

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. W-933, SUB 12  
DOCKET NO. W-1328, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Joint Application by Red Bird Utility Operating	)	
Company, LLC d/b/a Red Bird Water and	)	
Etowah Sewer Company, Inc. for Transfer of	)	PROPOSED ORDER OF RED
Public Utility Franchise and Approval of Rates	)	BIRD UTILITY OPERATING
	)	COMPANY, LLC

HEARD: Wednesday, November 1, 2023, at 7:00 p.m., Henderson County Courthouse, in Courtroom 2, 200 N. Grove Street, Hendersonville, North Carolina

Monday, November 20, 2023, at 1:00 p.m., in Commission Hearing Room 2115, Dobbs Building, 430 N. Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioners Kimberly W. Duffley; Jeffrey A. Hughes; and Floyd B. McKissick, Jr.

APPEARANCES:

For Red Bird Utility Operating Company, LLC:

Kiran H. Mehta, Molly M. Jagannathan, Mindy McGrath, and Holly R. Ingram, Troutman Pepper Hamilton Sanders LLP, 301 South College Street, Suite 3400 Charlotte, North Carolina 28202

For the Using and Consuming Public:

Gina Holt, James Bernier, Jr., and Davia Newell, Public Staff – North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699

BY THE COMMISSION: On October 8, 2020, Red Bird Utility Operating Company, LLC d/b/a Red Bird Water (Red Bird or the Company) and Etowah Sewer Company, Inc. (Etowah) filed with the North Carolina Utilities Commission (Commission) an Application

for Transfer of Public Utility Franchise and for Approval of Rates (Application) seeking authority to transfer the wastewater utility system and public utility franchise serving the Etowah Community in Henderson County, North Carolina (Etowah System) from Etowah to Red Bird and for approval of rates. Red Bird filed with the Commission supplemental and additional materials in support of the Application on October 19, 2020, October 22, 2020, May 14, 2021, October 7, 2021, February 15, 2022, August 17, 2022, August 23, 2022, and August 15, 2023.

On December 22, 2020, the Division of the Public Staff – North Carolina Utilities Commission (Public Staff) filed a deficiency letter (First Deficiency Letter) outlining information that was needed to complete the Application.

On May 14, 2021, October 7, 2021, February 15, 2022, August 17, 2022, and August 23, 2022, Red Bird filed supplemental materials to address the deficiencies identified in the First Deficiency Letter.

On June 14, 2023, Red Bird filed a letter indicating that it considered the Application to be complete.

On July 25, 2023, Public Staff filed a second deficiency letter (Second Deficiency Letter) outlining additional and updated information needed to complete the Application. In the Second Deficiency Letter, Public Staff recommended that the Commission determine the Application incomplete.

On July 28, 2023, the Commission issued an Order Finding Application Incomplete and directed Red Bird to file an amended application form and all required exhibits with information current as of no earlier than December 31, 2022 (July 28 Order).

Pursuant to the Commission's July 28 Order, on August 15, 2023, Red Bird filed an amended application form and additional information to address the deficiencies noted in the Second Deficiency Letter and the July 28 Order.

On August 22, 2023, Public Staff filed a letter with the Commission indicating that these dockets now include all of the information required for a complete Application.

On September 14, 2023, the Commission issued an Order Finding Application Complete and Requiring the Public Staff to Provide Specific Application Data (September 14 Order).

On September 21, 2023, the Public Staff provided the information requested in the Commission's September 14 Order.

On September 26, 2023, the Commission issued its Order Scheduling Hearings, Establishing Discovery Guidelines, and Requiring Customer Notice (Scheduling Order) setting this matter for a public witness hearing on November 1, 2023, and an expert witness hearing on November 20, 2023. On October 2, 2023, the Commission issued an Order Changing Time for Commencement of Expert Witness Hearing from 11:00 a.m. on November 20, 2023, to 1:00 p.m. on November 20, 2023.

Pursuant to the Scheduling Order, on October 2, 2023, Red Bird filed its proposed Notice to Customers, which was agreed upon by Red Bird and the Public Staff. On October 4, 2023, the Commission issued an Order Approving Red Bird's Notice to Customers (Notice Order).

As required by the Commission's Notice Order, on October 10, 2023, Red Bird filed its Certificate of Service reflecting service of the Notice to Customers to Etowah's customers.

Also on October 10, 2023, Red Bird filed the Direct Testimony and Exhibits of Josiah Cox, President of Red Bird and CSWR, LLC (CSWR), a Missouri limited liability company formed to provide managerial, technical, and financial support to its utility operating affiliates, including Red Bird.

Subsequent to the filing of Red Bird's Application in this docket, the Public Staff engaged in substantial discovery of Red Bird regarding the matters addressed in Red Bird's Application and supplemental and additional materials filed with the Commission in support of the Application.

On October 18, 2023, Kiran H. Mehta, Molly M. Jagannathan, and Holly R. Ingram of the firm of Troutman Pepper Hamilton Sanders LLP filed their Notices of Appearance of Counsel for Red Bird.

On October 19, 2023, Public Staff filed a Motion to Revise the Scheduling Order (October 19 Motion) requesting that the Commission modify the Scheduling Order to change certain filing requirements of the parties and discovery guidelines. In support of its October 19 Motion, the Public Staff stated that under the Scheduling Order, formal discovery would close before any prefiled direct testimony was filed thereby prohibiting the Public Staff from performing its functions and investigations under N.C. Gen. Stat § 62-15(d). The revised scheduling order proposed by the Public Staff, as agreed to by Red Bird, would not change the hearing dates for the public or expert witness hearings, or change the deadlines for significant protests or motions to intervene.

On October 20, 2023, the Commission granted Public Staff's October 19 Motion and issued an Order Amending Discovery Guidelines and Filing Dates for Prefiled Testimony (Revised Scheduling Order). The Revised Scheduling Order only amended certain formal discovery guidelines and filing requirements put forth in the Scheduling Order. All other provisions of the Scheduling Order – including a public witness hearing date of Wednesday, November 1, 2023, and expert witness hearing date of Monday, November 20, 2023 – remained unchanged.

On October 27, 2023, the Public Staff filed the Direct Testimony and Exhibits of John R. Hinton, Director of the Economic Research Division of the Public Staff; the Direct Testimony and Exhibits of Lynn Feasel, Public Utilities Regulatory Manager of the Water, Sewer, and Telecommunications Sections with the Accounting Division of the Public Staff; and the Direct Testimony of D. Michael Franklin, a Public Utilities Engineer with the Water, Sewer, and Telephone Division of the Public Staff.

On October 31, 2023, Red Bird filed a Motion of Counsel for Red Bird to Withdraw, which requested the withdrawal of Daniel C. Higgins and the firm of Burns, Day, and Presnell, P.A. as counsel of record for Red Bird, which the Commission granted on November 1, 2023.

On November 1, 2023, Mindy McGrath of the firm of Troutman Pepper Hamilton Sanders LLP filed a Notice of Appearance of Counsel for Red Bird. Also on November 1, 2023, the public witness hearing was held as scheduled.

On November 13, 2023, Red Bird filed the Rebuttal Testimony and Exhibits of Josiah Cox; the Rebuttal Testimony and Exhibit of Brent G. Thies, Vice President and Corporate Controller of CSWR; and the Rebuttal Testimony of James A. Beckemeier, a Managing Member of BL-STL, LLC, a vendor of Red Bird.

On November 15, 2023, Red Bird filed corrected Rebuttal Testimony of Brent Thies.

As directed by the Scheduling Order, on November 15, 2023, Red Bird, on behalf of itself and the Public Staff, filed the list of witnesses to be called at the hearing, the order of witnesses, and the estimated times for cross-examination.

Also on November 15, 2023, Red Bird filed its Verified Report Regarding Issues Raised at Public Hearing (Verified Report) addressing customer service and service quality complaints, as well as actions planned by Red Bird to remedy customer concerns, as expressed during the public witness hearing held on November 1, 2023.

On November 20, 2023, the expert witness hearing was held as scheduled.

On November 29, 2023, Public Staff filed a Response to the Verified Report (Response) providing the results of the Public Staff's review of Red Bird's Verified Report and the Public Staff's view of whether Red Bird adequately addressed the customers' concerns. In its Response, Public Staff expressed its belief that the Verified Report adequately addressed customer concerns raised during the public witness hearing.

On December 4, 2023, in accordance with the Commission's request at the November 20, 2023 expert witness hearing, Red Bird filed summaries of the direct and rebuttal testimonies of Mr. Cox, and the rebuttal testimony of Mr. Thies and Mr. Beckemeier.

On December 6, 2023, Red Bird filed a letter informing the Commission that the Late Filed Exhibit (LFE) requested during the November 20, 2023 expert witness hearing was in progress and would be filed within one week of the issuance of the official hearing transcript.

On December 14, 2023, in accordance with the Commission's directive, Red Bird filed its Late Filed Exhibit 1.

On December 22, 2023, the official transcript of the November 20, 2023, expert witness hearing was published.

Also on December 22, 2023, the Commission issued a Notice of Due Date for Proposed Orders and/or Briefs requiring that proposed orders and/or briefs be filed no later than January 16, 2024.

On January 4, 2024, the Commission issued a Revised Notice of Due Date for Proposed Orders and/or Briefs which required that proposed orders and/or briefs be filed no later than January 12, 2024.

Based upon the foregoing and the entire record in these proceedings, the Commission makes the following:

### **FINDINGS OF FACT**

1. Red Bird is a North Carolina limited liability company formed to acquire water and wastewater assets in this State and operate those assets as regulated public utilities. Red Bird is a wholly owned subsidiary of its sole member, Red Bird Utility Holding Company, LLC (RBUH), which is also a North Carolina limited liability company in good standing. RBUH is a wholly owned subsidiary of its sole member, North Carolina Central States Water Resources, LLC (NCCSWR), which is also a North Carolina limited liability company in good standing and a wholly owned subsidiary of CSWR.

2. Red Bird presently holds four utility franchises in North Carolina. On December 8, 2021, in Docket No. W-1328, Sub 7, the Commission issued an Order Accepting and Approving Bond, Granting Franchise, Approving Rates, and Requiring Customer Notice (Utility Franchise Order I) granting Red Bird a wastewater utility franchise for the Ocean Terrace and Pine Knoll Townes I, II, and III townhome communities in Carteret County, North Carolina. On February 7, 2023, in Docket Nos. W-1328, Sub 4 and W-1040, Sub 10, the Commission issued its Order Approving Stipulation, Approving Bond, Approving Transfer and Rates, and Requiring Customer Notice (Utility Franchise Order II) approving the transfer of the Bear Den Acres Development water system and public utility franchise in McDowell County, North Carolina to Red Bird. On August 29, 2023, in Docket Nos. W-1328, Sub 9, and W-992, Sub 8, the Commission issued an Order Approving Stipulation, Approving Bond, Approving Transfer and Rates, and Requiring Customer Notice (Utility Franchise Order III) approving the transfer of the water and wastewater system serving the Baywood Forest Subdivision, the wastewater system serving the Cottonwood Subdivision, and the public utility franchise serving all of Crosby Utilities, Inc.'s service areas in Wake County, North Carolina. On December 14, 2023, in Docket Nos. W-1146, Sub 13, and W-1328, Sub 10, the Commission issued a Recommended Order Approving Stipulation, Approving Transfer and Rates, Granting Franchise, Approving Bond, and Requiring Customer Notice (Utility Franchise Order IV, collectively, with Utility Franchise Order I, II, and III, the Utility Franchise Orders) approving the transfer of the water and wastewater systems serving the Lake Royale

subdivision in Franklin and Nash Counties, North Carolina, from Total Environmental Solutions, Inc. to Red Bird.<sup>1</sup>

In addition to the four systems for which Red Bird has been granted franchises in North Carolina, Red Bird's indirect corporate parent, CSWR, through separate state affiliates, has acquired and currently operates more than 800 water or wastewater utility systems in Missouri, Arkansas, Kentucky, Louisiana, Texas, Tennessee, Mississippi, Arizona, Florida, and South Carolina, and provides utility service to approximately 221,000 wastewater customers and approximately 146,000 water customers.

3. Etowah's wastewater service area consists of an estimated 3.6 square miles and includes neighborhoods on Meadow Road, Sunset Ridge Road, Brickyard Road, Turnpike Road, Pebble Creek, and Brandymill Loop in Henderson County (Etowah Service Area). Etowah provides wastewater service to approximately 485 sewer customers.

4. Etowah operates its wastewater system under two North Carolina Department of Environmental Quality (DEQ) permits. Etowah's wastewater treatment plant (WWTP) is authorized under North Carolina National Pollutant Discharge Elimination System (NPDES) permit NC0071323 to discharge up to 125,000 gallons per day of treated wastewater to the French Broad River. Etowah's wastewater collection system is authorized under NPDES permit WQCSD0135 to collect wastewater and transfer it to the WWTP.

5. A Red Bird affiliate, Central States Water Resources, Inc. (Central States), entered into an Agreement for Sale of Utility System with Etowah dated August 23, 2019 (Purchase Agreement). According to the Purchase Agreement, the closing of the sale will occur after regulatory approval is obtained. Central States subsequently assigned the Purchase Agreement to its affiliate, Red Bird. The Purchase Agreement is a confidential attachment to the Application.

6. Red Bird seeks Commission approval to acquire the Etowah System and public utility franchise.

7. As supplemented, Red Bird has filed all required exhibits with its Application.

8. Upon acquisition of the Etowah System, Red Bird plans to make capital improvements. Based on its consulting engineer's 2020 projections, Red Bird estimates that the cost of necessary improvements will be approximately \$470,200, consisting of \$141,400 for work on the collection system and \$328,800 for work on the wastewater treatment plant.

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<sup>1</sup> The Utility Franchise IV Order became final and effective on January 2, 2024.



9. Etowah's approved monthly rates, as set forth in the Commission's order issued on May 13, 2016, in Docket Nos. W-933, Sub 10, and M-100, Sub 138, which Red Bird proposes to adopt, are as follows:

<u>Monthly Sewer Utility Service</u>	<u>Present and Proposed</u>
Residential Flat Rate	\$26.33
Commercial Customers (metered rates)	
Base Charge, zero usage	\$26.33
Usage Charge, per 1,000 gallons	\$4.05
<u>Connection Charge</u>	
Residential	\$2,300 per connection
Commercial	\$2,300, minimum per connection, plus \$6.97 per gallon of design flow over 330 gallons per day
<u>Reconnection Charge</u>	
If sewer service cut off by utility for good cause	\$14.99
<u>Finance Charge for Late Payment</u>	1% per month

10. Red Bird has the technical, managerial, and financial capacity to own and operate the Etowah System.

11. Etowah is a financially distressed utility that is unable to make needed capital investments in the Etowah System.

12. The Etowah System is operationally distressed, troubled, and in need of capital investments.

13. The determination of whether or to what extent Red Bird should be afforded an acquisition adjustment in connection with the proposed transfer of the Etowah System to Red Bird should be deferred to the first general rate case proceeding for the Etowah System.

14. The determination of whether or to what extent Red Bird should be permitted to recover due diligence costs incurred in connection with the proposed transfer of the Etowah System to Red Bird should be deferred to the first general rate case proceeding for the Etowah System.

15. The determination of the appropriate rate base to be included in rates for the Etowah System should be deferred to the first general rate case proceeding for the Etowah System.

16. Consistent with N.C.G.S. § 62-111(a), approval of the pending Application is justified by the public convenience and necessity and is in the public interest.

17. A bond in the amount of \$50,000 for the Etowah Service Area for sewer service is just, reasonable, and appropriate.

### **EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-2**

The evidence supporting these findings is contained in Red Bird's Application; the supplemental filing made by Red Bird in these dockets on August 17, 2022; the testimony and exhibits of Red Bird witness Cox; and the Commission's records in Docket Nos. W-1328, Subs 4, 7, 9, and 10; W-1040, Sub 10; W-992, Sub 8; and W-1146, Sub 13, including the Commission's Utility Franchise Orders issued in each of these dockets.

Red Bird witness Cox provided testimony regarding Red Bird, Red Bird's relationship to CSWR, and the role CSWR would play in Red Bird's operation of the Etowah System. (Tr. vol. 2, 26). In his direct testimony, witness Cox explained that Red Bird was formed to acquire water and wastewater assets in North Carolina and to operate those assets as regulated public utilities. (*Id.*, 27). As of October 10, 2023, the date witness Cox's direct testimony was filed, witness Cox testified that in addition to the three utility franchises that Red Bird currently holds in North Carolina, Red Bird also has applications to acquire public utility franchises pending before the Commission in seven other dockets and two pending applications for Certificate of Public Convenience and Necessity dockets. (*Id.*, 28). Witness Cox also testified that Red Bird is an affiliate of CSWR and that CSWR, through its utility operating subsidiaries, has acquired and is operating over 800 water and/or wastewater utility systems in Missouri, Arkansas, Kentucky, Louisiana, Texas, Tennessee, Mississippi, North Carolina, Arizona, Florida, and South Carolina. (*Id.*, 26).

Following the filing of Mr. Cox's direct testimony, on December 14, 2023, the Commission issued its Recommended Order Approving Stipulation, Approving Transfer and Rates, Granting Franchise, Approving Bond, and Requiring Customer Notice, granting the franchise and approving the transfer of the water and wastewater systems serving the Lake Royale subdivision in Franklin and Nash Counties, North Carolina, from Total Environmental Solutions, Inc. to Red Bird in Docket Nos. W-1146, Sub 13, and W-1328, Sub 10.

In Attachment K of Red Bird's Application – Central States Water Resources Corporate Entity Organizational Chart – Red Bird provided a corporate organizational chart illustrating the relationship between Red Bird and its affiliates. Additionally, in its August 17, 2022 supplemental filing, Red Bird provided an updated corporate organization chart along with Certificates of Good Standing from the North Carolina Secretary of State for Red Bird, RBUH, and NCCSWR.



Based upon competent, substantial, and material evidence in the record, the Commission concludes that these findings are informational, procedural, or jurisdictional in nature and are not contested by any party.

#### **EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 3-4**

The evidence supporting these findings is contained in the testimony and exhibits of Red Bird witnesses Cox, Beckemeier, and Thies; the direct testimony of Public Staff witnesses Feasel, Franklin, and Hinton; and the Commission's records in these and other dockets relating to Etowah.

Based upon competent, substantial, and material evidence in the record, the Commission concludes that these findings are informational in nature and are not contested by any party.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 5**

The evidence supporting this finding is contained in Confidential Attachment G of the Application, which includes the Purchase Agreement with Etowah dated August 23, 2021; Confidential Attachment G-1 of the supplemental filing made by Red Bird in these dockets on October 22, 2020, which includes the First Amendment to the Purchase Agreement whereby Central States assigned its rights under the Purchase Agreement to Red Bird as the buyer; Confidential Attachment G-2 of the supplemental filing made by Red Bird in these dockets on February 15, 2022, which includes the Second Amendment to the Purchase Agreement whereby certain terms were revised; and Confidential Attachment G-3 of the supplemental filing made by Red Bird in these dockets on August 17, 2022, which includes the Purchase Agreement with all exhibits attached.

Based upon competent, substantial, and material evidence in the record, the Commission concludes that this finding is informational in nature and is not contested by any party.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 6**

The evidence supporting this finding is contained in the Application and the direct testimony of Red Bird witness Cox.

Based upon competent, substantial, and material evidence in the record, the Commission concludes that this finding is informational in nature and is not contested by any party.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 7**

The evidence supporting this finding is contained in the supplemental filings made by Red Bird in these dockets on October 19, 2020, October 22, 2020, May 14, 2021,

October 7, 2021, February 15, 2022, August 17, 2022, and August 15, 2023; and the testimony and exhibits of Red Bird witness Cox.

Based upon competent, substantial, and material evidence in the record, the Commission concludes that this finding is procedural in nature and is not contested by any party.

### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 8**

The evidence for this finding is found in Confidential Attachment L of the Application; Attachment L.1 of the supplemental filing made by Red Bird in these dockets on May 14, 2021; Confidential Attachment L.2 of the supplemental filing made by Red Bird in these dockets on October 7, 2021; the testimony and exhibits of Red Bird witness Cox; and the testimony of Public Staff witness Franklin.

In his direct testimony, witness Cox testified about the deficiencies and need for improvements in the Etowah System as identified by McGill Associates (McGill), Red Bird's North Carolina consulting engineers. (Tr. vol. 2, 43-44). Witness Cox testified that in order to address operational and/or compliance issues associated with the Etowah System, McGill recommended the following work be performed:

1. Purchase portable davit crane or hoist to lift pumps for maintenance (1-5 years)
2. Brandyfills Lift Station
  - a. Install transfer switches for connection to portable backup power supply (1-5 Years)
  - b. Replace pump guide rail and chains (1-5 Years)
  - c. Install baseplate for portable mounted pump hoist (1-5 Years)
  - d. Replace Myers 2 HP pumps (6-10 Years)
3. Jonathan Creek Lift Station
  - a. Replace pump guide rail and chains (6-10 Years)
  - b. Install baseplate for portable mounted pump hoist (6-10 Years)
  - c. Replace Hydromatic 5 HP pumps (6-10 Years)
4. Sunset Ridge Lift Station
  - a. Install baseplate for portable mounted pump hoist (1-5 Years)
  - b. Replace pump guide rail and chains (6-10 Years)
  - c. Replace 2 HP pumps (6-10 Years)
5. Meadows Lift Station
  - a. Dewater and clean wet well (1-5 Years)
  - b. Install transfer switches for connection to portable backup power supply (1-5 22 Years)
  - c. Replace pump guide rail and chains (1-5 Years)
  - d. Replace control panel enclosures (1-5 Years)
  - e. Install baseplate for portable mounted pump hoist (6-10 Years)
  - f. Replace Myers 3 HP pumps (6-10 Years)
6. Homeplace Lift Station

- a. Install transfer switches for connection to portable backup power supply (1-5 29 Years)
  - b. Replace pump guide rail and chains (1-5 Years)
  - c. Install baseplate for portable mounted pump hoist (6-10 Years)
  - d. Replace Myers 3 HP pumps (6-10 Years)
7. Etowah Reach Lift Station
- a. Install transfer switches for connection to portable backup power supply (1-5 35 Years)
  - b. Replace pump guide rail and chains (1-5 Years)
  - c. Install baseplate for portable mounted pump hoist (6-10 Years)
  - d. Replace Hydromatic 3 HP pumps (6-10 Years)

(*Id.*, 44). Witness Cox testified that based on McGill's 2020 projections, the estimated cost for the above-listed improvements to the Etowah System is approximately \$470,200, consisting of \$141,400 for work on the collection system and \$328,800 for work on the WWTP. (*Id.*, 45). Witness Cox emphasized, however, that these estimates are three years old and are still preliminary. (*Id.*). Witness Cox explained that the precise capital investments required for repairs and upgrades cannot be known until Red Bird begins operating the Etowah System. (*Id.*).

In his direct testimony, Public Staff witness Franklin noted that it will be incumbent upon Red Bird to ensure that all investments it makes in Etowah's wastewater system are reasonable and prudent if it wishes to have the capital investments associated with the improvements added to rate base and included in rates in a future rate case proceeding. (*Id.*, 218-19).

The Commission notes Red Bird's assertion that the Etowah System requires maintenance and upgrades in order to ensure to the provision of safe and reliable service to its customers. However, the Commission concludes, based upon competent, substantial, and material evidence in the record, that the scope and extent of capital improvements and repairs that are reasonable and prudent is, at this time, not adequately known or knowable by any party to these proceedings. Thus, the Commission concludes that the appropriate time and venue to determine the reasonableness and prudence of proposed and/or actual capital investments is the next general rate case involving the Etowah System.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9**

The evidence supporting this finding of fact is found in the Application; the testimony and exhibits of Red Bird witness Cox; the testimony of Public Staff witness Franklin; and the Commission's records in prior Etowah dockets, including Docket Nos. W-933, Sub 10, and M-100, Sub 138.

As reflected in the Application, the direct testimony of Red Bird witness Cox, and the direct testimony of Public Staff witness Franklin, Red Bird proposes to adopt Etowah's existing rates and is not proposing to change the rates associated with the Etowah System in connection with the request for approval of the transfer of the Etowah System

to Red Bird. (Tr. vol. 2, 49, 209-10). Because Red Bird proposes to adopt Etowah's existing rates approved pursuant to the Commission's Order issued on May 13, 2016, in Docket Nos. W-933, Sub 10 and M-100, Sub 138, the Commission concludes that based on substantial and material evidence in the record, this finding is not contested by any party to these proceedings.

### EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 10

The evidence supporting this finding of fact is found in Red Bird's Application and supplemental filings; the testimony and exhibits of Red Bird witness Cox; the testimony and exhibits of Public Staff witnesses Hinton and Franklin; and the entire record in these proceedings.

In his direct testimony, Red Bird witness Cox testified that Red Bird has the financial, technical, and managerial ability to acquire, own, and operate the Etowah System. (Tr. vol. 2, 30). Additionally, witness Cox testified that Red Bird is part of an affiliate group that has acquired and currently operates over 800 water and/or wastewater utility systems in eleven states and currently provides service to approximately 221,000 wastewater customers and approximately 146,000 water customers. (*Id.*)

In his direct testimony, Public Staff witness Franklin agreed with Red Bird witness Cox that Red Bird "has the financial, technical and managerial capabilities necessary to provide wastewater utility service to customers in [the] Etowah [S]ervice [A]rea." (*Id.*, 211). As such, witness Franklin recommended that the Commission approve the transfer of the Etowah System to Red Bird. (*Id.*)

In his direct testimony, Public Staff witness Hinton testified that "Red Bird will have sufficient equity capital to acquire and improve Etowah's water and wastewater systems, fund system upgrades, and support other capital improvements." (*Id.*, 232). Witness Hinton further testified that CSWR, Red Bird's indirect corporate parent, "has sufficient capital resources to be considered financially viable" and that the Public Staff was "unaware of any plant and operational problems that stem from a lack of investment capital" for Red Bird's other North Carolina operations. (*Id.*, 233).

During the evidentiary hearing, Public Staff's opening remarks reiterated that it "believes that the Company has the technical, managerial, and financial capabilities to operate the Etowah System" and that it further "does not oppose the transfer of the Etowah [w]astewater [s]ystem to Red Bird." (*Id.*, 14).

Based upon competent, substantial, and material evidence in the record, the Commission concludes that Red Bird has the technical, managerial, and financial capacity to provide adequate, safe, efficient, and reasonable sewer utility service on an ongoing basis to customers in the Etowah Service Area. In reaching this conclusion, the Commission notes that this finding is not contested by any party to these proceedings. Additionally, the Commission recognizes that it has made similar findings regarding Red Bird in its Utility Franchise Orders in Docket Nos. W-1328, Subs 4, 7, 9, and 10; W-1040, Sub 10; W-992, Sub 8; and W-1146, Sub 13. Accordingly, the Commission finds that Red

Bird has the technical, managerial, and financial capabilities to operate the Etowah System.

### EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 11

The evidence supporting this finding of fact is contained in Red Bird's Application; the testimony and exhibits of Red Bird witness Cox; the testimony and exhibit of Public Staff witness Hinton; and the entire record in these proceedings.

In his direct testimony, Public Staff witness Hinton testified that "Red Bird will have sufficient equity capital to acquire and improve Etowah's water and wastewater systems, fund system upgrades, and support other capital improvements." (Tr. vol. 2, 232). Witness Hinton further testified that CSWR, Red Bird's indirect corporate parent, "has sufficient capital resources to be considered financially viable" and that the Public Staff was "unaware of any plant and operational problems that stem from a lack of investment capital" for Red Bird's other North Carolina operations. (*Id.*, 233).

In his rebuttal testimony, Red Bird witness Cox testified that Etowah is a financially distressed utility that does not have the capital, or the ability to access capital, to maintain and improve its system. (*Id.*, 275-76). Witness Cox noted that in its 2022 Annual Report filed in Docket No. M-2, Sub 2023W, Etowah reported a negative net income of (\$32,000). (*Id.*, 275). Witness Cox also noted that Etowah "has lost money for almost every single year in the last five years" (*id.*, 56-57, 275), and that Etowah does not view itself as "hav[ing] the capital or the expertise to really upgrade or run this system." (*Id.*, 57). Additionally, during the evidentiary hearing, witness Cox referred to Etowah as an unsophisticated "mom-and-pop" company that was "afraid of regulation" (*id.*, 70) and provided detail testimony supporting the notion that Etowah is "unbankable" – that is, Etowah does not have access to commercial financing or institutional loan money to raise the funds necessary to invest in its system. (*Id.*, 158). During his live testimony, witness Cox also testified that over the last five years, there have been basically no additions to plant in service. (*Id.*, 56).

In light of the parties' testimony and all of the evidence presented, the Commission finds and concludes that the uncontested evidence in these proceedings demonstrates that Etowah is a thinly-capitalized, financially troubled utility that is unable to make needed capital investments in the Etowah System. The Commission notes that Public Staff did not include any testimony disputing witness Cox's characterization of Etowah as "unbankable," nor any evidence disputing Etowah's inability to access capital markets. Accordingly, because Public Staff did not introduce any evidence disputing Etowah's status as a thinly-capitalized "unbankable" system, Public Staff has conceded this issue. *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 851 S.E.2d 237 (2020) (intervenors have a burden of production in order to overcome the presumption that utility's contentions are valid). As such, the evidence indisputably demonstrates that Etowah is financially troubled and does not have the financial ability to make needed investments in the Etowah System.



## EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 12

The evidence supporting this finding of fact is contained in Red Bird's Application; the testimony and exhibits of Red Bird witness Cox; the testimony of Public Staff witness Franklin; and the entire record in these proceedings.

In his direct testimony, Red Bird witness Cox testified that the Etowah System is operationally distressed, troubled, and in need of capital investment. (Tr. vol. 2, 27-28). During the evidentiary hearing, witness Cox explained that the Etowah System's poor operations history clearly indicates that the Etowah System is troubled or distressed. (*Id.*, 56-58). For example, witness Cox explained that the Etowah System has been out of compliance with its wastewater discharge permit for "almost the entirety of the last five years." (*Id.*, 56). Additionally, witness Cox testified that since 2020, when Red Bird entered into the contract to acquire the Etowah System, there have been eleven notices of violation (NOV) and many more instances of non-compliance. (*Id.*). Witness Cox testified that "any NOV is a failure . . . [and] when you have repeated failures of the same constituents, it shows the plant is not able to meet [its permit requirements]." (Tr. vol. 3, 37). Witness Cox further noted that these repeated violations tell "everyone in the wastewater business, hey, this activated sludge plant is not really equipped to treat the waste down to the level it's required and on a consistent basis." (*Id.* at 38).

In his direct testimony, Public Staff witness Franklin disagreed with Red Bird's characterization of the Etowah System as operationally troubled or distressed. (Tr. vol.2, 211-12). Although witness Franklin acknowledged that Etowah's WWTP and wastewater collection system both experienced recent operational incidents that resulted in eleven NOVs issued by the DEQ, some of which remain open, (*id.*, 211-12), based on a visual inspection of the Etowah System and its recent performance, witness Franklin claimed that the Etowah System "appears to be in fair condition." (*Id.* at 204). Despite the recent operational incidents, witness Franklin claims that Etowah has the willingness, ability, and means to address the NOVs. (*Id.*, 216).

In his rebuttal testimony, witness Cox disagreed with witness Franklin's operational assessment of the Etowah System. Witness Cox reiterated that the poor condition of the Etowah System facilities, combined with Etowah's substandard operations history, qualify the Etowah System as operationally distressed. (*Id.*, 268). At the evidentiary hearing, Witness Cox expressed concern at how Public Staff witness Franklin was dismissive of the eleven NOVs despite two of the NOVs currently remaining open. (*Id.*, 270). Witness Cox noted that the two open NOVs resulted from a sanitary sewer overflow event that occurred in January 2023 – only one year ago – which resulted in the discharge of 600 gallons of sewage per day. (*Id.*, 271). Witness Cox explained in his live testimony that permitting Etowah to continue to operate the Etowah System "pose[s] a human health risk" (*Id.*, 59), because the January 2023 sanitary sewer overflow event resulted in the release of "human health-impacting . . . pathogens" potentially affecting 20,000 residents downstream from the Etowah WWTP. (*Id.*, 58).

The Commission cannot ignore the public health risks associated with Etowah's continued operation of the Etowah System. In light of the parties' testimony and all of the



evidence presented, including the substandard operations history of the Etowah System – as evidenced by the eleven NOVs, two of which remain open, and several instances of non-compliance, the Commission is of the opinion that the Etowah system is in fact operationally troubled and/or distressed. Accordingly, the Commission finds and concludes that the Etowah System is an operationally distressed and troubled system.

### EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 13

The evidence supporting this finding is contained in Red Bird's Application; the testimony and exhibits of Red Bird witness Cox; the direct testimony of Public Staff witness Franklin; and the entire record in these proceedings.

In his direct testimony, Company witness Cox provided testimony concerning why an acquisition adjustment associated with Red Bird's proposed acquisition of the Etowah System was warranted. (Tr. vol. 2, 46-48). During the evidentiary hearing, however, witness Cox clarified that the Company is not requesting approval of an acquisition adjustment in these transfer proceedings. (*Id.* at 148). Rather, witness Cox testified that the Company is requesting that the issue of whether (and to what extent) an acquisition adjustment is warranted be deferred to the first post-acquisition general rate case involving the Etowah System. (*Id.* 277-79). During his live testimony, witness Cox explained that the Company included testimony on the issue of the acquisition adjustment because Red Bird knew it was of interest to Public Staff. (*Id.*, 181-82). Accordingly, in his direct testimony, witness Cox explained that given the historic and continuing compliance issues with the Etowah System and the benefits accruing to Etowah's customers from Red Bird's anticipated investments in the Etowah System, Red Bird believes that an acquisition adjustment in connection with the proposed transfer of the Etowah System to Red Bird is appropriate. (*Id.*, 46-47). Witness Cox also provided testimony on the Commission's standard for approval of an acquisition adjustment, as set forth in *In the Matter of Utilities, Inc.*, Order Approving Transfer And Denying Acquisition Adjustment, Docket 11 W-1000, Sub 5 (January 6, 2000) (UI Order). As the Commission articulated in the UI Order, a party seeking rate base treatment for an acquisition adjustment must establish that the agreed upon purchase price is prudent and that the benefits of including the acquisition adjustment in rate base outweigh any resulting burden to ratepayers. (Tr. vol. 2, 47). In essence, to secure rate base treatment of an acquisition adjustment, the purchasing utility must establish "that the price to be paid for the acquired utility is prudent and that both the existing customers of the acquiring utility and the customers of the acquired utility would be better off [or at least no worse off] with the proposed transfer, including rate base treatment of any acquisition adjustment, than would otherwise be the case." (*Id.*, 48). In making this determination, witness Cox explained that the Commission considers "a wide range of factors . . . including the prudence of the purchase price paid by the acquiring utility; the extent to which the size of the acquisition adjustment resulted from an arm's length transaction; the extent to which the selling utility is financially or operationally 'troubled;' the extent to which the purchase will facilitate system improvements; the size of the acquisition adjustment; the impact of including the acquisition adjustment in rate base on the rates paid by customers of the acquired and acquiring utilities; the desirability of transferring small systems to professional operators;

and a wide range of other factors, none of which have been deemed universally dispositive.” (*Id.*, 46).

Witness Cox further testified that an acquisition adjustment associated with the transfer of the Etowah System to Red Bird satisfied the Commission’s standard in the UI Order. (*Id.*, 48). Specifically, witness Cox stated that the purchase price for the Etowah System was negotiated at arm’s length between two unrelated parties; the purchase price agreed to was prudent; the acquisition adjustment is only for a reasonable portion of the amount of the purchase price that exceeds Etowah’s rate base in the assets to be acquired; and that Etowah’s customers will be better off if an acquisition adjustment is approved because Red Bird will be able to invest the necessary capital in the Etowah System and the Etowah System will be owned and operated by an adequately capitalized and professionally run utility. (*Id.*).

In his direct testimony, Public Staff witness Franklin testified that the Public Staff did not support an acquisition adjustment for the transfer of the Etowah System to Red Bird. (*Id.*, 213). Witness Franklin claimed that an acquisition adjustment was not in the public interest because Red Bird had not established that the benefits to Etowah’s customers resulting from the allowance of rate base treatment of an acquisition adjustment would offset or exceed the resulting burden or harm to customers. (*Id.*, 218). In particular, witness Franklin questioned whether, due to the uncertainty as to the amount of capital investment that may be necessary, Red Bird’s willingness to make capital investments could be considered a tangible benefit. (*Id.*, 216). Witness Franklin also took issue with Red Bird’s claimed customer service benefits. (*Id.*, 215). Witness Franklin claimed that there was no evidence to suggest that Etowah customers would be better off under Red Bird ownership with Red Bird hiring a contract operator, third-party customer service firm, or obtaining a contract with Utility Cloud, as compared to Etowah or a different purchaser doing the same. (*Id.*). Further, as discussed above, witness Franklin disagreed with Red Bird’s characterization of the Etowah System as operationally troubled or distressed. (*Id.* 216). Witness Franklin theorized that granting Red Bird an acquisition adjustment could incentivize other current utility owners to accumulate environmental violations and fail to properly operate and maintain systems in order to receive an acquisition adjustment. (*Id.*, 217). Finally, witness Franklin claimed that Red Bird had not quantified the impact of including the acquisition adjustment in rate base on the rates paid by customers and that, by Public Staff calculations, granting the acquisition adjustment would equate to a \$22.23 (or 84%) increase in residential monthly wastewater flat rates and commercial metered monthly base charge. (*Id.*, 217-18).

Witness Franklin also disagreed with Red Bird’s request that the determination of an acquisition adjustment be deferred until the first general rate case for the Etowah System. (*Id.*, 221-22). Witness Franklin claimed that pursuant to N.C. Gen. Stat § 62-111(f), the Commission cannot determine whether the transfer of the Etowah System to Red Bird is in the public interest if it does not know the impact to rate base and customer rates of the acquiring utility’s proposed acquisition adjustment. (*Id.*, 221). Witness Franklin claims that the information required for an acquisition adjustment decision is known and that deferring a decision on the acquisition adjustment for multiple utility systems would

unduly complicate and encumber the rate case proceeding. (*Id.*). As such, witness Franklin testified that deferring to a future rate case the decision on the acquisition adjustment would not be in the public interest. (*Id.*, 221-22).

In his rebuttal testimony, Red Bird witness Cox testified that a determination on whether, and in what amount, an acquisition adjustment is warranted should be deferred to the first rate case proceeding involving the Etowah System. (*Id.*, 277-79). Witness Cox explained that three reasons support the deferral of Red Bird's acquisition adjustment. (*Id.*). First, because the transaction is not finalized, the full amount of the acquisition adjustment is currently unknown. (*Id.*, 277). During the evidentiary hearing, witness Cox reiterated that the Company does not currently have all the information required to put a value on the acquisition adjustment. (*Id.*, 179-80). Rather, witness Cox testified that the Company has "incomplete information at best." (*Id.*, 180). Second, witness Cox testified that deferring a decision on the acquisition adjustment is consistent with the recently amended statute governing the transfer of water and wastewater utilities in North Carolina – N.C. Gen. Stat § 62-111. (*Id.*, 277-78). Witness Cox stated that recent changes to N.C. Gen. Stat § 62-111(f) narrowed the scope of the Commission's inquiry in water or wastewater acquisition proceedings to determining: (1) whether the party seeking to acquire a system possesses the technical, managerial, and financial capabilities necessary to provide public utility services, and (2) whether the transaction is in the public interest. (*Id.*, 277-78). Witness Cox stated that the public interest determination under N.C. Gen. Stat § 62-111(f) is to be made in the context of the rates proposed to be in effect immediately after the system is transferred. (*Id.*, 278). Witness Cox explained that because an acquisition adjustment is not relevant to either of the factors to be considered in an acquisition proceeding under N.C. Gen. Stat § 62-111, it is neither necessary nor appropriate to decide this issue in the context of a transfer proceeding. (*Id.*). Third, because Red Bird is not proposing to change Etowah's currently approved rates, the future impacts of the proposed acquisition adjustment on Etowah's customers are speculative and unreliable. (*Id.*, 278-79). As such, witness Cox contends that deferring a decision on whether an acquisition adjustment should be authorized will allow the impact on rates to be fully considered. (*Id.*, 278-79). During the evidentiary hearing, witness Franklin conceded that for purposes of this case and N.C. Gen. Stat § 62-111, the "relevant rates ... are those that will be in effect post-closing." (*Id.*, 252).

Based on the evidence in the record, the Commission finds and concludes that a determination on Red Bird's requested acquisition adjustment should be deferred to the first general rate case involving the Etowah System. The Commission agrees with witness Cox that as a result of recent changes to N.C. Gen. Stat § 62-111, the Commission's inquiry in transfer proceedings involving water and wastewater utilities is now limited to determining (1) whether the acquiring party possesses the technical, managerial, and financial capabilities necessary to provide public utility services, and (2) whether the transaction is in the public interest. The Commission is not of the opinion that these two inquiries require the Commission to determine whether an acquisition adjustment should be approved when assessing whether a proposed water or wastewater transfer is in the public interest. Rather, the Commission concludes that it has the discretion to defer a

determination on a party's request for an acquisition adjustment and that deferring a decision on this issue to a subsequent general rate case is appropriate.

Accordingly, the Commission finds that it is neither necessary nor appropriate to decide whether or to what extent Red Bird should be allowed an acquisition adjustment in the context of these transfer proceedings. Instead, the Commission concludes that the acquisition adjustment issue should be deferred to the first rate case proceeding involving the Etowah System. In reaching this conclusion, the Commission gives great weight to the testimony of witness Cox that the requisite information for determining whether an acquisition adjustment is appropriate – i.e., the reasonableness of the purchase price and the effect of the proposed acquisition on customers – is not adequately known or knowable by any party to these proceedings. As such, any decision on the requested acquisition adjustment should be deferred until the acquisition closes when more complete information is available. Moreover, because Red Bird is not proposing to change Etowah's currently approved rates, the future impacts of the acquisition adjustment on Etowah's customers are speculative and unreliable. Deferring a decision on whether the acquisition adjustment should be authorized will allow the impact on rates to be fully considered. Thus, the Commission concludes that the appropriate time and venue to determine the reasonableness of the purchase price and the rate impacts of the acquisition is in the first general rate case involving the Etowah System.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 14**

The evidence supporting this finding is contained in Red Bird's Application; the testimony and exhibits of Red Bird witness Cox and the testimony of Red Bird witness Beckemeier; the testimony of Public Staff witness Franklin; and the entire record in these proceedings.

Company witness Cox provided testimony regarding the Company's due diligence activities and costs associated with the transfer of the Etowah System to Red Bird. In his direct testimony, witness Cox testified that the due diligence activities undertaken by Red Bird in connection with Red Bird's acquisition of the Etowah System included surveying work, legal title work, preliminary civil engineering work, environmental compliance site surveys, and accounting due diligence. (Tr. vol. 2, 51). Witness Cox explained that these due diligence efforts provide the Company with preliminary insight as to the condition of a utility system and the problems and issues that must be addressed. (*Id.*). Witness Cox further explained that without due diligence, it would be impossible for Red Bird to acquire systems with a reasonable understanding of what will be required to operate the system in a manner that ensures customers receive safe and reliable utility service provision. (*Id.*, 52). However, witness Cox emphasized that the full scope and scale of any problems cannot be truly known until Red Bird has acquired and begun to operate the Etowah System. (*Id.*, 51). Accordingly, witness Cox stated that Red Bird will not know the total due diligence and transactional costs associated with the acquisition of the Etowah System until the purchase actually closes. (*Id.*). Witness Cox noted that as of October 10, 2023, Red Bird had incurred \$317,269.22 for due diligence, transactional and regulatory work related to acquisition of the Etowah System. (*Id.*).

In his direct testimony, Public Staff witness Franklin recommended that the Commission apply a \$10,000 cap on Red Bird's due diligence costs incurred in connection with the acquisition of the Etowah System. Witness Franklin testified that due diligence expenses are typically limited to transaction closing costs and are generally less than \$10,000. (*Id.*, 221). Witness Franklin claimed that permitting the Company to recover its requested due diligence expenses would result in a 24% increase in residential monthly wastewater flat rates and commercial metered monthly wastewater base charge, zero usage rates. (*Id.*, 220). As such, witness Franklin suggested that the majority of Red Bird's due diligence expenses should be absorbed by the Company as the cost of doing business and not included in rate base. (*Id.*).

Witness Franklin also disagreed with Red Bird's request that the determination of due diligence expenses be deferred until the first general rate case for the Etowah System. (*Id.*, 221-22). Witness Franklin claimed that pursuant to the Water Act, the Commission cannot determine whether the transfer of the Etowah System to Red Bird is in the public interest if it does not know the impact to rate base and customer rates of the acquiring utility's proposed due diligence expenses. (*Id.*, 221). Witness Franklin claimed that the "majority" of the due diligence expenses were known and that deferring a decision on the due diligence expenses for multiple utility systems would unduly complicate and encumber the rate case proceeding. (*Id.*). As such, witness Franklin argued that deferring to a future rate case the decision on due diligence expenses would not be in the public interest. (*Id.*, 221-22).

In his rebuttal testimony, witness Cox clarified that the Company is not seeking a ruling on due diligence costs or proposing to recover any due diligence costs as part of these transfer proceedings. (*Id.*, 279-80). Rather, witness Cox testified that the Company is requesting that a determination on the appropriate amount of due diligence costs to be included in rate base be deferred to the first general rate case proceeding for Etowah, consistent with the reasons Red Bird articulated in support of a deferral of the acquisition adjustment determination. (*Id.*). Witness Cox reiterated that as a result of a recent amendment to the Water Act, the Commission's inquiry in water and wastewater acquisition cases is limited to determining (1) whether the transaction is in the public interest, and (2) whether the party seeking to acquire a system possesses the technical, managerial, and financial capabilities necessary to provide public utility services. (*Id.*, 279). As such, witness Cox testified that the appropriate amount of due diligence costs is not one of the factors that the Commission is *required* to consider as part of assessing a transfer application. (*Id.*, 280). Additionally, witness Cox testified that because the Etowah transaction is not finalized, the final amount of due diligence expenses is currently unknown. (*Id.*, 280). During the evidentiary hearing, witness Cox reiterated that the Company does not currently have all of the information required to put a value on due diligence costs. (*Id.*, 179-80). Rather, witness Cox testified that the Company has "incomplete information at best." (*Id.*, 180). Therefore, witness Cox testified that any decision on due diligence expenses should be deferred until the acquisition closes and more complete information is available. (*Id.*, 280). Moreover, witness Cox testified that because Red Bird is not proposing to change Etowah's currently approved rates, the amount of due diligence costs will have no effect on the rates Red Bird will charge



immediately after closing if the transfer is approved. (*Id.*, 279). As such, deferring the determination of due diligence expenses to a future rate case will not harm or disadvantage any customer or party to these proceedings. (*Id.*, 280). Accordingly, witness Cox stated that a determination on the appropriate amount of due diligence expenses should be deferred to a future rate case proceeding when the transaction-related costs are known and measurable and all parties can present evidence relevant to ratemaking. (*Id.*, 280).

Witness Cox also testified that if the Commission finds that it is necessary to determine the amount of due diligence costs in these proceedings, that Red Bird should not be limited to recovering only \$10,000. (*Id.*, 280). Witness Cox explained that all the due diligence costs that Red Bird incurred are a necessary component of the acquisition process. (*Id.*). For example, witness Cox testified that in order to complete certain application requirements, Red Bird had to engage in extensive pre-filing due diligence to obtain necessary engineering studies and ownership information. (*Id.*, 281).

Company witness Beckemeier also provided rebuttal testimony on the scope and purpose of Red Bird's due diligence expenses. Witness Beckemeier testified that for a potential purchaser, such as Red Bird, to properly assess the feasibility of acquiring a utility system, it is incumbent upon the purchasing utility to perform due diligence. (*Id.*, 310). Witness Beckemeier stated that the scope of due diligence typically consists of the following areas: (1) engineering review of the current operational integrity and deferred maintenance needs of the system; (2) valuation of the system assets; and (3) determination of real property rights and easement rights. (*Id.*). Witness Beckemeier explained that the "true driver" of due diligence costs is the assets being reviewed and the number of defects or deficiencies that are discovered. (*Id.*, 317). Therefore, witness Beckemeier testified that witness Franklin's suggestion that due diligence expenses be limited to \$10,000 for a utility system with 485 customers, consisting of a treatment facility, six pump stations, a force main and sewer lines throughout the service area "suggests that Mr. Franklin does not appreciate the work involved in conducting reasonable due diligence required for a transaction of this type." (*Id.*, 310). Contrary to Public Staff's claims otherwise, witness Beckemeier testified that the due diligence activities performed to date for the Etowah acquisition are reasonable and consistent with prior North Carolina transactions conducted by Red Bird and consistent with the due diligence Red Bird's affiliates have performed for similar transactions in other states. (*Id.*, 314). Witness Beckemeier also noted that due to the significant delay of the regulatory approval process of this transaction, much of the title review and certain parts of the engineering due diligence will need to be updated to current conditions prior to the closing in order to finalize the due diligence. (*Id.*, 315).

In light of all of the evidence, the Commission finds and concludes that the determination on Red Bird's due diligence expenses associated with the transfer of the Etowah System to Red Bird should be deferred to the first general rate case for the Etowah System. As expressed above, the Commission agrees with witness Cox that as a result of recent changes to N.C. Gen. Stat § 62-111, the Commission's inquiry in acquisition cases is now limited to determining (1) whether the acquiring party possesses



the technical, managerial, and financial capabilities necessary to provide public utility services, and (2) whether the transaction is in the public interest. As such, the Commission is not *required* to determine whether due diligence expenses should be approved when assessing whether a proposed water or wastewater transfer is in the public interest. Rather, the Commission has the discretion to defer a determination on due diligence expenses if it is more appropriate to address the issue in a subsequent general rate case. Accordingly, the Commission finds that it is neither necessary nor appropriate to decide to what extent Red Bird should be allowed to recover due diligence expenses in the context of these transfer proceedings. Instead, the Commission concludes that the issue of due diligence expenses should be deferred to the first rate case proceeding for the Etowah System. In reaching this conclusion, the Commission gives great weight to the testimony of witnesses Cox and Beckemeier that the requisite information for determining the appropriate amount of due diligence expenses is not adequately known or knowable by any party to these proceedings given that the Etowah transaction has not yet closed. Witness Franklin acknowledges as much in his pre-filed and live testimonies. As such, any decision on the amount of due diligence expenses should be deferred until after the acquisition closes when more complete information is available. Moreover, because Red Bird is not proposing to change Etowah's currently approved rates, the future impacts of the due diligence expenses on Etowah's customers are speculative and unreliable. Deferring a decision on the appropriate amount of due diligence expenses will allow the impact on rates to be fully considered in the context of a general rate case. Thus, the Commission concludes that the appropriate time and venue to determine the appropriate amount of due diligence expenses is the first general rate case involving the Etowah system.

### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 15**

The evidence supporting this finding of fact is contained in Red Bird's Application; the testimony and exhibits of Red Bird witnesses Cox and Thies; the testimony of Public Staff witnesses Feasel and Franklin; and the entire record in these proceedings.

Company witness Cox provided testimony regarding Red Bird's rate base components, including the value of the utility assets, acquisition adjustment, and due diligence expenses. (Tr. vol. 2, 21, 47, 53). Witness Cox testified that, based on Red Bird's audit of supporting documentation and its understanding of the Public Staff's valuation, it believed the rate base value of assets to be acquired to be \$277,423. (*Id.*, 43). Witness Cox also testified that Red Bird would not seek an acquisition adjustment for the entire purchase price but instead for a reasonable portion of the amount of the purchase that exceeds the rate base assets. (*Id.*, 48).<sup>2</sup> Witness Cox also provided testimony regarding the due diligence and acquisition related expenses, which included surveying work, legal title work, preliminary civil engineering work, environmental compliance site surveys, and accounting due diligence. (*Id.*, 51). Witness Cox

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<sup>2</sup> At the evidentiary hearing, Red Bird witness Cox clarified that the Company included testimony on the issue of the acquisition adjustment because it was of interest to Public Staff but that Red Bird was not seeking a determination of that issues in the current proceedings. (Tr. vol.2, 181-82).

emphasized that Red Bird will not know the total due diligence and transactional costs associated with the acquisition of the Etowah System until the purchase actually closes. (*Id.*). Witness Cox explained that Red Bird is proposing to adopt the rates currently in effect for the Etowah System. (*Id.*, 49). He further stated that he believed the recent changes to N.C. G. S. § 62-111 signaled issues such as rate base, acquisition adjustment, and due diligence should be deferred to the first rate case following the acquisition. (*Id.*, 50).

In her direct testimony, Public Staff witness Feasel provided the Public Staff's calculation of the original cost rate base to be (\$282,207). (*Id.*, 195). In his direct testimony, Public Staff witness Franklin testified that the Public Staff's support of Red Bird's requested transfer is contingent on including in rate base no more than the negative net plant in-service value calculated by witness Feasel as (\$282,207) plus \$10,000 in capped due diligence expenses. (*Id.*, 225). Witness Franklin disagreed with Red Bird's request that the rate base determination be deferred until the first general rate case for the Etowah System, (*id.*, 221-22), claiming instead that pursuant to the Water Act, the Commission cannot determine whether the transfer of the Etowah System to Red Bird is in the public interest if it does not know the rate base and resulting impact to customer rates of the acquisition. (*Id.*, 221).

In his rebuttal testimony, witness Cox reiterated that the Company has not proposed any changes in rates for the Etowah System in these proceedings. (*Id.*, 280, 283). Witness Cox further emphasized that Red Bird is not seeking a ruling on due diligence costs or an acquisition adjustment as part of this transfer proceeding. (*Id.*, 280). Witness Cox explained that Red Bird intends to request in its first North Carolina rate case approval of consolidated, statewide rates for both water and wastewater services. (*Id.*, 285). As such, witness Cox testified that the issue of rates should be deferred, along with the decision regarding an acquisition adjustment and due diligence expenses, to Red Bird's future rate case proceeding where information is known and measurable and all parties can present evidence. (*Id.*, 285-86). Witness Cox reiterated that under the recent amendment to the Water Act, the Commission's inquiry in water and wastewater acquisition cases is focused on determining whether the transaction is in the public interest, and whether the party seeking to acquire a system possesses the technical, managerial, and financial capabilities necessary to provide public utility services. (*Id.*, 279).

Red Bird witness Thies also testified in his rebuttal testimony that the final rate base determination can and should be deferred to the first rate case proceeding involving the Etowah System where necessary evidence will be available to determine the revenue requirement and to establish the appropriate rate design. (*Id.*, 302). Witness Thies also testified to the differences in the Public Staff and Red Bird's rate base calculations, including differences in depreciation rates and lives, and further testified that depreciation changes should also be addressed in a rate case proceeding to allow for further evaluation and the completion of depreciation studies. (*Id.*, 300).

At the evidentiary hearing, witness Cox reiterated that the Company does not currently have all of the information required to put a value on due diligence costs and an acquisition adjustment, and therefore cannot finalize its rate base (*Id.*, 179-80). Instead, witness Cox testified that the Company has “incomplete information at best” and that at the time of the Company’s first rate case proceeding, it would have a complete record. (*Id.*, 180). Red Bird witness Thies testified that, prior to closing, Red Bird only receives the financial information regarding plant in-service that is provided by the seller. (Tr. vol. 3, 32). Witness Thies stated that “at times we will discover things that were on an asset list that aren’t installed or vice-versa,” (*id.*, 33-34), and he explained that additional information “comes from [Red Bird’s] actual operators and staff getting in there and seeing what the assets have actually had done to them.” (*Id.*, 32).

In response to Commissioner questions, Public Staff witness Franklin agreed that the relevant rates for purpose of evaluating whether the proposed transfer is in the public interest are the rates that will be in effect post-closing. (Tr. vol. 2, 252). Witness Franklin further agreed that the Commission has the authority to set rates in the next general rate case proceeding regardless of whether future rate impacts are evaluated in the proposed transfer. (*Id.*). Witness Franklin also conceded that the Commission’s ability to allow or disallow due diligence costs and/or recovery of an acquisition premium would *not* be diminished if the determination were deferred to Red Bird’s first general rate case proceeding. (*Id.* at 252-53).

Based on the evidence in the record, the Commission finds and concludes that a determination of Red Bird’s rate base should be deferred to the first general rate case involving the Etowah System. The Commission agrees with Red Bird witness Cox that as a result of recent changes to N.C. Gen. Stat § 62-111, the Commission’s inquiry in acquisition cases is focused on determining (1) whether the acquiring party possesses the technical, managerial, and financial capabilities necessary to provide public utility services, and (2) whether the transaction is in the public interest. The Commission is also persuaded by the testimony of Red Bird witness Thies, highlighting inaccuracies and potential deficiencies in pre-closing documentation provided by a seller, which makes it difficult for a buyer to establish and substantiate the rate base for a system prior to ownership. The Commission is not *required*, as part of this transfer proceeding, to determine the Company’s final rate base. Rather, the Commission has the discretion to defer a determination on the Etowah System’s final rate base until a subsequent rate case proceeding. Accordingly, the Commission concludes that the determination of the final rate base calculation, including recovery of an acquisition adjustment and due diligence costs (if any), should be deferred to the first rate case proceeding involving the Etowah System.

In reaching this conclusion, the Commission gives great weight to the testimony of Red Bird witnesses Cox and Thies that the requisite information for determining these issues is not adequately known or knowable by any party to these proceedings. Moreover, because Red Bird is not proposing to change Etowah’s currently approved rates, the future impacts of the acquisition on Etowah’s customers are speculative and unreliable. Deferring a decision on the final rate base to be determined alongside the determination

of whether an acquisition adjustment should be authorized and the extent of due diligence expenses that should be included (if any) will allow the impact on rates to be fully considered on a fulsome record. Thus, the Commission concludes that the appropriate time and venue to determine the final rate base calculation and the rate impacts of the acquisition is the first general rate case involving the Etowah system.

### EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 16

The evidence supporting this finding of fact is contained in Red Bird's Application; the testimony and exhibits of Red Bird witness Cox; the direct testimony of Public Staff witness Franklin; and the entire record in these proceedings.

The Commission's evaluation of water and wastewater utility transfer applications is governed by N.C. Gen. Stat. § 62-111. N.C. Gen. Stat. § 62-111(a) provides, in relevant part, that "[n]o franchise . . . shall be sold, assigned, pledged or transferred . . . except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." On June 30, 2023, House Bill 455 (S.L. 2023-67; codified as N.C. Gen. Stat. § 62-111(f)), titled *An Act to Expedite Transfer of Water or Wastewater Public Utilities*, became law. House Bill 455 amended N.C. Gen. Stat. § 62-111 to include new subsection N.C. Gen. Stat. § 62-111(f). N.C. Gen. Stat. § 62-111(f) both imposes a new statutory standard and specific deadlines for the review and processing of transfer applications involving water and wastewater utilities. Under the new standard, the Commission must approve a transfer if it determines (1) that the transfer "is in the public interest, [and] will not adversely affect service to the public under any existing franchise," and further determines that (2) "the person acquiring said franchise or certificate of public convenience and necessity has the technical, managerial, and financial capabilities necessary to provide public utility service to the public." N.C. Gen. Stat. § 62-111(f)(1).

The Commission has a longstanding policy of encouraging the transfer of smaller, under-capitalized water and wastewater utilities to larger, well-capitalized utilities with greater operational and capital resources. For example, nearly a quarter-century ago in its *Order Approving Transfer and Denying Acquisition Adjustment* in Docket No. W-1000, Sub 5 (January 6, 2000) (Topsail Order), the Commission approved the purchase of North Topsail Water and Sewer, Inc.'s (NTWS) sewer treatment facilities and franchise to Utilities, Inc. (UI), holding:

No testimony or evidence was presented in this docket calling into question . . . UI's suitability as a purchaser of NTWS. Indeed, UI and its subsidiaries have long been considered to be professional, competently operated, well-capitalized water and sewer companies. *The Commission has adopted policies encouraging the transfer of small, independently-operated, thinly-capitalized utilities to utilities like UI.*

(*Id.*, 16 (emphasis added)). And, only a few months ago, the Commission reiterated its longstanding view that the public interest favors fostering the ability of well-capitalized utilities "to acquire financially or operationally troubled water and wastewater systems in North Carolina that are in need of significant investment and to make that necessary

investment in the acquired systems.” *Order Scheduling Technical Conference*, Docket No. W-100, Sub 67 at 1 (September 18, 2023). *See also Order Determining Regulatory Treatment*, Docket Nos. W-354, Sub 133 and 134, (September 7, 1994) at 7 (“It is, and shall continue to be, the policy of this Commission to take such actions as will encourage the larger water and sewer utilities with greater operational and capital resources, including governmental entities, to acquire the smaller, under-capitalized, less efficient systems. Such policy serves the public interest by promoting efficiencies through economies of scale and generally results in more favorable rates and an enhanced quality of service.”).

Based upon competent, substantial, and material evidence in the record, the Commission concludes that good cause exists to approve the Application. Consistent with N.C. Gen. Stat. § 62-111(a), the Commission concludes that approval of the Application is justified by the public convenience and necessity and is in the public interest. The evidence introduced in these proceedings overwhelmingly proves that the transfer of the Etowah System to Red Bird is in the public interest and will not adversely affect service to the public. As the Commission has repeatedly held over decades, the public interest is served when small, thinly capitalized water and wastewater utilities are acquired by larger, well-capitalized utilities with access to capital markets. With such access, these larger, well-capitalized utilities are positioned to make needed capital investments to maintain and upgrade smaller systems. The record in this case irrefutably demonstrates that Red Bird is a well-capitalized utility, and that Etowah is a thinly-capitalized utility. Additionally, the evidence in this case proves that Red Bird has the operational ability to maintain the Etowah System as a viable system and that Etowah does *not* have the operational expertise or means to provide adequate service. Accordingly, the transfer of the Etowah System to Red Bird advances an important policy goal established by the Commission – that large utilities be encouraged to acquire smaller, financially troubled systems for the good of the public. Moreover, as explained above, Public Staff believes that the Company has the technical, managerial, and financial capabilities to operate the Etowah System. Public Staff also does not oppose the transfer of the Etowah System to Red Bird or contend that the transfer will adversely affect service to the public. Accordingly, the Commission concludes that Red Bird’s Application should be approved, effective upon the close of the acquisition of the Etowah System by Red Bird from Etowah.

#### **EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17**

The evidence supporting this finding of fact is contained in Red Bird’s Application; the testimony and exhibits of Red Bird witness Cox; the direct testimony of Public Staff witness Franklin; and the entire record in these proceedings.

In his direct testimony, Company witness Cox testified that to satisfy the financial and security requirements imposed by Commission Rule R7-37, Red Bird will post its own bond, to be secured by a corporate surety bond in a form that complies with Rule R7-37. (Tr. vol. 2, 53).

In his direct testimony, Public Staff witness Franklin recommended that Red Bird post a \$200,000 bond. (*Id.*). Witness Franklin testified that N.C. Gen. Stat. § 62-110.3(a)



– which is largely restated in Commission Rules R7-37 and R10-24 – provides that no franchise may be granted to any water or sewer utility company “until the applicant furnishes a bond, secured with sufficient surety as approved by the Commission, in an amount not less than twenty-five thousand dollars (\$25,000).” (*Id.*, 53). Witness Franklin stated that N.C. Gen. Stat. § 62-110.3(a) further provides that in setting the amount of a bond, the Commission shall consider the following factors: (1) whether the applicant holds other water or sewer franchises in North Carolina and, if so, its record of operation; (2) the number of customers the applicant currently serves and the number of customers it proposes to serve; (3) the likelihood of future expansion needs of the service; (4) the age, condition, and type of equipment of the system being acquired; and (5) any other relevant factors, including the design of the system being acquired. (*Id.* at 223). Witness Franklin claimed that because Red Bird does not have a history of operations and management in North Carolina, and due to Etowah’s large customer base, the improvements planned by Red Bird, and the size of the Etowah System, that a \$200,000 bond was appropriate. (*Id.*, 224).

In his rebuttal testimony, witness Cox testified that a \$200,000 bond was excessive. (*Id.* 286). Witness Cox noted that Mr. Franklin admitted that “[b]ond recommendations are not determined by a mathematical formula” and that Public Staff was unable to supply workpapers showing how the Public Staff quantified its bond recommendation. (*Id.*, 286). Witness Cox acknowledged that while Red Bird does not have a lengthy operations history in North Carolina, Red Bird has significant operating and managerial experience with regard to ownership and successful operation of water and wastewater systems across the Company’s affiliate groups outside of North Carolina. (*Id.*, 286-87). Specifically, witness Cox stated that Red Bird’s affiliate group owns and manages facilities in ten other states and currently provides wastewater service to more than 200,000 customers and water service to more than 130,000 customers. (*Id.* at 287). Witness Cox testified that in every state in which the Company’s affiliate groups operate, its systems are successfully serviced and maintained. (*Id.*, 287). As such, witness Cox stated that there is no reason for the Commission or Public Staff to believe that Red Bird’s operation of the Etowah System will be of lesser quality than its affiliates’ performance elsewhere. (*Id.*, 288). Moreover, witness Cox noted that the bond currently required for the Etowah System is \$20,000. (*Id.*). As such, Public Staff’s recommendation that Red Bird post a bond in the amount of \$200,000 is ten times the current bond amount. (*Id.*). Witness Cox reiterated that the current bond amount applies to a small, undercapitalized utility that has been subject to penalty actions and ongoing violations. (*Id.*).

Based on the evidence in the record, the Commission finds and concludes that a bond in the amount of \$50,000 is appropriate for the Etowah System. The Commission rejects witness Franklin’s recommendation that Red Bird post a \$200,000 bond. Witness Cox offered convincing testimony that Red Bird, while lacking a history of operations and management in North Carolina, is part of an affiliate group that is professionally managed, well-capitalized, and successfully operates water and wastewater systems serving more than 330,000 customers in eleven states. Additionally, as the Commission determined above, Etowah is a small, undercapitalized utility and the Etowah System is operationally



troubled and distressed. Accordingly, the Commission finds and concludes that a \$50,000 bond for the Etowah System is just, reasonable, and appropriate.

### CONCLUSIONS

Based on all of the evidence in the record, approval of the Application is justified by the public convenience and necessity and is in the public interest.

The Commission therefore approves the Application; concludes that Red Bird's adoption of Etowah's existing rates should be approved; that a \$50,000 bond shall be posted by Red Bird for the Etowah Service Area prior to closing; that Red Bird should provide written notification to the Commission within 30 days from the date of this Order that closing of the sale of the Etowah System has been completed along with the bond; that upon receipt of such written notification and bond, Red Bird should be granted a Certificate of Public Convenience and Necessity to provide sewer utility service to the Etowah Service Area; and that Red Bird should provide notice to customers that the franchise has been granted and of the approved rates.

IT IS, THEREFORE, ORDERED as follows:

1. That Etowah is hereby authorized to transfer its wastewater utility system serving neighborhoods on Meadow Road, Sunset Ridge Road, Brickyard Road, Turnpike Road, Pebble Creek, and Brandyhill Loop in Henderson County, North Carolina to Red Bird;
2. That Red Bird is granted a Certificate of Public Convenience and Necessity to provide wastewater utility service to the Etowah Service Area consisting of the neighborhoods on Meadow Road, Sunset Ridge Road, Brickyard Road, Turnpike Road, Pebble Creek, and Brandyhill Loop in Henderson County, North Carolina, effective upon the closing of the sale of the Etowah System assets to Red Bird;
3. That Appendix A, attached hereto, constitutes the Certificate of Public Convenience and Necessity;
4. That the Certificate of Public Convenience and Necessity to provide wastewater utility service heretofore granted to Etowah is cancelled, effective on the date when Red Bird files with the Commission written notification that closing of the transfer of the Etowah System has been completed;
5. That Red Bird's request to adopt Etowah's approved monthly rates, as set forth in the Commission's order issued on May 13, 2016, in Docket Nos. W-933, Sub 10, and M-100, Sub 138, is approved;
6. That the Schedule of Rates, attached hereto as Appendix B, is hereby approved and deemed filed with the Commission pursuant to N.C.G.S. § 62-138. This

Schedule of Rates shall become effective for service rendered on and after the date of the closing of the sale of the Etowah System assets to Red Bird;

7. That the Company’s request to defer the issues of whether or to what extent the Commission should allow an acquisition adjustment in connection with the proposed transfer of the Etowah System, whether or to what extent due diligence costs incurred by Red Bird in connection with the transfer of the Etowah System may be recovered, and, accordingly, the final rate base calculation is approved. Accordingly, Red Bird shall, in its first general rate case involving the Etowah System, have the opportunity to seek an acquisition adjustment and due diligence expenses in connection with the transfer of the Etowah System to Red Bird;

8. That Red Bird shall provide notification to the Commission within three business days of the date of closing that the sale of the Etowah System serving the Etowah Service Area has been completed;

9. That within 30 days of the closing of the sale of the Etowah System, Red Bird shall file in these dockets the warranty deed showing Red Bird’s ownership of the required easements and all interests in land it has obtained in connection with the operation and maintenance of the Etowah System;

10. That a copy of this Order and Appendix B shall be mailed with sufficient postage or hand delivered by Red Bird to Etowah’s customers within seven days of the closing of the sale of the Etowah System and that Red Bird shall submit to the Commission the attached Certificate of Service, properly signed and notarized, not later than 15 days after the mailing or hand delivery of the Order and Appendix B;

11. That a bond in the amount of \$50,000 is hereby accepted and approved for Red Bird, in compliance with N.C. Gen. Stat. § 62-110.3; and

12. That Red Bird’s surety bond held by the Commission shall be released to Red Bird upon receipt of written notification to the Commission that closing of the transfer of the Etowah System has been completed.

ISSUED BY ORDER OF THE COMMISSION.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2024.

NORTH CAROLINA UTILITIES COMMISSION

A. Shonta Dunston, Chief Clerk

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. W-933, SUB 12  
DOCKET NO. W-1328, SUB 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

RED BIRD UTILITY OPERATING COMPANY, LLC

is granted this

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

to provide sewer utility service

to

THE ETOWAH COMMUNITY

Henderson County, North Carolina

subject to any orders, rules, regulations,  
and conditions now or hereafter lawfully made  
by the North Carolina Utilities Commission.

ISSUED BY ORDER OF THE COMMISSION.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2024.

NORTH CAROLINA UTILITIES COMMISSION

A. Shonta Dunston, Chief Clerk

SCHEDULE OF RATES

for

RED BIRD UTILITY OPERATING COMPANY, LLCfor providing sewer utility service

in

ETOWAH COMMUNITY

Henderson County, North Carolina

Monthly Sewer Utility Service:

Residential Flat Rate	\$ 26.33
Commercial Customers (metered rates)	
Base Charge, zero usage	\$ 26.33
Usage Charge, per 1,000 gallons	\$ 4.05

Connection Charge:

Residential	\$2,300 per connection
Commercial	\$2,300 minimum per connection, plus \$6.97 per gallon of design flow over 330 gallons per day

Reconnection Charge:

If sewer only service cut off by utility for good cause	\$14.99
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Bills Due: On billing dateBills Past Due: 15 days after billing dateBilling Frequency: Shall be monthly for service in arrearsFinance Charge for Late Payment: 1% per month will be applied to the unpaid balance of all bills still past due 25 days after the billing date.

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Issued in Accordance with Authority Granted by the North Carolina Utilities Commission in Docket Nos. W-933, Sub 12, and W-1328, Sub 0 on this the \_\_\_\_ day of \_\_\_\_\_, 2024.