

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

Docket No. W-354, Sub 411  
Docket No. W-1148, Sub 22

In the Matter of		
Application of Carolina Water Service, Inc. of	)	
North Carolina, 5821 Fairview Road, Suite 401,	)	Motion for Leave
Charlotte, North Carolina 28209 and Mountain	)	to File Testimony
Air Utilities Corporation, Post Office Box 1090,	)	by Mountain Air
Burnsville, North Carolina 28714, for Authority	)	Homeowners
to Transfer the Mountain Air Water and	)	Association
Wastewater Utility Systems and Public Utility	)	
Franchise in Yancey County, North Carolina,	)	
and for Approval of Rates	)	

Now Comes the Mountain Air Homeowners Association by and through the undersigned counsel and moves the Commission for leave to file direct testimony in response to the direct prefiled testimony submitted on behalf of the Public Staff on July 6, 2023.

1. In the Commission’s Order Scheduling Hearing, Establishing Discovery Guidelines, and Requiring Customer Notice dated June 5, 2023 decretal paragraph 8 the Commission required that the Public Staff and intervenors, if any, shall file their testimony on or before Thursday July 6, 2023 which is 40 days prior to the expert witness hearing.

2. In decretal paragraph 9 of the Commission’s June 5, 2023 order it stated that CWSNC shall file its rebuttal testimony, if any, on or before Wednesday, July 26, 2023, which is 20 days prior to the expert witness hearing.

3. Prior to the Public Staff's filing of its direct testimony on July 6, 2023 the Homeowners Association had incomplete information upon which to file any meaningful testimony in support of its ultimate position in this case and information useful to the Commission in resolving the disputes at issue.

4. In particular, the Homeowners Association was unaware of the proposed rates and method of calculating rates the Public Staff would advocate in this docket. Well before the Public Staff had filed its testimony the Homeowners Association had met with the Public Staff to ascertain what the Public Staff's position would be. The Public Staff was unable to respond completely at that time as its audit and investigation were ongoing. Subsequently, through a data request, the Homeowners Association sought to learn from the Public Staff information that likely would inform what the Public Staff recommendation would be as to the level of rates CWSNC should charge should the Commission approve the requested transfer. The Public Staff responded that it was not in a position to answer the data request. It was not until the Public Staff filed its direct testimony that the Homeowners Association knew which of several proposed rate levels the Public Staff would advocate.

5. In addition, issues have arisen in the Public Staff testimony addressing a potential requirement that a survey be conducted of the Mountain Air residents.

6. Finally, the Public Staff testimony addresses its position on the requested \$950,000 plant acquisition adjustment Carolina Water Service has requested in its application to be used to satisfy a number of liens encumbering property used to provide water and wastewater services within Mountain Air. Depending upon the level of rates the Commission approves in this docket and its response to the requested plant acquisition adjustment, residents within Mountain Air very well could bear responsibility to pay for all or some of this \$950,000.

7. The Homeowners Association requests leave to file the attached testimony that addresses the level of rates advocated by the Public Staff, the issue of a survey of residents, and

the issue of a requirement that consumers within Mountain Air bear responsibility of a \$950,000 plant acquisition adjustment that is addressed in the Public Staff testimony.

8. The proposed testimony on behalf of the Homeowners Association does not contain extensive or complicated calculations. The proposed testimony simply addresses positions advocated by the Public Staff for the first time and provides to the Commission what the Homeowners Association deems to be significant input and suggestions that the Commission may take into account in addressing and resolving the issues that have arisen in this docket.

9. The Homeowners Association is authorized to state that the Applicant, Carolina Water Service, does not object to the Commission's authorizing the filing of this testimony with the understanding that Carolina Water Service should have the opportunity to file rebuttal to it should it wish to do so.

Respectfully submitted this 26th day of July, 2026.

Edward S. Finley, Jr.  
/s/ Edward S. Finley, Jr.  
Edward S. Finley Jr. PLLC  
Counsel for Mountain  
Air Homeowners Association

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Motion for Leave to File Testimony was duly served upon parties of record either by depositing same in a depository of the United States Postal Service, first class postage prepaid, or by electronic delivery.

This the 26th day of July 2023

Edward S. Finley, Jr.,  
/s/ Edward S. Finley, Jr.

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HOMEOWNERS ASSOCIATION

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

Docket No. W-354, Sub 411  
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In the Matter of	)	
Application of Carolina Water Service, Inc. of	)	
North Carolina, 5821 Fairview Road, Suite 401,	)	Direct Testimony of
Charlotte, North Carolina 28209 and Mountain	)	John Robertson
Air Utilities Corporation, Post Office Box 1090,	)	for Mountain Air
Burnsville, North Carolina 28714, for Authority	)	Homeowners
to Transfer the Mountain Air Water and	)	Association
Wastewater Utility Systems and Public Utility	)	
Franchise in Yancey County, North Carolina,	)	
and for Approval of Rates	)	

**BEFORE THE NORTH CAROLINA UTILITIES COMMISSION**

**DOCKET NO. W-354, SUB 411**

**DOCKET NO. W-1148, SUB 22**

**Direct Testimony of John Robertson**

**On Behalf of Mountain Air Homeowners Association**

**July 26, 2023**

1 Q. Please state your name, address and position with the Mountain Air Homeowners  
2 Association.

3 A. My name is John Robertson. I am the Mountain Air Homeowners Association Board  
4 member primarily responsible for water and wastewater issues coming before the Board.

5 Q. Have you reviewed the Carolina Water Service application, the direct prefiled testimony  
6 of Mountain Air Utilities Corporation, Carolina Water Service and the Public Staff?

7 A. Yes. The Homeowners Association has reviewed the application, direct prefiled  
8 testimony of Mountain Air Utilities Corporation, Carolina Water Service and the Public Staff.

9 Q. Are you generally familiar with the water and wastewater systems upon which the  
10 residents in the Mountain Air community rely for their services?

11 A. Yes.

12 Q. What is the purpose of your testimony?

13 A. The purpose of this testimony is to react to the positions of the parties on behalf of the  
14 constituents of the Mountain Air community as their elected representatives on important  
15 matters coming before the community such as these.

16 Q. What is your assessment of the services Carolina Water Service has provided as the  
17 emergency operator within the Mountain Air subdivision?

18 A. Initially, the Homeowners Association wishes to convey its support for the efforts and  
19 accomplishments Carolina Water Service has made in its role as emergency operator. We have  
20 found Carolina Water Service responsive and transparent in its dealings with the Association  
21 and the Mountain Air residents. Based on our observations, the Company has provided  
22 important services in a professional and competent manner. We recognize that the water and  
23 wastewater systems within the community were in desperate need of attention, replacement,  
24 and repair. By and large, we are pleased with what we have observed with respect to Carolina  
25 Water Service's efforts. Consequently, we strongly support the efforts by the Company to  
26 acquire the water and wastewater systems from MAUC and become the permanent provider of  
27 water and wastewater services within the Mountain Air community.

28

1 Q. Are you generally familiar with the Asset Purchase Agreement between MAUC and  
2 Carolina Water Service?

3 A. Yes. In this regard we recognize that the Asset Purchase Agreement entered into  
4 between Carolina Water Service and MAUC contains a provision that allows Carolina Water  
5 Service to withdraw from its commitments under the agreement to the extent that the  
6 Commission imposes requirements with which the Company determines are unduly onerous.  
7 Such a withdrawal should be avoided.

8 Q. Do you understand that compensating Carolina Water Service as the emergency  
9 operator and the Commission's approval of the sale to Carolina Water Service will result in  
10 substantial increased costs that must be recovered through rates?

11 A. Yes. The Homeowners Association has realized that MAUC for a number of years has  
12 sought to transfer the systems and that substantial costs would be incurred and that rates to  
13 consumers within the community would have to increase in order for the acquirer to receive  
14 adequate remuneration. The costs Mountain Air consumers must bear going forward obviously  
15 are a major concern.

16 Q. Can you provide some background and perspective motivating the Homeowners  
17 Association to participate in this docket and respond to the position of the parties that have  
18 been filed to date?

19 A. Yes. Some recent history from the Homeowners Associations perspective may be useful  
20 to the Commission in addressing recovery of costs that have been incurred in the past and that  
21 will be incurred in the future should the Commission approve Carolina Water Service's  
22 application to acquire the Mountain Air systems. Although there have been discussions in the  
23 past with potential acquirers such as Aqua North Carolina and Carolina Water Service, recently  
24 Red Bird Utility Operating Company entered into an agreement to acquire the systems from  
25 MAUC.

26 Q. Please describe the Association's participation in the Red Bride discussion.

27 A. The Homeowners Association engaged in extensive discussions with MAUC, Red Bird  
28 and the Public Staff. Our understanding based on those extensive discussions was that an  
29 essential confidential provision of the agreement between MAUC and Red Bird was that the



1 purchase price was in the range of \$800,000 to \$1.3 million. Our understanding was that the  
2 net original cost of the system in the hands of MAUC was practically zero. We understood that  
3 a condition the Public Staff wished Red Bird to meet was that the Homeowners Association  
4 survey the Mountain Air residents to determine their approval or disapproval of the proposed  
5 transaction. We also understood that the Mountain Air acquisition was one of the first Red Bird  
6 sought for approval in North Carolina. The Homeowners Association became concerned that  
7 the Mountain Air residents would be responsible for the rate base as high as \$1.3 million when  
8 the original costs of the systems was practically nothing. In addition, the Homeowners  
9 Association reacted negatively to the requirement that the residents be surveyed. The draft  
10 survey that was being discussed would have had insufficient information to allow residents to  
11 make an informed decision, and fundamentally we questioned whether this was traditional  
12 practice and whether the result would be worth the effort. The purchase price was confidential  
13 and could not be discussed with residents. Moreover, it was unclear to us upon whom Red Bird  
14 would rely in Yancey County to provide the services necessary. We recognized that it would be  
15 difficult for Red Bird to charge uniform rates as Red Bird owned almost no other systems within  
16 the state at that time. For these and other reasons the Homeowners Association argued that  
17 the transfer to Red Bird based on the terms of the agreement, as we understood it, should not  
18 take place.

19 Q. What if any actions did the Homeowners Association take subsequent to the withdrawal  
20 of the Red Bird application?

21 A. The Homeowners Association on its own initiative reached out to other potential  
22 acquirers such as Carolina Water Service.

23 Q. What understanding did you have of the Public Staff position on rate base in the hands  
24 of an acquirer such as Carolina Water Service?

25 A. In discussions with the Public Staff with respect to a potential purchase price in the  
26 range of \$1 million we understood the agency to be supportive of a plant acquisition  
27 adjustment on the theory that costs per connection within Mountain Air would be comparable  
28 to the costs per connection within the Carolina Water Service systems charged the Company's  
29 uniform rates.

1 We understood that the Public Staff would be supportive of Carolina Water Service's  
2 acquisition with the inclusion of the purchase price in rate base as a plant acquisition  
3 adjustment and that consumers within Mountain Air would be charged Carolina Water Service's  
4 uniform rates. These discussions took place before CWS was appointed as emergency operator  
5 and undertook restoration efforts at considerable expense. Based on these discussions, in  
6 contrast to its position with respect to the potential Red Bird acquisition, the Homeowners  
7 Association expressed its support for the Carolina Water Service acquisition. In short, we relied  
8 upon the representations of the Public Staff in formulating our position.

9 Q. What actions occurred in the meantime?

10 A. In the meantime of course MAUC requested the appointment of an emergency  
11 operator. The Commission appointed Carolina Water Service as the emergency operator.  
12 Carolina Water Service has incurred millions of dollars in expense as the emergency operator to  
13 address needed improvements and repairs. The Homeowners Association understands that  
14 ultimately Mountain Air consumers alone will bear most of these costs in addition to paying  
15 new monthly usage rates that under any of the proposed scenarios being discussed by the  
16 parties will be substantially higher than those in place for MAUC.

17 Q. Based on this background what recommendations does the Homeowners Association  
18 convey to the Commission for addressing the application of Carolina Water Service?

19 A. Within the background set forth above the Homeowners Association responds to the  
20 potential methods for establishing rates should the Commission approve the acquisition by  
21 Carolina Water Service. Based on the Public Staff's calculations, the method that produces the  
22 lowest rates upon acquisition would be stand-alone rates without the plant acquisition  
23 adjustment. Should Mountain Air be charged Carolina Water uniform rates, this would result in  
24 the next highest rates. The highest rates would be stand-alone rates with the plant acquisition  
25 adjustment. Obviously, the Commission's treatment of the plant acquisition adjustment is  
26 fundamentally important.

27 Q. What do you understand to be the purpose of the plant acquisition adjustment?

28 A. The Homeowners Association understands that should MAUC receive payment based on  
29 the plant acquisition adjustment, the funds so provided would be used to satisfy liens

1 encumbering property owned by Mr. Banks or affiliated interests within Mountain Air, including  
2 property comprising the water and sewer utilities. Of course, the Mountain Air water and sewer  
3 consumers have done nothing to cause the encumbrances on the utility property and facilities  
4 and find it inappropriate to pay rates in the future based on a rate base that is established for  
5 the extinguishment of these encumbrances.

6 Q. What is your understanding of how these liens originated and the impact that they  
7 might have and the Commission's decision in this case?

8 A. The Homeowners Association assumes that the liens and encumbrances cover all the  
9 property owned by Mr. Banks and his affiliated interests, not just the property and facilities  
10 used to provide public utility water and sewer service. Obviously, some allocation was  
11 necessary to apportion the liens and encumbrances on the utility property and facilities. We  
12 assume that when these judgments and encumbrances arose the utility systems were in need  
13 of the repairs and replacements that Carolina Water Service has recently sought and is seeking  
14 to remedy. We therefore question whether it was appropriate to apportion any measure of the  
15 security from these judgments and encumbrances on the utility properties as an asset.  
16 Likewise, any holder of liens or judgments that would have attempted to foreclose on the utility  
17 properties would have acquired responsibility to incur costs that ostensibly exceeded the  
18 apportioned value of the property in question. Moreover, utility property, whether falling  
19 within the certificate of public convenience and necessity or not are essential and necessary to  
20 provide the public utility service, and should not be encumbered as security without the  
21 Commission's approval. No such approval has been sought or given. This situation has arisen in  
22 the past. The Public Staff has noted it and has questioned the validity of these types of security  
23 interests.

24 Q. Has an effort been made on your behalf to raise these concerns with the parties in the  
25 past?

26 A. Yes. Please see the attached Exhibit 1 to my testimony.

27 Q. What is your understanding of the concerns expressed by Carolina Water Service with  
28 respect to the liens and encumbrances?

1 A. The Homeowners Association recognizes that Carolina Water Service legitimately seeks  
2 to obtain all property and clear title to all of the assets it seeks to acquire for continued  
3 ownership and operation of the utility systems. We also appreciate that Carolina Water Service  
4 would wish to avoid undertaking responsibility for challenging the validity of these  
5 encumbrances and obtaining orders removing them. Still, to the extent that the Commission  
6 approves a plant acquisition adjustment to provide \$950,000 to clear the title of these  
7 encumbrances it will be the Mountain Air consumers who bear the responsibility for these costs  
8 when nothing these consumers ever did gave rise to the encumbrances.

9 This will increase their rates. In addition, these consumers will bear responsibility for  
10 the costs incurred by Carolina Water Service as an emergency operator. Again, the current and  
11 future consumers will be inappropriately burdened by bearing these costs that should have  
12 been incurred or avoided long ago.

13 Q. What is your recommendation as to how the Commission should address and resolve  
14 the issues in this docket?

15 A. The Homeowners Association maintains that the Commission should either approve  
16 stand-alone rates without approving the plant acquisition adjustment or uniform rates, even  
17 though the uniform rates based on the calculations of the Public Staff presents result in higher  
18 monthly rates for consumers. To the extent that further improvements and repairs are required  
19 for the Mountain Air systems, under uniform raters these costs will be borne across the  
20 Carolina Water Service systems and will not be solely the responsibility of the Mountain Air  
21 customers alone.

22 Q. What is your recommendation with regard to the plant acquisition adjustment?

23 A. Some effort should be undertaken by a party or agency other than the Homeowners  
24 Association to determine the validity of the \$950,000 as an encumbrance on the Mountain Air  
25 water and sewer property and facilities. To the extent that it can be established that the  
26 \$950,000 is not a valid and binding encumbrance upon utility facilities, the obligation by  
27 Carolina Water Service under its Asset Purchase Agreement should be reduced so as to relieve  
28 Mountain Air customers of a responsibility to bear this cost through their rates. The  
29 Homeowners Association assumes that the liens and encumbrances have been in effect for a

1 substantial period of time. The Homeowners Association is unaware of any recent effort to  
2 foreclose on the utility property or facilities. The Homeowners Association questions whether  
3 such a foreclosure could take place. Perhaps the \$950,000 or some more reasonable lesser  
4 amount more appropriately representing an accurate apportioned amount should be placed in  
5 escrow pending some effort to foreclose or some judicial determination or agreement as to the  
6 validity of the liens on the utility property. In the meantime, the Mountain Air rates should not  
7 be established to recover these costs. Upon an appropriate determination that the liens are not  
8 enforceable or will not be enforced, the amount in escrow should be returned to Carolina  
9 Water Service. At least the Commission should address this issue to find a reasonable solution  
10 better than one that subjects the customers to bear the cost of these encumbrances.

11 Q. What is the position of the Homeowners Association that the Mountain Air consumers  
12 be surveyed to express their opinions on the proposed transaction?

13 A. We continue to question the wisdom and appropriateness of a survey.

14 Q. Does this conclude your testimony?

15 A. Yes.

MEMORANDUM  
ATTORNEY CLIENT PRIVILEGED

To: Bill Grantmyre  
From: Ed Finley  
Re: Liens on Mountain Air utility property.  
Date: July 16, 2021

A primary justification listed by Red Bird for seeking a plant acquisition adjustment with respect to its petition to obtain the CPCN from MAUC for the Mountain Air water and sewer systems is that the property upon which the systems are located and presumably the systems themselves are encumbered by judgment liens as a result of debts owed by the developer, Randy Banks. Apparently, some of the property upon which the utility facilities are located is not owned by MAUC because it has never been transferred to the utility from Banks.

Pleadings or representations suggest that the cumulative obligations with respect to Bank's debts resulting in incumbrances on the Mountain Air property are \$15 million. Our understanding is that the liens on the utility property are quoted as being in the range of \$800,000 to \$1.3 million. The actual number is unknown because Red Bird maintains that the purchase price is confidential. It is unclear how the allocation of the totality of the lien obligations compares to the purported lien obligation on the utility property.

Irrespective of whether the property has been deeded to MAUC or remains under the ownership of the developer, the utility real estate and facilities are necessary to provide the utility functions and are subject to the utility obligations. This property is "fixed with a public interest" and is distinct from other property owned by Banks that ostensibly could be foreclosed upon and developed for any number of lucrative commercial purposes. The nonutility property is of far less value without the utility facilities to make the property available for development with the water and sewer amenities.

The North Carolina court cases of Mackie and Buck Island establish that even if the owner of property used to provide public utility services to the using consuming public has not been certificated by the North Carolina Utilities Commission, the owner of the property is nevertheless a de facto public utility. Under the rationale of these cases, even if property used to provide utility service has never been deeded to MAUC, it is nevertheless constrained by the public utility obligation, and, were the holders of the liens to attempt to foreclose, all that such a foreclosure would accomplish would be to place the foreclosing entities in the shoes of the existing utility with all of the utility's obligations.

Our understanding is that the investment of MAUC is practically nonexistent. In other words, the rate base is practically zero. The rates charged by MAUC are inadequate; MAUC lacks records to justify realistic rates; and the facilities are in poor shape and in need of major, costly renovations. As such, should a lien holder attempt to foreclose, the result would be that it obtained substantial financial obligations and liabilities. Rather than obtaining property of value in the range of \$800,000 to \$1.3 million, the lienholders would subject themselves to substantial liability. It is as though lien holders claims on the utility property are second in line to the obligations of that property to the using and consuming public and as such are of little, if any value. Presumably the Banks debts arose in the 2008-9 depression or subsequently, well after the utility facilities were installed and certificated by the NCUC. The lienholders would be obtaining an obligation to provide public utility service. While the identification of the lien holders is unknown, it is safe to assume that they would be disinterested in operating a water and sewer utility, especially the one currently serving Mountain Air.

The Mountain Air ratepayers have done nothing that has resulted in the obligations resulting in the judgment liens. These ratepayers ultimately will be responsible for reimbursement for major capital infusions for plant improvements and operations and maintenance expense at a greater level if the utility systems are transferred as is presently contemplated. In our view, it is grossly unfair to require these ratepayers to bear responsibility for discharging liens on utility property for obligations for which they have borne no responsibility. At the very least, some effort should be undertaken to appropriately quantify and value the incumbrance on the utility property vis-a-vis the developer property that is not encumbered by a public utility obligation. Perhaps this could be accomplished through expert witness testimony before the NCUC should Red Bird insist on proceeding with its efforts to acquire the systems and include its purchase price in rate base that is based on the amount of the liens. Another alternative might be to bring a declaratory judgment petition before the Superior Court in an effort to show that the liens on the public utility property are of little value.

The POA assumes that the Public Staff in its investigation and due diligence is seeking to obtain facts with respect to the identification of the lien holders, the basis for the liens and the amount of obligations outstanding. The POA respectfully requests that the Public Staff attempt to determine, among other things, how the purported lien amount on the public utility property compares to the total debt obligation incurred by developer Banks.

#### ADDENDUM 11-11-2022

An additional reason supporting the position that liens or security interests against the utility property in Mountain Air are unenforceable is that it appears that there is no Commission order authorizing the encumbrance of the utility assets pursuant to N.C. Gen. Stat. § 62-160. In this regard, see the Public Staff's Investigation Report dated May 6, 2013 in Docket No. W-1125, Sub 4. In that report involving the Outer Banks/Kinnakeet Associates' system the Public Staff identified a number of liens and security interests filed against the property of the utility. On page 13 the following paragraph appears:

Neither the First South Bank \$3,025,500 loan nor the pledging of assets was approved by the Commission as required by G.S. 62-160. Therefore, whether the deed of trust and purported security agreement are enforceable liens is a legal issue, which may need to be decided in the Superior Court of the General Court of Justice and possibly the North Carolina Court of Appeals.