STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1333, SUB 0

In the Matter of Application by Currituck Water and Sewer, LLC and Sandler Utilities at Mill Run, LLC for Authority to Transfer the Sandler Utilities at Mill Run Wastewater System and Public Utility Franchise in Currituck County, North Carolina, and for Approval of Rates	))))))))	EXPEDITED REQUEST FOR APPROVAL OF AGREEMENT BETWEEN CURRITUCK WATER & SEWER, LLC AND ENVIROLINK, INC.

EXPEDITED REQUEST FOR APPROVAL OF AGREEMENT BETWEEN CURRITUCK WATER & SEWER, LLC AND ENVIROLINK, INC.

Currituck Water & Sewer, LLC ("Currituck") respectfully requests the Commission approve the Utility Management Services Agreement ("Agreement") between Currituck and Envirolink, Inc. ("Envirolink"). In support of this Request, Currituck states as follows:

INTRODUCTION AND SUMMARY

On July 27, 2022—nearly two (2) years ago—the Agreement between Currituck and Envirolink was presented to the Commission. Despite the Commission's explicit findings in September, 2022 that (1) Currituck had the technical, managerial, and financial capacity to own and operate the Eagle Creek Wastewater System; (2) Currituck filed the Agreement with the Commission and it was entered into evidence; and (3) the entirety of the Settlement Agreement between Currituck and the Public Staff had been approved, the Public Staff has now raised an expensive, time-consuming, and unnecessary procedural complaint relating to the Agreement. Specifically, the Public Staff contends that notwithstanding the foregoing, as well as explicit and long-standing North Carolina law, the Agreement has somehow not been approved by the Commission. For this reason, it takes the unfortunate position that Currituck cannot pay Envirolink

any fees, commissions, or compensation of any description whatsoever until Currituck makes *another* filing seeking duplicative approval of the Agreement. Exhibits A and B, May 10, 2024 email correspondence from R. Coxton, attached hereto.

No party—the Public Staff included—has raised any objection to any payments made by Currituck pursuant to that Agreement. Curiously, the Public Staff has all but conceded the Agreement has been timely and appropriately filed with and approved by the Commission by openly engaging with Currituck and Envirolink over operational, customer service, and related issues. *See, e.g.*, Exhibits C, D, and E, correspondence between Currituck and Public Staff, attached hereto; and May, June, and July Monthly Updates filed by Currituck in Docket W-1333, Sub 5. Thus, even if it were correct that Currituck still needed to make *another* filing concerning the Envirolink Agreement (and it clearly is not, for the reasons set forth below), the harm associated with this supposed procedural oversight is *de minimus* as to any party other than Currituck itself, which would have to incur additional fees and costs. Therefore, for the reasons set forth below, Currituck requests expedited approval of the Agreement to prevent further harm and delays.

FACTUAL BACKGROUND

On or about May 19, 2021, Currituck and Sandler Utilities at Mill Run, LLC ("Sandler") filed a joint application for transfer of a public utility franchise and for approval of rates in this matter. Subsequently, Currituck and the Public Staff – North Carolina Utilities Commission ("Public Staff") engaged in settlement discussions and ultimately filed a Settlement Agreement and Stipulation ("Settlement Agreement") on June 7, 2022.

Pursuant to Paragraph II.J of the Settlement Agreement, Currituck "agree[d] to file for Commission approval its agreement with Envirolink pursuant to N.C.G.S. § 62-153 after the

Commission has approved the transfer application and prior to closing." The Commission approved the Settlement Agreement on September 13, 2022.

In the Eagle Creek CPCN Order, the Commission found that "[p]ursuant to the Stipulation and N.C. Gen. Stat. § 62-153, on July 27, 2022, Currituck filed with the Commission its Utility Management Service Agreement with Envirolink." Eagle Creek CPCN Order FOF ¶ 21. The Commission further found that "[t]he provisions of the Stipulation are just and reasonable to all parties to this proceeding, as well as to Sandler's customers, and service the public interest. It is appropriate to approve the Stipulation in its entirety." *Id*. ¶ 22. It also found that "Currituck has the technical, managerial, and financial capacity to own and operate the Eagle Creek Wastewater System." *Id*. ¶ 23. These conclusions are further echoed in the Commission's Evidence and Conclusions for Findings of Fact Nos. 20-21 and 22-23. *See id*. (e.g., explaining that Currituck appropriately filed the Envirolink Agreement pursuant to the Stipulation); *id*. (concluding that the terms of the Stipulation are "reasonable" and that the Stipulation is approved in its entirety.) Based upon these findings, the Commission, as part of the ordering paragraphs in the Eagle Creek CPCN Order, specifically concluded that the Agreement with Envirolink was entered into evidence. *Id*. Ordering Paragraph 1. Neither the Commission nor any other party to Docket No. W-1333, Sub 0 objected in any way to either the timely filing of or the terms of the Envirolink Agreement or otherwise raised any concerns with the Commission relating to the Agreement.

At the time the Settlement Agreement was entered into evidence and the Commission's approved same, the parties and the Commission understood the closing on the Sandler assets would occur in short order. To the contrary, and as set forth more fully in an August 15, 2023, letter filed by Edward Finley, Jr. (counsel for Currituck) herein and Currituck's Response and Answer to Public Staff's Motion to Show Cause, Docket W-1333, Sub 5, filed April 25, 2024, pp.7-9, the

negotiations concerning the loan for purchase of the assets were extensive and complicated, involving multiple parties, substantial efforts to meet United States Department of Agriculture ("USDA") lending requirements, and significant efforts to prepare and provide materials relating to the future repair and operation of the systems whose purchase the loan was to finance. Ultimately, Currituck obtained funding elsewhere. The closing ultimately occurred approximately three (3) months ago on March 27, 2024. Currituck and the Public Staff engaged in extensive communications throughout this time, and the Public Staff was fully aware of the issues causing a delay in closing. *See, e.g.*, Exhibit F, August 15, 2023 update from E. Finley.

Nearly two (2) years later, on May 10, 2024, the Public Staff raised for the first time its contention that though Currituck filed the Agreement, and the Agreement was entered into evidence, the Agreement has not been approved by the Commission. Exhibits A, B, and D. Notably, the Public Staff has not raised any complaint or allegation that the charges by Envirolink to Currituck are unreasonable, excessive, or otherwise problematic. Currituck responded with authorities Currituck believes demonstrate that the Agreement has been approved and it is permissible for Currituck to pay Envirolink pursuant to the Agreement for services and invited the Public Staff to identify any authorities to the contrary so that Currituck may consider them. Exhibit D. The Public Staff responded by insisting, it seems, that "preapproval" is required pursuant to North Carolina law and alleged "long-standing Commission practice." Exhibit D.

ARGUMENT

I. The Agreement has been filed with and approved by the Commission.

Currituck has fully complied with the terms of the Settlement Agreement and North Carolina law. Though N.C.G.S. § 62-153(b) states that affiliate agreements must be filed with the Commission and approved, relevant authorities interpreting this provision have explained that such

agreements (and the costs imposed pursuant to them) are presumed reasonable unless the presumption is overcome. *See, e.g., State ex rel. Utils. Com. v. Conservation Council of N.C.*, 312 N.C. 59, 64, 320 S.E.2d 679, 683 (N.C. 1984) ("Costs are presumed to be reasonable unless challenged.") Specifically, Currituck's obligation to affirmatively present additional evidence to rebut an allegation that costs imposed by its affiliate agreement are unreasonable or unjust "…arises only when the Commission requires it or affirmative evidence is offered by a party to the proceeding that challenges the reasonableness of expenses allocated to it by an affiliated company…" *State ex rel. Utils. Com. v. Intervenor Residents of Bent Creek/Mt. Carmel Subdivisions*, 305 N.C. 62, 76-77, 286 S.E.2d 770, 779 (N.C. 1982). Stated another way, "[a]lthough it always has the authority to do so, in the absence of contradiction or challenge by affirmative evidence offered by any party to the proceeding, the Commission has no affirmative duty to make further inquiry or investigation into the reasonableness of charges or fees paid to affiliated companies. While affiliation calls for close scrutiny, affiliation alone does not impose an additional burden of proof or require the presentation of additional evidence of reasonableness." *Id*. at 778.

This conclusion has been echoed, at least in part, by decisions from the Commission in other proceedings explaining that N.C.G.S. § 62-153(b) provides the Commission with "the power to ***disapprove*** such contracts, if it finds them to be unjust or unreasonable*…" See, e.g., In the Matter of Application of Old N. State Water Co., Inc., for Auth. to Adjust & Increase Rates for Water Util. Serv. in All Its Serv. Areas in N. Carolina*, No. SUB 60, 2024 WL 1532588, at *11 (Apr. 3, 2024) (emphasis added); *see also In the Matter of Protest Related to Informational Filing by Duke Energy Carolinas, LLC, & Duke Energy Progress, LLC*, No. E-2, 2021 WL 523050, at

*4 (Feb. 5, 2021) (explaining that N.C.G.S. § 62-153 **does not require** "preapproval" of affiliate agreements).

In light of these authorities, Currituck had no obligation for the Commission to explicitly approve the Agreement before costs could be incurred pursuant thereto. Rather, unless the Agreement was challenged as unreasonable (and here, it was not), the Commission's order approving the CPCN was sufficient to satisfy the "approval" required by § 62-153(b) even without findings overtly approving of the Agreement.

In *Bent Creek*, the North Carolina Supreme Court concluded that the Commission appropriately discharged its duty to approve an affiliate agreement by concluding generally that the "allocated general and operating and maintenance expenses…" incurred by a company were reasonable, even though the Commission did not specifically make an inquiry into and/or issue specific findings or conclusions on the reasonableness of the challenged affiliation agreement. *See* 305 N.C. 62, 76-78. Similarly, here the Commission concluded, among other things, that the terms of the Settlement Agreement were "reasonable," that "Currituck has the technical, managerial, and financial capacity to own and operate the Eagle Creek Wastewater System," and that "the proposed transfer will serve the public convenience and necessity, and is in the public interest…" Clearly, the Commission's conclusion approving the CPCN for Eagle Creek directly implicates the approval of the Agreement. Otherwise, what would the Commission have approved? These findings, among others, are like those deemed sufficient to resolve the question of whether an affiliate agreement was "approved" in *Bent Creek*.

There is no question that the Commission had the Agreement before it (as it was accepted into evidence), and thus, that it could have disapproved the Agreement had it elected to do so. Similarly, the Public Staff was free to offer any objection or challenge to the terms of that

Agreement or to payments to Envirolink pursuant to it during the proceedings, but chose not to do so. It should not now be permitted to "re-open" the terms of its own Settlement Agreement to the issuance of the Eagle Creek CPCN Order by intimating that, for some unknown reason, the Agreement is now problematic or otherwise calls into question the CPCN and the Commission's conclusion that it would be in the public's best interest for Currituck to provide services to Eagle Creek customers in part pursuant to the terms of its Agreement with Envirolink. Simply put, the time to challenge the Envirolink Agreement passed years ago, and the law clearly deems the Commission's findings in the proceeding to satisfy N.C.G.S. § 62-153(b).[1]

II. Because Envirolink is not a subsidiary or affiliate of Currituck, the Agreement is not subject to approval pursuant to N.C.G.S. § 62-153.

Regardless of whether the Agreement was approved by the Commission, the Agreement did not require approval pursuant to N.C.G.S. § 62-153. Currituck agreed to file the Agreement with the Commission for approval in the Settlement Agreement to promote full transparency of the relationship between it and Envirolink to the Commission. Its concession to filing was not an admission that approval was in fact required by law nor that Envirolink and Currituck were subsidiaries or affiliates pursuant to N.C.G.S. § 62-153.

As of July 27, 2022, when the Agreement was filed, Clear Current, LLC held an 80% interest in Currituck Water and Sewer Holdings, LLC, and Longleaf Utilities, LLC ("Longleaf") held a 20% interest. *See* Currituck's Response and Answer to Public Staff's Motion to Show Cause, p.3. Neither Envirolink nor Michael Myers has ever had any interest in Clear Current,

[1] The Public Staff's position on this issue runs contrary the position it has taken in similar matters reviewed by the Commission. For example, in Docket No. W-1165, Sub 0, the Commission awarded a CPCN to Enviro-Tech of North Carolina, Inc. to provide service to the Village at Ocean Hill Subdivision. As part of the proceeding, Enviro-Tech filed a service agreement it had with a sewer service provider that had the same ownership as Enviro-Tech. The CPCN in that proceeding was approved, without objection from the Public Staff, despite the lack of any findings from the Commission specifically approving the service agreement. These conflicting and arbitrary positions suggest that the Public Staff's goal is not to ensure compliance with applicable statutes or the Settlement Agreement, but rather simply to prevent Currituck from later seeking to recover in a future rate case reasonable costs paid to Envirolink.

LLC. *Id.* At this same time, Longleaf's sole member was Two River's Holdings, LLC which is owned by the Myers Family Trust (whose executors are Michael Myers and his wife, Melissa). *See* Currituck's Response and Answer to Public Staff's Motion to Show Cause, p.3. Envirolink is wholly owned by Envirolink Holdings, Inc. which is wholly owned by Michael Myers; Envirolink has never been owned by, controlled by, and/or affiliated with Currituck or Currituck Water and Sewer Holdings, LLC. *Id.* at p. 10. As such, Currituck and Envirolink are not affiliates or subsidiaries.

Further, the purpose of N.C.G.S. § 62-153 is to ensure that agreements between utilities and affiliated corporations are just and reasonable and do not appear that their purpose is to conceal or divert profits from the public utility to an affiliate. *Bent Creek*, 305 N.C. at 65-66. Here, while Michael Myers has an indirect and noncontrolling interest in Currituck Water and Sewer Holdings, LLC and an ownership in Envirolink, his relationship does not rise to the level of control, influence, or association required by N.C.G.S § 62-153. Michael Myers' involvement in the two companies does not place Currituck in a relationship that incentivizes nor permits it to pay Envirolink charges or fees that would be more than what Currituck would pay any other third-party. Likewise, Michael Myers was and is in no position to use any leverage from his relationship with Currituck to demand unreasonable fees and charges, nor would the majority owner of Currituck—Clear Current, LLC—receive any benefit from excessive payments to Envirolink.[2]

Not only is there no incentive to divert or conceal profits, but the terms of the Agreement demonstrate the charges paid by Currituck to Envirolink are reasonable. The Agreement sets forth

[2] Importantly, Envirolink believes it has been operating at a loss with respect to services provided at Eagle Creek. As can be demonstrated at any hearing in this matter, the Operating Agreement between Envirolink and Sandler included monthly compensation of approximately $13,000, but Envirolink's monthly labor costs alone were approximately $20,000 for just the collection system.

payments based on a cost-plus rate as opposed to a standard rate. This ensures a charge that is more representative of the actual cost of operations and that is likely lower than what would be paid by Currituck otherwise. Such contracts do not require Commission approval because they are negotiated in an open market where competitive forces and transparency limit the terms and prevent abuse.

Finally, any delay on the part of Currituck in filing the agreement was the result of a unanticipated delay in closing that was not the fault of any of the parties. Because of this delay, however, Envirolink could not have been a subsidiary or affiliate of Currituck until the closing on March 27, 2024 as it was only at closing that Currituck became the public utility owning the Eagle Creek assets. Accordingly, to the extent Currituck failed to seek approval of the Agreement, the delay in doing so has only been since March 27, 2024 – a matter of a few months, and no harm has resulted from this delay.

WHEREFORE, Currituck Water & Sewer, LLC respectfully requests the Commission issue an order declaring the Agreement, attached hereto as Exhibit G, was approved as of September 13, 2022, the date of the Eagle Creek CPCN Order.

In the alternative, and without waiving any rights or arguments with respect to the approval of the Agreement, the ability to recover payments made pursuant thereto, or the affiliate status of Envirolink, Currituck requests the Commission expeditiously approve the Agreement effective March 27, 2024, and for all other just and appropriate relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served on all parties of record or their attorneys, or both, in accordance with Commission Rule R1-39, by United States Mail, first class or better; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

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