

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. W-1305, SUB 29

DOCKET NO. W-1300, SUB 69

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

WLI Investments, LLC,)	
)	
Complainant)	
)	
v.)	REPLY TO UTILITIES' JOINT
)	RESPONSE AND RENEWED
)	MOTION FOR STAY OF
Pluris Hampstead, LLC, and Old North State)	PROCEEDINGS
Water Company, LLC,)	
)	
Respondents.)	
)	

NOW COMES WLI Investments, LLC, (“WLI Investments”), by and through the undersigned counsel and pursuant to Commission Rule R1-5 and R1-9, and files this **Reply to Utilities’ Joint Response and Renewed Motion for Stay of Proceedings** (“Reply and Motion”) responding to the Joint Response to Status Report and Motion to Stay and Joint Motion for Approval of Transfer, Grant of Franchises, and Approval of Rates (“Utilities Joint Response”), which was jointly filed by Pluris Hampstead, LLC (“Pluris”) and Old North State Water Company, LLC “ONSWC”) (together with Pluris, “Utilities”) in the above-captioned proceeding on January 18, 2022. In support of its Reply and Motion, WLI Investments respectfully shows unto the Commission as follows:

1. On October 9, 2020, in the above-captioned proceeding, Pluris and ONSWC jointly filed the Transfer Application.

2. On March 11, 2021, in the above-captioned proceeding, the Commission issued an Order allowing WLI Investments to intervene and participate in this proceeding as a party.

3. On December 9, 2021, WLI Investments filed its Case Status Report and Motion to Stay Proceedings.

4. On January 3, 2022, in Docket Nos. W-1300, Sub 77, and W-1305, Sub 35, WLI Investments filed its Complaint and Petition for Declaratory Ruling (“Complaint”), alleging, *inter alia*, that the Utilities 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 and provision of utility service in and adjacent to Salters Haven subdivision in Pender County, North Carolina.

5. On January 18, 2022, in Docket Nos. W-1300, Sub 77, and W-1305, Sub 35, the Utilities 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.

6. Also on January 18, 2022, in the above-captioned proceeding, the Utilities filed the Utilities’ Joint Response.

7. Contemporaneous with the filing of this Reply and Motion, WLI Investments filed its Reply and Motion for Procedural Order in Docket Nos. W-1300, Sub 77, and W-1305, Sub 35 (“Complaint Proceeding”), stating, among other things, that the Utilities’ Answer is not acceptable to WLI Investments and that WLI Investments desires a hearing in this proceeding to present evidence in support of the allegations of the Complaint.

REPLY TO UTILITIES' JOINT RESPONSE

WLI Investments disputes many of the statements and arguments contained in the Utilities' Joint Response, as follows:

8. The Utilities represent and argue that WLI Investments "cannot establish any legitimate factual or legal basis for delaying approval of the transfer" requested in this proceeding.¹ WLI disagrees.

The purpose of WLI Investments' requested stay of proceedings is to maintain the status quo while the Commission resolves the underlying dispute between the parties. At this stage of the Complaint Proceeding, WLI Investments' allegations must be taken as true.² Due process affords WLI Investments the right to present its claims and obtain a ruling from the Commission.³ The relief requested in the Complaint includes the expansion of the relevant service territory to include the entirety of Salters Haven and the Lea Tract – relief that, if granted, would alter the Commission's consideration of the application filed in the above-captioned proceeding. The granting of a stay pending the outcome of the Complaint Proceeding would protect WLI Investments' due process rights, avoid the potential for duplicative proceedings in the above-captioned dockets, and avoid the potential for inconsistent determinations in the two inter-related proceedings.

Moreover, and contrary to the Utilities' Joint Response, WLI Investments has detailed issues directly relevant to the Commission's consideration of the requested transfer application

¹ Utilities' Joint Response at p. 1.

² *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 269 N.C. App. 1, 8, 837 S.E.2d 144, 149 (2019) (quoting *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted)).

³ N.C. Const. Art. 1, § 19.

pending in the above-captioned proceeding.⁴ If the Commission determines, as alleged in the Complaint and after hearing and receiving evidence in the Complaint Proceeding, that the Utilities have violated provisions of the Public Utilities Act, acted unreasonably, and that the ONSWC breached its contract obligations under the Development Agreement, those determinations would be highly relevant to the consideration of the application filed in the instant dockets. Again, at this stage in the Complaint proceeding, these allegations must be treated as admitted. WLI Investments' due process rights, judicial efficiency, and the fair administration of justice in furtherance of the public interest are all legitimate legal and factual justifications for maintaining the status quo in this proceeding while these issues are resolved in the Complaint Proceeding.

9. The Utilities represent without any citation to evidence or legal authority that WLI Investments "seeks to delay approval of the transfer...by any means possible....in an effort to obtain concessions from ONSWC and/or Pluris..."⁵ WLI Investments disputes this representation as inaccurate, misleading, and irrelevant.

Here again, the Utilities offer no factual support for this allegation and no legal argument tending to demonstrate that WLI Investments' actions before the Commission are wrongful or inappropriate. As noted above, WLI Investments requested a stay in these proceedings to maintain the status quo while resolution of relevant issues raised in the Complaint Proceeding can be obtained. WLI Investments has a right to seek redress of the Utilities conduct and the Commission has the authority and duty to receive complaints against public utilities and render judgement thereon.⁶ There is nothing inappropriate in requesting a stay of proceedings to allow sufficient

⁴ See Case Status Report and Motion to Stay Proceedings, at 6-7.

⁵ Utilities Joint Response at ¶19.

⁶ N.C. Gen. Stat. § 62-73; see also N.C. Gen. Stat. §§ 62-30, -60.

time for the Commission to do so. Nor is it inappropriate for WLI Investments to seek to resolve the dispute between it and the Utilities, and, in fact, WLI Investments has sought to do so and found the Utilities unwilling to engage in dialogue.

Even if there was factual and legal support for this allegation, WLI Investments' subjective motivations are irrelevant. More relevant here are the allegations of unlawful and unreasonable conduct on the part of the Utilities contained in the Complaint that call into question the fitness of Pluris to obtain the transfer requested in this docket. At this stage of the Complaint Proceeding, WLI Investments' allegations must be taken as true and WLI Investments has a right to be afforded an opportunity to prove its claims. Staying these proceedings pending the outcome of the Complaint is not improper in any way.

10. The Utilities' have misconstrued and misrepresented WLI Investments' position in this proceeding.

There should be no confusion that WLI Investments seeks to obtain only what was bargained for in the Development Agreement. It is not in WLI Investments interest to unnecessarily delay the availability additional wastewater treatment capacity in the Hampstead area, and WLI Investments is not attempting to do so. In fact, WLI Investments supported ONSWC's effort to expand the Majestic Oaks WWTP as agreed upon in the Development Agreement. This dispute only materialized when ONSWC changed its mind and decided to not expand the Majestic Oaks WWTP and instead sell its utility system to Pluris, who would make use of its Hampstead WWTP to cover the needed wastewater treatment capacity. There is no dispute that the availability of additional wastewater treatment capacity in the Hampstead area would further the public interest, and WLI Investments President D. Logan testified to that reality before the Pender County Board of Commissioners in support of the special use permit that ONSWC

sought for the expansion of Majestic Oaks WWTP. The dispute centers on whether ONSWC has breached its obligations under the Development Agreement and whether the Utilities have violated the Public Utilities Act and acted unreasonably in dealing with WLI Investments.

Yet the Utilities characterize WLI Investments' position as justifying delay of the transfer based on the public interest. The reasons for the requested stay in this proceeding are detailed herein. WLI Investments' positions are well-stated in its filings. The Commission should disregard the Utilities' representations to the contrary as unsupported by fact and law. The public interest is not served by a speedy approval of the transfer that disregards the allegations against the Utilities, curtails WLI Investments' due process rights to pursue its claims, and raises the potential for inconsistent rulings and duplicative proceedings.

11. The Utilities' Arguments about whether the Lea Tract is within or outside the boundaries of Salters Haven subdivision or part of the service area to be transferred are irrelevant.

The Utilities present a lengthy but irrelevant argument centered on the fact that the Lea Tract is outside of the Salters Haven subdivision. That is true and that fact has not been disputed by WLI Investments. However, the Utilities ignore that ONSWC executed the Development Agreement and thereby obligated itself to do the following, among other things, with respect to the wastewater collection systems to be constructed in Salters Haven and the Lea Tract: approve the Plans for the wastewater collection without unreasonably withholding approval, "cooperate fully" with WLI Investments to expedite issuance of the DWR permit and Pender County's approval if required, and apply to the Commission as soon as may be obtain a CPCN or Certificate

Extension to authorize wastewater service, and to provide wastewater service to customers in Salters Haven.⁷

The Utilities also discuss at length the scope of the current franchised service territory of ONSWC and the environmental permits that ONSWC currently holds relevant to this area. This is a nonsensical argument, and ultimately irrelevant to the issues raised in this proceeding and in the Complaint. The current CPCN and environmental permits held by ONSWC only covers Phases 1 and 2 of Salters Haven because ONSWC has stopped cooperating with WLI Investments in obtaining permits and has failed to pursue a CPCN extension to cover the entirety of Salters Haven. The Notification of Intention to Begin Operations in Area Contiguous to present Service, filed by ONSWC in Docket No. W-1330, Sub 56, contains the verified application stating that the proposed addition consists of 338 service taps.⁸ This is consistent with the provisions of the Development Agreement that the entirety of Salters Haven (308 service taps) and the Lea Tract (30 service taps) would be included in a future CPCN or CPCN extension and environmental permits.

WLI Investments is well-aware of these facts and has requested that the Commission provide relief by order directing the expansion of the franchised service territory and the Utilities' cooperation with environmental permitting. The Utilities' circular argument is that because ONSWC only included Salters Haven Phase 1 and 2 in the notice of contiguous extension and DEQ permit applications, these areas are not covered by the CPCN and environmental permits, and, therefore, ONSWC is not authorized to provide service in that area and NCDEQ has not issued a permit authorizing WLI Investments to construct facilities on the Lea Tract.⁹ ONSWC's

⁷ Development Agreement at §§ 4 and 5 and p. 1.

⁸ Notification of Intention to Begin Operations in Area Contiguous to present Service, p. 3, No. W-1300, Sub 56 (*filed* Jan. 4, 2019).

⁹ See Utilities Joint Response at ¶ 15.

allegation that it has not received a formal request to provide service to the ESA is similarly faulty: first, ONSWC is well-aware that WLI Investments wants its cooperation in permitting so that the Lea Tract or ESA wastewater collection system can be permitted and constructed, and second, the Utilities have made it clear that they will not cooperate with permitting the Lea Tract or ESA wastewater collection system, begging the question: why bother to make a “formal request to provide service”? It is the Utilities’ conduct, not any failure on the part of WLI Investments that has brought this dispute to the Commission.

12. The Utilities’ argument that there is no reasonable basis for WLI Investments’ lost confidence in the Utilities’ willingness to fulfill the obligations of the Development Agreement is contradicted by ONSWC’s refusal to perform on its obligations, the absence of any indication that Pluris will perform on ONSWC’s obligations as assignee, and the chilling effect that this dispute has on WLI Investments’ business activities.

The Utilities apparently misunderstand the basis for WLI Investments’ loss of confidence, alleging that WLI Investments has no reasonable basis for expressing a lack of confidence that the Utilities will fulfill the obligations of the Development Agreement. The source of WLI Investments’ lost confidence is that ONSWC signed a contract obligating it to expand the Majestic Oaks WWTP and then applied for a transfer that calls for decommissioning that plant. It would have been a simple matter for ONSWC to propose assigning the contract to Pluris, and Pluris to provide WLI Investments with adequate assurances that the wastewater collection systems would be purchased as agreed to and the Hampstead WWTP would provide the treatment capacity committed to WLI Investments sufficient to cover the entirety of Salters Haven and the Lea Tract. The Utilities have not done so, primarily because Pluris does not accept new systems with grinder pumps and low-pressure facilities. Instead, ONSWC sought the Commission’s approval of

avoiding its contract obligations, justified by the argument that the requested transfer would “better” serve the public interest. The Commission could reach that conclusion, but WLI Investments’ contract rights cannot be ignored in doing so.

This dispute, and the potential that it could be repeated, has a chilling effect on WLI Investments’ business activities. Simply put, WLI Investments cannot do business (including performing on its own independent contract obligations to third parties) without the assistance and cooperation of the Utilities. ONSWC obligated itself to assist and cooperate by executing the Development Agreement, but then changed its mind. By the application pending in this proceeding, Pluris stands ready to step into ONSWC’s position as the certificated wastewater service provider but refuses to accept the wastewater collection systems designed consistent with the provisions of the Development Agreement. This leaves WLI Investments without access to wastewater treatment capacity, and without the ability to complete the construction of the wastewater collection systems that it agreed to build under the Development Agreement.

The reality of the Utilities’ position in this monopsony market gives them an unequal bargaining power and the ability to unilaterally alter WLI Investments’ contract rights. This dispute demands regulation by the Commission to ensure that the Utilities are acting reasonably and consistent with the provisions of the Public Utilities Act and performing on contract obligations that are consistent with the public interest.

13. The Utilities’ argument that the approval of bulk service moots WLI Investments “legitimate concerns” lacks merit.

In the first place, with the Commission’s approval of bulk service, there is no harm in maintaining the status quo by a stay on these proceedings pending the outcome of the Complaint

Proceeding. As noted above, WLI Investments has legitimate concerns that the outcome of this proceeding will alter its rights under the Development Agreement, that its ability to prosecute the claims in the Complaint will be undermined in violation of due process, and that in the absence of maintaining the status quo the Commission could be required to undertake duplicative proceedings with potentially inconsistent determinations. For example, if the Commission approves the transfer, and later determines that the Utilities are acting unreasonably and in violation of the provisions of the Public Utilities Act, the approval of the transfer would be justifiably reconsidered because the Utilities would no longer be in “good standing.” At this point, the Utilities cannot demonstrate to any degree of certainty that WLI Investments will not prevail in the Complaint proceeding. The purpose of the stay is to allow WLI Investments and the Commission an opportunity to resolve these issues *before* the transfer application is considered.

Second, mootness is misplaced in this circumstance. WLI Investments needs and is seeking the resolution of this matter by expansion of the franchise to include all of Salters Haven and the Lea Tract, as agreed upon in the Development Agreement. Thus, WLI Investments’ concern is not about capacity for Salters Haven Phase 1 and 2, but with the entirety of the subdivision and the Lea Tract or ESA. The inclusion of all of Salters Haven and the Lea Tract within a franchised service territory was agreed upon in the Development Agreement by ONSWC’s promise to cooperate fully with WLI Investments in seeking environmental permits and to obtain an extension of the CPCN. This dispute is very much live, and not moot. Mootness focuses on events that occur after a legal controversy arises, events occurring during the course of litigation that provide the relief sought, or events that result in the controversy between the parties no longer being at issue.¹⁰

¹⁰ *Cape Fear River Watch v. N.C. Env'tl. Mgmt. Comm'n*, 368 N.C. 92, 97-98, 772 S.E.2d 445, 449, (2015) (quoting *Messer v. Town of Chapel Hill*, 346 N.C. 259, 260, 485 S.E.2d 269, 270 (1997), which states that “[W]henver during the course of litigation it develops that . . . the questions originally in controversy between the parties are no

REQUEST TO TAKE NOTICE OF REPLY

For the sake of efficiency and for the convenience of the Commission, WLI Investments has not repeated here the full argument set out in its Reply filed in the Complaint Proceeding. WLI Investments respectfully requests that the Commission take notice of that filing and consider the arguments contained therein, as relevant to this proceeding. WLI Investments disputes many of the statements, allegations, and arguments contained in the Utilities' Joint Response, as reflected in the Reply and the foregoing.

RENEWED MOTION FOR STAY OF PROCEEDINGS

Based upon the foregoing, WLI Investments maintains that a stay of proceedings is justified and necessary to protect its right to prosecute its Complaint against the Utilities, to avoid duplicative proceedings with potentially conflicting determinations, and to resolve questions of law and fact that are relevant to whether the transfer should be approved. The Utilities' Joint Response presents no factual or legal justification otherwise, and their opposition to the stay is based upon a misunderstanding and mischaracterization of WLI Investments' positions, irrelevant arguments, and a disregard for WLI Investments due process rights. Therefore, WLI Investments renews its Motion to Stay these proceedings pending the outcome of the Complaint Proceeding,

longer at issue, the case should be dismissed, for courts will not entertain an action merely to determine abstract propositions of law." (emphasis added) (citations omitted in original).

for the reasons stated herein and further detailed in its Case Status Report and Motion to Stay Proceedings.

WHEREFORE, WLI Investments respectfully requests that the Commission enter an order temporarily staying the proceedings on the joint application for transfer until the conclusion of the proceedings on the Complaint filed in Docket Nos. W-1300, Sub 77, and W-1305, Sub 35.

Respectfully submitted this 1st day of February, 2022.

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CERTIFICATE OF SERVICE

The undersigned, Patrick Buffkin, certifies that a copy of the foregoing Reply and Motion for Procedural Order has been served upon counsel for the Utilities herein, with a courtesy copy to counsel for the Public Staff, by electronic mail this the 1st day of February, 2022.

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