

**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,)	ORDER GRANTING IN PART
Complainant)	AND DENYING IN PART
)	MOTION TO STRIKE CERTAIN
v.)	PLEADINGS
)	
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 Per DWR, the moratorium will be rescinded when OBKA has repaired the WWTP, has met all conditions of Permit No. WQ0002284, can demonstrate that it can adequately treat and dispose of its waste, and has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.

In its Motion to Strike, OBKA requests that the Commission strike from the Complaint Paragraphs 8, 9, 10, 11, 12, 14, 16, 17, and 18 in their entirety as well as Paragraph 13 with the exception of the allegations that "[t]he Public Staff conducted its investigation and filed its report with the Commission on May 6, 2013" and "the Public Staff concluded that the wastewater system was in good condition and that OBKA was providing adequate wastewater utility service." Motion to Strike at 1. OBKA argues that these allegations are not relevant to and are immaterial to the determination of the issues raised in this action. OBKA further asserts that these pleadings are improperly included in the Complaint solely for the purposes of disparaging and prejudicing OBKA in its ability to have a fair hearing before the Commission.

In its Response, the HOA requests that the Commission deny OBKA's Motion to Strike and argues that it listed 19 paragraphs reciting the history of OBKA's actions wherein "it failed to comply with its public utility responsibilities under Chapter 62 of the General Statutes, its Certificate of Public Convenience and Necessity and its permits issued by the Division of Water Quality." Response at 1-2. The HOA states that OBKA provides a "bare bones" motion using boiler plate recitations without any substantive argument as to why the allegations are immaterial or irrelevant. The HOA argues that the allegations are relevant and material because they address the history of OBKA's actions or omissions during OBKA's ownership and operation of the sewage collection and treatment facilities and provide facts describing the extent to which OBKA has failed to comply with its public service responsibilities. The HOA asserts that the allegations are factual accounts from the public record, and if the allegations tend to disparage or prejudice OBKA, it is the actions of OBKA and not the allegations that do so. The HOA asserts that OBKA has displayed a cavalier attitude toward the Commission's jurisdiction and the wellbeing of the consumers in its service territory which supports the need it has requested.

In its Reply to the HOA's Response, OBKA argues that the HOA cites the incorrect Commission rule as the statutory authority for its Response, is unnecessarily redundant, and demonstrates that the relief requested in the Complaint relates to prospective investigations, the current condition of the WWTP, and the Respondent. OBKA argues that allegations regarding events that occurred prior to 2013 are not relevant to the current situation because the Public Staff determined that OBKA was providing adequate wastewater treatment in 2013 rendering a historical discussion of prior facts irrelevant to the issues before the Commission and, therefore, should be stricken from the Complaint.

DISCUSSION AND CONCLUSIONS

The issues before the Commission in this complaint proceeding are limited to whether OBKA is taking swift, reasonable, and prudent action to repair the Kinnakeet Shores WWTP, meeting all conditions of Permit No. WQ0002284, working to have the moratorium issued by DWR effective October 13, 2021, rescinded, and meeting its obligations under the CPCN and to its consumers as a public utility. In an attempt to ensure

that OBKA is meeting its obligations under the CPCN and its public utility responsibilities under Chapter 62 of the General Statutes, the HOA requests that the Commission require a due diligence investigation which answers those questions and depending on the results of the investigation, take certain actions as requested.

The function of a pleading is not to narrate the evidence, but rather to state the substantive, ultimate facts upon which the right to relief is founded. Allegations which set forth matters immaterial to the controversy are considered irrelevant. On a motion to strike, the test of relevancy is the right of the pleader to present in evidence upon the trial the facts to which the allegations relate. Nevertheless, allegations in a complaint should be stricken only when they are clearly improper, irrelevant, or unduly repetitious. *Daniel v. Gardner*, 240 N.C. 249, 251, 81 S.E.2d 660, 662 (1954). See also *Dixie Lines v. Grannick*, 238 N.C. 552, 78 S.E.2d 410; *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551; *Whitlow v. R.R.*, 217 N.C. 558, 8 S.E.2d 809; *Hildebrand v. Telegraph Co.*, 216 N.C. 235, 4 S.E.2d 439. However, if the pleading is irrelevant or redundant, and its retention will cause harm or injustice to the moving party, the pleading should be stricken. *Daniel*, 240 NC at 252; *Hinson v. Britt*, 232 N.C. 379, 61 S.E.2d 185.

OBKA made its motion timely and alleges that the specific paragraphs subject to the motion are irrelevant and immaterial to a determination of the issues in this matter. The HOA's argument that allegations presenting the historical background of OBKA's interactions with the Commission are automatically relevant to this proceeding does not bear weight. The Chair is not persuaded that Paragraphs 11, 12, 14, 16, and 17 are relevant to the matters currently before the Commission because they do not address the current status of the WWTP nor the current actions of OBKA in responding to the moratorium, its obligations under the CPCN, or the needs of its consumers under Chapter 62 of the General Statutes. The Chair finds that Paragraphs 8, 9, 10, 13, 15, and 18 are relevant and have probative value to the determination of the matters before the Commission.

OBKA further asserts that the allegations are disparaging and prejudicial to OBKA affecting its ability to have a fair hearing before the Commission. The HOA's response that because the statements are factual, and the actions causing embarrassment to OBKA are of its own making does not automatically override the prejudicial effect Paragraphs 8, 9, 10, 13, 15, and 18 may have or diminish the potential prejudicial effect of these allegations. However, under the circumstances of this proceeding, these particular allegations are relevant to ensuring a full understanding of the current state of the WWTP and OBKA's suitability to continue to own and operate the WWTP in compliance with its obligations. The Chair finds that the probative value outweighs the prejudicial effect, if any, to OBKA that may be presented by these allegations.

IT IS, THEREFORE, ORDERED as follows:

1. That OBKA's Motion to Strike is granted with regard to Paragraphs 11, 12, 14, 16, and 17 of the Complaint;

2. That OBKA's Motion to Strike is denied with regard to Paragraphs 8, 9, 10, 13, 15, and 18 in their entirety;

3. That OBKA shall file its answer to Paragraphs 8, 9, 10, 13, 15, and 18 on or before Friday, July 8, 2022;

4. That OBKA's answer must be signed and filed by a member of the Bar of the State of North Carolina admitted and licensed to practice as an attorney at law and may be verified by an officer, attorney, or agent thereof who is acquainted with the facts as required by Commission Rule R1-5(d); and

5. That the Clerk's Office shall serve this Order on the Parties by electronic mail, delivery confirmation requested.

ISSUED BY ORDER OF THE COMMISSION.

This the 28th day of June, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, appearing to read "Erica N. Green". The signature is fluid and cursive, with the first name "Erica" being more prominent.

Erica N. Green, Deputy Clerk