

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. W-1305, SUB 35
DOCKET NO. W-1300, SUB 77

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
WLI Investments, LLC, 60 Gregory Road,)	
Ste 1, Belville, North Carolina 28451,)	
)	
Complainant)	ORDER ISSUING SUBPOENA
)	TO MICHAEL J. MYERS
v.)	
)	
Old North State Water Company, LLC and)	
Pluris Hampstead, LLC,)	
Defendants.)	

BY THE HEARING EXAMINER: On January 3, 2022, WLI Investments, LLC (WLI), filed a Verified Complaint and Petition for Declaratory Ruling (Complaint), in the above-captioned dockets against Old North State Water Company, LLC (ONSWC), and Pluris Hampstead, LLC (Pluris). In summary, WLI alleged that it has a contract (Development Agreement), with ONSWC for WLI to build and transfer to ONSWC a wastewater collection system by which ONSWC will provide wastewater treatment service to 308 single family residential units in Salter's Haven at Lea Marina Subdivision (SHLM), in Pender County, North Carolina, and to an additional 30 lots to be developed by WLI in the Lea Tract adjacent to but outside of SHLM.

Further, WLI summarized the Joint Application filed on October 9, 2020, in Docket Nos. W-1300, Sub 69 and W-1305, Sub 29 (Transfer Dockets), by ONSWC and Pluris requesting Commission approval for a transfer of the utility franchises and approval of rates for three residential developments located in Pender County from ONSWC to Pluris, with one of the developments expressly identified in the Joint Application being SHLM. WLI alleged that ONSWC has breached the Development Agreement and that Pluris has violated the Public Utilities Act (Act), with regard to ONSWC's obligations under the Development Agreement. WLI attached a copy of the Development Agreement to its Complaint as Exhibit A. In conclusion, WLI requested that the Commission issue a declaratory ruling that ONSWC has certain obligations to WLI under the Development Agreement, and that Pluris should be required to pay fines for alleged violations of the Act.

On January 18, 2022, ONSWC and Pluris (Defendants), filed a joint Response to Complaint. On February 1, 2022, WLI filed a Reply.

On September 13, 2022, WLI filed a Motion for Issuance of Subpoena to Michael J. Myers. In summary, WLI stated that Michael J. Myers (Myers) signed the Development Agreement on behalf of ONSWC but is no longer affiliated with ONSWC, and that Myers has indicated that he will not voluntarily testify at the hearing, or voluntarily participate in depositions or produce documents. WLI further stated that it believes that Myers knows of information and possesses documents that are material and relevant to the issues in this proceeding because he can provide evidence about the intent of the parties at the time the Development Agreement was signed and the dealings of the parties during the executory period of the Development Agreement, as well as evidence about standards of reasonable conduct for public utilities, ONSWC's policies and practices in dealing with real estate developers, and the performance on the Development Agreement. WLI requested that the Commission enter an order issuing a subpoena requiring Myers to testify and produce documents as a witness and a deponent.

On September 14, 2022, ONSWC filed a Response to WLI's motion requesting that issuance of the subpoena be denied. In summary, ONSWC's objection is that the Development Agreement is not ambiguous and speaks for itself. Therefore, ONSWC contends that testimony, documents and other evidence that might be provided by Myers about the parties' intent or customary business practices is inadmissible because it is parole evidence. In addition, ONSWC stated that Pluris supports ONSWC's opposition to the issuance of the subpoena.

Discussion

Standard of Review

When acting in its judicial capacity, the Commission applies the North Carolina Rules of Evidence (NCRE) "insofar as practicable." N.C. Gen. Stat. § 62-65. Further, although the Commission often looks to the North Carolina Rules of Civil Procedure for guidance, it is not strictly bound to apply them. N.C. Gen. Stat. § 62-60; State ex rel. Utilities Comm'n v. Springdale Estates Ass'n, 46 N.C. App 488, 491, 265 S.E.2d 647, 649 (1980).

Pursuant to N.C. Gen. Stat. § 62-62, in pertinent part:

The Commission shall have the authority to require the applicant for a subpoena for persons and documents to make a reasonable showing that the evidence of such persons or documents will be material and relevant to the issue in the proceeding.

Pursuant to NCRE Rule 401, "relevant evidence" is defined as

[e]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C. Gen. Stat. § 8C-1, Rule 401.

Finally, under Rule 26(b)(1) of the North Carolina Rules of Civil Procedure, in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.

WLI's Complaint includes an allegation that the Development Agreement is "at best ambiguous" as to the intent of the contracting parties to allow grinder pumps and low-pressure facilities (LPF) for wastewater collection within the Lea Tract. (Complaint, at 5, fn. 3). In addition, WLI alleges that ONSWC has breached the Development Agreement by failing to cooperate with WLI in obtaining permits required to make water and wastewater service available to the Lea Tract. WLI alleges that this constitutes a material breach of the Development Agreement. *Id.* at 6. Moreover, WLI alleges that Pluris unjustly and unreasonably exercised operational control over ONSWC, thereby causing ONSWC to decide to refuse acceptance of LPF for wastewater collection in the Lea Tract. *Id.* at 9-10.

Relevant Information

The signature block in the Development Agreement states, in pertinent part:

[a]nd Utility [ONSWC] has caused this instrument to be executed by its corporate officer authorized to execute and seal this contract on behalf of the corporation, the day and year first above written.

Complaint, Exhibit A, at 16.

In addition, the identifying line under Myers's signature on behalf of ONSWC states:

By: Michael Myers, Manager

Id. at 17.

The Hearing Examiner determines that it is reasonable to conclude that Myers, as a Manager of ONSWC and an authorized signatory to the Development Agreement, could have been involved in discussions and actions that are evidence or could lead to evidence of the intent of the contracting parties, an executory breach of the Development Agreement by ONSWC, or operational control of ONSWC by Pluris. Such evidence could have a tendency to make the existence of facts that support WLI's claims more probable or less probable. As a result, the evidence would be relevant under NCRE Rule 401.

Finally, ONSWC may be correct in its contention that testimony and documents extrinsic to the Development Agreement will be inadmissible at trial. However, it is too early in the proceedings to decide that issue. In addition, as noted above, Rule 26 allows discovery of information that “appears reasonably calculated to lead to the discovery of admissible evidence.” The Hearing Examiner determines that the testimony and documents sought by WLI from Myers meet that test.

Conclusion

Based on the forgoing and the record, the Hearing Examiner concludes that the Complainant has made a reasonable showing that the testimony and documents of Michael J. Myers will be material and relevant to the issues in this proceeding. As a result, there is good cause to issue a subpoena pursuant to N.C. Gen. Stat. § 62-62 requiring Michael J. Myers to appear and testify at the hearing on December 6, 2022, to produce documents that are in his possession or control in response to discovery requests, and to make himself available, upon proper notice and at a reasonable location, as a deponent in one or more depositions to be scheduled by the parties.

The Chief Clerk is directed to issue the attached Subpoena to Michael J. Myers immediately after the issuance of this Order.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the day of 19th September, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, reading "Erica N. Green". The signature is written in a cursive, flowing style.

Erica N. Green, Deputy Clerk

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v.)	SUBPOENA TO
)	MICHAEL J. MYERS
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Old North State Water Company, LLC and)	
Pluris Hampstead, LLC,)	
Defendants.)	

**TO: Michael J. Myers
Envirolink, Inc.
4700 Homewood Ct.
Ste. 108
Raleigh, NC 27609**

YOU ARE HEREBY COMMANDED to appear in the above-captioned proceeding before the North Carolina Utilities Commission in Commission Hearing Room 2115, Dobbs Building, 430 N. Salisbury St., Raleigh, North Carolina, as a witness on the part of WLI Investments, LLC, on December 6, 2022, at 10:00 a.m. and continuing from day-to-day until released by the Commission; and

YOU ARE HEREBY FURTHER COMMANDED to cooperate with the parties in producing documents in response to discovery requests and to make yourself available as a deponent in one or more depositions to be scheduled by the parties, upon reasonable notice of not less than 10 days and at a place within a reasonable distance from your residence or place of business.

ISSUED BY: 

DEPUTY CLERK – NORTH CAROLINA UTILITIES COMMISSION

DATE ISSUED: 9/19/2022

Patrick Buffkin, representing WLI Investments, LLC (Attorney Requesting Subpoena)

RETURN OF SERVICE

To Be Completed by Sheriff or Other Process Officer:

Served the _____ day of _____, 2022.

Served by: _____ (name)

_____ (title)

Note to Sheriff or Other Process Officer: Please make return to Chief Clerk, North Carolina Utilities Commission, 4325 Mail Service Center, Raleigh, North Carolina 27699-4300.