

**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,	)	
	)	
Complainant	)	<b>STATEMENT ON JURISDICTION AND STIPULATION WAIVING OBJECTION TO JURISDICTION</b>
	)	
v.	)	
	)	
Pluris Hampstead, LLC, and Old North State	)	
Water Company, LLC,	)	
	)	
Respondents.	)	

**NOW COMES** WLI Investments, LLC, (“WLI Investments”), by and through the undersigned counsel and pursuant to the Commission’s *Order Requiring Parties to File Statement on Jurisdiction*, issued in the above-captioned proceeding on August 2, 2022, and files this **Statement of Jurisdiction and Stipulation Waiving Objection to Jurisdiction:**

**BACKGROUND**

1. On January 3, 2022, WLI Investments filed its Verified Complaint and Petition for Declaratory Ruling (“Complaint”), alleging, *inter alia*, that the Respondents engaged in unreasonable and unjust practices in their dealings with WLI Investments in breach of a 2018 contract between WLI Investments and Old North State Water Company, LLC (“ONSWC”) (“Development Agreement”) and in violation of certain provisions of the Public Utilities Act,

arising from the development activities in and adjacent to Salters Haven subdivision in Pender County, North Carolina.

2. On January 18, 2022, ONSWC and Pluris Hampstead, LLC (“Pluris,” together with ONSWC, “Respondents”) filed the Respondents’ Answer, denying many of the factual allegations of the Complaint and requesting that the Commission issue an order dismissing the Complaint for failure to state a claim upon which relief can be granted.

3. On January 24, 2022, the Commission issued an *Order Serving Answer and Motion to Dismiss*.

4. On February 1, 2022, WLI Investments filed its Reply and Motion for Procedural Order.

5. On August 2, 2022, the Commission issued an *Order Requiring Parties to File Statement of Jurisdiction*, noting that Section 17.12 of the Development Agreement contains the following provisions:

Consent to Jurisdiction. The Parties agree that the state and federal courts of North Carolina *shall* have exclusive jurisdiction over this Agreement and any controversies arising out of, relating to, or referring to this Agreement, the formation of this Agreement, and actions undertaken by the parties hereto as a result of this Agreement, whether such controversies sound in tort law, contract law or otherwise. Each of the Parties hereto expressly and irrevocably consents to the personal jurisdiction of such state and federal courts, agrees to accept service of process by mail, and expressly waives any jurisdictional or venue defenses otherwise available.

*Order Requiring Parties to File Statement of Jurisdiction*, p. 2, No. W-1305, Sub 35, and W-1300, Sub 77 (issued Aug. 2, 2022) (*citing* Complaint Ex. A, at 15-16) (emphasis added). That Order directed the parties herein as follows: (1) to file a statement of their position on the effect of Section 17.12 of the Development Agreement on the Commission’s jurisdiction over WLI Investments’

Complaint, and (2) for parties taking the position that the Commission can exercise jurisdiction over WLI' Investments' Complaint, to file a stipulation stating that the party waives any objection based on Section 17.12 to the Commission's exercise of jurisdiction over WLI's Complaint. In compliance with that direction, WLI Investments provides the following:

### **STATEMENT ON JURISDICTION**

1. Statement of position on the effect of Section 17.12 of the Development Agreement on the Commission's jurisdiction over WLI Investments' Complaint:

Section 17.12 allows the parties to the Development Agreement to invoke the jurisdiction of any state or federal court of North Carolina, including the Commission, to seek resolution of controversies arising out of, relating to, or referring to the Development Agreement.

In support of the above statement of position, WLI Investments respectfully requests the Commission's consideration of the following. First, Pluris is not a party to the contract and has no basis for asserting any rights under the Development Agreement. Second, the claims stated in the Complaint are based upon provisions of the Public Utilities Act and not the Development Agreement. Third, interpretation of the provisions of Section 17.12 consistent with North Carolina law confers upon the parties to the Development Agreement a choice without limitation to invoke the jurisdiction of any state or federal court seated in North Carolina, including the Commission, for disputes arising under the Development Agreement. Fourth, assuming *arguendo* that Section 17.12 represents an agreement between WLI Investments and ONSWC to not bring an action before the Commission, ONSWC has waived its right to assert the defense of Section 17.12. Fifth and finally, considerations of judicial economy and public policy support the Commission's exercise of jurisdiction over the Complaint. WLI Investments details its position on each of these

considerations below and respectfully requests that the Commission issue an order determining that it has jurisdiction over the Complaint, and setting this matter for hearing.

First, it should be made clear that Pluris is not a party to the Development Agreement and has no basis for asserting any rights under the Development Agreement. Pluris has not indicated any intention to assume the rights and obligations of ONSWC as a party to the Development Agreement. With respect to this matter, Pluris is not in privity of contract in any manner with WLI Investments. Thus, it is clear that Pluris has no basis to assert any rights under the Development Agreement and Section 17.12 has no effect on the Commission's jurisdiction over Pluris or the claims stated against Pluris in the Complaint. By virtue of being a public utility, the Commission has personal jurisdiction over Pluris and by virtue of the nature of the Complaint and the claims arising under the provisions of the Public Utilities Act identified in the Complaint, the Commission has subject matter jurisdiction. Moreover, the claims stated in the Complaint against Pluris are based on provisions of the Public Utilities Act and not upon the Development Agreement.<sup>1</sup>

Second, with respect to ONSWC, the Complaint alleges that ONSWC's practices in its dealings with WLI Investments, which also independently constitute a breach of the Development Agreement, are unjust and unreasonable. In other words, the same conduct that resulted in ONSWC's breach of contract itself is an unjust and unreasonable practice by ONSWC. N.C. Gen. Stat. § 62-73 provides the Commission with jurisdiction over complaints against public utilities, not only for violation of state law or orders or rules of the Commission, but also where a utility institutes a "practice [that] is unjust and unreasonable." The activities contemplated to be

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<sup>1</sup> Complaint at p. 8-10 (alleging Pluris violated N.C. Gen. Stat. § 62-110 and §62-111), p. 10-12 (alleging Pluris violated N.C. Gen. Stat. § 62-140), p. 12-13 (alleging Pluris engaged in unjust and unreasonable conduct in violation of N.C. Gen. Stat. § 62-73), p. 13 (alleging that Respondents coordinated in actions that constitute unjust and unreasonable conduct), p. 13- (alleging that there is a need to secure adequate service or facilities for the Lea Tract and seeking an extension of service pursuant to N.C. Gen. Stat. § 62-42).

undertaken by ONSWC pursuant to the Development Agreement are unquestionably “service” of a public utility.<sup>2</sup> The same principle applied in *Southern Bell Tel. & Tel. Co.* applies here, where the Respondents enjoy “a great advantage over all competitors in the field” of providing access to wastewater treatment capacity and the service of making that capacity available to the public.<sup>3</sup> The same result is required in this case: the activities contemplated in the Development Agreement are utility service, the Respondents are public utilities, and the Commission’s authority to regulate these activities is plenary, whether it be regulation of the inclusion of revenues and expenses from such activities or as to the reasonableness of the service provided. The Commission has jurisdiction over such matters pursuant to the plain language of N.C. Gen. Stat. § 62-73 and pursuant to its general supervisory authority over public utilities as provided in N.C. Gen. Stat. § 62-30.

Third, proper interpretation of the provisions of Section 17.12 consistent with North Carolina law confers jurisdiction upon the Commission for disputes arising under the Development Agreement. “Although the language used may differ from one contract to another, one or more of three types of provisions (choice of law, consent to jurisdiction, and forum selection), which have very distinct purposes may often be found in the boilerplate language of a contract.”<sup>4</sup> Section 17.12 is a standard “boiler plate” contract provision combining forum selection and consent to

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<sup>2</sup> See N.C. Gen. Stat. § 62-3(24) (“‘Service’ means any service furnished by a public utility, including any commodity furnished as a part of such service and any ancillary service or facility used in connection with such service.” See also *State ex. rel. Utilities Com’n. v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299, S.E.2d 763 (1983) (holding that directory advertising is not a separate enterprise from the transmission of telephone messages, affirming the Commission’s conclusion that the classified directory is an integral part of providing adequate telephone service, and overruling *Gas House, Inc. v. Southern Bell Telephone Co.*, to the extent inconsistent with the holding herein).

<sup>3</sup> *Southern Bell Tel. & Tel. Co.*, at 546. See also Reply and Motion for Procedural Order, p. 12, No. W-1300, Sub 77, and No. W-1305, Sub 35 (filed Feb. 1, 2022) (“This reality creates an imbalance in bargaining power that is ripe for abuse and underscores the very need for the existence and authority of this Commission.”)

<sup>4</sup> *Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92, 414 S.E. 2d 30, 33 (1992).

jurisdiction in one contract provision.<sup>5</sup> Section 17.12 limits the geographic location of the courts where claims may be brought to courts in North Carolina, but importantly Section 17.12 does not limit the adjudicative body before which claims may be brought. Thus, Section 17.12 is not a true *venue selection clause*. Such agreements are viewed as permissive unless specific limiting language is included in the agreement.<sup>6</sup> Thus, Section 17.12 allows the parties to the Development Agreement to select the venue they desire, limited only to selecting from venues within the forum or geographic location agreed-upon: the various “federal and state courts of North Carolina.”

This interpretation is supported by the plain language of the Development Agreement and further supported by “the well-recognized rule that an ambiguity in a written contract is to be construed against the drafter.”<sup>7</sup> ONSWC, as the drafter of the Development Agreement, could easily have resolved the ambiguity that the Commission has raised. Section 1.7 of the Development Agreement defines “Commission” to mean the North Carolina Utilities Commission, but the Development Agreement includes no provision limiting the parties’ choice of adjudicative bodies nor does Section 17.12 expressly exclude the Commission as a proper venue. Thus, the phrase

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<sup>5</sup> Section 17.13 of the Development Agreement provides the choice of law provision, wherein the parties agree that the Development Agreement will be governed by North Carolina law.

<sup>6</sup> *Cable Tel Services v. Overland Contracting*, 154 N.C. App. 639, 574 S.E.2d 31, 34 (N.C. App. 2002). *See also Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 86 (2001) (holding that clause was mandatory forum selection clause where the clause provided that “The parties...stipulate that the State Courts of North Carolina shall have sole jurisdiction...and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina”); *Appliance Sales & Service v. Command Electronics Corp.*, 115 N.C. App. 14, 23, 443 S.E.2d 784, 790 (finding enforceable forum selection clause existed where language in parties’ contract provided that “the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue”); *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1993) (finding a mandatory forum selection clause existed where language in parties’ agreement provided that “Any action related to this Agreement shall only be instituted...in courts in Los Angeles County, California”).

<sup>7</sup> *Root v. Allstate Ins. Co.*, 272 N.C. 580, 585, 158 S.E.2d 829, 834 (1968).

“federal and state courts of North Carolina” appearing in Section 17.12 is at best ambiguous given that the Commission is the state court of record for matters arising under the Public Utilities Act.<sup>8</sup>

Section 17.12 could have provided that the resolution of controversies under the Development Agreement is to be pursued in “only the General Court of Justice,” “only in the North Carolina Superior Court,” “only in federal courts of North Carolina,” or some similar phrasing to distinguish the Commission as a court from the courts of the judicial branch. Section 17.12 could have included an agreed-upon definition of “state court” or further identified the county of the Superior Court or the federal district in which venue was proper. Section 17.12 could have made use of the defined term “Commission” to make clear that the Commission is not included in the term “state court.” ONSWC did none of these things in drafting the Development Agreement, and this ambiguity must be resolved against ONSWC. Thus, the appropriate interpretation of Section 17.12 by its terms and resolving ambiguities against ONSWC the drafter of the contract, is that WLI Investments is permitted to select a venue within the forum of the “federal and state courts of North Carolina,” including bringing claims before the Commission. As a public utility subject to the general supervisory powers of the Commission, no hardship or surprise should result by requiring ONSWC to defend itself before the Commission, and by the filing of the Complaint WLI Investments has consented to the Commission’s jurisdiction or waived its rights to object to venue before the Commission.

Fourth, assuming, *arguendo*, that the Commission is not a “court of North Carolina” for purposes of Section 17.12, ONSWC has likewise waived its opportunity to assert this defense before the Commission.<sup>9</sup> “Defendants can assert a venue objection in either: (i) a responsive

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<sup>8</sup> See N.C. Gen. Stat. § 62-60; *see also* N.C. Gen. Stat. § 62-65.

<sup>9</sup> N.C. Gen. Stat. § 1-83 (requiring demand for proper venue be made before the time of answering expires).

pleading; or (ii) a motion to dismiss under N.C. R. Civ. P. 12(b)(3).... If a defendant fails to object ‘by timely motion or answer the defense is waived.’”<sup>10</sup> Further, “[e]ven if defendants properly raise a venue objection, they can impliedly waive the defense through their ‘actions or conduct.’”<sup>11</sup> Factors indicating waiver include: (i) failure to unambiguously raise and pursue a venue objection; (ii) participation in litigation; and (iii) unnecessary delay.<sup>12</sup> In this case, ONSWC has failed to unambiguously raise and pursue a venue objection, has participated in litigation by filing a response to the Complaint and a dispositive motion, and has allowed the venue question to go unraised for the six months since it filed its Response to Complaint.<sup>13</sup> Improper venue is not jurisdictional, and is subject to waiver if omitted from a motion raising other Rule 12 defenses, or if it is neither made by motion nor included in a responsive pleading.<sup>14</sup> ONSWC’s Response to Complaint is conduct inconsistent with an intent to enforce the venue selection clause amounting to a waiver of the defense because the response fails to timely raise the defense of proper venue, responds to the factual allegations of the Complaint, and requests that the Commission dismiss the case on the merits. In the words of the 11<sup>th</sup> Circuit Court, “[t]o hold otherwise would encourage parties to holster their forum selection clause arguments until they suspect they could achieve a better result in another forum.”<sup>15</sup>

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<sup>10</sup> *Lendingtree, LLC v. Anderson*, 747 S.E.2d 292, 297 (N.C. App. 2013) (citing *Simms v. Mason’s Stores, Inc.*, 285 N.C. 145, 154, 203 S.E.2d 769, 775 (1974)).

<sup>11</sup> *Lendingtree*, at 297 (citing *Simms v. Mason’s Stores, Inc.*, 285 N.C. 145, 154, 203 S.E.2d 769, 775 (1974)).

<sup>12</sup> *Lendingtree*, at 297.

<sup>13</sup> The North Carolina Court of Appeals has declined to establish a precise point at which delay rises to the level of waiver, *Lendingtree* at 301, but recognize that participation in litigation can waive a venue objection. *Shaw v. Stiles*, 13 N.C. App. 173, 185 S.E.2d 268 (1971).

<sup>14</sup> *Stokes v. Stokes*, 371 N.C. 770, 773, 821 S.E.2d 161, 163-164 (2018).

<sup>15</sup> *Southeast Power Group, Inc. v. Vision 33, Inc.*, at p. 15, NO. 19-137684 (May 6, 2021).



To be clear, even if the parties agreed among themselves by contract to not bring an action before the Commission it would not divest the Commission of jurisdiction *per se*; rather, it is the objection or motion of a party and the Commission's enforcement of the venue selection clause that would bar the action. That technicality aside, WLI Investments questions whether a public utility can by contract avoid the jurisdiction of the Commission, and believes that a contract provision that attempts to do so is likely void as against public policy. The Commission need not decide that issue here, however, because ONSWC has failed to timely raise objection and, thus, has waived any defense that Section 17.12 might have offered to the Complaint proceeding before the Commission.

Moreover, upon review of the cases over which the Commission has determined that it does not have jurisdiction, the present matter is of a different character. In its *Order on Jurisdiction and Dismissal of Complaint*, the Commission stated that it is a court of original jurisdiction only as to subjects embraced within the statute defining the Commission's powers and duties.<sup>16</sup> The Commission further stated that this jurisdiction does not include jurisdiction to resolve issues within the sole jurisdiction of the Superior Court, such as tort claims or property rights, except as provided in Chapter 62.<sup>17</sup> In another case, the Commission stated that the proper forum for considering arbitrary and unreasonable acts by a utility may be either this Commission or the General Court of Justice, depending on the nature of the complaint and the relief sought.<sup>18</sup> In the present case, the allegations of the Complaint are not based in real estate issues or tort law, or other

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<sup>16</sup> Order on Jurisdiction and Dismissal of Complaint, p. 13, No. E-7, Sub 1038 (N.C.U.C. Mar. 5, 2014).

<sup>17</sup> *Id.*, citing N.C. Gen. Stat. § 62-2(b). See also Order Dismissing Complaint, p. 2, No. E-22, Sub 553 (N.C.U.C. 2019) (dismissing complaint related to “ongoing real estate issues”); Order Denying Jurisdiction and Dismissing Complaint, p. 11-12, No. EC-46, Sub 45 (2021) (dismissing complaint on statutory grounds).

<sup>18</sup> Order, 64 N.C.U.C. 89, 94, *in re: Kirkman v. Duke Power Company* (1974).

areas of law solely assigned to the General Court of Justice. Reference to the Development Agreement is made only out of necessity to support the allegations of arbitrary and unreasonable acts by a utility, and the relief sought is not enforcement of a contract, but a declaration of the parties' rights, status, and other legal relations pursuant to N.C. Gen. Stat. § 1-253, *et. seq.* The Commission's authority to issue declaratory rulings with respect to controversies involving a public utility's arbitrary and unreasonable conduct or alleged violations of the provisions of Chapter 62 has not, to WLI Investments' knowledge, ever been seriously questioned.<sup>19</sup>

Fifth, considerations of judicial economy and public policy support the Commission's exercise of jurisdiction over the Complaint. This proceeding is not a run-of-the-mill contract dispute. The resolution of this matter is bound up in factual questions about "reasonableness" of conduct by a public utility – determinations that the Commission is solely and uniquely well-positioned to make. The Commission is North Carolina's regulatory expert on such questions and the Commission is the appropriate venue for resolution of the matters such as this one. The Commission, not the State Superior Courts and Federal District Courts of North Carolina, is tasked with supervising the activities of public utilities, resolving disputes arising under the Public Utilities Act, and has superior knowledge and expertise to efficiently resolve this matter. The Commission alone is specifically tasked with hearing and deciding complaints against public utilities, superseding the exercise of jurisdiction of matters such as this case in the general courts

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<sup>19</sup> See, e.g., Order Issuing Declaratory Ruling, p. 5, No. SP-100, Sub 35 (N.C.U.C. 2022) ("Pursuant to N.C.G.S. 62-20, the Commission has 'all the powers and jurisdiction of a court of general jurisdiction' over matters within its jurisdiction. Sections 1-253 through 1-267 of the North Carolina General Statutes (Declaratory Judgment Act) provide the Commission the authority to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C.G.S. § 1-253. Section 1-264 further provides that the purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally constructed and administered." See also *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 446-50, 206 S.E.2d 178, 186-89 (1974) (*Consumers Power*).").

of justice in North Carolina. Thus, it seems likely to WLI Investments that if the Complaint as related to the breach of contract had been filed in Superior Court, the Respondents would have moved to transfer the case to the Commission. Conversely, if the Commission concludes that the claims related to the Development Agreement cannot continue in this venue, WLI Investments could be required to litigate causes of action arising from the same set of facts in two different venues, one of which has no specific authority to regulate public utilities and no experience or expertise in doing so. Such a result would not be an efficient use of judicial resources and cannot be a result that the General Assembly intended in assigning broad authority to the Commission for the “fair regulation of public utilities in the interest of the public.”<sup>20</sup>

Lastly, the Commission should carefully consider the consequences that would result from enforcing a contract clause that allows a public utility to avoid the Commission’s oversight through an agreement with a non-utility counterparty. WLI Investments believes that such a ruling would be fundamentally inconsistent with the provisions of the Public Utilities Act that expressly grant the Commission both personal and subject matter jurisdiction over public utilities and complaints against public utilities such as this case.

2. Stipulation Waiving Objection Based on Section 17.12 to the Commission’s exercise of jurisdiction over WLI’s Complaint.

In compliance with the Commission’s *Order Requiring Parties to File Statement on Jurisdiction*, and WLI Investments having taken the position that the Commission can exercise jurisdiction over WLI Investments’ Complaint, WLI Investments hereby stipulates that it waives

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<sup>20</sup> N.C. Gen. Stat. § 62-2(a)(1).

any objection based on Section 17.12 to the Commission's exercise of jurisdiction over WLI Investments' Complaint.

### CONCLUSION

For the reasons detailed above, Section 17.12 allows the parties to the Development Agreement to invoke the jurisdiction of any state or federal court of North Carolina, including the Commission, to seek resolution of controversies arising out of, relating to, or referring to the Development Agreement. It should be noted, however, that Pluris is not a party to the Development Agreement and the claims stated in the Complaint against Pluris and ONSWC arise under the Public Utilities Act and not solely upon a claim for breach of contract. Even if Section 17.12 is interpreted such that the Commission's jurisdiction would be barred, ONSWC has waived that defense by failing to raise an objection to venue. More importantly, considerations of judicial economy and public policy weigh heavily in favor of the Commission exercising jurisdiction over the Complaint. Therefore, WLI Investments maintains that Section 17.12 allows the prosecution of the Complaint before the Commission and WLI Investments waives any objection to the Commission undertaking proceedings upon the Complaint.

**WHEREFORE**, WLI Investments respectfully requests that the Commission enter an order determining that it has jurisdiction over this matter and that venue before the Commission is proper for the resolution of the Complaint, denying the Respondents' motion to dismiss, and

setting this matter for hearing, establishing discovery guidelines, and addressing such other matters as the Commission deems appropriate.

Respectfully submitted this 11<sup>th</sup> day of August, 2022.

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## CERTIFICATE OF SERVICE

The undersigned, Patrick Buffkin, certifies that a copy of the foregoing Statement on Jurisdiction has been served upon counsel for the Respondents herein, with a courtesy copy to counsel for the Public Staff, by electronic mail this the 11<sup>th</sup> day of August, 2022.

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