

members, including the City. (Aff. of Chau Nguyen ¶¶ 2-3 filed December 9, 2016 (“1st Nguyen Aff.”).)

46. In or around November, 2012, the City requested that ECG propose options for raising revenue sufficient to cover another expected deficit in the electric utility for fiscal year 2013. (Pls SMF ¶ 37; Defs Resp. ¶ 37; 1st Nguyen Aff ¶ 4.) The City provided ECG Director of Analytical Services Chau Nguyen with information necessary to make the requested calculations and prepare the requested proposals. (1st Nguyen Aff. ¶¶ 3-4.) Based on the information provided, Nguyen concluded that: (a) Over the previous two fiscal years, the City’s electric utility faced declining revenue and increased costs of power; and (b) the City’s wholesale electric cost budget faced a \$3,285,885 deficit in operating revenues. (Id. ¶ 5.)

47. When calculating the \$3,285,885 deficit, Nguyen did not take into account the approximately \$4,355,592 paid in Voluntary Deposits via the MCT Monetization Process. (Nguyen Dep. 43:14-44:21.) Nguyen testified that if the power cost figure was reduced by \$4,355,592, there would not have been a deficit. (Id. 42:5-21.)

48. At the City’s request, Nguyen and MEAG representative Stuart Jones presented at a Special Called Workshop held on November 15, 2012. (Defs SMF ¶ 65; Pls Resp. ¶ 65.)

49. On November 19, 2012, at a Regular City Council Meeting, former Mayor

Pittman presented a resolution for ECG to examine the City's electric utility rates, which the City Council adopted. (Id.) Mayor Pittman signed the Resolution to Examine Electrical Utility Rates the same day. (Defs SMF ¶ 66; Pls Resp. ¶ 66.) The Resolution sought direction from ECG on eliminating a winter rate and using the summer rate year-round, and updating the City's PCA. (Id.)

50. Nguyen attended several public meetings with the City Council, Mayor Pittman, and City staff in December 2012 where he answered questions and learned the City's objectives for eliminating the projected deficit. (Defs SMF ¶ 67; Pls Resp. ¶ 67.)

51. Based on the information provided by the City, and his understanding of the City's objectives, Nguyen prepared two options, or "proposals," and presented them at City Council meetings held on December 17, 2012 and January 7, 2013. (Defs SMF ¶ 68; Pls Resp. ¶ 68.) At the December 17, 2012 meeting, at which former Mayor Pittman was present, City Council Member Gothard made a motion to adopt proposal #2. (White Aff. Ex. M at 10.) City Council Member Reed made a motion to postpone the discussion on the Electrical Rate Study until the January 7, 2013 and this motion carried unanimously. (Id.)

52. The January 7, 2013 meeting agenda reflects the first item is the "electrical rate study" and Nguyen made a presentation. (Id. Ex. O at 3.) The verbatim minutes show the City Council and former Mayor Pittman deliberated on proposal

#2. (Id. Ex. P.) Specifically, former Mayor Pittman stated she had written about the issue in her “email newsletter that [rates] [w]ere going up ... [s]o, the City knew.” (Id. 4.) She also stated the City Council “need[s] to make the motion to adopt the power cost adjustment rate [or PCA], the ECCR [or environmental compliance cost recovery rider], and the EMR [or economic mitigation rider].” (Id.)

53. Proposal 2 of the ECG Rate Study (“Proposal 2”) recommended a PCA rate/rider of \$0.0102 and an ECCR rate/rider of \$0.0062. (Pls SMF ¶¶ 41, 42; Defs Resp. ¶¶ 41, 42.)

54. Proposal 2 stated the combined amount of revenue to be recouped by the respective PCA and ECCR rate/riders would be \$2,156,956 over the 6 month period at issue (January to June 2013). (Pls SMF ¶ 43; Defs Resp. ¶ 43.)

55. Proposal 2 also recommended “rate revision” increases of the various retail rates to produce an additional \$1,128,929 in revenue over the 6 month period (January to June 2013). (Pls SMF ¶ 44; Defs Resp. ¶ 44.)

56. After hearing Nguyen’s recommendations and deliberating on the matter, the City Council adopted Proposal 2 by a vote of 6 to 2. (Pls SMF ¶¶ 45, 46; Defs Resp. ¶¶ 45, 46; White Aff. Ex. O at 3.) Specifically, the January 7, 2013 meeting minutes reflect there was a “motion to approve proposal #2 to adopt a Power Cost Adjustment of 0.0102 kwh and ECCR of 0.0062 kwh and an EMR discount at .0111 effective until June 2013.” (White Aff. Ex. O at 3.)

57. The rates and riders adopted by the City Council in Proposal 2 went into effect on January 8, 2013. (Pls SMF ¶ 47; Defs Resp. ¶ 47; Defs SMF ¶ 71; Pls Resp. ¶ 71.)

58. In the City's records are two versions of Ordinance 001-13, one marked on the first page as "with changes" ("January 2013 Ordinance V.2.") and one not marked "with changes" ("January 2013 Ordinance V.1") (collectively the "January 2013 Ordinances").⁵ (Pls SMF ¶ 1; Defs. Resp. ¶ 1; White Aff. Exs. Q, R; 1st Pittman Aff. ¶ 15, Exs. A, B; 2nd Pittman Aff. ¶¶ 10, 11, Exs. A, B.)

59. January 2013 Ordinance V.1 includes the amendments recommended by Proposal 2, including the revised retail rate, imposition of the Economic Mitigation Rider, and provision for the PCA and ECCR whereas January 2013 Ordinance V.2 did not include the amendments recommended by Proposal 2. (Nguyen Dep. 59:23-62:22, Exs. 5 and 6; White Aff. Exs. Q (§§ 8-2105(c)-(e), 8-2106(a) and R (§§ 8-2105(c)-(e), 8-2106(a).))

60. According to the City's O.C.G.A. § 9-11-30(b) witness, there is nothing "that shows [a January 2013 ordinance] was approved by [the City C]ouncil other than the fact that it was found in [the City's records]" (White Dep. 23:18-22.)

61. The City continued to impose, assess, and collect the Proposal 2 charges

⁵ Former Mayor Pittman admits that both versions appear to bear her signature, but she claims that she did not sign them. (1st Pittman Aff. ¶¶ 23, 24; 2nd Pittman Aff. ¶¶ 19, 20.)

after June 2013. (Pls SMF ¶¶ 50, 51; Defs Resp. ¶¶ 50, 51.)

June 2013 Ordinance

62. Nguyen advised City representatives that the rate increases under Proposal 2 would likely need to remain in effect after FY2013 because existing rates were expected to be insufficient to cover the City's expected electric utility expenses going forward. (1st Nguyen Aff. ¶ 8.)

63. Former Mayor Pittman observed at the January 7, 2013 meeting that, "[c]ome June, we go to, we take off the EMR," but are still "paying [the PCA] along with the [ECCR]." (White Aff., Ex. P at 4.) Former Mayor Pittman continued that as of June 2013, only "the discount drops off," not the riders and rate increase. (Id.)

64. The May 20, 2013 City Council agenda included "Electric Rate Adjustment FY'14." (Aug. 25, 2017 Defs. Not. of Filing, Ex. B at 4.) Nguyen "recall[s] proposing a summer and winter rate for residential service to council" with "the summer rates stay[ing] the same, but [he] present[ed an] option for the winter rate." (Nguyen Dep. 68:22-23; 69:3-4.) **The May 20, 2013 City Council minutes reflect a council member "made a motion to adopt option 1 to reinstate summer/winter rate for residential cost of action of \$900,000."** (Aug. 25, 2017 Not. of Filing, Ex. C at 11.) The motion passed unanimously. (Id.)

65. **The City records reflect Ordinance 019-13 (the "June 2013 Ordinance") was approved May 20, 2013.** (White Aff. Ex. S at 14; Defs SMF ¶ 79; Pls Resp. ¶

79.) The City's records further reflect the June 2013 Ordinance was approved by the City Attorney on July 11, 2013, approved by the City Manager on July 12, 2013, received by the Mayor's Office on July 22, 2013, and received by the City Clerk for distribution on July 26, 2013.⁶ (White Aff. Ex. S at 14.)

66. However, the City admits the June 2013 Ordinance was not voted on and was not adopted at the May 20, 2013 meeting. (Pls SMF ¶ 36; Defs Resp. ¶ 36; June 26, 2017 Pls. Not. of Filing, Ex. A ¶ 15.)

67. In comparing January 2013 Ordinance V.1 and the June 2013 Ordinance, Nguyen testified the June 2013 Ordinance contains the summer and winter rate. (Nguyen Dep. 68:22-69:1, Exs. 5 and 7.)

Recommended Reserve

68. On August 10, 2015, Nguyen and the Electric Utility recommended the City maintain "a minimum (45) forty-five day Electrical Reserve estimated at (\$5,820,229.00)." (Defs SMF ¶ 49; Pls Resp. ¶ 49.) By June 2016, the Electric Utility was projected to have a 42 day reserve, with a balance of approximately \$5,485,000. (*Id.*) Nguyen also gave the City options for 60 and 90 day reserves. (Defs SMF ¶ 50; Pls Resp. ¶ 50.)

⁶ Former Mayor Pittman admits the June 2013 Ordinance appears to bear her signature, but claims she did not sign it. (1st Pittman Aff. ¶¶ 33, 34; 2nd Pittman Aff. ¶¶ 31, 32.)

Annual Budget Ordinances

69. Each fiscal year, the City passes an Adopted Budget by ordinance as required by City Charter and state law. (Affidavit of Lolita Grant ¶ 3 filed Dec. 9, 2016 (“1st Grant Aff.”); Defs SMF ¶ 80; Pls Resp. ¶ 80.)
70. On November 25, 2013, the City passed the FY2014 Adopted Budget by ordinance (the “2014 Budget Ordinance”). (Defs SMF ¶ 81; Pls Resp. ¶ 81.)
71. The 2014 Budget Ordinance encompasses “all revenues” included in the Adopted Budget. (Defs SMF ¶ 82; Pls Resp. ¶ 82.)
72. The City adopted its FY2017 Budget Ordinance (056-016) on June 6, 2016. (Defs SMF ¶ 83; Pls Resp. ¶ 83.)
73. The FY2017 Budget Ordinance includes a “fee schedule” containing the rates set forth in the June 2013 Ordinance with a listed effective date of “the month of June, 2013.” (Aug. 28, 2017 Defs. Not. of Filing, Ex. A at 23; Defs SMF ¶ 84; Pls Resp. ¶ 84.)

Fourth Amended Complaint

On November 2, 2017, Plaintiffs filed the Verified 4th Amended Complaint with claims alleging: the 2010 PCA Ordinance is illegal, *ultra vires*, null and void (count one); the January 2013 Ordinances are illegal, *ultra vires*, null and void (count two); the June 2013 Ordinance is illegal, *ultra vires*, null and void (count three); the City’s imposition and assessment of the Proposal 2 charges is illegal,

and their cross-motion for summary judgment (in which Plaintiffs did not move for summary judgment on count one). (Pls. 2/12/18 Br. 1.) At oral argument, Plaintiffs conceded the 2010 PCA Ordinance was a mere procedural irregularity.

The Court finds the 2010 PCA Ordinance is not illegal, *ultra vires*, null and void.

c. January 2013 Ordinances

The parties seek cross-summary judgment on counts involving the January 2013 Ordinances.

The City concedes “[t]he January 2013 Ordinance was not specifically voted on by the City Council before it was enacted.” (Defs. 2/12/18 Br. 21.) The Court finds the substance of January 2013 Ordinance V.1 was discussed at two public hearings and adopted by City Council in January 2013. See Sec. II ¶¶ 48-56. The Court finds the City substantially complied with the law in adopting January 2013 Ordinance V.1.

The Court finds January 2013 Ordinance V.1 is not illegal, *ultra vires*, null and void. The Court further finds January 2013 Ordinance V.2 was not enacted and is null and void.

d. June 2013 Ordinance

The parties seek cross-summary judgment on counts involving the June 2013 Ordinance.

The City admits the June 2013 Ordinance was not voted on and was not adopted at the May 20, 2013 meeting. (Pls SMF ¶ 36; Defs Resp. ¶ 36; June 26, 2017 Pls. Not. of Filing, Ex. A ¶ 15.)

The Court finds the City deliberated and adopted the substance of the June 2013 Ordinance, which adopted a summer/winter rate instead of just the summer rate contained in the January 2013 Ordinance. See Sec. II ¶¶ 62-64. The Court finds the City substantially complied with the law in adopting the June 2013 Ordinance.

The Court further finds the June 2013 Ordinance is not illegal, *ultra vires*, null and void.


e. Proposal 2 Charges

The parties seek cross-summary judgment on counts involving the Proposal 2 Charges.

Plaintiffs argue the Proposal 2 Charges are illegal, *ultra vires*, and void “because these charges have never been enacted into law by ordinance, as required by Charter Section 5-206.” (Pls. 2/12/18 Br. 24.)

For the reasons previously found in Sec. IIIA(ii)(a)-(d), the Court finds the Proposal 2 Charges were adopted by ordinance.

Additionally, Plaintiffs argue the Proposal 2 Charges are illegal, *ultra vires*, and arbitrary and capricious because “there was not actually a ‘deficit’ in [the



City's] FY2013 electric power budget.” (Id. 26.)

As previously found in Sec. IIIA(i), the Court finds the Electric Utility is not charging ratepayers more than the reasonably estimated cost to the City of providing electric power and there was no requirement that the City use the MCT Credit to reduce ratepayers' wholesale power bill.

Additionally, the City passed its FY2014 Adopted Budget by ordinance on November 25, 2013. See Sec. II ¶¶ 70-73. The 2014 Budget Ordinance states it adopts “all revenues” included in the Adopted Budget and therefore adopted the existing Electric Charges, which included the Proposal 2 Charges. Further, the 2014 Budget Ordinance contains only one “subject matter” – the adoption of operating budgets for the City's enterprise funds. Because the 2014 Budget Ordinance adopted “all revenues,” and has the “force and effect of law” (see Charter § 2-207(a)), the Court concludes that the 2014 Budget Ordinance adopted the Electric Charges.

For these reasons, the Court finds the Proposal 2 Charges are not illegal, *ultra vires*, and arbitrary and capricious.

f. PCA and ECCR Rate/Riders

The City seeks summary judgment on the counts involving the PCA and ECCR rate/riders. Plaintiffs seek summary judgment on count five; however, they do not seek summary judgment on the PCA and ECCR rate/riders portion of count