

1 PLACE: Dobbs Building, Raleigh, North Carolina

2 DATE: Wednesday, November 8, 2023

3 TIME: 10:01 a.m. - 10:19 a.m.

4 DOCKET: W-938, Sub 6

5 W-1328, Sub 8

6 BEFORE: Commissioner Floyd B. McKissick, Jr.

7 Commissioner Kimberly W. Duffley

8 Commissioner Karen M. Kemerait

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IN THE MATTER OF:

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Joint Application By Red Bird Utility Operating

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Company, LLC d/b/a Red Bird Water and Baytree

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Waterfront Properties, Inc. For Transfer of Public

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Utility Franchise and For Approval of Rates

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VOLUME 2

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NORTH CAROLINA UTILITIES COMMISSION

1 A P P E A R A N C E S:

2 FOR RED BIRD UTILITY OPERATING COMPANY, LLC d/b/a RED
3 BIRD WATER AND BAYTREE WATERFRONT PROPRETIES, INC.:

4 Dan Higgins, Esq.

5 Burns, Day & Presnell, PA

6 Post Office Box 10867

7 Raleigh, North Carolina 27608

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9 FOR THE USING AND CONSUMING PUBLIC:

10 Gina Holt, Esq.

11 North Carolina Utilities Commission

12 4326 Mail Service Center

13 Raleigh, North Carolina 27699-4326

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NORTH CAROLINA UTILITIES COMMISSION

P R O C E E D I N G S

COMMISSIONER MCKISSICK: Good morning. Let us come to order and go on the record. I'm Floyd B. Mckissick, Jr., a Commissioner with the North Carolina Utilities Commission, and I will be presiding over this hearing today. With me are Commissioners Kimberly W. Duffley, and Karen M. Kemerait.

I now call for hearing Dockets Number W-938, Sub 6, and W-1328, Sub 8, which is the Application of Baytree Waterfront Properties Inc., hereinafter referred to at times as Baytree, and Red Bird Utility Operating Company LLC, doing business as Red Bird Water, hereinafter referred to at times as Red Bird for Transfer of Public Utility Franchise and for Approval of Rates.

Before we proceed further, as I am required by the State Government Ethics Act, I remind members of the Commission of our duty to avoid conflicts of interest, and I inquire at this time as to whether any Commissioner has any known conflicts of interest with respect to these dockets.

(No response.)

COMMISSIONER MCKISSICK: Let the record reflect that I have no such conflict and that no such

1 conflicts have been identified by the other
2 Commissioners.

3 On October 9, 2020, Red Bird and Baytree
4 filed with the Commission an Application for Authority
5 to Transfer the Wastewater Utility System and Public
6 Utility Franchise serving the Windermere Point
7 Subdivision in Montgomery County, North Carolina, from
8 Baytree to Red Bird and for Approval of Rates.

9 The Transfer Application requests that the
10 Commission approve the transfer of the wastewater
11 system assets, approve the transfer of the public
12 utility franchise from Baytree to Red Bird, and
13 improve wastewater rates as currently approved.

14 The present rates for the Windermere Point
15 Subdivision were approved in Dockets W-938, Sub 5, and
16 M-100, Sub 138, and have been in effect since January
17 1, 2017. Baytree currently serves 26 residential
18 customers in the Windemere Pointe Subdivision.

19 Red Bird supplemented the Application
20 several times after the initial filing, with the last
21 supplemental filing occurring on August 2, 2023.

22 On August 9, 2023, the Public Staff filed a
23 letter indicating that these dockets now include all
24 of the information required for a complete

1 Application.

2 On September 11, 2023, Red Bird filed its
3 objections and confidential response to the Public
4 Staff's confidential ninth set of data requests.

5 On September 13, 2023, the Commission issued
6 an Order scheduling hearings, establishing discovery
7 guidelines, and requiring customer notice.

8 The Order scheduled a public witness hearing
9 to be held on Wednesday, October 18, at 7 p.m. in the
10 Montgomery County Courthouse in Troy, North Carolina,
11 for the purpose of receiving public witness testimony
12 on the Application, as well as an expert witness
13 hearing to begin on November 6, 2023, at 1 p.m. at the
14 Dobbs Building Utilities Commission Hearing Room 2115
15 in Raleigh, North Carolina, and continuing as
16 necessary until conclusion.

17 On September 20, 2023, the Public Staff
18 filed a letter notifying the Commission that the
19 parties had come to an impasse regarding the content
20 of the customer notice. On that same date, Red Bird
21 filed a Motion for Approval of Notice to Customers.

22 On September 25, 2023, the Commission issued
23 an Order granting Red Bird's motion and approving the
24 Company's proposed customer notice.

1 On October 9, 2023, Red Bird filed the
2 confidential and public-redacted direct testimony and
3 exhibits of Josiah Cox consisting of 30 pages and four
4 exhibits.

5 On October 10, 2023, the Public Staff filed
6 a motion to revise the Order scheduling hearings and
7 discovery guidelines.

8 On October 11, 2023, the Commission issued
9 an Order amending discovery guidelines, filing dates
10 for prefiled testimony, and witness lists and
11 requiring reports.

12 On October 12, 2023, the Public Staff filed
13 a motion to cancel the public witness hearing
14 scheduled for Wednesday, October 18.

15 On October 13, 2023, the Commission issued
16 an Order canceling the public witness hearing.

17 On October 23, 2023, the Public Staff filed
18 the direct testimony of John R. Hinton, consisting of
19 five pages, one appendix, and one exhibit; the
20 confidential and public-redacted direct testimony of
21 Hermanth Meda, consisting of seven pages, one
22 appendix, and four exhibits; and the confidential and
23 public-redacted testimony and exhibits of D. Michael
24 Franklin, consisting of 19 pages and one appendix.

1 On October 30, 2023, Red Bird filed the
2 rebuttal testimony of Josiah Cox, consisting of 18
3 pages, and Caitlin O'Reilly, consisting of five pages.

4 On November 1, 2023, Red Bird filed a
5 witness list and estimated cross-examination times.

6 On this past Friday, November 3, 2023, Red
7 Bird filed a motion for leave to file corrected
8 rebuttal testimony and requested that the expert
9 witness hearing be rescheduled.

10 On November 6, 2023, the Commission issued
11 an Order granting Red Bird's motion for leave to file
12 corrected testimony -- corrected rebuttal testimony, I
13 should state -- and rescheduled the public witness
14 hearing to begin on this date, time, and location, and
15 continuing as necessary until conclusion.

16 Also on November 6, Red Bird filed the
17 corrected rebuttal testimony and exhibits of Josiah
18 Cox, consisting of 20 pages and two exhibits.

19 Of course, that brings us to today. And
20 what I'd like to do is recognize the attorneys who are
21 here on behalf of the Applicant and on behalf of the
22 Public Staff.

23 MR. HIGGINS: Good morning, Commissioners.
24 My name is Dan Higgins. I'm appearing on behalf of

1 Red Bird Utility Operating Company, LLC.

2 MS. HOLT: Good morning. I'm Gina Holt,
3 with the Public Staff here on behalf of the Using and
4 Consuming Public. And with me at counsel table are
5 attorneys James Bernier and Davia Newell.

6 COMMISSIONER McKISSICK: Thank you.

7 And one thing I want to do is remind the
8 Applicant that this is a legal proceeding and the
9 Commission is required to act within a certain period
10 of time on these Applications. However, the
11 Commission is not required to grant these
12 Applications. The Commission is required to conduct a
13 proceeding in order to determine whether granting a
14 transfer such as this one that's before us meets the
15 statutory requirements.

16 The Commission is not able to make this
17 determination if the Applicant fails to timely provide
18 the required information, including rebuttal testimony
19 and showing up for scheduled hearings. Failing to
20 adhere to procedural schedules set forth by the
21 Commission in these proceedings will be grounds for
22 the Commission to dismiss your Application.

23 So I want to remind everyone, including the
24 Public Staff, that the Commission is working to meet

1 the statutory deadlines for many Applications at this
2 time. Not only the Application relating to water
3 transfers such as this proceeding, but also all the
4 other matters before the Commission including several
5 rate cases.

6 The Applicant appears to be under the
7 impression that any day without a publicly scheduled
8 hearing on our schedule is free and that the parties
9 can request that particular day for a rescheduled
10 hearing pretty much at their prerogative and whim, and
11 that's not the case. The Commission has a full
12 schedule. Only some of which of the hearings that are
13 there and publicly known to you are matters that we're
14 taking care of. We are also conducting other business
15 other than those things that appear on our public
16 schedule in terms of hearings. And it doesn't mean
17 just because there's a date on the calendar that you
18 don't see a hearing that we're going to be available
19 to move forward and conduct a hearing in this
20 particular case.

21 So I wanted to kind of state that for the
22 record because I've been concerned about the way
23 things have worked in this particular proceeding. I
24 mean, if I -- if I go back and I look at the initial

1 scheduling Order that was entered on September 13 of
2 '23, it establishes, you know, an expert witness
3 hearing of November 6 of 2023. And on October 10,
4 2023, there was a revised scheduling Order that was
5 entered that re-stated that the expert witness hearing
6 was going to be scheduled for November 6, 2023. And
7 in the October 10, 2023, revised scheduling Order, it
8 stated that Red Bird needed to submit rebuttal
9 testimony and exhibits by October 30, 2023. And Red
10 Bird did, in fact, file rebuttal testimony of Josiah
11 Cox and Caitlin O'Reilly on Monday, October 30, 2023,
12 but they waited until Friday, November 3, 2023, to
13 file a motion to file corrected rebuttal testimony.
14 And the request of a 30-day extension of a 180-day
15 deadline. So, I mean, it gives me concern, of course,
16 at that time and in that particular -- in that
17 particular matter that was filed.

18 You also requested that you be able to file
19 that revised testimony by Tuesday, November 7th. Now,
20 we did communicate through our staff, the Commission's
21 staff, that we wanted to get that in by Monday. By
22 Monday the sixth of November instead of waiting until
23 Tuesday, November 7th. And, of course, they requested
24 a hearing date on Monday, December, 11th, and Tuesday,

1 December 12th. I think that was being somewhat
2 presumptuous, and that's disturbing to me and to the
3 Commission that there would be that type of
4 presumption made relating to our schedule and to our
5 availability.

6 And one thing I'd like to do, and I want to
7 hear from the Applicant is, when did you first
8 discover that the rebuttal testimony that was filed on
9 Monday, October 30, was an error? Or that it
10 contained errors?

11 MR. HIGGINS: Commissioner's, I apologize
12 for the circumstances we find ourselves in. It's the
13 first time I've been in this posture quite frankly,
14 and I appreciate that my clients regrettable mistaking
15 of information from the Baytree Lake Subdivision and
16 including that in their initial rebuttal filed October
17 30th is what has brought us to the point we are.

18 We filed that rebuttal on Monday,
19 October 30th on -- late on the afternoon of Wednesday,
20 which would have been November 1, we learned of the
21 mistake. And then had subsequent discussions with
22 Public Staff and we -- and with regard, I certainly
23 did not intend to be presumptuous as to the
24 Commission's schedule. Public Staff had identified

1 dates that they thought might be available for a
2 hearing, and we offered those up. And so, with
3 apologies for how that appears to have been construed,
4 it was simply a function of the conversations we had
5 with Public Staff about how we might move forward.

6 I know that the Commission is unhappy with
7 the situation. I get that, but I also know that the
8 Commission wants a complete record and a record that's
9 based on accurate information, and so we have
10 attempted to get us to that point. And I apologize
11 for the confusion, the delay, and the circumstances
12 that we're in.

13 COMMISSIONER MCKISSICK: Now, are you
14 prepared to move forward today? I know you do not
15 your witness here.

16 MR. HIGGINS: I am not. I communicated with
17 Commission's staff that my witnesses are in a hearing
18 for the Arizona Commission starting this morning. So
19 that is a regrettable consequence of where we find
20 ourselves. So I don't have witnesses that are
21 available today.

22 COMMISSIONER MCKISSICK: And did you
23 communicate to the witness that this matter was put on
24 for today to be heard so that they could make a

1 determination as to whether to come here or go and
2 attend a hearing in another jurisdiction?

3 MR. HIGGINS: I did apprise the -- once I
4 got word of -- that the Commission wanted to move
5 forward or intended to move forward on Wednesday, I
6 immediately communicated that information. The
7 response was they were already committed to be in a
8 hearing at the Arizona Commission starting this
9 morning. And so, quite frankly, they had a dilemma in
10 terms of what to do, and they're -- they were not able
11 to be here today. They couldn't be in two places at
12 once, and --

13 COMMISSIONER MCKISSICK: When was the
14 Arizona hearing scheduled, because I know we had this
15 as a backup date on our calendar since the original
16 date of -- the beginning date was, you know, set.

17 MR. HIGGINS: Commissioner McKissick, I'm
18 not -- I'm not involved in the Arizona docket. I
19 can't -- I'm sorry, I can't provide you with that
20 information.

21 COMMISSIONER MCKISSICK: Okay. Well, I will
22 be heard if you would like to make any kind of motion
23 at this time.

24 MR. HIGGINS: Well, if I -- I would ask that

1 the Commission recess this hearing to the earliest
2 possible convenient date for the Commission and that
3 we may resume then and have -- I don't think this will
4 take us a day. I think we can complete this in less
5 than -- in one day or less. And so with that in mind,
6 I would ask that the Commission recess this until my
7 witness can be -- witnesses can be available, and
8 Public Staff can be available, and as the Commission's
9 schedule allows.

10 COMMISSIONER MCKISSICK: Okay. And would
11 you be waiving the 30 days?

12 MR. HIGGINS: Yes, sir. Red Bird --

13 COMMISSIONER MCKISSICK: It may, in fact,
14 take longer. Now, let me ask you this: at this point
15 in time, you don't know what your client's
16 availability is in terms of other potential dates that
17 we may set today?

18 MR. HIGGINS: I don't have dates,
19 Commissioner, but may I respectfully assure you that I
20 would expect them to make the -- absolutely every
21 effort to accommodate -- I don't know how to proceed
22 in this regard. If the Commission could tell us
23 potential dates and we would not -- I would not
24 presume to suggest any further dates, but if we could

1 have some guidance, we would make every effort to be
2 here as soon as possible.

3 COMMISSIONER MCKISSICK: Okay. And I'll now
4 hear from Public Staff in terms of your thoughts as it
5 relates to this issue.

6 MS. HOLT: The Public Staff does not object
7 to a short delay in progressing with the hearing,
8 especially in light of the fact that we received
9 corrected information just Monday, and we would like
10 the opportunity to conduct discovery on that corrected
11 testimony.

12 COMMISSIONER MCKISSICK: Okay. Based upon
13 the information that is available to us at this time,
14 we're going to go ahead and set this hearing to begin
15 on December 13th, and it will continue on to the 14th.
16 Do I -- I'd like to hear from the Public Staff. Do
17 you feel that's a reasonable timeframe for you to work
18 within? In terms of rebuttal testimony or any
19 discovery.

20 MS. HOLT: Yes, we think so.

21 COMMISSIONER MCKISSICK: And, of course, I
22 feel that these are dates that are -- we can be
23 available, and so we're going to set it on for hearing
24 at that time and we'll reflect into the record that

1 the Applicant agrees to a 30-day waiver. Would that
2 be correct, sir?

3 MR. HIGGINS: Yes, sir, it would.

4 COMMISSIONER MCKISSICK: All right. With
5 that said, we will go ahead and conclude our matters
6 for today.

7 Are there any further matters that either
8 the Applicant or the Public Staff would like to bring
9 to our attention that needs to be addressed at this
10 time?

11 MR. HIGGINS: Nothing further for the
12 Applicant.

13 MS. HOLT: Nothing further from us.

14 COMMISSIONER MCKISSICK: All right. Let the
15 record reflect that we will stand in recess until
16 December 13, 2023, at 10 a.m., to begin the hearing in
17 this proceeding.

18 Thank you.

19 (The hearing was adjourned
20 at 10:19 a.m., and set to
21 reconvene at 10:00 a.m., on
22 December 13, 2023.)
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C E R T I F I C A T E

I, KAYLENE M. CLAYTON DO HEREBY CERTIFY that
the Proceedings in the above-captioned matter were
taken before me, that I did report in stenographic
shorthand the Proceedings set forth herein, and the
foregoing pages are a true and correct transcription to
the best of my ability.



Kaylene M. Clayton