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November 22, 2023

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street
Dobbs Building, Fifth Floor
Raleigh, NC 27603

Re: In the Matter of Application by Red Bird Utility Operating Company, LLC, and Total Environmental Solutions, Inc. for Authority to Transfer the Lake Royale Subdivision Water and Wastewater Utility Systems and Public Utility Franchise in Franklin and Nash Counties, NC and for Approval of Rates NCUC Docket Nos. W-1146 Sub 13 and W-1328 Sub 10 *Lake Royale Property Owners Association Post-Hearing Brief*

Dear Ms. Dunston:

On behalf of Lake Royale Property Owners Association, provided herewith for filing in the above referenced dockets is the Lake Royale Property Owners Association's Post-Hearing Brief.

This Post Hearing Brief will also be provided in native format to Briefs@ncuc.net.

A Pennsylvania Limited Liability Partnership

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Ms. A. Shonta Dunston, Chief Clerk
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Please do not hesitate to contact me with any questions or concerns regarding this filing.

Sincerely,

/s/ David T. Drooz

David T. Drooz

cc: Parties and Counsel of Record
Commission Staff – Legal
NC Public Staff

pbb

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Nov 22 2023

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. W-1146, Sub 13
Docket No. W-1328, Sub 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Application by Red Bird Utility Operating)
Company, LLC, 1650 Des Peres Road, Suite)
303, St. Louis, Missouri 63131, and Total)
Environmental Solutions, Inc., Post Office)
Box 14056, Baton Rouge, Louisiana, 70898,))
For Authority to Transfer the Lake Royale)
Subdivision Water and Wastewater Utility)
Systems and Public Utility Franchise in)
Franklin and Nash Counties, North Carolina,))
and for Approval of Rates)

LAKE ROYALE PROPERTY
OWNERS ASSOCIATION
POST-HEARING BRIEF

NOW COMES the Lake Royale Property Owners Association, Inc. (Lake Royale POA) through counsel and submits the following post-hearing brief in this proceeding. This brief is offered in lieu of a proposed order because the Lake Royale POA has only a couple matters related to the transfer that it wishes to address.

The Lake Royale POA is a nonprofit corporation with membership of property owners in the community served by the regulated public utility water and wastewater systems that are the subject of these dockets. Members of the Lake Royale POA are current customers of Total Environmental Solutions, Inc. (TESI).

Approval of Transfer

The Lake Royale utility customers have suffered from poor water and sewer service for years, as discussed by customer witnesses at the September 25, 2023, public hearing. Based on the record in this proceeding, the Lake Royale POA is optimistic that Red Bird Utility Operating Company, LLC (Red Bird), will make improvements to the water and sewer utility service. Therefore, the Lake Royale POA supports Commission conditional approval of the transfer to Red Bird. The recommended conditions are discussed below.

Road Repairs

Customers presented extensive testimony at the public hearing about damage to their community roads caused by repeated water leaks from the TESI water system, and in some cases caused by TESI efforts to repair those leaks. That testimony included the following:

Steve Regaglia, Vice President of the Board of Directors for the Lake Royale POA (T Vol 1, p 22):

We have had leaks at the lake that literally flow down the roads for six months at a time before they're fixed. . . . This has caused a big problem in your infrastructure. It's not just our roads; our culverts, our road sides have washed out, and it's caused continuous problems. And the leaks get ignored or the get -- you know, shotty [*sic*: shoddy] repairs are done to them, and then they just go to the next weakest link is what they do.

Elaine Sammon (T Vol 1, p 34):

I have two examples. One at 137 Geronimo and the other at 402 Shawnee. At Geronimo, the broken water line was issuing water continuously into the culvert for more than a month. At Shawnee, water was seeping continuously through a crack in the road surface. The second was not fixed ever.

Larry Nida (T Vol 1, pp 49-50):

Those repairs made by TESI to damage done by digging up the roads to repair of the system, we're [*sic*: were] poor at best. It crumbled due to lack of proper preparation of the road surfaces and they just start sinking and then we've got potholes and then it just goes over and over again.

Richard Dyer, Treasurer of the Board of Directors for the Lake Royale POA (T Vol 1, pp 53-54):

In terms of water line breaks, again, we talked about the number -- if their number is substantial, just to give you three examples. Near 517 Sagamore, despite the water line break being reported to TESI numerous times, and the Utility Commission at least once, the break was not addressed for basically a year. It started in 2020 and went all the way through most of 2021. The break lasted long enough that there was visible erosion on the side of the road. My wife and I actually quit driving on that section of Sagamore because we were fearful that the road would collapse underneath our vehicle. That was finally repaired.

Now, just the breaks I'm personally aware of from walking through the neighborhood, there are three. There are two that are very similar to the ones at 517 where there's just a steady stream of water. One of those is located at 512 Sagamore, another is located at 667 Sagamore. There was a water line break at 532 Sagamore, and while the leak has been repaired, the road has not. So you see gravel in the road where the asphalt should be.

Holt Dale (T Vol 1, p 66):

We paid for those roads, not Franklin County, not Nash County, not the State of North Carolina, we did. And when I hear everyone say that the roads have not been repaired when water pipes have been repaired, it makes me angry because I paid for those and I want those roads the way they were before work began.

John Bell, Member of the Board of Directors for the Lake Royale POA
(T Vol 1, p 76):

Our infrastructure with our water lines is 50 years old. Again, the additional water pressure coming out of Louisburg is wreaking havoc on these lines.

Dylan Bunch (T Vol 1, pp 81-82):

And the other thing about our water, anybody who plays golf in our neighborhood has realized my son works at the maintenance shop, there's been a leak that's been leaking for two years in front of the golf shop. They had to fix the road last month to the maintenance shop because that leak had eroded the road down so you could not get back to the maintenance shop without scraping your car. So, the leaks around our neighborhood have been going on for 20 years and, I mean, and it's bad. I mean, you can drive around, especially on the river side where the roads have collapsed and have not been fixed properly.

As indicated in the customer testimony, some of the road damage caused by TESI's water system remains. Some of the road damage caused by TESI's water system has been repaired at the expense of the Lake Royale POA. Grace Noonan, the General Manager of the Lake Royale POA, testified that "We've had roads that were repaired but then we had to repair them again because they weren't properly repaired. We have invoiced TESI just recently \$16,000 for repairs that we've had to make." (T Vol 1, p 14) She further explained:

Q. Okay. Thank you. You had mentioned road repairs in the beginning, what's the connection between road repairs and the water and sewer utility?

A. Well, when we had major water line breaks, I mean, we've had geysers, and it leaks for a long time. It's destroying the infrastructure of the roads. It's taking -- when I came on board, I think there were three people there with TESI that did repairs. Just a couple of months ago, it was down to one person. Those three people couldn't handle the repairs so a lot of things didn't get done. And even the repairs that were done were so shotty [*sic*: shoddy] that it didn't [last] any time at all. And like I said, we just invoiced TESI two months of \$16,000 for road repairs.

Q. And are you saying those road repairs were caused --

A. Yes.

Q. -- by problems with the water lines breaking, and the utility company has not properly repaired the road --

A. Absolutely.

(T Vol 1, pp 17-18)

In these circumstances, it would be fair and reasonable for the Commission to condition its approval of the transfer upon:

(1) TESI first repairing all existing road damage due to leaks from its water system and from its past repair efforts, or paying another party to make those repairs, and

(2) TESI paying the Lake Royale POA for the \$16,000 incurred by the Lake Royale POA to repair road damage caused by TESI.

In its October 9, 2023, Verified Report Regarding Issues Raised at Public Hearing, Red Bird noted that “the Company has heard the customers concerns regarding future road repairs associated with repairs to the system and Red Bird is willing and able to both repair the roads post-improvements and work with customers to ensure that this is done to their liking.” This report is a positive sign for the future; however, it offers no relief for existing road damage and repair costs borne by the property owners at Lake Royale. In the evidentiary hearing, Red Bird witness Josiah Cox declined to offer an opinion on the reasonableness of a remedy for existing road damage and repair costs borne by the property owners at Lake Royale. (T Vol 2, pp 95-96)

Also on October 9, 2023, TESI filed its Response to Customer Testimony. That response acknowledged the water system has experienced leaks and road damage and stated that TESI is working on road repairs. TESI described the difficulty it had in obtaining adequate staffing for operations. Their report did not offer to reimburse the Lake Royale POA for road repairs that the POA paid for after failure of TESI to make the repairs; nor did their report commit to repairing all existing damage caused while TESI holds the CPCN.

On October 23, 2023, the Public Staff filed its response to the reports of Red Bird and TESI on the customer hearing. The Public Staff summarized the positions of Red Bird and TESI in their reports, but the Public Staff did not offer any remedies or comments of its own on the leaks and existing road damage and unreimbursed repair costs incurred by the Lake Royale POA.

There is no evidence in the record to contradict the testimony of customers and the General Manager on the road damages caused by TESI water system leaks and inadequate TESI repair work. While the Commission does not have authority to order compensatory damages, it can – and in these circumstances should – condition approval of the transfer on TESI taking financial responsibility for road damage caused by its inadequate maintenance and repair of its water system.

Future Improvements

At hearing, witness Cox stated that Red Bird planned to do further assessments to get a full idea of what improvements were needed. He further agreed that upon completion of that assessment, Red Bird would provide the Lake Royale POA with information on planned improvements. (T Vol 2, pp 93-94) It is reasonable and appropriate for Red Bird to communicate on its planned improvements with the Lake Royale POA once that information is known to Red Bird. There is no disagreement among the parties as to this request, and therefore it would be an appropriate condition to add to the transfer order.

Importance of Gradualism in Rate Increase

Finally, the Lake Royale POA urges that any future rate increases apply the regulatory principle of gradualism. The Lake Royale POA understands that rate increases are not directly involved in the present proceeding; however, a transfer should consider all aspects of a proposed transfer with respect to their impact on the public interest. Indeed, in Docket No. W-354, Sub 399, the impact of the transfer on future rates was a valid and important consideration. The Commission's August 29, 2023, Order Granting Certificate of Public Convenience and Necessity, Approving Rates, and Requiring Compliance Filing, Bond, and Customer Notice in that docket states at page 9: "The primary risk that the Public Staff identified in connection with granting the CPCN is a risk of increased rates for existing System customers and/or existing uniform rate CWSNC customers above the rate increases that could be expected if the CPCN were denied." Although the Commission appropriately left decisions on future rates to be decided in future rate cases, it did review evidence of rate impacts in that Carolina Water Service transfer case.

Case law underscores this approach:

We further hold that when the Commission is adjudging public convenience and necessity in the context of proposed transfers of water and sewer franchises under G.S. 62-111 (a), it must inquire into all aspects of anticipated service and rates occasioned and engendered by the proposed transfer, and then determine whether the transfer will serve the public convenience and necessity. This comports with the longstanding principle that the public convenience and necessity doctrine "is a relative or elastic theory rather than an abstract or absolute rule [and] [t]he facts in each case must be separately considered." *Utilities Comm. v. Casey*, 245 N.C. 297, 96 S.E.2d 8 (1957).

State ex rel. Utilities Commission v. Village of Pinehurst, 99 N.C.App. 224, 393 S.E.2d 111 (1990), review allowed 328 N.C. 97, 402 S.E.2d 427, affirmed 331 N.C. 278, 415 S.E.2d 199 (1992). There is nothing in the June 30, 2023, enactment of N.C.G.S. § 62-111(f) that would require a different outcome by the appellate courts. Session Law 2023-67, which created the new N.C.G.S. § 62-111(f), includes this wording:

Within 300 days of the filing of a completed application, the Commission shall issue an order approving the application upon finding that the proposed grant or transfer, including adoption of existing or proposed rates for the transferring utility, is in the public interest, will not adversely affect service to the public under any existing franchise, and the person acquiring said franchise or certificate of public convenience and necessity has the technical, managerial, and financial capabilities necessary to provide public utility service to the public.

(Emphasis added.) As in the *Pinehurst* case, the need to determine if a transfer is in the public interest is a broader inquiry than just the questions of whether the transfer will adversely affect service and whether the transferee is qualified.

The Customer Notice in the present case stated that (1) in the transfer proceeding Red Bird proposed to keep rates the same as those approved for TESI; (2) Red Bird plans to seek a rate increase approximately 14 months after the transfer; and (3) projected monthly residential water bills for Lake Royale customers, on a usage of 2,300 gallons, would increase from \$42.88 at present to \$68.35 in Year 2 and to \$73.44 in years 3-5. At hearing, Red Bird witness Josiah Cox disavowed these projections but had no alternative estimates for future increases in bills. (T Vol 2, pp 100-02, 105-06) The projections in the Customer Notice would be a \$30.56 increase, or 71% more than current bills. Of course, those numbers will be greater for customers who use more than 2,300 gallons per month.

The Lake Royale POA recognizes that needed improvements in the water and sewer systems will cost money, and the utility company should be able to recover its reasonable costs through rates. At the same time, rate increases of 71%, or anything close to that magnitude, would have a shock impact on customers. Accordingly, the public interest of the pending transfer request by Red Bird should include Commission affirmation that future rate increases will be reviewed in light of the principle of gradualism, so that customers do not experience rate shock.

Respectfully submitted this the 22nd day of November 2023.

Electronically Submitted

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**ATTORNEY FOR LAKE ROYALE PROPERTY
OWNERS ASSOCIATION, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LAKE ROYALE PROPERTY OWNERS' ASSOCIATION POST-HEARING BRIEF has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This is the 22nd day of November, 2023

By: /s/ David T. Drooz