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December 14, 2022

Ms. A. Shonta Dunston  
Chief Clerk  
North Carolina Utilities Commission  
4326 Mail Service Center  
Raleigh, NC 27699-4300  
*Via electronic filing only*

RE: WLI Investments, LLC's Response to Motion to Strike (Docket No. W-1300, Sub 77,  
and No. W-1305, Sub 35)

Dear Ms. Dunston,

Please find enclosed for filing in the above-captioned dockets WLI Investments, LLC's  
Response to Motion to Strike.

Should you have any questions regarding this filing, please contact me at your earliest  
convenience.

Sincerely,

/s/ Patrick Buffkin

Patrick Buffkin

Buffkin Law Office

Enclosures

Cc: Mr. Dan Higgins, Counsel for Pluris Hampstead, LLC; Mr. David Drooz, Counsel for Old  
North State Water Company

OFFICIAL COPY

Dec 14 2022

**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>COMPLAINANT’S RESPONSE TO MOTION TO STRIKE</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 responds to the Respondents’ Motion to Strike, filed in the above-captioned proceeding on November 23, 2022, requesting that the Commission deny that motion. In support of this Response and request to deny the motion to strike, WLI Investments respectfully shows unto the Commission the following:

**BACKGROUND**

1. On January 3, 2022, WLI Investments filed its Verified Complaint and Petition for Declaratory Ruling (“Complaint”), alleging, *inter alia*, that Pluris Hampstead, LLC (“Pluris”) and Old North State Water Company, LLC (“ONSWC,” together with Pluris, “the Respondents”) engaged in unreasonable and unjust practices in their dealings with WLI Investments in breach of a 2018 contract between WLI Investments and 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, the Respondents filed an 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 22, 2022, the Commission issued an Order that, among other things, scheduled this matter for hearing and required the parties to pre-file testimony in advance of the hearing.

6. On October 3, 2022, WLI Investments timely filed the direct testimony of D Logan, along with certain exhibits.

7. On November 4, 2022, the Respondents timely filed the testimony of their witnesses.

8. On November 16, 2022, WLI Investments filed the rebuttal testimony of D Logan, along with certain additional exhibits.

9. On November 23, 2022, the Respondents jointly filed a motion to strike the following portions of Mr. Logan's rebuttal testimony:

- i. Reference to an out-of-court statement made by former Pluris employee Randy Hoffer ("the Hoffer Statement") on the basis that it is inadmissible hearsay, under North Carolina Rules of Evidence 801, 803, and 804;

- ii. Reference to out-of-court statements made by former ONSWC member Michael Myers, who negotiated and signed the Development Agreement on behalf of ONSWC (“the Myers Statements”), also on the basis that they is inadmissible hearsay, under North Carolina Rules of Evidence 801, 803, and 804; and
- iii. Reference to what the Respondents believe are “new issues not asserted in WLI’s Complaint or raised in [Mr. Logan’s] direct testimony,” including the issues of estoppel and waiver as related to the Development Agreement (“the Allegedly New Issues”), on the basis that it would be “inappropriate” to allow WLI Investment to raise the Allegedly New Issues in its rebuttal testimony.

### **ARGUMENT**

The Commission should deny the Respondent’s motion to strike. The Hoffer Statement is not, as the Respondents claim, inadmissible hearsay. Rather, because the Hoffer Statement was made while Mr. Hoffer was a Pluris employee and acting within the scope of his employment, it is excepted from the rule against hearsay.<sup>1</sup> The same analysis should apply to the Myers Statements. Finally, contrary to the Respondents’ position, the Allegedly New Issues are not, in fact, new at all. Even if they were, WLI Investments properly raised those issues to rebut arguments or contentions advanced by the Respondents.

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<sup>1</sup> N.C. Gen. Stat. § 8C-1, Rule 801(d)(D).

### Legal Standard

The Commission applies the rules of evidence insofar as practicable, and its decisions must be supported by competent material and substantial evidence.<sup>2</sup> “Substantial evidence” is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>3</sup> Procedure before the Commission, and particularly the admission of evidence, is not so formal as litigation conducted in the superior court.<sup>4</sup> Further, in this proceeding before the Commission’s Hearing Examiner, like a bench trial in superior court, there is no risk that the jury would be prejudiced by the hearing of some evidence that ought to have been excluded and, in any event, the Hearing Examiner would be required to view the evidence to determine admissibility. Thus, in this proceeding, the application of the Rules of Evidence should be more informal, flexible, and practical because the prejudicial effect of allowing otherwise inadmissible evidence to be admitted is minimal. Moreover, the purpose of the Rules of Evidence is “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”<sup>5</sup>

### The Hoffer Statement

The Respondents argue that the Hoffer Statement is hearsay and should not be admitted as evidence, citing Rules 801, 803, and 804.<sup>6</sup> The Respondents’ arguments are misplaced and rely on

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<sup>2</sup> N.C. Gen. Stat. § 62-65(a).

<sup>3</sup> *State ex. rel. Com’r of Insurance v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 231 S.E. 2d 882 (1977).

<sup>4</sup> *State ex. rel. Utilities Comm’n v. Carolina Telephone & Telegraph Co.*, 267 N.C. 257, 148 S.E.2d 100 (1966).

<sup>5</sup> N.C. Gen. Stat. § 8C-1, Rule 102.

<sup>6</sup> N.C. Gen. Stat. § 8C, Rules 801, 802, and 803.

an incorrect application of these Rules, because Respondents have misapplied the provisions of Rule 801(d) to the facts alleged in this case. Contrary to the Respondents' arguments, the Hoffer Statement is admissible under Rule 801(d).

Rule 801(d) provides that a "statement is admissible as an exception to the hearsay rule if it is offered against a party and it is...(C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship."<sup>7</sup> The allegations of the Complaint, as supported by the testimony of WLI Investments witness Logan, are that the Hoffer Statement will be offered against a party, Pluris, and that statement was made by Mr. Hoffer, who was an employee of Pluris at the time the statement was made. Further, the testimony of WLI Investments witness Logan confirms that the Hoffer Statement was made either (1) concerning a subject that Pluris authorized Mr. Hoffer to make statements about or (2) within the scope of his employment. Because the Hoffer Statement comes within the plain language and straightforward application of Rule 801(d), it is within an exception from the hearsay rule and further analysis under Rules 803 or 804 is unnecessary and erroneous.

For the following reasons, Respondents' arguments to the contrary are irrelevant. First, that Mr. Hoffer is no longer an employee of Pluris is irrelevant to analysis under Rule 801(d), because the rule provides that a statement is admissible if made during the existence of the employment relationship, which is the case here. Second, that WLI Investments has not subpoenaed Mr. Hoffer also has no impact on whether a statement is within an exception to the hearsay rule, because there is no "unavailability" requirement under Rule 801(d). Third, the Respondents offer no evidentiary

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<sup>7</sup> N.C. Gen. Stat. § 8C-1, Rule 801.

support and no new factual allegations that support the argument that Mr. Hoffer was acting outside the scope of his employment. WLI Investments understands that the scope of Mr. Hoffer's employment duties was quite broad, given that his job title was "Regional Manager" and he was sometimes referred to as "North Carolina manager."<sup>8</sup> The Respondents have offered no evidence to contest the fact that, in that position, Mr. Hoffer had the authority to provide Mr. Logan with an explanation as to why ONSWC would not sign a permit application required to authorize construction of the wastewater collection system required under the Development Agreement (a system that Pluris would come to own under its proposed acquisition of ONSWC's service territories).

Finally, the fact that the Respondents regard the Hoffer Statement as being "outrageously provocative" does not determine whether the Hoffer Statement should be admitted as evidence, nor is it probative on the question of whether Mr. Hoffer was authorized to make the statement. An "outrageously provocative" statement may nonetheless be true. The Rules of Evidence require that the Hoffer Statement be admitted pursuant to Rule 801(d) "to the end that the truth may be ascertained."<sup>9</sup> Respondents' arguments go only toward the weight to be given to the Hoffer Statement by the finder of fact and not whether the Hoffer Statement should be admitted as evidence. The weight given to that evidence is for the Hearing Examiner to decide in light of the full record of evidence in this case. Moreover, in a case such as this one where there is no jury, the

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<sup>8</sup> See, e.g., "Randy Hoffer Hoffer," <https://www.linkedin.com/in/randy-hoffer-hoffer-74680ba9/> (last visited Nov. 29, 2022) (listing Randy Hoffer's position as "Regional Manager at Pluris LLC"); "Florida and North Carolina Managers – A Common Passion for Customer Service and Innovation," Pluris Holdings, LLC, Nov. 2015, <https://www.plurisusa.com/resources/pluris-news/2015/florida-and-north-carolina-managers> (last visited Nov. 29, 2022) (stating that "Randy oversees all operations in North Carolina"); "Pluris Hampstead Membrane Bio-reactor (MBR) Treatment Facility Expanded and new advanced Membranes Added," Pluris Holdings, LLC, Dec. 2021, <https://www.plurisusa.com/resources/pluris-news/2021/december-2021> (last visited Nov. 29, 2022) (identifying Mr. Hoffer as "North Carolina manager, Randy Hoffer..." and stating "Customers are encouraged to contact Randy to arrange for a site visit or to ask *any questions* regarding Pluris facilities in North Carolina." (emphasis added)).

<sup>9</sup> N.C. Gen. Stat. § 8C-1, Rule 102.

Hearing Examiner is required to view the evidence to determine its admissibility and is tasked with giving that evidence the weight it is due to reach findings of fact and, ultimately, to determine a just result in this proceeding.

### The Myers Statements

Respondents also seek to strike Mr. Logan's testimony in all places where Mr. Logan refers to statements by Michael Myers, other than statements appearing in Mr. Myers' deposition, where those statements are offered as evidence of the truth of the matter asserted. The specific references to Mr. Logan's testimony provided by Respondents are to page 6, lines 18-21, and to page 10, lines 4-5 of Mr. Logan's rebuttal testimony.

Here again, the Respondents arguments are based on a misapplication of the Rules of Evidence and rely upon on facts that are irrelevant to the question of whether the Myers Statements should be admitted into evidence. First, the Myers Statements are not hearsay because the Myers Statements concerning the negotiation of the terms of the Development Agreement are offered not for the truth of the matter asserted, but to demonstrate the listener's state of mind—specifically, WLI Investments' reliance.<sup>10</sup> In the Myers Statements, the matter asserted is that ONSWC would approve and accept a low-pressure wastewater collection systems in Salters Haven and the Lea Lots (the "Subdivision" defined in the Development Agreement), even though it had a preference for gravity sewer. Regardless of whether that assertion was true, that statement explains WLI Investments' next steps—building or attempting to build a low-pressure wastewater collection system.

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<sup>10</sup> Pursuant to Rule 801(c), an out of court statement is not hearsay if it is offered for some purpose other than to prove the truth of the matter asserted.



In addition, the Myers Statements also come within Rule 801(d), because the statement is offered against ONSWC and was made by ONSWC's agent (Mr. Myers) concerning a matter within the scope of his agency (the configuration of the wastewater collection systems to be constructed by WLI Investments and eventually owned by ONSWC), and made during the existence and in furtherance of the relationship (while Mr. Myers was a member of ONSWC, one of his duties was to negotiate development agreements with real estate developers to further ONSWC's interest to increase its customer base). There is, to WLI Investments' knowledge, no dispute that Mr. Myers was a member of ONWSC at the time the Myers Statements were made and that Mr. Myers was authorized to negotiate the terms of the Development Agreement.

Third, the existence of a separate and unrelated legal dispute between Mr. McDonald and Mr. Myers is irrelevant to the question of whether the Myers Statements should be admitted to evidence. Here again, questions of credibility of a witness and of the weight of the evidence are reserved for the finder of fact, and inapposite to the question of whether the evidence should be admitted. Moreover, the Respondents have already had the opportunity to challenge Mr. Myers' motives. As the Respondents note, Mr. Myers sued ONSWC's principal, John McDonald, on August 22, 2022, and he amended his complaint on October 14, 2022. Mr. Myers was deposed on October 20, 2022, nearly a full week later. Had the Respondents had reason to question the accuracy of Mr. Myers' statements or his motives, they should have done so then. That the Respondents did not suggests that their prejudice argument is a farce.

Finally, it should be noted here that reference to the theory of waiver to enforce the Development Agreement is not based solely upon the Myers Statements. In this case, waiver supports enforcement of the Development Agreement not solely because of what Mr. Myers stated, but because of what ONSWC did in dealing with WLI Investments. What ONSWC did was to

accept a wastewater collection system in phases 1 and 2 of Salters Haven with low-pressure facilities, despite the language in the contract that the Respondents now argue forecloses the installation of low-pressure facilities. ONSWC cannot have it both ways: either the language in the contract prohibits low-pressure facilities or the technical requirements have been waived based on ONSWC's approval and acceptance of the wastewater collection systems in Salters Haven phases 1 and 2. The evidence provided, which is not in dispute, demonstrates that the contract language in Sections 4.3 and 5.3 of the Development Agreement are substantively identical. ONSWC's approval and acceptance of a low-pressure wastewater collection system operates to waive the technical requirements of that contract language. Whether that "waiver" arose under the contract theory of waiver or estoppel, or based upon the course of performance by WLI Investments and ONSWC is a question best decided in light of a full record of evidence.<sup>11</sup> In any event, the Myers Statements are not the sole basis for enforcing the Development Agreement under those theories.

#### The Allegedly New Issues

The Respondents move to strike portions of Mr. Logan's rebuttal testimony on the basis that Mr. Logan raises new issues not asserted in the Complaint or in Mr. Logan's direct testimony. Specifically, the Respondents allege that on page 7, lines 4-7 and 12-18, Mr. Logan raises the new issues of estoppel and waiver, to which Respondents had "no meaningful opportunity to address and respond to...".<sup>12</sup> Without citation to any statute, rule, or order of the Commission, the

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<sup>11</sup> See N.C. Gen. Stat. § 62-65.

<sup>12</sup> Respondents' Motion to Strike, p. 5, No. W-1300, Sub 77, W-1305, Sub 35 (filed Nov. 23, 2022).

Respondents argue that it is “inappropriate” for WLI Investments to raise new issues in rebuttal and foreclose the Respondents’ witnesses from presenting their positions on these issues.<sup>13</sup>

The Respondents arguments in support of striking testimony on the Allegedly New Issues are wholly misplaced. First, these are not new issues. The Complaint and Mr. Logan’s direct testimony speak to the enforcement of the Development Agreement as a contract between ONSWC and WLI Investments. The issue is interpretation and enforcement of the Development Agreement. Estoppel and waiver are theories that support WLI Investments’ position on the issue of interpretation and enforcement of the Development Agreement. Second, even if these were new issues, WLI Investments offers the testimony that the Respondents seek to strike in response to the arguments raised by the Respondents’ witnesses and to provide additional evidence that WLI Investments obtained after the filing of Mr. Logan’s direct testimony, but during the discovery period established by the Commission. This is, by definition, the purpose of rebuttal testimony.

Third, there is no element of surprise or unfairness in allowing this testimony into evidence because the essential factual allegations are also not new. Instead, this testimony identifies the specific legal theories referenced to respond to the Respondents’ testimony evidence and provides the Commission with additional evidence. This is made clear by a careful examination of the testimony sought to be struck, wherein Mr. Logan testifies that based on the evidence obtained and the testimony filed by the Respondents, Mr. Logan was advised by his attorneys that the evidence expected to be admitted supports the theories of waiver and estoppel to enforce the Development Agreement. WLI Investments very well could have waited to raise any legal issues in post-hearing briefs or proposed orders, and would be within its rights to do so if, for example, evidence came

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<sup>13</sup> *Id.*

out at the hearing that supported those theories for enforcement of the Development Agreement. The same concept applies here, albeit the evidence came out in pre-filed testimony and during discovery, which is the procedure that the Commission traditionally uses. The Respondents are unjustified in taking the view that their rights have been prejudiced in any manner, particularly where they have the opportunity to cross-examine Mr. Logan at the hearing. That reality is made clear by the complete absence of any citations to any authorities that support the Respondents' positions.

### CONCLUSION

The Respondents' Motion to Strike should be denied. With respect to the Hoffer Statement, straightforward application of the provisions of Rule 801(d) demonstrates that the Hoffer Statement is within the exception to hearsay as an admission by a party opponent. Thus, the Hoffer Statement must be admitted to evidence. With respect to the Myers Statements, this evidence is offered for a purpose additional to proving the truth of the matter asserted: the evidence is submitted to demonstrate the facts and circumstances that justified WLI Investments' reliance on ONSWC's statements and conduct which objectively indicated that low-pressure facilities, including grinder pumps, would be acceptable components of the wastewater collection systems to be installed under the Development Agreement. Moreover, the Myers Statements come within the same Rule 801(d) exception to hearsay as the Hoffer Statement. Like the Hoffer Statement, the Myers Statements must be admitted to evidence. With respect to the Allegedly New Issues, the Respondents cite no rule, statute, or order to support their view that their rights are somehow prejudiced. The testimony evidence sought to be struck is not new evidence, but the identification of a legal theory that is supported by the evidence and a response to the Respondents' pre-filed testimony. There is no unfairness or surprise to allowing this evidence to be admitted because the

Respondents can cross-examine witness Logan at the hearing and respond to legal arguments through their post-hearing filings.

Finally, it is noted and emphasized again that in this proceeding the Commission's Hearing Examiner is the finder of fact. Like in a bench trial, the risk that the Hearing Examiner will be prejudiced by considering some evidence that ought to have been excluded is quite low, and the practical reality is that the Hearing Examiner must consider the evidence to determine its admissibility. Moreover, the strict application of the Rules of Evidence in Commission proceedings is intended to be limited by practical considerations and to be less formal than in the superior court. Therefore, where the testimony evidence sought to be stricken from the record is required to be admitted as evidence under even a strict application of the Rules of Evidence, there is practically no way to avoid the Hearing Examiner viewing the evidence, and there is little risk of prejudicial effect to admitting the evidence, the evidence must be admitted. Accordingly, Respondents' Motion to Strike should be denied.

**WHEREFORE**, WLI Investments respectfully requests that the Commission issue an order denying the Respondents' Motion to Strike.

Respectfully submitted this 14<sup>th</sup> day of December, 2022.

/s/ Patrick Buffkin  
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*COUNSEL FOR WLI  
INVESTMENTS, LLC*

## CERTIFICATE OF SERVICE

The undersigned, Patrick Buffkin, certifies that a copy of the foregoing Complainant's Response to Motion to Strike has been served upon counsel for the Respondents herein by electronic mail this the 14<sup>th</sup> day of December, 2022.

/s/ Patrick Buffkin  
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