

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1146, SUB 13
DOCKET NO. W-1328, SUB 10

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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

RED BIRD’S RESPONSE TO
PUBLIC STAFF MOTION TO COMPEL

NOW COMES Red Bird Utility Operating Company, LLC (“Red Bird”), and responds to the Motion to Compel filed by Public Staff on Friday afternoon, September 1, 2023, as to Red Bird’s objections relating to Public Staff’s 13th Set of Data Requests filed on August 30, 2023.

An initial point, and one not acknowledged in the Motion to Compel, is that Red Bird responded to each one of the items in the subject set of Data Requests, except for DR 13-6. The point being that Red Bird responded, without waiving the objections it asserted, to the best of its ability as to the first five items in this set of Data Requests. Despite that being the case, nowhere in the Public Staff’s Motion is that fact recognized. The Motion to Compel appears to be an effort to create the impression Red Bird did not respond to any of Public Staff’s data requests when that simply was not the case. Thus, as to the responses it provided as to Items 13-1 through 13-5, Red Bird does not consider a motion to compel to be appropriate. If Public Staff is not satisfied with the responses provided as to those requests, it can and likely will propound additional data requests, but the fact is that they have received Red Bird’s responses to those items.

Additional information relevant to the Motion to Compel concerns the corporate structure above Red Bird. As shown in Exhibits B and C to the Motion to Compel, and specifically the corporate organization chart filed with the Commission on August 2, 2022, Red Bird's parent entity is Red Bird Utility Holding Company, LLC ("RBUHC"). RBUHC's parent entity is North Carolina CSWR, LLC ("NC-CSWR"). NC-CSWR's parent entity is CSWR, LLC ("CSWR"), and CSWR's parent entity is US Water Resources, LLC ("US Water").

Those general observations aside, Red Bird addresses the following specific aspects of the Motion to Compel:

1. Paragraph 6: Public Staff's Motion states, in pertinent part, that "Red Bird also objects to each item 'on the basis that it is vague, ambiguous, and indefinite, and *calls for speculation.*'" (Emphasis added). The grounds cited by Red Bird in its objections to DRs 13-1, 13-2, 13-3 included that those requests call for speculation. Red Bird did not, however, raise the same or similar objection to DRs 13-4, 13-5, or 13-6. Red Bird's assertion of the "calls for speculation" objection as to DRs 13-1, 13-2, 13-3 was appropriate and justified, because each of those Data Requests calls for a description of "any and all anticipated future involvement, affiliation, relationship, or similar arrangement." Those requests undeniably require Red Bird to speculate about what could or might happen in the future, rather than seeking information as to existing matters, which Red Bird does not understand itself to be obligated to provide. Red Bird understands that there is a limit to the scope of discovery under Rule 26, such that a party is not required to answer interrogatories calling for speculation. *Baker v. Yellow Cab Co.*, 12 F.R.D. 84, 1951 U.S. Dist. LEXIS 3542 (D. Mo. 1951). *See also, American Oil Co. v. Pennsylvania Petroleum Products Co.*, 23 F.R.D. 680, 2 Fed. R. Serv. 2d (Callaghan) 493, 1959 U.S. Dist. LEXIS 4258 (D.R.I. 1959) (interrogatory requesting defendant to state sums

of money which it would be required to expend in future to service heating equipment of customers, to repair same, and to compensate said customers ... and computation of sums which defendant would be required to pay in future, was objectionable on grounds that answers to those questions could reflect only guesswork at time interrogatories were propounded). Red Bird does not have information about any such future arrangements, and requiring Red Bird to engage in guesswork regarding whether there will be any such arrangement is beyond the scope of discovery. Notwithstanding its objection, Red Bird nonetheless provided responses to part (b) of each of those data requests providing information regarding “anticipated future involvement” with the specified entity to the best of its ability.

2. Paragraph 8: This paragraph contains statements the Public Staff attributes to the website of Sciens Water. Neither CSWR nor any of its downstream subsidiaries, including Red Bird, is responsible for or controls the website of Sciens Water or any information provided there. If Public Staff wants information about statements made on that website it needs to ask Sciens Water. That paragraph in the Moton to Compel also contains the following misstatement of fact: “John Rigas, Daniel Standen, and Tom Rooney are also three of the four members of CSWR’s Board of Directors.” CSWR, LLC is a limited liability company and has no board of directors. However, the three men identified are on the board of Central States Water Resources, Inc., a corporation that is completely separate from CSWR, and is not part of the corporate structure running from Red Bird through CSWR to US Water.
3. Paragraph 9: Just as is the case with the content of Sciens Water’s website, neither CSWR nor any of its downstream subsidiaries, including Red Bird, is responsible for or controlled a podcast apparently made in 2021, which apparently included a statement at some point concerning ownership of CSWR. While Red Bird knows that US Water was created in 2018

by Sciens Capital Management, it has no knowledge as to who the current owner(s) of US Water may be. If Public Staff wants information about statements made during that podcast it needs to ask Sciens Water. Accurate information as to the corporate structure of Red Bird's affiliate group and the relationships of Red Bird and CSWR to US Water is set forth in the organization chart previously filed with the Commission and attached to the Motion to Compel as Exhibit C.

4. Paragraph 10: Public Staff states here that it seeks information about the corporate structure of Red Bird and its affiliates “in order to determine the financial viability of Red Bird.” In three other recent dockets in which the Commission approved transfers of other systems to Red Bird,¹ Public Staff has already agreed and the Commission has found that “Red Bird has the technical, managerial, and financial capacity to provide utility service” to the subject systems. It has been no secret that CSWR's business model involves the use of private equity funding. The testimony of Josiah Cox filed on behalf of Red Bird in those dockets, and just recently filed in the instant dockets, include testimony along the following lines:

Over a period of approximately three years, I met with over 52 infrastructure investment groups trying to raise the necessary financing. By February 2014, I achieved my goal, and I used the debt and equity capital I was able to raise to start CSWR.

In 2018, I was able to attract an additional large institutional private equity investor, which allowed me to expand the scope of my business plan. This new investor is allowing CSWR to form companies for the purpose of acquiring water and wastewater systems in additional states.²

All responses provided to Public Staff's 13th Set of Data Requests relating to the corporate structure of Red Bird's affiliate group and the relationships of Red Bird and CSWR to US

¹ Ocean Terrace/Pine Knoll Townes, Docket No. W-1328, Sub 7; Bear Den Acres, Docket No. W-1328, Sub 4; and Crosby Utilities, Docket No. W-1328, Sub 9.

² Direct Testimony of Josiah Cox on Behalf of Red Bird Utility Operating Company, LLC, filed August 30, 2023 p. 3, line 22 – p. 4, line 2.

Water are accurate and are as shown in the corporate organization chart previously filed with the Commission and referenced on page 1 of this Response. Neither Red Bird nor CSWR possess any definitive information regarding the current ownership of US Water and they do not understand themselves to be required to speculate as to such.

5. Paragraph 11: The “Owner” referenced in Redacted Attachment K.1 to the TESI Transfer Application, attached to the Motion to Compel as Exhibit G, is CSWR, LLC, the entity that provides equity capital to Red Bird.
6. Paragraphs 12 and 13: As previously stated, neither Red Bird nor CSWR possesses definitive information regarding the current ownership of US Water. Despite that fact, Red Bird does know that US Water has provided nearly half a billion dollars in equity financing to CSWR since 2019, which funding has been used by CSWR operating subsidiary entities, such as Red Bird, to acquire, upgrade, and operate small, oftentimes distressed, water and wastewater systems in 11 states. Red Bird does not believe that the source of the equity funding provided by CSWR can be relevant to whether this transfer should be approved. Instead, the relevant issues here are whether the proposed transfer of the TESI system (which is understood to be a troubled system) to Red Bird, including adoption of TESI’s existing rates, (i) is in the public interest, (ii) will not adversely affect service to the public under any existing franchise, and (iii) Red Bird has the technical, managerial, and financial capabilities necessary to provide public utility service to the public.
7. Paragraphs 14 and 15: Here Public Staff takes issue with CSWR’s response to DR 13-1(a) indicating that it has no legal, financial, or operating relationships or affiliations with Sciens Water. Whether Public Staff likes or agrees with them, the responses to DRs 13-3 and 13-4 are accurate. Public Staff already knows from responses provided to previous data requests

that US Water is the sole member/owner of CSWR, LLC. Public Staff makes the following argument in in Paragraph 15:

[I]t is vital that the Commission and the Public Staff have information regarding the existence of transfers, sales, expense allocations, agreements, and similar arrangements between Red Bird and any direct or indirect affiliates, because transfers, sales, expense allocations, agreements, and similar arrangements may necessitate such things as regulatory conditions, reporting requirements, approval of agreements, and audits.

Those could be legitimate issues if this was a rate case, but it is not a rate case – Red Bird proposes to adopt TESI’s existing rates. Suffice it to say that Red Bird has come to appreciate that it is not popular with Public Staff and has been frustrated with the pace at which its transfer applications have been processed. Public Staff’s pursuit of information as to the ownership of US Water, which information is not possessed by CSWR, is effectively the same as if Red Bird was borrowing money from a commercial lender and Public Staff wanted Red Bird to provide information as to the identity of the ultimate owners of the bank. Red Bird cannot help but wonder if others seeking to make similar acquisitions are put through this same process, e.g., has Public Staff forced Carolina Water Service to determine and identify the ultimate source of CORIX’s funding when Carolina Water Service files an application to transfer ownership of a water or sewer utility and adopt its existing rates?

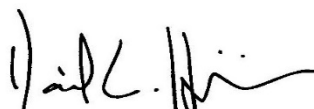
8. Paragraph 16: This relates to the pending Missouri proceeding referenced in DR 13-6, which is a rate case for CSWR’s Missouri subsidiary, Confluence Rivers Utility Operating Company, LLC (“Confluence”), Confluence responded to approximately 1,000 data requests (including subparts) in connection with that rate case, the overwhelming majority of which pertained exclusively to that entity. For the reasons stated in its objections, Red Bird does not intend to and should not be required to provide those voluminous responses to Public Staff. From information included in this paragraph of the Motion to Compel, it is apparent Public Staff is

monitoring that proceeding, so if, hypothetically, there was information produced in that case that is relevant to the issues to be decided by the Commission in ruling on the proposed transfer of the TESI system to Red Bird, then Public Staff should request that specific information. To put it simply, Public Staff could have used a rifle instead of a shotgun, but instead it propounded an unduly burdensome request for “all discovery responses produced by” Confluence in that rate case. A request for all data request responses from a Missouri rate case that has nothing to do with a proposed acquisition in North Carolina pretty much defines the terms “overbroad” and “unduly burdensome.”

Red Bird respectfully submits that in view of the foregoing, and because this proceeding involves the proposed transfer of the TESI system to Red Bird, and not a Red Bird rate case, the Motion to Compel should be denied.

This the 6th day of September, 2023.

BURNS, DAY & PRESNELL, P.A.



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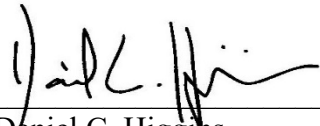
Attorneys for Red Bird

CERTIFICATE OF SERVICE

I certify that I have served a true and exact copy of the foregoing document on counsel for all parties to these dockets in accordance with Commission Rule R1-39, by United States mail, first class postage prepaid; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 6th day of September, 2023.

BURNS, DAY & PRESNELL, P.A.

By: 

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