

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. W-938, SUB 6  
DOCKET NO. W-1328, SUB 8

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of )  
Application by Red Bird Utility Operating )  
Company, LLC, and Baytree Waterfront )  
Properties, Inc. for Transfer of Public Utility )  
Franchise and for Approval of Rates )

**REVISED REBUTTAL TESTIMONY OF JOSIAH COX  
ON BEHALF OF RED BIRD UTILITY OPERATING COMPANY, LLC**

**I. INTRODUCTION**

1   **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

2   A. My name is Josiah Cox. My business address is 1630 Des Peres Road, Suite 140, St.  
3   Louis, Missouri, 63131. I am President of Red Bird Utility Operating Company, LLC  
4   ("Red Bird"). I also am President of CSWR, LLC, ("CSWR") a Red Bird affiliate.

5   **Q. ARE YOU THE SAME JOSIAH COX WHO PREVIOUSLY FILED DIRECT**  
6   **TESTIMONY AND REBUTTAL TESTIMONY IN THESE DOCKETS?**

7   A. Yes, I am.

8   **Q. WHAT IS THE PURPOSE OF YOUR REVISED REBUTTAL TESTIMONY?**

9   A. The subject of these dockets is the Application for Transfer of Public Utility Franchise  
10   and for Approval of Rates ("Joint Application") filed in these dockets by Red Bird and  
11   Baytree Waterfront Properties, Inc. ("Baytree"). The Joint Application seeks Commission  
12   approval for Red Bird to acquire all utility assets currently used by Baytree and to provide  
13   wastewater utility services to customers in the Windemere Pointe subdivision in  
14   Montgomery County, and to adopt Baytree's Commission-approved rates. In testimony

1 filed October 23, Public Staff witnesses Michael Franklin and John Hinton acknowledge  
2 Red Bird has the technical, managerial and financial qualifications required to acquire,  
3 own, and operate Baytree's wastewater system, and appear to have conditionally  
4 recommended Commission approval of the Joint Application. However, Mr. Franklin  
5 expressed Public Staff's concerns and reservations regarding certain aspects of the  
6 proposed transactions.

7 I now realize that certain information contained in my original rebuttal testimony  
8 related to the Baytree Lakes wastewater system,<sup>1</sup> rather than the Baytree Waterfront system  
9 which is the subject of these dockets. Given the extent of the corrections that would have  
10 to be made to my original rebuttal testimony to address this, I file this rebuttal testimony.  
11 My revised rebuttal testimony addresses those concerns and reservations.

12 Specifically, my revised rebuttal testimony addresses the following issues raised in  
13 testimony filed by Public Staff's witnesses:

- 14 • The contention that the Baytree system is not a "troubled" utility;
- 15 • Public Staff's contention that no "acquisition adjustment" should be allowed in  
16 connection with the proposed acquisition;
- 17 • Concerns expressed by Mr. Franklin regarding due diligence costs Red Bird will  
18 incur in connection with this transaction;
- 19 • Public Staff's claims regarding the effect approval of this acquisition would have  
20 on customer rates; and

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<sup>1</sup> Baytree Lakes is the subject of Docket No. [Docket W-1080](#).

1 I also will reiterate the many benefits Red Bird's proposed acquisition would bring  
2 to customers served by the Baytree wastewater system both immediately and in the long  
3 term.

4 In addition, I will briefly address concerns expressed in the testimony of Public  
5 Staff's witness John Hinton regarding CSWR's ability to provide capital necessary to  
6 acquire, make required upgrades and improvements, and operate the Baytree systems after  
7 closing.

8 In separate rebuttal testimony filed by CSWR witness Caitlin O'Reilly, Red Bird  
9 will address accounting issues raised in the testimony of Public Staff's witness Hemanth  
10 Meda.

11 **II. IS THE BAYTREE SYSTEM A "TROUBLED" UTILITY**

12 **Q. WHAT IS MR. FRANKLIN'S ASSESSMENT OF THE OVERALL**  
13 **CONDITION OF BAYTREE AND ITS UTILITY FACILITIES?**

14 A. At page 6 of his prefiled testimony Mr. Franklin states that "[b]ased on the lack of  
15 warnings or violations from the Montgomery County Environmental Health Office and the  
16 lack of customer complaints over the past three years . . . Baytree is providing safe and  
17 reliable service to its wastewater customers . . ."

18 **Q. DO YOU CONCUR WITH MR. FRANKLIN'S ASSESSMENT?**

19 A. I do not concur with Mr. Franklin's assessment. Because Baytree's system is  
20 regulated by the Montgomery County Health Department instead of the North Carolina  
21 Department of Environmental Quality (NCDEQ) there is no publicly available database to  
22 check to determine the system's compliance history. I therefore have no reason to  
23 disbelieve Mr. Franklin's statement that Montgomery County has issued no warnings or

1 violations to Baytree over the past three years. That said, I believe it important to note that  
2 Montgomery County's regulatory requirements for wastewater treatment are much less  
3 rigorous than those of the NCDEQ. That can be seen by a simple side-by-side comparison  
4 of the operating permit issued to Baytree by Montgomery County and the NPDES permit  
5 issued to Crosby Utilities, a system Red Bird recently acquired, by the NCDEQ. I have  
6 attached copies of those permits to my testimony as **Cox Rebuttal Exhibits 1 and 2,**  
7 respectively. Therefore it is possible that while Baytree's system meets the county's  
8 standards it may not satisfy the more rigorous standards of the NCDEQ.

9 ~~In preparation for this testimony a review of available compliance documentation for the~~  
10 ~~Baytree system was completed to assess the compliance history and competency of the~~  
11 ~~existing ownership. As a result of that review a number of trends in reporting, facility~~  
12 ~~status, and enforcement action were noted that indicate the existence of compliance and~~  
13 ~~management issues at the facility. The facility received numerous notices of violation~~  
14 ~~(NOVs) and civil penalty (CP) assessments over the period observed with NOVs and CPs~~  
15 ~~issued monthly for monitoring reporting that was not submitted for previous months. Each~~  
16 ~~violation stated that while the reporting had been completed and submitted, the facility~~  
17 ~~owner or responsible official failed to sign the reports in order for them to be accepted. In~~  
18 ~~fact, the notices stated the owner "refused to sign" the reports as required by law. This~~  
19 ~~resulted in monthly fines of \$10,083.44 being issued for two missing reports and to cover~~  
20 ~~the enforcement costs associated with issuing the NOVs and CPs. It is unclear if the state~~  
21 ~~succeeded in collecting these fines. However, because there is no record of the owner~~  
22 ~~responding to the NOVs or CPs to request the penalties be waived, those fines likely remain~~

1 outstanding. This pattern continued every month until August 2022 when, inexplicably, the  
2 owner began to sign reports.—

3 Reports available after August 2022 show two consistent issues with facility  
4 performance/status. First, each report shows the facility consistently exceeding its flow  
5 limits in both monthly average flow (20,000 gallons per day on average) and daily  
6 maximum flow (30,000 gallons per day). This indicates the facility is receiving more flow  
7 than it is permitted or designed for, possibly due to inflow and infiltration in the collection  
8 system or overloading. Daily maximum exceedances ranged from more than 20,000  
9 gallons per day to more than 50,000 gallons per day. This indicates that either inflow and  
10 infiltration problems must be addressed or facility and drain field upgrades must occur to  
11 account for the additional flows.—

12 Another issue highlighted in the post August 2022 reports is that no disinfection process is  
13 currently in use at the facility. There is a chlorine dosing system present in the Baytree  
14 system, but it is disconnected from the system because the piping is too corroded to allow  
15 the chlorine feed to be connected. The reports also state that the "area manager"  
16 (presumably either a DEQ or local official, or an operator of the facility) has received  
17 quotes for the piping replacement required to reenable the disinfection system, but that the  
18 owner refused to grant approval for the work to be performed. As the DEQ inspector  
19 indicates in his report, this means that "all effluent that is sprayed has not been  
20 disinfected." Such a practice represents a risk of introducing harmful pathogens to the  
21 environment or causing health issues for people nearby.

1 Overall, the history I just recounted indicates conditional and design issues at the facility  
2 that have been left unaddressed related to disinfection, potential collection system or under-  
3 sizing issues, and a pattern of obstinance on the part of the existing ownership leading to  
4 fines that could affect customers. I do not consider these to be indicia of a system that is  
5 providing safe and reliable service.

6 **Q. DO YOU HAVE INFORMATION TO SUPPORT YOUR OPINION THAT**  
7 **BAYTREE AND ITS UTILITY SYSTEMS ARE “TROUBLED”?**

8 A. Yes, I do. In addition to the differences in regulatory standards I just mentioned I  
9 also want to caution the Commission against relying too heavily on Mr. Franklin’s  
10 assessment of the condition of Baytree’s wastewater system based on a single visit to those  
11 facilities. That single visit provides a “snapshot” of what was observed on that one day and  
12 may not – especially in the face of contrary historical evidence – provide an accurate  
13 picture of the true condition of Baytree’s system or how Baytree has operated that system  
14 over time. Therefore, in assessing whether Baytree’s system is “troubled” the Commission  
15 should take a longer-term, more wholistic view. Just because Baytree’s system currently  
16 complies with applicable regulations does not mean it will be in compliance in the future.

17 **Q. WHAT EVIDENCE HAS RED BIRD IDENTIFIED IN ITS DUE**  
18 **DILIGENCE ANALYSIS THAT SUGGESTS CONTINUED COMPLIANCE WILL**  
19 **BE DIFFICULT, IF NOT IMPOSSIBLE, FOR BAYTREE TO ACHIEVE?**

20 A. In my direct testimony in this docket (pages 20-23) I described the preliminary  
21 engineering assessment Red Bird performed of Baytree’s wastewater system as part of its  
22 due diligence and the recommendations developed for repairs and upgrades required after  
23 closing. That report, which was prepared by a third-party engineering firm in February  
24 2021 identified necessary sewer system repairs and upgrades estimated to cost more than

1 \$155,000. Because of the effects of inflation in the more than two years since those  
2 recommendations were prepared, I would expect current cost estimates of the  
3 recommended projects to be substantially greater. Well run and managed water and  
4 wastewater systems to not allow their facilities to deteriorate to the degree described in the  
5 due diligence engineering report.

6 **Q. DO YOU BELIEVE BAYTREE HAS THE CAPACITY TO RAISE**  
7 **CAPITAL NECESSARY TO MAKE THE REQUIRED IMPROVEMENTS**  
8 **IDENTIFIED IN THE PRELIMINARY ENGINEERING ASSESSMENT?**  
9

10 **A. No, I do not. It appears Baytree's original rates were set when it was certificated in**  
11 **1988 and its only rate case was filed in 2001, so it's unlikely the rates set in 2002, and**  
12 **reduced in 2017 due to a change in North Carolina tax rates, reflect or recover the actual**  
13 **cost of operating the wastewater system in 2023. That suspicion is validated by the**  
14 **financial statements included as part of Baytree's 2020, 2021, and 2022 annual reports. As**  
15 **shown there, Baytree recorded net operating losses for two of those three years and positive**  
16 **net income of less than \$700 for the third. As we have found in seeking debt financing for**  
17 **affiliates outside North Carolina, commercial lenders won't lend money to utilities that**  
18 **haven't had a recent rate case and don't have the income/cash flows necessary to ensure**  
19 **repayment of loans. Those same characteristics would, I believe, make Baytree equally**  
20 **unappealing to potential equity investors as well. Therefore, for any or all of the reasons I**  
21 **just described I believe Baytree could not raise the capital necessary to finance the**  
22 **improvements identified in our preliminary engineering assessment of this system.**

1 **III. ACQUISITION ADJUSTMENT**

2 **Q. MR. FRANKLIN STATES IN HIS TESTIMONY THAT PUBLIC STAFF**  
3 **DOES NOT SUPPORT RED BIRD RECEIVING AN ACQUISITION**  
4 **ADJUSTMENT IN THIS PROCEEDING. HOW DO YOU RESPOND?**

5 A. For reasons I will further explain later in my testimony, I believe the Commission  
6 *need not* authorize an acquisition adjustment for Red Bird in this proceeding. Instead, the  
7 Commission can and should defer to Red Bird's initial rate case involving the Baytree  
8 system any decision regarding whether an acquisition adjustment should be granted. There  
9 are three primary reasons for my deferral proposal.

10 First, based on the changes to the law applicable to water and wastewater  
11 acquisitions that I discussed in my direct testimony, the Commission's focus in these types  
12 of cases is limited to determining (1) whether the party seeking to acquire a system  
13 possesses the technical, managerial, and financial capabilities necessary to provide public  
14 utility services, and (2) whether the transaction is in the public interest. And insofar as the  
15 public interest determination is concerned, that determination is to be made in the context  
16 of the rates proposed to be in effect immediately after the system is transferred. Because  
17 any acquisition adjustment deemed appropriate in this case would affect none of the factors  
18 the Commission is to consider in a water or sewer transfer proceeding, it is neither  
19 necessary nor appropriate to decide that issue at this point in this acquisition case.

20 Second, there is no need for the Commission to address the acquisition adjustment  
21 in this case because after closing Red Bird plans to adopt and charge customers Baytree's  
22 currently approved rates. Therefore, any decision regarding whether an acquisition



1 adjustment should be authorized can be deferred to the initial rate case involving the  
2 Baytree systems when that issue and its impact on rates can be fully considered.

3 Finally, by deferring the acquisition adjustment issue to Red Bird's initial rate case  
4 involving the Baytree system more and better information would be available regarding  
5 the circumstances and factors that govern whether such an adjustment should be included  
6 in rate base. As stated in the Commission's decision in the *Order Approving Transfer and*  
7 *Denying Acquisition Adjustment*, issued in Socket No. W-100, Sub 5 (N.C.U.C. January 6,  
8 2000) ("*North Topsail*"):

9 Although the number of relevant considerations seems virtually unlimited,  
10 all of them apparently relate to the question of whether the acquiring utility  
11 paid too much for the acquired utility and whether the customers of both the  
12 acquired and acquiring utilities are better off after the transfer than they  
13 were before that time . . . [T]he Commission should refrain from allowing  
14 rate base treatment of an acquisition adjustment unless the purchasing utility  
15 establishes, by the greater weight of the evidence, that the price the  
16 purchaser agreed to pay for the acquired utility was prudent and that both  
17 the existing customers of the acquiring utility and the customers of the  
18 acquired utility would be better off [or at least no worse off] with the  
19 proposed transfer, including rate base treatment of any acquisition  
20 adjustment, than would otherwise be the case.

21  
22 *North Topsail* at page 27.

23 Evidence regarding the purchase price presented in this case does not focus on  
24 whether the purchase price Red Bird will pay for Baytree's assets is "reasonable."  
25 However, Red Bird states the price was the lowest that could be negotiated after arms-  
26 length negotiations between the two non-affiliated parties.

27 Because the transaction has not yet been completed, there is not – and cannot be –  
28 any tangible evidence regarding how the proposed acquisition would affect either Baytree's  
29 current customers or Red Bird's current and future customers. Public Staff's projections

1 regarding future rate impacts of the proposed acquisition are purely speculative and are  
2 unreliable for that reason.

3 However, deficiencies in the current record regarding both the reasonableness of  
4 the purchase price and the effect of the proposed acquisition on customers can be cured if  
5 the acquisition adjustment issue is deferred to a future rate case. And customers would not  
6 be harmed by such a deferral, because Red Bird's proposed adoption of Baytree's current  
7 approved rates ensures that the rates charged to Red Bird's and Baytree's customers would  
8 not change if Red Bird's acquisition of the Baytree system is approved.

9 For all the reasons just stated, I believe it makes sense to defer any decision on an  
10 acquisition adjustment to Red Bird's initial North Carolina rate case including Baytree. As  
11 previously noted, such a deferral will harm no one. Moreover, such a deferral is more  
12 consistent with what I believe is the intent of recent changes to the statute governing  
13 transfer of water and wastewater utilities, which narrows the scope of the Commission's  
14 inquiry in such cases to public interest in the context of the rates proposed by the acquiring  
15 utility and the technical, managerial, and financial qualifications of a potential acquiror.

#### **IV. DUE DILIGENCE COSTS**

16 **Q. PUBLIC STAFF RECOMMENDS THE COMMISSION APPLY A \$10,000**  
17 **CAP ON DUE DILIGENCE COSTS INCURRED BY RED BIRD IN CONNECTION**  
18 **WITH THE BAYTREE ACQUISITION. HOW DO YOU RESPOND?**

19 A. I disagree with Public Staff's recommendation for at least two reasons. First, as I  
20 stated elsewhere in my testimony and reiterate here, changes to G.S. § 62-111 limit the  
21 issues the Commission is to consider in water and wastewater acquisition cases. Because  
22 the amount of due diligence costs Red Bird incurred does not reflect on the rates it proposes

1 to use if the transfer is approved, or its technical, managerial, or financial capabilities to  
2 own and operate the Baytree systems, the amount of due diligence costs that should be  
3 included in rate base is an issue that can and should be deferred to Red Bird's initial rate  
4 case involving the Baytree system.

5 Second, because Red Bird is not proposing to change rates currently in effect for the  
6 Baytree system, there is no need for the Commission to deal with any issue related to  
7 transaction costs in this proceeding. Deferring that issue will harm or disadvantage no one.  
8 Moreover, deferring the issue to a future rate case, when the full amount of transaction-  
9 related costs will be known, will enable all parties to provide evidence regarding the  
10 prudence of those costs and whether they should be included in the rate base used to  
11 calculate rates.

12 In addition, I find many of the arguments Mr. Franklin makes regarding due  
13 diligence costs to be unreasonable. For example, at page 13 of his testimony Mr. Franklin  
14 claims invoices Red Bird supplied to support its due diligence costs included five law firms  
15 and two engineering firms. While that number may sound excessive to Mr. Franklin and  
16 Public Staff, there are good reasons why each of the firms Red Bird used was engaged to  
17 assist in this transaction.

18 With regard to the law firms Red Bird engaged, what appears from the invoices to  
19 be five different law firms actually is only three. Beckemeier LeMoine Law and The  
20 Beckemeier Law Firm are one and the same. However, the firm's name changed over the  
21 more than three years this application has been pending. The same is true for Black,  
22 Slaughter & Black and Law Firm Carolinas; it's the same firm before and after a name

1 change. In terms of their respective roles in the due diligence process, Beckemeier  
2 LeMoine Law has overall responsibility for coordinating all due diligence and closing  
3 activities. To partially fulfill that obligation, it engaged Law Firm  
4 Carolinas to handle matters and issues related to ensuring Red Bird would obtain at closing  
5 clear title to all utility assets it contracted to acquire from Baytree. This is significant,  
6 because Public Staff will not recognize that a transfer application is complete until the  
7 parties to the application establish that the seller owns or otherwise controls and is able to  
8 convey to the purchaser all real property and easements, etc., required for operation of the  
9 utility system. The remaining firm whose costs are included in the due diligence total is  
10 Burns, Day & Presnell who is responsible for legal work required to secure Commission  
11 approval of the proposed acquisition.

12 As part of the engineering portion of the due diligence costs, our affiliate group  
13 routinely engages a third-party engineering firm to assess the condition of assets we  
14 propose to purchase and to project what capital improvements will be necessary during the  
15 first few years we own and operate those assets. For Baytree, McGill Associates performed  
16 that assessment, and while the results of its efforts are preliminary – because we have found  
17 the true condition and needs of systems we acquire can only really be determined after we  
18 own and operate those systems – they are nonetheless invaluable for many reasons. Among  
19 those is the need to respond to questions raised by regulators in acquisition cases regarding  
20 future capital plans. The Commission’s own application form is a perfect example of why  
21 information gathered during our engineering due diligence activities is essential to the  
22 process for obtaining regulatory approval for acquisitions we seek to make. Questions 1

1 and 2 of the Commission's *Application for Transfer of Public Utility Franchise and for*  
2 *Approval of Rates* require applicants, like Red Bird, to provide the following information:

3 1. Are there any major improvements/additions required in the next  
4 five years and the next ten years? Indicate the estimated cost of each  
5 improvement/addition, the year it will be made, and how it will be financed  
6 (long-term debt, short-term debt, common stock, retained earnings, and  
7 other (please explain)).

8 2. Are there any major replacements required in the next five years  
9 and the next ten years? Indicate the estimated cost of each replacement, the  
10 year it will be made, and how it will be financed (long-term debt, short-term  
11 debt, common stock, retained earnings, and other (please explain)).

12 Answering these questions, which is necessary for an acquisition application to be deemed  
13 "complete," would not be possible without the information gathered from the engineering  
14 studies prepared as part of our acquisition due diligence.

15 21 Design Group, the remaining entity whose costs are included in the due diligence  
16 total, was engaged to perform tasks such as surveying and mapping the service area,  
17 including the location of utility facilities Red Bird proposes to acquire. Some of this work  
18 also is required to complete the Commission's application process. But even if it wasn't,  
19 the work is critical to the successful operation of the system after closing.

20 **Q. DOESN'T MR. FRANKLIN ALSO CLAIM RED BIRD'S DUE DILIGENCE**  
21 **COSTS ARE EXCESSIVE?**

22 A. He does not claim they're excessive, but he does contend the amount of due  
23 diligence expense "suggests a lack of oversight." However, beyond misunderstanding the  
24 number of firms who were involved in the process he offers no evidence supporting this  
25 contention. There is nothing in the biographical information provided in his testimony that  
26 suggests Mr. Franklin has ever been responsible for dealing with the numerous and critical  
27 legal and engineering issues that routinely attend the acquisition of utility system assets. If

1 he had, I believe he could better understand and appreciate what is actually required to  
2 accomplish an acquisition like the one proposed in this case and the reasonableness of Red  
3 Bird's due diligence expenses.

4 **V. EFFECT OF PROPOSED ACQUISITION ON CUSTOMER RATES**

5 **Q. TWO OF PUBLIC STAFF'S WITNESSES INCLUDE ESTIMATES**  
6 **REGARDING THE EFFECT ON CUSTOMER RATES OF VARIOUS ASPECTS**  
7 **OF THE JOINT APPLICATION. HOW DO YOU RESPOND?**

8 A. My response to Mr. Franklin's and Mr. Meda's projections regarding the proposed  
9 acquisition of Baytree's system on future rates is twofold. First, because of recent changes  
10 to G.S. § 62-111, which governs the Commission's consideration of water and wastewater  
11 transfer applications, the only rates the Commission should consider in determining  
12 whether an acquisition is in the "public interest" are those that would be in effect  
13 immediately after closing. Future rates – i.e., those that would be set by the Commission  
14 in a future rate case – are not mentioned in the statute and are not relevant to the  
15 determination of whether an acquisition application should be granted.

16 As we made clear in the Joint Application and as reiterated in my direct testimony,  
17 if Red Bird is authorized to acquire Baytree's wastewater system the customer rates  
18 currently in effect will continue to be charged until the Commission authorizes a change in  
19 rates in a future Red Bird rate case. Because approval of the Joint Application will have no  
20 impact on customer rates the Commission should disregard the rate impact estimates  
21 included in the testimonies of both Mr. Franklin and Mr. Meta. Those estimates have no  
22 relevance to the issues the Commission must decide in this case – i.e., whether Red Bird is

1 technically, managerially, and financially qualified to own and operate the Baytree system  
2 as a regulated public utility and whether the proposed transaction is in the public interest.

3 But there is another reason Public Staff's rate impact testimony should be  
4 disregarded – the rate impacts are just estimates. What's more, they are estimates made  
5 based on assumptions regarding all elements of ratemaking – revenue, expenses, rate base,  
6 capital structure, rate of return, rate design, etc. – that may or may not be valid. For  
7 example, Red Bird has made clear it intends to request in its first North Carolina rate case  
8 approval of consolidated, statewide rates for both water and wastewater services. Based on  
9 the experience of our affiliate group in states outside North Carolina, where such rates have  
10 been approved, consolidated rates are an effective mechanism to mitigate “rate shock” that  
11 otherwise would result when small, undercapitalized, and mismanaged systems are taken  
12 over by experienced and technically competent owners that invest the capital required to  
13 address needs in those systems. Consolidated rates allow all customers within a state to  
14 share the benefits of economies of scale our affiliated group can achieve, and also helps to  
15 spread out the rate impact of required capital investments that have greater impacts on some  
16 systems in the short term but that will affect all systems in the long run. Benefits to the  
17 customers from consolidated rates include long-term protection from rate shock, spreading  
18 costs across a larger base, and reduction in risk. Despite Red Bird's declared intent to seek  
19 consolidated rates, Public Staff's estimated rate impacts, in addition to being based on  
20 estimates and assumptions, also are calculated as if rates for the Baytree system would  
21 always be set on a stand-alone basis.

1 **Q. BECAUSE OF THE FACTORS YOU JUST DESCRIBED, DO YOU THINK**  
2 **THE COMMISSION SHOULD CONSIDER FUTURE RATE IMPACTS IN**  
3 **REACHING A DECISION IN THIS CASE?**

4 A. No, I do not. The impact on future rates of Red Bird's acquisition of the Baytree  
5 system will not and cannot be known at the present time, so it would be inappropriate and  
6 unreasonable for the Commission to consider that issue in the current case. As a regulated  
7 utility, Red Bird is prohibited by law from changing rates unless and until such a change is  
8 authorized by the Commission. Under applicable law, no change in rates can be approved  
9 by the Commission without a thorough consideration of a utility's rate change request, with  
10 full opportunity for interested parties – including Public Staff – to present evidence and  
11 arguments regarding that request. Also, as provided in Chapter 62, all rates set by the  
12 Commission must be fair and reasonable. For all these reasons, it serves no purpose for the  
13 Commission to consider possible future rate impacts in this case. Consideration of rates  
14 can and should be deferred to future rate cases where all parties can present evidence on  
15 all factors relevant to ratemaking. Following such consideration, both the utility and its  
16 customers can be assured that whatever decision the Commission makes regarding rates  
17 will be based on facts – instead of estimates and assumptions – and that the resulting rates  
18 are fair and reasonable to all affected parties.

19 For the same reason, I believe the Commission should defer determining rate base  
20 in the acquired assets until Baytree's first rate case. CSWR's experience has been that  
21 small systems often have poor accounting habits. After acquisitions close we sometimes  
22 find that expenditures that the selling utility were expensed should have been capitalized.  
23 We also sometimes find additional documentation of investment that supports additional



1 rate base. If the determination of rate base is made now, this forecloses red bird 's ability  
2 to provide evidence of additional rate base that it might discover after it acquired the Bay  
3 tree system.

4 **Q. HOW DO YOU RESPOND TO MR. FRANKLIN'S CLAIM THAT RED**  
5 **BIRD PROPOSES TO INCREASE BAYTREE'S CURRENT RECONNECTION**  
6 **CHARGE BY \$0.18?**

7 A. Mr. Franklin is correct; our filing does suggest such an increase. But that particular  
8 rate was misstated in the Joint Application because we made an error when transposing  
9 rate information provided by the seller. We intend no increase in Baytree's current rates,  
10 so the correct reconnection charge is \$46.64 not \$46.82 as stated in the Joint Application.  
11 Red Bird regrets the error and is grateful Mr. Franklin pointed it out.

12 **VI. PROPOSED ANNUAL REVIEW OF OPERATIONS AND**  
13 **FINANCIAL CONDITION**

14 **Q. PUBLIC STAFF WITNESS HINTON PROPOSES RED BIRD BE**  
15 **REQUIRED TO MEET ANNUALLY WITH PUBLIC STAFF TO DISCUSS THE**  
16 **COMPANY'S WATER AND WASTEWATER OPERATIONS AND TO REVIEW**  
17 **ITS FINANCIAL CONDITION. HOW DO YOU RESPOND?**

18 A. In the Settlement Agreement and Stipulation filed in Docket Nos. W-1146, Sub 13  
19 and W-1328, Sub 10 Red Bird agreed to meet annually with Public Staff to discuss the  
20 company's water and wastewater operations and to review its financial condition. Although  
21 that agreement applied only to the acquisition at issue in those two dockets, we plan to  
22 include in those annual meetings information about all of Red Bird's North Carolina  
23 operations. Therefore, if the Commission approves the proposed acquisition of Baytree's  
24 wastewater system, information related to that system would be part of future annual  
25 meetings.

1 **Q. WHAT ABOUT THE CONCERNS MR. HINTON EXPRESSED**  
2 **REGARDING “THE ONGOING VIABILITY OF CSWR, LLC, BECAUSE IT**  
3 **CONTINUES TO REPORT SIGNIFICANT LOSSES ON ITS CONSOLIDATED**  
4 **INCOME STATEMENT.” ARE THOSE CONCERNS VALID?**

5 A. No, they are not valid. If you focus solely on profit and loss from utility operations,  
6 it’s true CSWR has lost money each year the company has been in existence. But the picture  
7 Mr. Hinton paints is focused too narrowly because it fails to acknowledge that neither  
8 CSWR nor its utility affiliates fund day-to-day operations exclusively from revenues  
9 derived from utility operations. Instead, those revenues are substantially supplemented by  
10 working capital provided by investments from U.S. Water Systems, LLC (“U.S. Water”) –  
11 the affiliate group’s ultimate corporate parent.

12 As explained in my direct testimony, U.S. Water invests equity in CSWR sufficient  
13 to fund the purchase of systems like Baytree, fund capital improvements necessary to  
14 ensure those systems provide safe and reliable service that complies with applicable law,  
15 and provide working capital necessary to fund day-to-day operations until rates for the  
16 acquired systems can be reviewed and adjusted by state regulators, as necessary. Like  
17 Baytree, most systems our group acquires are losing money at the time of acquisition. And  
18 because we routinely adopt rates in place at the time of acquisition, those losses continue  
19 after closing. Indeed, we expect losses to increase because most systems we acquire were  
20 not properly or professionally operated before our acquisition, and those systems usually  
21 require significant capital investment to repair, replace, and upgrade infrastructure that was  
22 neglected for many years. Therefore, losing money until rates can be adjusted to  
23 compensatory levels is something our company – and our investors – expect and plan for.  
24 That is another reason why CSWR and its affiliates have been so successful at turning

1 around environmentally and financially distressed utilities like Baytree. Consequently, the  
2 financial metrics that so concerned Mr. Hinton need not concern the Commission,  
3 especially in light of the fact current customers are being served by a utility that not only  
4 is losing money but is failing to provide compliant service.

5 Since it began operations, CSWR has invested more than \$450 million to acquire,  
6 improve, and operate water and wastewater systems. Of that total, \$205 million was paid  
7 to sellers to acquire the utility assets and \$195 million has been invested to make capital  
8 improvements. The remaining \$50 million has provided working capital necessary to keep  
9 those operations going until rates can be adjusted. Regulators in all other states where our  
10 affiliates operate agree this arrangement satisfies the requirement that a party seeking to  
11 acquire utility assets demonstrate the financial wherewithal necessary to own and operate  
12 those assets. This approach will work as well in North Carolina as it does elsewhere.

13 CSWR has the equity capital necessary to purchase, improve, and operate the water  
14 and wastewater systems our affiliates acquire. And that entire investment has been made  
15 without a written commitment. CSWR has demonstrated that any potential concerns  
16 regarding the lack of such a commitment are unfounded by living up to promises made  
17 each time CSWR and its affiliates are granted authority to make an acquisition. Our  
18 commitment to regulators has been to invest equity sufficient to fund purchases, make  
19 necessary capital improvements, and provide working capital. And because those  
20 commitments were kept, those same regulators continue to entertain and approve our  
21 acquisitions.

22 Red Bird plans to add debt to its capital structure at the appropriate time, but that  
23 time is not now. The Company currently has no assets, and as I have previously testified

1 Baytree's North Carolina operations currently operate at a loss. No commercial lender  
2 would lend money to a company with that kind of balance sheet and income statement.  
3 That's why only three state operating companies in our affiliate group – the affiliates in  
4 Missouri, Louisiana, and Mississippi – have been able to obtain debt financing. Until debt  
5 is available, equity provided by CSWR will be sufficient to fund and sustain utility  
6 operations, as Red Bird's affiliates conclusively have demonstrated in other states.

7 **VII. CONCLUSION**

8 **Q. DO YOU HAVE ANY CONCLUDING THOUGHTS YOU WANT TO**  
9 **EXPRESS TO THE COMMISSION REGARDING THIS JOINT APPLICATION?**

10 A. Yes. I would like to reiterate what I said at the conclusion of my direct testimony  
11 in this case. Red Bird's proposed acquisition of the wastewater system currently owned  
12 and operated by Baytree is consistent with and would promote the public interest. Transfer  
13 of this system to a well-capitalized enterprise that is a professional utility would be in the  
14 best interest of Baytree's customers. Red Bird and CSWR are fully qualified, in all respects,  
15 to own and operate those systems and to otherwise provide safe and adequate service.  
16 Accordingly, I respectfully ask the Commission to grant the authority sought in the Joint  
17 Application.

18 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY AT THIS TIME?**

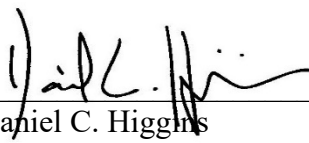
19 A. Yes, it does.

## CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document, has been served on the Public Staff, by either depositing same in a depository of the United States Postal Service, first-class postage prepaid and mailed by the means specified below, or by electronic delivery.

This the 6<sup>th</sup> day of November. 2023.

BURNS, DAY & PRESNELL, P.A.



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Attorneys for Red Bird



# Montgomery County Health Department Environmental Health Section

## OPERATION PERMIT FOR TYPE V WASTEWATER COLLECTION, TREATMENT AND DISPOSAL SYSTEM

In accordance with the provisions of Article 11 of Chapter 130A, General Statutes of North Carolina as amended, and other applicable Laws and Rules

PERMISSION IS HEREBY GRANTED TO

**Baytree Waterfront Properties, Inc.**  
**Montgomery County**

FOR THE

operation of a pressure sewer collection system consisting of individual 900-gallon septic tanks with dosing chambers, submersible simplex grinder pumps, high water alarms, and approximately 2000 linear feet of 3-inch force main, a 13,000 gallon per day treatment and disposal system consisting of a 13,000 gallon septic tank, a 13,000 gallon dosing tank with dual 840 gpm dosing pumps and high water alarms and stand-by generator and 52,000 square foot low pressure pipe disposal site with seven (7) fields to serve 31 lots in Windemere Point Subdivision in Montgomery County with no discharge of wastes to the ground surface or to surface waters, pursuant to the application dated August 25, 2003, and in conformity with the project plan, specifications, and other supporting data previously filed and approved by the North Carolina Department of Environment and Natural Resources (NCDENR) and considered part of this permit.

This permit shall be effective from the date of issuance until October 15, 2008, and shall be subject to the following specified conditions and limitations:

### **I. PERFORMANCE STANDARDS**

1. The owner is subject to all provisions of Article 11 of Chapter 130A of the General Statutes and 15A NCAC 18A .1900 et. seq. The owner is especially referred to Rules .1935 (29, 31), .1961, .1965, .1967, and .1968.
2. The issuance of this permit shall not relieve the Permittee of the responsibility for damages to surface or groundwater resulting from the operation of this facility.
3. Residuals generated from these treatment facilities must be treated and disposed in accordance with the Federal Regulations codified in 40 CFR 503 and in a manner approved by the Division of Solid Waste.
4. Diversion or bypassing of the untreated wastewater from the treatment facilities is prohibited.

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5. An acceptable reserve area, equal in size to the approved disposal area, shall be maintained at all times.

## II. OPERATION AND MAINTENANCE REQUIREMENTS

1. The wastewater treatment and disposal facilities shall be effectively maintained and operated at all times so that there is no discharge to the ground surface or to surface waters. In the event that the facilities fail to perform satisfactorily, including the creation of nuisance conditions or failure of the subsurface disposal area to adequately assimilate the wastewater, the Permittee shall take immediate corrective actions including those actions that may be required by the Montgomery County Health Department, such as the construction of additional or replacement wastewater treatment and disposal facilities, upon receipt of a repair permit.
2. This system is classified as a **Type Vb** subsurface disposal system. The Permittee shall employ a certified wastewater treatment plant operator to be in responsible charge (ORC) of the wastewater treatment facilities. The operator must hold a Subsurface Operator certificate. **The ORC of the facility must visit the facility at least weekly, and must properly manage and document daily operation and maintenance of the facility and must comply with all other conditions of 15A NCAC 8A .0202. Semi-annual operator reports must be submitted to the Montgomery County Health Department by January 31 and July 31 of each year.**
3. The low-pressure lines shall be purged at least two (2) times per year. Pressure on the distribution lines shall be checked and adjusted in accordance with the approved plans after each purging and at least on a quarterly basis. Pump flow rates for individual fields shall be tested after each purging following pressure re-adjustment by the following method:
  - Determine elevation of water in dosing tank.
  - Run pumps for five (5) minutes.
  - Measure difference in water elevations and calculate the number of gallons pumped per minute.
  - Compare design field dosing rate to measured pumping rate. **The data must be submitted in the semi-annual operator report.**
4. A suitable, year-round vegetative cover shall be maintained on the disposal areas. Clippings and other landscape debris shall be removed from the disposal area as needed to prevent thatch buildup. No traffic or other equipment shall be allowed on the disposal fields, with the exception of mowing equipment, without the permission of the operator and the Montgomery County Health Department. The application of chemicals to the distribution fields is prohibited.

## III. MONITORING AND REPORTING REQUIREMENTS

1. Any monitoring (including groundwater, surface water, soil or plant tissue analyses) deemed necessary by the Montgomery County Health Department to ensure surface and groundwater protection will be established and an acceptable sampling reporting schedule shall be followed.



2. The Operator shall review water use records every three months to determine if there are any changes in discharge volumes. If discharge volumes exceed drainfield capacity, the Operator shall notify the Montgomery County Health Department as soon as possible, but in no case more than 24 hours or on the next working day. The history of the system must be maintained through water records.
3. An on-site record shall be maintained of all residuals removed from this facility. This record shall include the name of the hauler, permit authorizing the disposal or a letter from a municipality agreeing to accept the residuals, date the residuals were hauled, and volume of residuals removed.
4. A maintenance log shall be maintained at this facility including, but not limited to, the following items:
  - a. Sampling results
  - b. Visual observations of the plant and plant site
  - c. Record of preventative maintenance
  - d. Dates LPP laterals cleared of solids and pressure head checked/adjusted; results of wastewater delivery rate and dosing volume measurements
  - e. Dates, times, and duration of site visits
5. Noncompliance Notification:

The Permittee shall report by telephone to the Montgomery County Health Department, telephone number (910) 572-8175, as soon as possible, but in no case more than 24 hours or on the next working day following the occurrence or first knowledge of the occurrence of any of the following:

- a. Any occurrence at the wastewater treatment facility which results in the treatment of significant amounts of wastes which are abnormal in quantity or characteristic, such as the dumping of food waste; the known passage of a slug of hazardous substance through the facility; or any other unusual circumstances.
- b. Any process unit failure, due to known or unknown reasons, that render the facility incapable of adequate wastewater treatment, such as mechanical or electrical failures of pumps, blowers, etc.
- c. Any failure of a pumping station, sewer line, or treatment facility resulting in a bypass directly to receiving waters without treatment of all or any portion of the influent to such station or facility.
- d. Any time that self-monitoring information indicates that the facility has gone out of compliance with its permit limitations.

Persons reporting such occurrences by telephone shall also file a written report in letterform within five (5) days following first knowledge of the occurrence. This report must outline the actions taken or proposed to be taken to ensure that the problem does not recur. When repairs are needed in accordance with NCGS 130A-334(9)(a) and 15A NCAC 18A .1961(c), the Permittee must obtain a repair permit from the Montgomery County Health Department prior to making the repair.

#### IV. INSPECTIONS

1. The Permittee or his designee shall inspect the wastewater treatment and disposal facilities to prevent malfunctions and deterioration, operator errors, and discharges which may cause or lead to the release of wastes to the environment, a threat to human health, or a nuisance. The Permittee shall keep an inspection log or summary including at least the date and time of inspection, observations made, and any maintenance, repairs, or corrective action taken by the Permittee. This log of inspections shall be maintained by the Permittee for a period of three (3) years from the date of the inspection and shall be made available upon request to the Division or other permitting authority.
2. Adequate inspection, maintenance, and cleaning shall be provided by the Permittee to ensure proper operation of the subject facilities.
3. Any duly authorized officer, employee, or representative of the Montgomery County Health Department or Department of Environment and Natural Resources (DENR) may, upon presentation of credentials, enter and inspect any property, premises, or place on or related to the disposal site or facility at any reasonable time for the purpose of determining compliance with this permit, may inspect or copy any records that must be maintained under the terms and conditions of this permit, and may obtain samples of groundwater, surface water, or influent wastewater or effluent wastewater.


#### V. GENERAL CONDITIONS

1. This permit shall become void unless the facilities are constructed in accordance with the conditions of this permit, the approved plans and specifications, and other supporting data.
2. This permit is effective only with respect to the nature and volume of wastes described in the application and other supporting data.
3. The local board of health or DENR may establish an Administering, Inspection and Compliance fee.
4. Failure to abide by the conditions and limitations contained in this permit may subject the Permittee to an enforcement action by the Montgomery County Health Department or DENR.
5. Prior to a transfer of this system to a new owner, a notice shall be given to the new owner that provides full details of the materials applied or incorporated at this site.
6. The issuance of this permit does not preclude the Permittee from complying with any and all statutes, rules, regulations, or ordinances that may be imposed by other government agencies (local, state, and federal) that have jurisdiction.
7. The Permittee for the life of the project must retain a set of approved plans and specifications for the subject project.
8. The Permittee, at least six (6) months prior to the expiration of this permit, shall request its extension. Upon receipt of the request, the Commission will review the adequacy of the

facilities described therein, and if warranted, will extend the permit for such period of time and under such conditions and limitations, as it may deem appropriate.

Permit issued this the 15<sup>th</sup> day of October, <sup>2013 +1</sup>~~2003~~.

MONTGOMERY COUNTY HEALTH DEPARTMENT

  
\_\_\_\_\_, REHS  
Teresa Davis  
Environmental Health Specialist

Permit No. 2013088