

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No.: W-1297, Sub 14

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

MRT-1, LLC,)	
)	
)	
Complainant,)	<u>NOTICE AND MOTION FOR</u>
)	<u>SANCTIONS</u>
v.)	<u>(N.C. Gen. Stat. §§62-60 and</u>
)	<u>1A-1, Rule 37)</u>
HARKERS ISLAND SEWER COMPANY,)	
)	
Respondent.)	
)	

NOW COMES MRT-1, LLC, by and through counsel, and respectfully (I) hereby provides notice that Complainant has not timely received any of the Respondents' testimony or exhibits as directed by order of the North Carolina Utilities Commission (the "Commission"), and (II) hereby moves for an appropriate discovery sanction for failure to comply with the Commission's order. In support of this motion, the undersigned shows the Commission, as follows:

1. Complainant initially filed its Complaint on May 2, 2019.
2. By order entered December 18, 2020, the Commission ordered, in relevant part, that the direct testimony and exhibits of Complainant shall be filed on or before Monday, March 1, 2021; and that the direct testimony and exhibits of Respondent shall be filed on or before Monday, March 29, 2021; and that the rebuttal testimony and exhibits of Complainant shall be filed on or before Monday, April 12, 2021.
3. On Monday, March 29, 2021, the date Respondent's testimony and exhibits were due, Respondent filed a motion for an extension of time to make said filings stating that it needs

additional time to file direct testimony and exhibits due to the impacts of COVID-19 on Respondent's work duties, on coordinating and meeting with Respondent's engineer, and on coordinating and meeting with Respondent's legal counsel. In its motion, Respondent stated that Complainant MRT-1, LLC, did not oppose the motion so long as it is granted one additional week for the filing of rebuttal testimony and exhibits. No other parties have intervened in this matter.

4. By order entered March 30, 2021, the Commission ordered that based on the record and the pending April 27, 2021 hearing date, "the Presiding Commissioner finds cause to extend the deadline for Respondent to file direct testimony and exhibits until Friday, April 2, 2021, on the express condition that a full and complete copy is provided to MRT's counsel via email no later than 5:00 pm on Friday, 2 April 2, 2021. The Presiding Commissioner also extends the time for Complainant to file rebuttal testimony and exhibits until Friday, April 16, 2021."

5. The foregoing order expressly provided as follows:

"Because Friday, April 2, 2021, is a state holiday, the Commission will not receive Respondent's filing, and said filing will not be available to the Complainant or the public via the Commission's website, until Monday, April 5, 2021. Hence, the requirement that Respondent provide a full and complete copy of its filing to MRT's counsel via email **no later than 5:00 pm on Friday, April 2, 2021**, effectively allowing Complainant an identical four day extension as the extension granted to Respondent." (emphasis added).

6. The foregoing order was received by counsel for Respondent on March 30, 2021, as confirmed by a responsive email.

7. To date, the undersigned, as counsel for Complainant, has never received any such testimony or exhibits from Respondent. To date, the Complainant (individually) has never received any such testimony or exhibits from Respondent.

8. N.C. Gen. Stat. §62-60 provides as follows:

"For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, **the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers**

and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law. The commissioners and members of the Commission's staff designated and assigned as examiners shall have full power to administer oaths and to hear and take evidence. The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record. A majority of the commissioners shall constitute a quorum, and any order or decision of a majority of the commissioners shall constitute the order or decision of the Commission, except as otherwise provided in this Chapter.”

N.C. Gen. Stat. § 62-60 (emphasis added).

9. N.C. Gen. Stat. 1A-1, Rule 37 (b)(2) provides in relevant part, as follows:

“If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

b. **An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters in evidence;**

c. **An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;**

d. **In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;**

e. Where a party has failed to comply with an order under Rule 35(a) requiring the party to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that the party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was

substantially justified or that other circumstances make an award of expenses unjust.”

N.C. Gen. Stat. § 1A-1, Rule 37.

10. The Commission clearly has the same authority as the general court of justice under the North Carolina General Statutes to enter orders in connection with the Rules of Civil Procedure, including providing for an appropriate sanction for failure to comply with an order of the Commission.

11. Complainant MRT-1, LLC hereby moves the Commission enter an appropriate sanction against Respondent including, without limitation, (i) refusing to allow the Respondent to oppose the claims filed by MRT-1, LLC in the complaint, and further prohibiting Respondent from introducing into evidence any testimony or evidence contesting the Complainant’s claims, and (ii) striking Respondent’s responsive pleading filed in the above-captioned action.

12. In the event that the Commission allows the Respondent to produce testimony beyond the previously ordered response deadline, Complainant respectfully requests an equal extension of time to respond to such late-filed testimony.

WHEREFORE, the undersigned counsel for Complainant MRT-1, LLC respectfully requests that the Commission issue an appropriate Order sanctioning Respondent Harkers Island Sewer Company for its failure to comply with the Commission’s order dated March 30, 2021.

This the 5th day of April, 2021.

Electronically submitted

/s/ Andrew D. Irby, NCSB # 35353
Attorney for MRT-1, LLC

OF COUNSEL:

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CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing MOTION TO SUBSTITUTE MRT-1, LLC AS COMPLAINANT on the parties of record by electronic mail or by United States first class mail, postage prepaid, properly addressed to the following:

I. CLARK WRIGHT, JR.
DAVIS HARTMAN WRIGHT, PLLC
209 Pollock Street
New Bern, NC 28560
Email: icw@dhwlegal.com
Attorney for Respondent HISCO

This the 5th day of April, 2021.

Electronically submitted

/s/ Andrew D. Irby, NCSB # 35353
Attorney for MRT-1, LLC