



434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

DAVID T. DROOZ
Direct No: 919.719.1258
Email: ddrooz@foxrothschild.com

November 23, 2022

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street, Room 5063
Raleigh, NC 27603

Via Electronic Submittal

**Re: In the Matter of
WLI Investments, LLC, Complainant, v. Old North State
Water Company, Inc. and Pluris Hampstead, LLC, Respondents
Docket Nos. W-1300, Sub 77 and W-1305, Sub 35
Respondents' Motion to Strike**

Dear Ms. Dunston:

On behalf of Old North State Water Company, Inc. ("ONSWC") and Pluris Hampstead, LLC ("Pluris"), I am herewith submitting Respondents' Motion to Strike for filing in the above referenced matter and dockets.

If you should have any questions concerning this filing, please let me know.

Thank you and your staff for your assistance.

Sincerely,
/s/ David T. Drooz
David T. Drooz
Attorney for
Old North State Water Company, Inc.

pbb
Enclosure
cc: All parties and counsel of record
NC Public Staff

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota Nevada
New Jersey New York North Carolina Pennsylvania South Carolina Texas Virginia Washington

138011861 1 00/11/2022 10:02:25 0/11/2022 2:05:31 PM

OFFICIAL COPY

Nov 23 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, 60 Gregory)	
Road, Suite 1, Belville, NC 28451,)	
Complainant,)	
)	
v.)	RESPONDENTS' MOTION TO STRIKE
)	
Old North State Water Company, Inc.)	
and Pluris Hampstead, LLC,)	
Respondents.)	

NOW COME Pluris Hampstead, LLC (“Pluris”) and Old North State Water Company, Inc. (“ONSWC,” together with Pluris, “Respondents”) and move to strike portions of the testimony filed by Mr. D. Logan on behalf of WLI Investments, LLC (“WLI”). In support of this motion, Respondents show the following.

1. Mr. Logan’s direct testimony filed on September 30, 2022, at page 14, lines 13 – 23, presents statements allegedly made by Mr. Randy Hoffer to Mr. Logan. Additional references to Mr. Hoffer’s alleged statement, in the form of the words “and Mr. Hoffer,” appear in Mr. Logan’s direct testimony at page 15, lines 8 and 14; page 18, line 9; page 29, line 18; and page 30, line 8.

2. Mr. Hoffer retired from employment with Pluris prior to the filing of Mr. Logan’s testimony. Mr. Hoffer is neither a party nor a witness in this proceeding. WLI could have sought to subpoena him, as Pluris provided Mr. Hoffer’s retirement contact information to counsel for WLI, but chose not to do so.

3. The testimony of Mr. Logan about what Mr. Hoffer allegedly told him is offered as evidence of the truth of the matter asserted therein. It is hearsay, and should not be admitted as evidence. None of the exceptions to the hearsay rule are applicable here.

4. In particular, none of the exceptions in Rule 803 apply to the alleged statement of Mr. Hoffer. There is a catch-all provision in Rule 803 (24) that allows hearsay that meets certain criteria, including “circumstantial guarantees of trustworthiness.” The statement that Mr. Logan says Mr. Hoffer made is highly controversial, is not supported by any other witness, and in the circumstances does not show circumstantial guarantee of trustworthiness.

5. Nor do the criteria for “declarant unavailable” under Rule 804 apply in the present situation. There is no record of WLI seeking a subpoena to procure Mr. Hoffer’s presence as a witness in this proceeding. Pluris located Mr. Hoffer and advised WLI that he was available for deposition. There has been no showing by WLI that it could not procure Mr. Hoffer’s presence as a witness in this proceeding. Nor do any of the hearsay exceptions for an unavailable declarant in Rule 804(b) apply.

6. Finally, Rule 801(d) provides an exception to the inadmissibility of hearsay where the statement is made by a party opponent. This exception should not be used to admit the statement that Mr. Logan alleges Mr. Hoffer made because Mr. Hoffer is no longer an employee of Pluris, Mr. Hoffer has not been subpoenaed by WLI, the alleged statement by Mr. Hoffer is outside of any authorized scope of employment duty, and thus the rationale for Rule 801(d) would be undermined by allowing into evidence the hearsay about his statement. Under Rule 801(d), a “party opponent” is normally

present at the hearing and has the opportunity to contradict an “admission by a party opponent” offered by the other party. That is not the circumstance presented here, where the hearing representative of Pluris – Mr. Gallarda – was not present at the conversation between Mr. Logan and Mr. Hoffer, and Mr. Hoffer is not a witness in this proceeding. It would be procedurally unfair to put Pluris in the position of having a former employee’s alleged statement used against Pluris, when that employee is not a witness and WLI has not sought to procure his attendance by subpoena. Nor would it be appropriate to conclude that Mr. Hoffer was acting in the scope and course of his employment if he did make the statement attributed to him by Mr. Logan. Pluris would not authorize an agent or employee to make such an outrageously provocative statement. Accordingly, the testimony of Mr. Logan set forth at the pages and lines identified above, and in all places where Mr. Logan refers to a statement allegedly made by Mr. Hoffer, should be stricken from the record and not allowed into evidence.

7. Mr. Logan in his prefiled rebuttal testimony refers to statements by Mike Myers, another third party. Mr. Myers has been subpoenaed by WLI to testify at the hearing, though it is unknown whether WLI will actually call him to testify. WLI also took the deposition of Mr. Myers.

8. Respondents do not seek to strike references Mr. Logan makes to Mr. Myers’ deposition statements. Respondents expect the deposition will be accepted into evidence at the hearing, and thus those statements by Mr. Myers can be independently verified and were subject to questioning at the deposition.

9. However, Respondents do move to strike Mr. Logan's testimony in all places where (a) Mr. Logan refers to statements by Mr. Myers other than appear in the deposition, and (b) those statements are offered as evidence of the truth of the matter asserted therein. Such testimony by Mr. Logan is hearsay and should not be admitted into evidence.

10. In particular, page 6, lines 18-21, of Mr. Logan's rebuttal claims reliance by WLI on statements made by Mr. Myers during negotiations. WLI can call Mr. Myers to testify if it seeks to introduce such statements into evidence, and that will provide Respondents with an opportunity to cross-examine Mr. Myers regarding alleged statements he made during negotiations with WLI. Likewise, the rebuttal testimony of Mr. Logan at page 10, lines 4-5, should be struck and barred from admission into evidence as an out-of-hearing statement by a third party, asserted for the truth of the matter stated therein.

11. It should be noted that Mr. Myers has filed a lawsuit against John McDonald and ONSWC, claiming millions of dollars in damages. The civil suit was filed on August 22, 2022, in Wake County Superior Court, docket number 22 CVS 9607, and amended on October 14, 2022. As a result, Respondents have reason to challenge the motives and credibility of Mr. Myers, and should have the opportunity to do so at hearing with regard to any substantive statements he may have made outside of the deposition. If those statements are admitted as hearsay through the testimony of Mr. Logan, any possible challenge to Mr. Myers' credibility is undermined.

12. On page 7 of Mr. Logan's rebuttal testimony, lines 4 - 7 and 12 – 18, he raises new issues not asserted in WLI's Complaint or raised in his direct testimony. The new issues are estoppel and waiver. Witnesses for the Respondents had no meaningful opportunity to address and respond to these arguments in their testimony. It is inappropriate for WLI to raise new issues in rebuttal and thereby foreclose Respondents' witnesses from presenting their position on the merits of those issues. Accordingly, those parts of Mr. Logan's rebuttal testimony should be struck from the record and not admitted into evidence.

WHEREFORE, Respondents respectfully request that the Commission issue an order granting the relief sought in this motion and such other relief as the Commission deems appropriate.

This the 23rd day of November, 2022.

FOX ROTHSCHILD LLP

By: /s/ David T. Drooz
David T. Drooz
Fox Rothschild LLP
434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
(919) 755-8764
E-mail: DDrooz@foxrothschild.com
Attorney for Old North State Water Company, Inc.

BURNS, DAY & PRESNELL, P.A.

By: /s/ Daniel C. Higgins

Daniel C. Higgins

P.O. Box 10867

Raleigh, North Carolina 27605

Telephone: (919)782-1441

E-mail: dhiggins@bdppa.com

Attorney for Pluris Hampstead, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Respondents' Motion to Strike, has been served on all parties and counsel of record in these dockets and on NC Public Staff by either depositing same in a depository of the United States Postal Service, first-class postage prepaid, or by electronic delivery.

This the 23rd day of November, 2022.

FOX ROTHSCHILD LLP

By: /s/ David T. Drooz
David T. Drooz
Fox Rothschild LLP
434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
(919) 755-8764
E-Mail: DDrooz@foxrothschild.com

SERVED ON:

Patrick Buffkin, Esq.
Buffkin Law Office
3520 Apache Dr.
Raleigh, NC 27609
pbuffkin@gmail.com