue Bonds, General Fund to be held by the Commission . . .
- f. Section 602. General Fund: Payments Thereto; Use Thereof. (a) All Revenues received or collected shall be deposited in the General Fund when received. . . .
- g. Section 607. General Fund Excess. The Commission, in its discretion . . . may transfer on or after June 30 of each Fiscal Year any balances remaining in the General Fund at the end of such Fiscal Year after making all deposits or payments required by Section 602 during such Fiscal Year, in whole or in part, to any other fund or account designed by the Commission, including additional transfers to the Issuer, provided that a Commission Representative shall first certify to the Trustee that, in the opinion of such Commission Representative, the transfer of such amount will not have a material adverse effect on the Issuer's ability over the next twelve calendar months to make all payments and deposits required by Section 602 and to meet all other financial obligations imposed by this Bond Order. . . .
- h. Section 6.11. Annual Budget (a) Prior to the beginning of each Fiscal Year, the Commission shall adopt a budget for the ensuing Fiscal Year, which shall be called the Annual Budget. (b) The Annual Budget shall be prepared in such manner as to show in reasonable detail (1) all rates, fees and other charges to be derived by the Commission to pay . . .
- i. Section 6.12. Records, Accounts and Audits. The Commission shall keep the funds, accounts, subaccounts, money and investments of the System separate from all other funds, accounts, money and investments, if any, of the Commission or the Issuer and shall keep accurate records and accounts of all items of costs and all expenditures relating to the System and of the revenues collected and the application of such Revenues. Such records and accounts shall be open to the inspection of the Trustee . . . The Commission shall cause its accountants to prepare and deliver to the Trustee and the Local Government Commission within 180 days after the close of each Fiscal Year an audit of the Commission's books and accounts . . .

The City's pronouncements and mandates as to PWC and the Commissioners' duties, rights, and obligations create uncertainty and confusion as to compliance with the Bond Order provisions set forth above. This conflict, uncertainty, and confusion indicate and constitute a controversy for which the Act is specifically appropriate and intended to enable judicial declaration to address and resolve.

CLAIMS FOR RELIEF / DECLARATIONS SOUGHT

63. Plaintiffs seek a declaratory ruling clarifying the Commission's power and authority under the Charter and the Local Government Budget and Fiscal Control Act, N.C. Gen. Stat. Ch. 159, Art. 3, and specifically request the Court to declare:
 - a. The PWC, under the supervision and control of the Commissioners, shall operate as a separate public authority, as defined by the Local Government Budget and Fiscal Control Act, with all obligations, rights, and responsibilities thereof. The Commissioners have the rights, responsibility, and authority to act consistent with the provisions of the Charter without further control by any City officers and the City council, except as expressly provided in Charter Chapter VI, Sections 6.1, 6.7, 6.15, and 6.20.
 - b. The Commission, by and through its Commissioners, has full power and control over the utility, which includes but is not limited to creating all policies and procedures for which the Commissioners in their sole discretion deem necessary or proper for the proper function and management of the utility.

- c. The Commission, acting by and through its Commissioners, is a separate Public Authority and has the authority to enter into contracts with the City, and such Contracts are enforceable and cannot be unilaterally rescinded or disregarded.

64. Plaintiffs seek a declaratory ruling clarifying PWC's and the Commissioners' authority under the Charter and the Local Government Budget and Fiscal Control Act, N.C. Gen. Stat. Ch. 159, Art. 3, and specifically over the finance and budget functions of PWC and specifically request the Court to declare:

- a. The Commissioners have exclusive power and authority to set PWC's budget, its revenue (as generated by rates and fees PWC exclusively sets) and expenditures. This includes but is not limited to:

- i. The authority to maintain operating and reserve funds, in reasonable and prudent amounts determined in their discretion for operations, emergencies, repairs, capital needs and routine maintenance.
- ii. The authority to determine and/or calculate what constitutes adequate operating and reserve funds in the reasonable judgment and discretion of the Commissioners.
- iii. The sole authority to possess, deposit, account for, control and spend these funds in the reasonable judgment and discretion of the Commissioners.

- iv. The authority to retain and contract with consultants, advisors and professionals of it's choosing as PWC, in its sole discretion, deems necessary or proper for these purpose.
 - b. The City cannot prepare, reject, or unilaterally amend the budget of PWC without PWC's consent and permission.
 - c. The City is entitled only to funds generated by PWC as set forth in the funds transfer policy agreed to by the Commission or in the budget created by PWC. The Commission calculates and determines if it has excess funds and the extent of those excess funds. Only funds considered and deemed by the Commission, as excess shall be paid to the City. The City has no authority to make any demand for additional funds outside of the funds transfer policy or agreement or the PWC budget. The most recent Funds Transfer Agreement between the City and the Commission is attached hereto as Exhibit 6 and is incorporated herein by reference. The Phase V Funding Agreement between the City and the Commission is attached hereto as Exhibit 7 and is incorporate herein by reference.
 - d. Funds Transfer Agreements cannot be unilaterally rescinded or disregarded by the City.
 - e. The Phase V Funding Agreements cannot be unilaterally rescinded or disregarded by the City.
65. Plaintiffs seek a declaratory ruling clarifying PWC's and the Commissioners' authority over human resources under the Charter and specifically request the Court to declare:

- a. The Commission has the exclusive power and authority to make all personnel decision in conducting its management and operation of the utilities. This includes, but is not limited to:
 - i. The authority to retain and contract with consultants, advisors and professionals of it's choosing as the Commission, in its sole discretion, deems necessary or proper for these purposes.
 - ii. The authority to hire, retain, and assign such other officers or employees of the Commission, as determined by the Commissioners in their reasonable judgment and discretion.
 - iii. The authority to contract with or employ any and all personnel necessary and appropriate to operate and manage the utility operations.
- b. The Legal Policy restrictions on retaining legal counsel by PWC to be null and void as a violation of the Charter.

66. Plaintiffs seek a declaratory ruling clarifying PWC's and the Commissioners' authority over contracting under the Charter and specifically request the Court to declare:

- a. The Commissioners have the exclusive power and authority to make all contracting decision in conducting its management and operation of the utilities, subject to the provisions requiring City Council approval for capital expenditures under Charter Section 6.7. This includes, but is not limited to:

- i. The authority to decide the scope of services that PWC receives by contract and that PWC provides by contract. The City cannot assign other City responsibilities or services to PWC or require PWC to receive services from (and pay for those services from) the City without the Commission's mutual written consent and agreement.
 - ii. The authority to enter into contracts with the City and commit funds for projects. The City cannot unilaterally demand PWC to expend or commit to a particular project without the express written agreement by PWC. Once contracts are entered into by the City and PWC, the City cannot unilaterally rescind or disregard such contracts.
- 67. Plaintiffs seek a declaratory ruling regarding its policies and practices in compliance with the terms of the Bond Order and specifically request the Court to declare:
 - a. No actions by the City, including any actions related to budget and finance functions, shall interfere, impede, compromise or jeopardize PWC's obligations under the Bond Order.
 - b. PWC shall continue its current finance and budgeting procedures, including, but not limited to, development of its own budget; determination of appropriate reserves; PWC's maintaining, accounting, and auditing of segregated funds, separate from the City; and sole

authority to agree to and certify the appropriateness of any transfers to the City in order to ensure compliance with the provisions of the Bond Order.

68. Plaintiffs seek injunctive relief, if and as necessary, barring the City from imposing any policy, or passing and enforcing any resolution, or attempting to transfer any funds in excess of the current agreement, in violation of the Charter, or as necessary to enforce the declarations sought in this Complaint.

PRAYER FOR RELIEF

Wherefore, Plaintiffs respectfully request that this Court:

1. Declare Plaintiffs legal rights and responsibilities as set forth above and specifically requested in paragraphs 63 to 67 and subparts thereof.
2. Grant preliminary and injunctive relief if and as needed to enforce the declarations requested;
3. Enter such other relief as the Court deems just and proper.

Respectfully submitted this the ____ day of _____, 2014

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