

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. W-1125, SUB 9

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Greater Kinnakeet Shores Home Owners, Inc.)	
c/o Pat Weston, P. O. Box 853, Avon, North)	
Carolina 27915,)	
Complainant)	ORDER DENYING MOTION TO
)	DISMISS
v.)	
)	
Outer Banks/Kinnakeet Associates, LLC.,)	
Defendant)	

BY THE CHAIR: On December 13, 2021, Greater Kinnakeet Shores Home Owners, Inc. (HOA), filed a complaint against Outer Banks/Kinnakeet Associates, LLC (OBKA), in the above-referenced docket (Complaint). The Complaint concerns a moratorium placed against the Kinnakeet Shores Wastewater Treatment Plant (WWTP) which is owned and operated by OBKA. The HOA seeks to have the Commission: (1) require a comprehensive due diligence investigation into OBKA's suitability to own and operate the WWTP and collection system in compliance with the public interest; (2) require OBKA to take immediate steps to rectify the deficiencies causing the imposition of the moratorium; (3) appoint an emergency operator if it determines such action is necessary; (4) revoke OBKA's bond if it is determined that OBKA is unwilling or unable to operate the system in accordance with the certificate of public convenience and necessity (CPCN); (5) investigate the possibility of identifying a potential new owner of the WWTP; and (6) if the Commission determines that OBKA should continue to own and operate the system, require a substantial increase in OBKA's bond.

The moratorium, issued by the North Carolina Department of Environmental Quality (DEQ), Division of Water Resources (DWR), effective October 13, 2021, states that the WWTP "is unable to adequately collect and treat waste tributary to its wastewater treatment facility." DWR determined that the WWTP's major treatment units are no longer functional and suspended the installation of new sewer taps, sewer extensions, or additional flow. Per DWR, the moratorium will be rescinded when OBKA has repaired the WWTP, has met all conditions of Permit No. WQ0002284, can demonstrate that it can adequately treat and dispose of its waste, and has obtained written permission from DWR suspending the moratorium.

On January 27, 2022, OBKA filed an Answer and a Motion to Strike Certain Pleadings (Motion to Strike). On February 3, 2022, the HOA filed a Response to the Motion

to Strike. On February 4, 2022, OBKA filed a Reply to the HOA's Response to the Motion to Strike. The Commission issued an order on June 28, 2022, granting in part and denying in part the Motion to Strike and allowing OBKA until July 8, 2022, to respond to the remaining allegations in the Complaint.

On February 4, 2022, OBKA filed a Motion to Dismiss Complaint for Lack of Standing and Jurisdiction (Motion to Dismiss).

On February 7, 2022, the HOA filed a Reply to OBKA's Answer requesting a public hearing, and on February 11, 2022, the HOA filed a Response to Motion to Dismiss Complaint (Response).

On March 11, 2022, property owners of 59 lots within the Kinnakeet Shores subdivision (Property Owners) filed a Joint Petition to Intervene. On May 23, 2022, the Commission issued an order granting the petition filed by the Property Owners.

On May 12, 2022, seven members of the Board of Directors of the Kinnakeet Shores HOA (Board Members) filed a Joint Petition to Intervene as representatives of all of the members of HOA. Six of the Board Members also requested to intervene as current customers of the WWTP. On May 23, 2022, the Commission issued an order granting the petition filed by the Board Members.

Also on May 12, 2022, Deborah Ashe and Jonathan Farrell (Ashe and Farrell), owners of Lots 16, 19, 26, and 20 of Phase 16 of the Kinnakeet Shores subdivision, filed a Petition to Intervene. The Commission issued an order granting the petition of Ashe and Farrell on May 23, 2022.

Additionally on May 12, 2022, Wiltton and Manette Britt (the Britts), owners of a home at 41196 Windlass Court and a vacant lot at 41148 Portside Drive, Lot 1704, located within the Kinnakeet Shores subdivision, filed a Petition to Intervene. On May 23, 2022, the Commission issued an order granting the Britts' petition.

On June 12, 2022, Marie and Stephen Minton (the Mintons), owners of a home at 41198 Sprintsail Court within the Kinnakeet Shores subdivision, filed a Petition to Intervene. On June 15, 2022, the Commission issued an order granting the Mintons' petition.

On June 14, 2022, OBKA filed supplemental information in the docket.

MOTION TO DISMISS

OBKA requests that the Commission dismiss the Complaint alleging that the HOA lacks standing to represent the individual members of the HOA that are customers of the Kinnakeet Shores WWTP. OBKA argues that the Articles of Incorporation for the HOA do not include authority to assert a cause of action against a private utility provider on behalf of certain members. Further, OBKA argues that under the applicable Declaration of Protective Covenants and Restrictions and its amendments, the HOA is neither authorized

nor required to assert an action against a private utility on behalf of a member. OBKA states that a corporation must have the authority to commence a lawsuit and when doing so, must comply with its own by-laws in bringing the lawsuit in order to have standing. OBKA asserts that only when a complainant has standing, does the Commission have subject matter jurisdiction.

OBKA also argues that the HOA has alleged no cognizable injury and “appears to be alleging a claim that must be asserted by a property owner that has been denied a building permit as a result of the moratorium on new wastewater connections.” Motion to Dismiss at 5. OBKA asserts that the HOA fails to allege the identity of any member of the HOA that has been denied a building permit because of the moratorium and accordingly lacks standing because it has not alleged an “injury in fact” to itself as a corporation.

Lastly, OBKA asserts that the HOA has repeatedly failed to comply with the Rules of the Commission in pleading its Complaint, and therefore the Complaint should be dismissed.

THE HOA'S RESPONSE

The HOA provides that Paragraph 1 of the Complaint states that the “HOA is the official agency that acts for and on behalf of property owners and utility consumers within the Kinnakeet Shores subdivision in Dare County, North Carolina.” The HOA asserts that members of the HOA and the association itself are consumers of OBKA’s wastewater services and owners of property within OBKA’s service territory as identified in its CPCN, which gives OBKA a monopoly to provide those services in its service territory and imposes upon OBKA public utility responsibilities.

The HOA states that OBKA has a responsibility to keep its facilities in adequate condition and repair and provide new service to property owners within the service territory upon their request. The HOA argues that it set out its cognizable injury in the Complaint as well as those of its members. The HOA states that with regard to the WWTP and OBKA’s service obligations, “both clarifiers, the tertiary filter, spray irrigation system, and backup generator are not functional. Biosolids have not been removed from the plant for at least seven years.” Response at 4. The HOA argues that consumers and ratepayers within Kinnakeet Shores “need not wait until these serious service deficiencies result in a catastrophic shutdown of the system before they have standing to seek the Commission’s assistance in rectifying these serious shortcomings.” *Id.*

The HOA argues that any single consumer of OBKA within the Kinnakeet Shores service territory has standing to file a complaint and that all consumers within the Kinnakeet Shores service territory are members of the HOA. Pat Weston, who is listed on the Complaint and verified it, is both a leader within the HOA and a resident and homeowner within OBKA’s service territory and, therefore, has standing to complain. Additionally, the HOA states that the association itself receives and pays a monthly bill in its own name and as a consumer of OBKA’s services has a right to complain. The HOA argues that “a complaint from any one consumer is more than sufficient to establish standing. The

homeowners' association, however, acting on behalf of itself and all property owners and consumers within Kinnakeet Shores only adds additional support to any standing requirement to bring this complaint.” *Id.*

The HOA responds to OBKA’s argument that in order to have standing, a claim must be asserted by a property owner that has been denied a building permit because of the moratorium stating it amounts to “a strawman fabricated by the responding party so as to fit imagined facts to an otherwise unsupportable theory of defense. Nowhere in the complaint is there any reference to a ‘building permit.’” *Id.* at 5.

The HOA provides that OBKA operates its system under a state-imposed moratorium because of the deficiencies set forth in the Complaint. It asserts that nothing more is required for a complaint than allegations setting forth these facts. The HOA, however, asserts “that property owners within [OBKA’s] service territory are prohibited due to the moratorium from making use of their property for which they have incurred costs of acquisition and on which they pay taxes, due to [OBKA’s] failure to comply with its public service responsibilities.” *Id.* The HOA argues that “these property owners are not required to seek a building permit and receive a rejection from a municipal or county official as a prerequisite to asserting their claim” against OBKA and that DEQ’s action in issuing the moratorium have precluded the need for that. *Id.* The HOA asserts that the imposition of the moratorium makes seeking a building permit an unnecessary undertaking, and that no member of the complainant class need undertake an unnecessary act in order to have standing to state a claim upon which relief can be granted.

The HOA also argues that the consumers and property owners within OBKA’s service territory “are not limited in bringing this complaint by any limitations in the powers and duties of Greater Kinnakeet Shores Home Owners Inc., even a cursory review of the Articles of Incorporation reveals that those articles clearly convey to the association authority to bring this complaint.” *Id.* at 6.

The HOA asserts that the Articles of Incorporation provide as follows:

Article III(b) states, “The purposes for which the corporation is organized are: To enforce any and all covenants, restrictions and *agreements* applicable to the common areas, *lot and dwelling units* in the development and particularly any declarations of covenants and restrictions or similar declarations which may hereafter be made with respect to the development and which may hereafter be recorded in the Dare County registry.” Article III(c) states, “The purpose for which the corporation is organized are: To make and perform any *contracts* and *do any acts and things, and exercise any powers suitable, convenient, proper or incidental for the accomplishment of the objectives enumerated herein.*” Article III(d) states, “The purposes for which the corporation is organized are: To engage in any lawful act or activity for which corporations may be organized under Chapter 55A of the General Statutes of North Carolina; however, notwithstanding

anything herein to the contrary, the corporation shall exercise only such powers as are in the furtherance of the exempt purposes of organizations set forth in section 501(c) of the Internal Revenue Code of 1954 and the regulations thereunder as the same now exist or as they may be hereafter amended from time to time.”

Id. (emphasis in original).

The HOA argues that the Kinnakeet Shores consumers of OBKA’s services have a contract or agreement with OBKA which requires payment for the services they receive pursuant to tariffs approved by the Commission, and they cannot receive wastewater services from any other provider. Therefore, in exchange for these payments, OBKA is required to maintain its facilities in a state of operation and repair to provide these services without the threat of disruption.

The HOA states that it will not dwell on OBKA’s allegations of procedural missteps under Commission rules calling them “about as trivial and inconsequential as one could imagine.” *Id.* at 7. The HOA also discusses the proper use of the word “Respondent,” and points out procedural errors made by OBKA in its filings. The HOA expresses frustration that OBKA is filing motions and raising baseless allegations instead of working to rectify its failures, explaining why the system is in the shape it is in, and informing consumers what it will do in the future to have the moratorium lifted.

DISCUSSION AND CONCLUSIONS

OBKA moves for the dismissal of the Complaint on three apparent grounds: (1) lack of standing to assert the claims set forth in the Complaint; (2) lack of subject matter jurisdiction by the Commission to adjudicate the claims set forth in the Complaint; and (3) failure to comply with the Commission’s rules of procedure. For the reasons explained below, the Commission denies OBKA’s Motion to Dismiss on each of the grounds identified.

Section 62-73 of the North Carolina General Statutes states in relevant part, that:

Complaints may be made by . . . any person having an interest, *either direct or as a representative of any persons having a direct interest in the subject matter of such complaint* by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable. . . . The Commission, by rule, may prescribe the form of complaints filed under this section. . . .

N.C. Gen. Stat. § 62-73 (emphasis added).

In the instant case, the HOA is a customer in its own right of OBKA as it is an account holder and pays for the service it receives from OBKA. Response at 4. In keeping with Commission practice, the fact that the HOA has an account with OBKA – is a customer at retail of the utility – is sufficient to establish standing for purposes of N.C.G.S. § 62-73. See Order Denying Petition to Intervene and Allowing Amicus Curiae Status, *Application of Duke Energy Progress, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina*, No. E-2, Sub 1142 (N.C.U.C. Oct. 5, 2017) (noting, for purpose of determining real interest in subject matter of proceeding that retail customers of utility were directly affected by the Commission’s decisions and thus had real interest).

The Commission has a practice of allowing associations of members to participate in proceedings as real parties in interest, specifically where at least one member is a customer of the utility, determining that an association’s “status as the collective of its members qualifies [the association] as an entity directly interested” in the proceeding. See Order Denying Motion for Reconsideration, *Petition of Carolina Utility Customers Association, Inc. to Initiate a General Rate Proceeding and Complaint Regarding Unjust and Unreasonable Rates*, No. E-7, Sub 715, at 3 (N.C.U.C. Oct. 17, 2002) (determining that an association had standing in the proceeding because one its members was a utility customer). In the instant case, the HOA provides that Ms. Weston, who is listed on the Complaint and who verified the Complaint, in addition to her leadership responsibilities within the association, is a customer of OBKA. Response at 4. Thus, a determination that the HOA has standing is in keeping with past practice of the Commission.

The HOA cites to several sections of the Articles of Incorporation of Greater Kinnakeet Shores Home Owners, Inc. that convey to the association the authority to bring this Complaint. The HOA points to Article III(b) as giving it the authority to enforce, among other things, agreements that are applicable to common areas, lots and dwelling units in the development. The HOA points to Article III(c) as giving it the authority to take any action or exercise powers necessary for the accomplishment of objectives set forth in the Articles, among them the authority to enforce agreements set forth in Article III(b). For these reasons, the Commission is not compelled by OBKA’s argument that the HOA does not have the authority to prosecute this Complaint.

Furthermore, the Property Owners, the Board Members, Ashe and Farrell, the Britts, and the Mintons have intervened in this matter in their official capacities and as individual property owners and customers within the Kinnakeet Shores subdivision to ask the Commission to address the service quality allegations in the Complaint and provide the relief requested.

The Chair has carefully considered the pleadings and arguments of the parties and finds that the HOA has provided sufficient information to demonstrate standing. Additionally, the interventions of private homeowners to this matter are sufficient to maintain this action even if the HOA were not able to meet its burden as to its standing. Accordingly, the Commission concludes that OBKA’s argument as to lack of standing is without merit.

OBKA argues that standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction, and that if a party does not have standing to bring a claim, then a court has no subject matter jurisdiction to hear the claim. Thus, the basis for its Motion to Dismiss based on lack of subject matter jurisdiction rests its allegation that the HOA lacks standing. However, the Commission has determined that the HOA has standing.

Moreover, in applying for and obtaining the CPCN to serve the Kinnakeet Shores subdivision, OBKA gained the exclusive right to its service territory and submitted itself to and became legally subject to the jurisdiction of the Commission. OBKA is vested with an obligation as a public utility to provide adequate, reliable, and economical utility service to all customers within its service territory, including any new customers joining the service territory. As such, the actions, or inactions, of OBKA regarding the adequacy of service to its exclusive service territory are properly before the Commission. The issuance of a moratorium by DWR stating that the major portions of the WWTP are no longer functional, stating that biosolids have not been removed from the plant for at least seven years, and suspending all new sewer taps, sewer extensions, or additional flows falls squarely within the Commission's authority.

For these reasons, the Commission concludes that OBKA's argument as to lack of subject matter jurisdiction is without merit.

Finally, the Commission addresses OBKA's argument that the Complaint should be dismissed for the HOA's failure to comply with certain procedural rules of the Commission. Pursuant to N.C.G.S. § 62-73, the Commission, by rule, may prescribe the form of complaints filed under this section. While Commission Rule R1-5(b) establishes the requirements for the contents of pleadings, generally, Commission Rule R1-9(b) establishes the requirements for the contents of complaints, specifically. Rule R1-9(b) provides expressly that "Rule R1-5 will apply to complaints under this Rule. . . ."

Commission Rule R1-5(e) provides that "[a]ll pleadings shall be liberally construed, and errors or defects therein which do not mislead or affect the substantial rights of the parties involved shall be disregarded." Commission Rule R1-3, also referenced by OBKA in its motion, establishes the terminology to be used in proceedings before the Commission.

The Commission has allowed parties to this proceeding leeway in their pleadings, and as such, neither party has been held to a strict pleading standard. "Ordinarily, the procedure before the Commission is more or less informal, and is not as strict as in Superior Court, nor is it confined by technical rules." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962). In proceedings before the Commission, "[g]reat liberality is indulged in pleadings[.]" and "substance and not form is controlling." *Id.* The Chair is not persuaded that the Complaint should be dismissed for slight procedural errors as it contains all the necessary information requested under Rule R1-5(b) and the use of the term "respondent" in lieu of "defendant," while not technically compliant with Rule R1-3(e), is not misleading or otherwise prejudicial to

OBKA. Accordingly, because the technical errors do not mislead or affect the substantial rights of the parties involved, the Commission denies OBKA's Motion to Dismiss the Complaint for failure to comply strictly with Commission rules.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of June, 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