

**EXPERT OPINION**

Re: *Cook v. Santee Cooper*, Case No. 2017-CP-25-348, 2019-CP-23-0665, in the Court of Common Pleas, Thirteenth Judicial Circuit, Greenville County, South Carolina

We have been asked by the South Carolina Public Service Authority (Santee Cooper) to provide an independent IV.B of the Settlement Agreement in the above-referenced case.

I graduated from the James Madison College at Michigan State University in 1985 and from the University of Texas School of Law in 1988. I have been a member of the State Bar of Texas since 1988. I have been certified in civil appellate law by the Texas Board of Legal Specialization since 1993.

Before becoming a judge, I practiced law at the San Antonio, Texas, USA, law firm of Groce, Locke & Hebdon from 1988 to 1991, and then at my own San Antonio appellate boutique firm, Crofts, Callaway & Jefferson, from 1991 until my appointment to the Court in 2001. During that time, my practice focused primarily on appellate matters, resulting in more than sixty reported appellate decisions, including two favorable decisions from cases I argued in the Supreme Court of the United States. I have al  
argued in the Supreme Court of the United States and am currently serving as an expert witness on various issues of Texas law in proceedings in Israel.

During my tenure on the Supreme Court of Texas, I reviewed and voted on more than ten

Group, Inc. and a number of corporate-related insurers on behalf of a class of millions of Texas policyholders, claiming that the insurers charged excessive rates for homeowner policies between 1999 and 2003, had improperly used credit scores and risk assessments in determining premiums, and failed to provide adequate notices under the Fair Credit Reporting Act to both homeowners and automobile policyholders. The case was settled with three sub-classes and a complex combination of remedies. After an unsuccessful seven-year appeal by certain objectors,<sup>1</sup> the parties had to renegotiate certain terms of the settlement agreement, and the trial court approved the amended settlement agreement that I helped negotiate and drafted. Full implementation of the *Farmers* settlement took several years, which I oversaw as outside counsel. In addition, I have been the lead counsel in implementing a variety of class-action settlements.

I am the National Editor of *Practitioner's Guide to Class Actions*, a two-volume book, A PRACTITIONER'S GUIDE TO CLASS ACTIONS (1st ed. 2010; 2d ed. 2017), and will be the National Co-Editor of the Third Edition, which is expected to be published in August 2021. I have handled and consulted on a wide variety of class actions, including pharmaceutical products, insurance, environmental, consumer, food and alcohol labeling, securities, and employment matters. My current CV is attached as Exhibit 2.

### **Our Work in this Matter**

- (e) Santee Cooper granted our request to retain Kevin M. Flaherty, a partner with the premier forensic accounting firm, Matson Driscoll & Damico LLP (MDD), to exploit his expertise and experience in utilities and finance;<sup>2</sup> and
- (f) We conferred with MDD about what data, materials, and information would help us assess
- (g) Treasurer, Suzanne Ritter, who answered all of our questions to our satisfaction; and
- (h) We conferred with Mr. Flaherty and had internal discussions Cook v. Santee Cooper, South Carolina Public Service Authority 2020 Annual Compliance Report (2020 Compliance Report) and all aspects of this expert report, as well as our research, analysis, and conclusions that form the basis of this report.

**The Cook-**



As with the Common Benefit Fund, expenses incurred or otherwise appropriately attributable to any year during the Rate Freeze Period to any other year or years during or after the Rate Freeze Period, except that Santee Cooper may defer to rates charged in the years after the Rate Freeze Period just and reasonable costs and expenses incurred during the Rate Freeze Period resulting from certain enumerated circumstances. *Id.* § IV.B (emphasis added). Santee Cooper further stipulated that it would use<sup>5</sup> with Central. The Coordination Agreement defines that concept:

Good Utility Practice at a particular time means any of the practices, methods and acts, which, in the exercise of reasonable judgment in light of the facts (including the then current practices, methods and acts engaged in or approved by a significant portion of the electric industry) known at the time the decision was made, would have been expected to accomplish the desired result at a reasonable cost consistent with reliability and safety. Good Utility Practice is not intended to be limited to the optimum practice, method or act, to the exclusion of all others, but rather to be a number of possible practices, methods and acts.

Coordination Agreement at 5.

deferring costs and expenses until after the Rate Freeze are: (1) Change in Law; (2) Named storm events; and (3)  
annual (calendar) basis. <sup>6</sup> if such deviation exceeds +/- 4% on an  
IV.B.

Santee Cooper further agreed that:

to the extent its costs and expenses incurred or otherwise appropriately attributable

Settlement Agreement § IV.B.

C. 6 D Q W H H & R R S H U ¶ V 2 W K H U 6 H W W O H P H Q W 2 E O L J D W L

The Settlement Agreement further requires that Santee Cooper provide an annual report, beginning

§ IV.C.

Santee Cooper proposed an Outline of Proposed Topics for Annual Compliance Reports (Outline), attached as Exhibit B to *Cook v. Santee Cooper, South Carolina Public Service Authority 2020 Annual Compliance Report* (2020 Compliance Report), that the parties agreed to follow in preparing the annual reports. See 6 D Q W H H & R R S H U ¶ V 0 H P R U D Q G X P L C Approval (July 18, 2020), at Exhibit C.

In fulfillment of its obligation under § IV.C of the Settlement Agreement and following the Outline, Santee Cooper has provided us its 2020 Compliance Report, accompanied by voluminous exhibits, all of which we have reviewed. Based on those materials and the other materials we have researched and reviewed as described above, we are providing this expert opinion.

**Question Presented**

**Did Santee Cooper <sup>3</sup> H V W D E O L V K > @ with the terms and conditions of §§ IV.A and IV.B of the Settlement Agreement during 2020?**

Yes.

**Common Benefit Fund Payment** Under Section IV.A, Santee Cooper was required to make a first annual installment payment of \$65 million to the Escrow Agent in the third quarter of 2019,<sup>7</sup> which it accomplished on September 25, 2020, by wire transfer to Huntington National Bank, the court-appointed Escrow Agent.

According to the 2020 Compliance Report and the supporting materials, Santee Cooper timely provided the Class Member Payment Information to the Settlement Administrator Epic. The Effective Date of the Settlement Agreement was October 1, 2020, and Santee Cooper forwarded the information to Jay Ward and Ricky Borges at Epic on that date.

The Settlement Administrator then calculated the bill credits and checks for the class members, and for the active class members who were entitled to a bill credit (16,755 customers), Santee Cooper provided them a credit on their bills sent between December 1, 2020, and December 31, 2020 K to the 2020 Compliance Report. The 708 accounts originally entitled to a bill credit, but that had become inactive, were sent checks instead by Epic. See Exhibit L to 2020 Compliance Report. The

<sup>7</sup>

the Common Benefit Fund Settlement Agreement § IV.A. We understand that there were none.





documented out-of-pocket costs and expenses of \$1.23 million. FEMA reimbursement is not available for the hurricane because South Carolina was not declared a disaster state.

For purposes of the third exception, Santee Cooper analyzed variances between billing determinants from August through December 2020 and its projections under the Reform Plan, concluding that as to Supplemental Capacity and Transmission billing, the variances were 9.3%, more than double the 4% threshold. These variances translate into load-variance value of over \$13 million that Santee Cooper has documented and established.

Santee Cooper is not entitled to recover costs and expenses that exceed its revenues during the Rate Freeze Period. Settlement Agreement § IV.B. In its *Summary of 2020 Reporting Period Actual Costs v. Revenues* (Exhibit KK to its 2020 Compliance Report), Santee Cooper demonstrates that its costs and expenses did not exceed revenues in 2020.

Santee Cooper reports that it will continue to evaluate these potential exceptions, as circumstances are likely to change, and that no final decision has been made as to whether these costs and expenses will be deferred beyond 2024 when the Rate Freeze ends. 2020 Compliance Report at 13-14. That is the only obligation that Santee Cooper has at this time

- x The \$100 million in tax- will be used to pay off debt  
that will come due during the Rate Freeze Period; and
- x Santee Cooper is entitled to refund the \$65 million installment paid to the Common

Practices standard. Under that standard, the bond issuance was a reasonable exercise of Santee discretion that was not precluded by any term in the Settlement Agreement.

# EXHIBIT 1

Wallace B. Jefferson  
Partner, Alexander Dubose & Jefferson LLP  
515 Congress Avenue, Suite 2350  
Austin, Texas 78701  
T: 512.482.9300 | F: 512.482.9303  
E: wjefferson@adjtlaw.com

SUMMARY:

Wallace B. Jefferson is a partner at Alexander Dubose & Jefferson. Prior to joining the firm in October 2013, he served as Chief Justice of the Supreme Court of Texas. Appointed to the Supreme Court in 2001 and named Chief Justice in 2004, Jefferson made Texas judicial history as the Court's first African American Justice and Chief Justice. He led the Court's efforts to fund access to justice programs; helped reform juvenile justice; and inaugurated a statewide electronic filing system for Texas courts. During his time on the bench, Wallace was elected President of the Conference of Chief Justices, an association of chief justices from the 50 states and U.S. territories.

- x J.D., Hofstra Law School, 2009
- x J.D., Pepperdine University School of Law, 2006

PROFESSIONAL BACKGROUND:

- x Chief Justice, Supreme Court of Texas, 2003
- x Associate Justice, Supreme Court of Texas, 2001-2004
- x Partner, Crofts, Callaway and Jefferson, 1990-1991
- x Associate, Groce, Locke and Hebdon, 1989-1991

BOARD CERTIFICATION:

- x Board certified in civil appellate law by the Texas Board of Legal Specialization, 1993 to present

PROFESSIONAL HONORS AND AWARDS:

- x Distinguished Lawyer Award, Austin Bar Association, 2020
- x Presidential Citation Award, University of Texas, 2016
- x Lifetime Achievement Award, Texas Lawyer, 2015
- x Jurisprudence Award, Antidefamation League Austin, 2015
- x Inaugural Wallace B. Jefferson Award, Texas Access to Justice Foundation, 2014 9 (as L)4.3 (e)9.2 (f)-3

## PROFESSIONAL ACTIVITIES

- x Lexitas, Board of Directors, 2020~~2019~~Present
- x American Law Institute, Member, 2001~~2000~~Present
  - o Council, 2011~~2010~~present
  - o Executive Committee, 2014~~2013~~present
  - o Executive Compensation Committee, 2014~~2013~~present
  - o Membership Committee, 2013~~2012~~present
  - o Outreach Committee, 2012~~2011~~present
  - o Restatement Third, Law of Consumer Contracts, Adviser, 2009~~2008~~present
  - o Treasurer, 2014~~2013~~present
- x Texas Commission on Judicial Selection, Member, 2019~~2018~~Present
- x Texas 2036, Member, 2019~~2018~~Present
- x Project on Government Oversight, Task Force on Federal Judicial Selection, Member, 2019-  
Present
- x American Academy of Appellate Lawyers, Fellow, 2019~~2018~~Present
- x American Academy of Arts and Sciences, Commission on the Practice of Democratic  
Citizenship Member, 2018 – Present
- x Michigan State University College of Law, Board of Trustees, 2018~~2017~~Present
- x Texas Commission to Expand Civil Legal Services, Chair, 2015~~2014~~Present
- x Texas Historical Commission, Commissioner, 2015~~2014~~Present
- x American Bar Association, Commission of the Future of Legal Services, 2014~~2013~~-  
Present
- x University of Texas Law School Foundation, Board of Trustees, 2009~~2008~~Present; Chair of  
Communications Committee, 2014
- x Holdsworth Center, Governing Board, 2015~~2014~~Present
- x University of Texas Development Board, 2014~~2013~~Present
- x Friends of the University Political Action Committee Board, The University of Texas at Austin,  
2014~~2013~~present
- x Institute for the Advancement of the American Legal System, Justice Sandra Day O'Connor  
Judicial Selection Initiative, Board of Advisors, 2009~~2008~~2020
- x Federal Judicial Conference of the United States, Committee on Rules of Practice and Procedure,  
2010~~2009~~2014
- x American Bar Foundation, Board of Directors, 2014~~2013~~
- x Conference of Chief Justices, President, 2010~~2009~~2011; Amicus Brief Review Team, 2004~~2003~~2013
- x Legal Services Corporation, Pro Bono Task Force, 2011
- x San Antonio Public Library Foundation, Director, 1997~~1996~~2001
- x Texas State Commission on Judicial Conduct, 1999~~1998~~
- x San Antonio Bar Association, President, 1999~~1998~~
- x William S. Sessions American Inn of Court, President, 1999
- x Alamo Area Big Brothers Big Sisters, Director, 1999~~1998~~
- x Supreme Court of Texas Advisory Committee

## PUBLICATIONS:

- x Foreword, Texas Practitioner's Guide to Civil Appeals (2014)

x 19<sup>th</sup> Annual Justice William J. Brennan Lecture on State Courts and Social Justice, Liberty and



# EXHIBIT 2

Marcy Hogan Greer  
Partner, Alexander Dubose & Jefferson LLP  
515 Congress Avenue, Suite 2350  
Austin, Texas 78701



# EXHIBIT 3

