

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

Docket No. W-1333, Sub 0  
Docket No. W-1130, Sub 11

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Application by Currituck Water & Sewer, LLC,	)	
4700 Homewood Court, Suite 108, Raleigh, North	)	
Carolina 27609, and Sandler Utility, LLC,	)	Motion of Currituck
Virginia Beach, Virginia, for Authority	)	Water and Sewer to
To Transfer the Eagle Creek Wastewater System	)	Compel and Request
And Franchise in Currituck County, North	)	for Extension of Time
Carolina, and Approval of Rates	)	

NOW COMES Currituck Water and Sewer (“CWS”) and, pursuant to paragraph 6 of the Commission’s discovery guidelines in its November 18, 2021 order in these dockets, moves to compel responses to data requests that the Public Staff has objected to by its filing dated March 16, 2022.

Many of the objections interposed by the Public Staff are to the effect that the questions go beyond the scope of the prospective but not yet delivered testimony of the Public Staff witnesses Franklin, May and Tankard. Other objections are based on the contention that the information requested is already known to CWS. Still other objections are based upon the statements that the questions are not those for which the witnesses have first-hand knowledge. Any objections based on these justifications are clear violations of discovery requirements and should be summarily rejected. Were these objections raised in Superior Court, those raising them in all likelihood would be subject to sanctions.

Other objections are based on unexplained, boilerplate statements that the requests are vague, burdensome, unclear, ambiguous or call for speculation. Many objections throw in a combination of the various objections without designating which objections are addressed specifically with any particular part of the question. In many responses the Public Staff throws in all sorts of objections and then proceeds to provide at least partial responses. It is unclear whether there are additional responses that are not provided due to the objections. It likewise is unclear whether by couching its answers with introductory objections the Public Staff seeks to prevent CWS from relying upon the answers the Public Staff provides.

The Commission's November 18, 2021 order on discovery sets forth timelines within which certain discovery actions by the parties must be completed. Many of these timelines have imposed substantial burdens on CWS and perhaps the Public Staff. However, CWS played no role in establishing these guidelines. The order requires that discovery by CWS be completed by March 10, 2022. That date is established in reference to the timing of the filing and serving of the Public Staff prefiled direct testimony.

Paragraph 4 of the Commission's November 18, 2021 order setting forth guidelines for discovery states as follows:

Formal discovery requests of the Public Staff or other intervenors shall be served by hand delivery, facsimile, or electronic delivery with the agreement of the receiving party, no later than five calendar days after the filing of the party's testimony. The party served shall have up to three business days to file with the Commission objections to the discovery requests on an item-by-item basis, but in no event shall objections be filed later than nine calendar days after the filing of the parties testimony.

The order does not address the substance of topics for which discovery can take place. The order places no limitations on the substance of the discovery. The order placed no requirements that the discovery be limited to the prefiled but not yet presented testimony of the Public Staff witnesses. Nothing in the Commission's order would have prevented discovery by CWS of the Public Staff prior to the time the Public Staff testimony was prefiled. Of course, as no answer has been filed to the application, and as CWS had no clue the position the Public

Staff would take in response to the application or who its witnesses would be, discovery prior to the filing of the Public Staff testimony would have been problematic. Significantly, there is no order from the Commission limiting the scope of the substance of the CWS discovery to be Public Staff.

Under N.C. Gen. Stat. § 62-60, in conducting proceedings the Commission is acting procedurally like the General Court of Justice. Rule 26 of the North Carolina Rules of Civil Procedure addresses specifically and in detail and prohibits the types of objections the Public Staff has repeatedly raised in its unanswered and objected to responses to the discovery. Quite clearly, the limitations on discovery are that the questions must be relevant. Nowhere in scores of objections does the Public Staff argue that the information sought in the questions to it are not relevant. The rule is clear that discovery cannot be objected to on the basis that it goes beyond the scope of any testimony or any knowledge of any prospective witness. It is likewise clear that there is no legitimate ground for objection by asserting that the party seeking the discovery already has knowledge of the information sought. Moreover, it is clear that discovery propounded to a party places upon the party upon which discovery is served the responsibility to obtain the answer without asserting that any particular witness does not have first-hand knowledge.

Rule 26 of the North Carolina Rules of Civil Procedure:

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

- (1) In general. 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, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and the location of persons having knowledge of any discoverable matter. It is not grounds 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.

Throughout the course of this proceeding, which has been pending for many months, CWS has responded to scores if not hundreds of parts and subparts of data requests propounded by the Public Staff. In each case CWS has used its best efforts to respond accurately and fully even in instances where CWS questioned the usefulness or even the relevance of the information sought in the Public Staff data requests. CWS has not resisted requests by the Public Staff to extend deadlines requested on the purported basis that the Public Staff needed more time because it had not yet received all of the numerous discovery answers it had sought.

CWS had only five calendar days between the time that the Public Staff's prefiled but not presented or accepted testimony was served upon it to complete its discovery. Two of these days were weekend days. CWS had not encumbered the Public Staff prior to the time the Public Staff prefiled its direct testimony with any discovery whatsoever. From CWS's perspective the fact that the Public Staff, an agency of the State, has objected to such a substantial number of the questions in the manner it has and has parsed the meaning of words in the data requests asking for information on testimony using the same words the Public Staff asserts need explanation is disappointing to say the least.

Even at the hearing stage, objections that cross-contamination questions exceed the scope of a particular witnesses' prefiled or direct testimony must be overruled. North Carolina is a jurisdiction in which cross-examination is not limited to that directed to a witnesses' direct testimony.

Particularly egregious is the Public Staff's objection to data request 45 with reference to the Tankard and May testimony. The Public Staff was asked about the evaluation of the independent engineering inspector required by DWR in the consent decree. The Public Staff objects on the grounds that the request is vague and ambiguous and requests information that is outside of the scope of Mr. May and Mr. Tanker's testimony. The Public Staff asserts that Mr. May and Mr. Tankard did not have Mr. Rigsby's report at the time their testimony was filed. The

Public Staff further objects to the extent that the request does not identify any so called conflicts for which the request seeks an explanation. Without knowing the purported conflicts the request assumes to exist, the agency asserts the response cannot be provided.

The Public Staff is required to answer requests addressing information that it has at the time it responds to the requests. It should even supplement its responses with information it subsequently receives. Whether or not Mr. May and Mr. Tankard or anyone else on the Public Staff had the independent engineer's report at the time they file their testimony is not relevant. If the Public Staff is unable to read the report of the independent engineer and discern the conflicts of that report with the Franklin, May and Tankard testimony, no number of citations to Merriam Webster would be useful to the agency.

CWS data requests 13 asks the Public Staff to address the Franklin testimony where it describes the occurrence of service "failure" as "rare" and then states that the system experiences approximately 5 "failures" per month. The Public Staff objects by asserting that the term "failure" is vague and ambiguous and it is unclear from the question what is meant by "failure". The use of the word failure in the data requests unmistakably refers to the use of the word "failure" in the Franklin testimony. Such feckless objections as these should never be countenanced.

Motion to compel responses to specific requests:

Examples of objections that the request goes beyond the scope of prefiled testimony:

Franklin

4, 6, 7, 11, 34

May, Tankard

4, 7(c), 8(f), 16(l), 28, 29, 31, 32, 34, 44, 45

General:

7

Examples of objections that CWS already knows the answers:

May, Tankard

8(d), 8(e), 16(b), 17, 40

Examples of objections that the requested answers are outside the personal knowledge of a witness:

May, Tankard

16(b), 16(i), 29

Examples of objections because the questions are broad, vague and unclear or calls for speculation:

Franklin

3, 4, 5, 6, 12(c), 13, 16, 19

May, Tankard

4, 7(a), 7(b), 9, 11(c), 11(d), 11(e), 12 i.- iii.(b), 13, 15(g), 15(h), 16(b)(i), 16(j), 16(k), 16(l), 17(o), 21, 16(k), 29, 31, 32, 34, 39, 16(k), 40 ,41, 42, 44, 45

General:

2, 3, 4

Examples of objections because the question is unclear:

May, Tanard

2

General:

2

Examples of objections because the request is burdensome:

May, Tankard  
8, 8(l),11(c), 39(c)i,

General:  
5

Examples of objections because the Public Staff would be required to do some research:

Franklin  
7

General:  
4, 6

There is one response that the Public Staff objects to on the basis that it is privileged. The legitimacy of that objection is yet to be determined. Otherwise, there are no legitimate objections. The Public Staff should be required to respond or supplement its responses on or before March 22, 2022.

Presently, CWS's rebuttal testimony presently is due March 22, 2022. As the Public Staff has failed to comply with the legitimate discovery requests and as CWS needs to rely on full answers to its discovery to prepare its rebuttal, CWS, much as the Public Staff requested earlier, requests an extension of time until five days beyond the date on which the Public Staff complies with its discovery responsibilities or March 24, 2022 whichever is later to file its rebuttal testimony.

CWS reserves the right to move to strike portions of the Public Staff sponsored testimony for failure to respond to discovery.

WHEREFORE, having responded to the objections of the Public Staff to CWS's discovery by moving to compel, CWS requests that the Commission grant the Motion to Compel and extend the time within which CWS is required to file its rebuttal testimony until March 24, 2022 or five days beyond the date on which Public Staff complies with its discovery responsibility, whichever is later.

Respectfully submitted this 18 day of March 2022.

Edward S. Finley, Jr.

/s/ Edward S. Finley, Jr.  
Attorney for CWS

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion to Compel and Extend Time to File Rebuttal Testimony was duly served upon parties of record either by depositing same in a depository of the United States Postal Service, first class postage prepaid, or by electronic delivery.

This the 18 day of March 2022

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