

**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 and Sewer, LLC,) 4700 Homewood Court, Suite 108, Raleigh,) North Carolina 27609, and Sandler Utilities at) Mill Run, LLC, 448 Viking Drive, Suite 220,) Virginia Beach, Virginia 23452, 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)	ORDER GRANTING IN PART AND DENYING IN PART MOTION TO COMPEL ANSWERS TO DATA REQUESTS AND GRANTING EXTENSION OF TIME TO FILE REBUTTAL TESTIMONY
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BY THE CHAIR: On May 20, 2021, Currituck Water and Sewer, LLC (Currituck), and Sandler Utilities at Mill Run, LLC (Sandler), filed in the above-captioned dockets a joint Application for Transfer of Public Utility Franchise and for Approval of Rates (Application), requesting authority to transfer the wastewater utility system and public utility franchise serving Eagle Creek Subdivision, Mill Creek Golf Club, and Moyock Middle School in Currituck County, North Carolina, from Sandler to Currituck and approval of rates.

On November 18, 2021, the Commission issued a Scheduling Order establishing hearing dates, discovery guidelines, customer notice requirements, and addressing other procedural matters. With respect to discovery guidelines, the Scheduling Order included the following two paragraphs, among others:

4. 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 that 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 that party's testimony.

6. Discovery requests need not be filed with the Commission when served; however, objections shall be filed with the Commission and the objecting party shall attach a copy of the relevant discovery request to the objections. Each discovery request, or part thereof, to which no objection is filed, shall be answered by the time objections are due, subject to other agreement of the affected parties or other order of the Commission.

Upon the filing of objections, the party seeking discovery shall have two business days to file with the Commission a motion to compel, and the party objecting to discovery shall have one business day thereafter to file a response. All objections, motions to compel, and responses shall be served on the other affected party by hand delivery, facsimile, or electronic delivery with the agreement of the receiving party, at or before the time of filing with the Commission.

Scheduling Order, at 4.

On March 2, 2022, the Public Staff filed the testimony and exhibits (testimony) of Mike Franklin, Iris Morgan, Phat H. Tran, and the joint testimony of David May and Robert Tankard. Witnesses Franklin, Morgan and Tran are employees of the Public Staff. Witnesses May and Tankard are employees of the North Carolina Department of Environmental Quality (DEQ), working in the Water Quality Regional Operations Section at DEQ's Regional Office in Washington, North Carolina.

On March 7, 2022, Currituck served the Public Staff with discovery. On March 10, 2022, the Public Staff filed a motion requesting an extension of time to March 15, 2022, in which to file objections to discovery. On March 11, 2022, the Commission issued an Order extending the deadline for the Public Staff to file objections to discovery to March 15, 2022, and preserving the remaining procedural dates and deadlines as required by the Scheduling Order.

On March 15, 2022, the Public Staff filed objections to numerous of the data requests served on it by Currituck.

On March 18, 2022, Currituck filed a Motion to Compel the Public Staff to answer the data requests objected to by the Public Staff. In summary, Currituck's motion stated that the Public Staff's objections are unfounded because the information sought by Currituck from the Public Staff is relevant, or is information that reasonably calculated to lead to the discovery of relevant evidence. Further, Currituck contended that the Public Staff's objections to several of Currituck's data requests require information outside the scope of the witnesses' testimony are unavailing because the scope of cross-examination in North Carolina, and likewise the scope of discovery, is not limited to the subjects addressed by a witness in direct testimony. Moreover, Currituck noted that in many of the Public Staff's objections the Public Staff provided partial responses, but stated that it is unclear to Currituck whether the Public Staff seeks to prevent Currituck from relying on these partial answers. Finally, Currituck stated that its rebuttal testimony is due on March 22, 2022, and it requested an extension of said due date to March 24, 2022, or five days after the date on which the Public Staff complies with an order compelling discovery, whichever is later.

On March 21, 2022, the Public Staff filed a response to Currituck's Motion to Compel. The Public Staff first noted that Currituck's motion was filed a day later than the timing required by the Scheduling Order. In addition, the Public Staff cited Rule 26(b)(1a) of the North Carolina Rules of Civil Procedure as stating limitations on the scope of

discovery, two of which it contended are applicable here: (1) discovery that is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive, and (2) discovery that is unduly burdensome or expensive, taking into account the needs of the case. Further, the Public Staff stated that it provided answers to numerous data requests after it had stated its objections, and maintained that because of the time constraints involved and the parties' ability to conduct discovery at any time prior to submission of prefiled testimony, discovery should be limited to questions based on the content of the prefiled testimony. Moreover, the Public Staff stated that several of Currituck's data requests asked for information that is not within the personal knowledge of the Public Staff's witnesses. Finally, the Public Staff contended that many of Currituck's data requests were unclear or called for speculation by the Public Staff's witnesses. For all these reasons, the Public Staff requested that Currituck's motion be denied.

DISCUSSION

Timeliness of Currituck's Motion to Compel

The Scheduling Order requires parties to file a motion to compel within two business days after objections are filed by the recipient of the discovery. On Tuesday, March 15, 2022, after requesting and receiving an extension of time, the Public Staff timely filed its objections to Currituck's data requests. In order to be timely with its motion to compel, Currituck's motion needed to be filed by Thursday, March 17, 2022. Nevertheless, Currituck did not file its motion until Friday, March 18, 2022. In addition, Currituck did not request an extension of time in which to file its motion to compel, and it did not provide any reason why its motion was not filed in a timely manner. Nevertheless, in the interest of obtaining a full evidentiary record of the facts at issue herein, and in recognition of Currituck's motion having been filed only one day late, the Chair finds good cause to accept Currituck's motion as filed and render a decision on it.

Data Requests to Witness Franklin

There are 13 data requests, including subparts, propounded by Currituck based on witness Franklin's testimony and objected to by the Public Staff. In general, Data Requests (DRs) 3, 4(a), 4(b), 6, 13(a)(ii), 13(b)(i), 16, and 19 request the witness's opinion about the length of time that it takes for equipment to degrade, or the condition of Eagle Creek's wastewater treatment equipment. In some of the DRs "equipment" refers to specific pieces of equipment, but in some it is simply used generally.

Witness Franklin's testimony includes a detailed discussion of several items of Eagle Creek's wastewater treatment equipment that have been identified by previous Commission orders and/or a Consent Judgment in Currituck County Superior Court as being defective or in a degraded condition. A fair reading of these DRs is that where not otherwise specified the general term "equipment" refers to the wastewater treatment equipment that is expressly discussed in witness Franklin's testimony as having been found by the Commission or the Superior Court to be defective or in a degraded condition.

As a result, the Chair concludes that the Public Staff should be required to answer these DRs.

However, to be clear, the Chair is not directing witness Franklin, or any of the Public Staff's witnesses, to speculate or give a speculative opinion on matters that the witness is not qualified to opine about, or on matters that involve so many variables that an opinion would lack a solid basis. Nonetheless, if that is the witness's position on the matter, the witness should provide a detailed explanation of why he is unable to express an opinion on the subject, including, if applicable, a list of the variables on which his inability to opine is based.

Currituck's DR 5 and the Public Staff's response are as follows:

In the experience of Mr. Franklin or others on the Public Staff, is the treatment process described in Mr. May and Mr. Tankard's testimony capable of meeting reclaimed standards without filters and ultraviolet disinfection?

Response: The Public Staff objects to this request as it calls for undue speculation. The term "treatment process" is vague and ambiguous.

The Public Staff's objection to DR 5 is not well taken. The DR specifically asks about the "treatment process described in Mr. May and Mr. Tankard's testimony." On pp. 6-9 of their testimony, witnesses May and Tankard (DEQ witnesses), describe the operations of a vacuum collection system such as the collection system used at Eagle Creek. A fair reading of this DR is that the term "treatment process" means that which is described in the testimony of the DEQ witnesses. Therefore, the Chair concludes that the Public Staff should be required to answer DR 5.

DR 7 references a survey about Eagle Creek that is cited in witness Franklin's testimony and asks the Public Staff to explain how survey questions are designed and surveys are conducted to ensure that they do not introduce bias into the survey results. The Public Staff objected on the bases that the information is outside the scope of witness Franklin's testimony and requests that the Public Staff provide research and/or explanation regarding a survey that it did not conduct. As Currituck correctly states in its motion, in North Carolina neither the scope of cross-examination nor the scope of discovery is limited to the subjects addressed by a witness in direct testimony. In addition, a substantial portion of the Public Staff's role as consumer advocate is investigating the facts in a myriad of fact situations. In that role, the Public Staff reviews surveys by other parties, asks questions, and propounds DRs about the facts. As a result, the Public Staff is undoubtedly aware that questions, in surveys and otherwise, can be structured so as not to result in biased responses. Therefore, the Chair concludes that the Public Staff should be required to answer DR 7.

DRs 11 and 15 ask whether the Public Staff requested information from the operators of the Eagle Creek wastewater system and about what Currituck perceives to be a discrepancy in the Public Staff's testimony, respectively. The Chair concludes that

the Public Staff's answers to DRs 11 and 15 are sufficient and, therefore, Currituck's motion to compel further answers to these DRs should be denied.

DR 34 asks for the number of wastewater collection systems that the Commission regulates. The Public Staff objected that the question calls for speculation and seeks information beyond the scope of direct examination. The Chair finds the Public Staff's objection unfounded and directs that the Public Staff answer DR 34.

Data Requests to DEQ Witnesses

DR 2 requests copies of all inspections of Eagle Creek's wastewater collection system from 1997 to the present. The Public Staff provided no reasonable ground on which to object to this DR, and responded that it produced the Eagle Creek inspection reports from January 2012 to the present. The Chair concludes that the Public Staff's response is not sufficient. Therefore, the Public Staff is directed to supplement its response to DR 2 by providing Currituck with copies of all inspections of Eagle Creek's wastewater collection system from 1997 through December 31, 2011.

In DR 4, Currituck asks whether in the witnesses' experience a treatment process that they described is able to reliably meet reclaimed effluent limits without filtration and/or ultraviolet disinfection. The Public Staff objected that the question was vague and ambiguous, and that the scope of the witnesses' testimony is limited to describing equipment rather than any "treatment process." The Chair does not agree. The DR references a treatment process described in the DEQ witnesses' testimony and asks for an opinion about the process. The Public Staff is directed to answer DR 4.

In DRs 7(a), (b), and (c), Currituck asks for information about the operations of other vacuum collection systems. The Chair finds that the Public Staff's answers to these DRs are sufficient and, therefore, Currituck's motion to compel further answers to these DRs should be denied.

In DRs 8(d), (e), and (f); 11(c), (d), and (e); 12(b) and (c); 13; 15(g) and (h); 16(b), (i), and (j); 17(m) and (n); 39(c)(i) through (c)(v); and 41, Currituck requests opinions and information on a number subjects related to the performance of Eagle Creek's collection system and Eagle Creek's operators, DEQ's actions and purported lack of action in detecting or enforcing certain DEQ requirements, and possible causes for the failure of a vacuum collection system. The Public Staff stated a number of objections to these DRs, and in several instances stated that the witnesses had "no personal knowledge" of the facts. The Chair finds the Public Staff's responses to these DRs insufficient. In particular, a lack of personal knowledge by the DEQ witnesses is not a valid reason for refusing to respond. DEQ is a state agency charged with the responsibility of inspecting and regulating wastewater systems. In that role DEQ keeps records of its activities and actions. The Chair expects the DEQ witnesses to make a reasonable search of the DEQ records that could provide the information sought by Currituck and, when such information is found, provide it to Currituck. Therefore, the Chair finds good cause to direct that the Public Staff provide further responses to these DRs.

DRs 9, 16(k) and (l), 21, 28, 29, 31, 32, and 40(p) ask about the reasons why DEQ received no more than three complaints about Eagle Creek's wastewater system, the causes for certain conditions and compliance issues at Eagle Creek, the number of vacuum collection systems in North Carolina, and the number of operator employees on site at a particular time. The Chair finds the responses by the Public Staff to these DRs sufficient and, therefore, will not compel the Public Staff to provide further responses.

DR 34 asks for the number of wastewater collection systems that the Commission regulates; the same information requested in Franklin DR 34. As with Franklin DR 34, the Chair finds the Public Staff's objection unfounded and directs that the Public Staff answer this DR 34.

In DR 42, Currituck asks for correspondence between DEQ and residents, and between DEQ and the Public Staff related to the Eagle Creek wastewater system and the present proceedings. The Public Staff objected that this DR is overly broad, burdensome, and calls for privileged information. The Chair finds the Public Staff's objections unavailing. The Chair expects the DEQ witnesses and the Public Staff to make a reasonable search of the DEQ and Public Staff's records, respectively, in order to provide copies of the correspondence requested by Currituck. This directive is conditioned on the rights of DEQ and the Public Staff to redact from such correspondence information that is confidential or otherwise privileged. Therefore, the Chair finds good cause to direct that DEQ and the Public Staff provide copies of the correspondence requested in DR 42.

In DRs 44(q), (r), and (s); and 45(t), (u), and (v), Currituck asks questions about what Currituck alleges to be conflicts between a report and the testimony of DEQ's witnesses. The Public Staff objects that these DRs do not adequately identify the alleged conflicts in question. The Chair agrees with the Public Staff's objection. Without referencing, at a minimum, the pages of the report and pages of the testimony of DEQ's witnesses these DRs are too vague. Therefore, the Chair declines to compel a response to these DRs.

Data Requests to Witnesses Franklin, May, and Tankard

DR 2 requests the same information as DR 2 to the DEQ witnesses. As in that DR finding, the Chair directs the Public Staff to supplement its response to DR 2 by providing Currituck with copies of all inspections of Eagle Creek's wastewater collection system from 1997 through December 31, 2011.

DR 3 requests that the Public Staff or DEQ provide information on the actions taken to address past service and compliance issues at Eagle Creek. The Public Staff objected on grounds that the question is vague as to what is meant by "service and compliance issues," and is overly broad, and unduly burdensome, and directs Currituck to "the direct testimony of Mr. Franklin in this proceeding." The Chair finds the Public Staff's objection to be unfounded. To the extent that the Public Staff and/or DEQ have taken actions to address service and compliance issues at Eagle Creek, this information is relevant and should be made available to Currituck. As a result, the Public Staff is directed to respond to DR 3.

DRs 4 and 5 request the identity of each of the Commission's regulated utilities, their bond requirement for each utility, and the status of each utility's bond. The Chair finds that this information is not relevant to any issue before the Commission in this proceeding, nor is it calculated to lead to relevant evidence. Therefore, Currituck's motion to compel answers to DRs 4 and 5 should be denied.

DR 6 asks the Public Staff to "provide evidence that the NCUC requires all regulated utilities in NC to provide sufficient capital resources." The Public Staff responded generally that "[a] utility needs to have access to capital at a reasonable cost to finance necessary improvements and replacements to ensure safe and reliable service at just and reasonable rates." The Chair finds the Public Staff's response to be adequate and, therefore denies the motion to compel a further answer to DR 6.

DR 7 asks for specific items of correspondence between DEQ and other entities, and the Commission and other entities. The Public Staff objected that this DR is overly broad and burdensome. Similar to DR 42 directed to the DEQ witnesses, the Chair expects the DEQ witnesses and the Public Staff to make a reasonable search of the DEQ and Public Staff's records, respectively, in order to provide copies of the correspondence requested by Currituck. Again, this directive is conditioned on the rights of DEQ and the Public Staff to redact from such correspondence information that is confidential or otherwise privileged. Therefore, the Chair finds good cause to direct that DEQ and the Public Staff provide copies of the correspondence requested in DR 7.

CONCLUSION

Based on the foregoing and the record, the Chair finds good cause to grant in part and deny in part, as specifically discussed above, Currituck's motion to compel. Further, Currituck's motion for an extension of time to file rebuttal testimony is also granted.

Finally, in response to Currituck's concern about whether it can rely on the Public Staff's partial responses that follow an objection by the Public Staff, the Chair concludes that the Public Staff's partial responses are answers to the data requests and, therefore, may be used by Currituck in the same manner and for the same purposes as responses that were not prefaced by an objection.

IT IS, THEREFORE, ORDERED as follows:

1. That Currituck's motion to compel is granted in part, as specifically discussed with respect to particular data requests identified in this Order, and the Public Staff is directed to respond to those data requests on or before March 25, 2022;
2. That Currituck's motion to compel is denied in part, as specifically discussed with respect to particular data requests identified in this Order; and

3. That the date for Currituck to file rebuttal testimony is hereby extended to March 31, 2022.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of March, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Erica N. Green". The signature is written in a cursive style with a large, stylized initial "E".

Erica N. Green, Deputy Clerk