

Edward S. Finley, Jr., PLLC
2024 White Oak Rd.
Raleigh, NC 27608
919-418-4516
edfinley98@aol.com
(N.C. Bar No. 6149)

November 30, 2023

Ms. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
Mail Service Center 4325
Raleigh NC 27699 -4300

RE: Docket Nos. W-1146, Sub 13; Docket No. W-1328, Sub 10

Dear Ms. Dunston:

Please accept for filing the attached Motion For Leave To File Response to Brief and the accompanying Response on behalf of Total Environmental Solutions Inc. in these dockets.

Thank you for your attention to this matter.

Sincerely,
/s/ Edward S. Finley, Jr.
Edward S. Finley, Jr.
Counsel for Total Environmental
Solutions, Inc.

cc. Parties of Record

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, Suite)
303, St. Louis, Missouri 63131, and 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)

MOTION FOR LEAVE TO
FILE RESPONSE TO BRIEF

NOW COMES Total Environmental Solutions Inc. (“TESI”) in the above captioned proceeding and moves for leave to file a response to a portion of the Post Hearing Brief of the Lake Royale Property Association filed on November 22, 2023.

In its post hearing brief filed on November 22, 2023 Intervenor, Lake Royale Property Owners Association (“POA”), asserts a claim against Total Environmental Solutions Inc. for \$16,000 and requests that the Commission impose as a condition upon the transfer of the CPCN in this docket that TESI pay the POA the \$16,000. The POA filed a request to intervene in this docket on September 11, 2023. In its request to intervene the POA gave no indication that it intended to seek from the Commission as a condition for approval of the requested transfer that it receive as damages \$16,000 as reimbursement for road repairs. NCUC Rule R1-19(a)(4) requires as a condition for request for intervention “A statement of the exact relief desired.” The only evidence in this case addressing the alleged \$16,000 is the testimony at the September

25, 2023 hearing for public witnesses by the POA President Grace Noonan and Dylan Bunch that POA claims it is due \$16,000 for road repairs. Counsel for the POA asked witness Cox of Red Bird several questions with respect to the \$16,000 at the October 23, 2023 hearing for expert witness testimony. The record in this case contains no documentary evidence supporting the claim.

Ms. Noonan and Mr. Bunch were public witnesses called by the Public Staff at the September 25, 2023 public hearing in this docket. Ms. Noonan and Mr. Bunch were not called as witnesses by the Intervenor POA. The Public Staff responded to the submissions by applicant Red Bird and TESI addressing issues brought forward at the September 25, 2023 public hearing and made no assertion that reimbursement to the POA for road repairs become a condition for approval of the transfer of the CPCN in this case. The Public Staff and Red Bird entered into a stipulation resolving all issues in the case. The stipulation does not address any claim by the POA that TESI should reimburse the POA as damages for road repairs. At the hearing on October 23, 2023 for expert witnesses no additional witness was presented suggesting that the POA intended to request a condition such as that set forth in the post hearing brief. The POA sponsored no expert or any other witnesses. The POA provided no advance notice that it intended to seek as a condition for approval of the transfer of the CPCN that the POA be awarded damages against TESI for road repairs.

TESI had no notice prior to the filing by the POA of its post hearing brief that the POA would seek relief in the form of damages against TESI for road repairs in this docket. TESI will be prejudiced without opportunity to respond to the POA's claims submitted for the first time in a post hearing brief.

WHEREFORE, TESI respectfully requests that the Commission grant TESI the opportunity to respond to the POA post hearing brief and attaches hereto its response.

Respectfully submitted this 30th day of November, 2023.

By: /s/ Edward S. Finley, Jr.
Edward S. Finley, Jr., PLLC
2024 White Oak Rd.
Raleigh, NC 27608
919-834-9222
edfinley98@aol.com

Attorney for Total Environmental
Solutions, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing notice has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This is the 30th day of November, 2023

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

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. W-1146, Sub 13
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BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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Application by Red Bird Utility Operating)
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14056, Baton Rouge, Louisiana, 70898, for)
Authority to Transfer the Lake Royale) RESPONSE TO BRIEF
Subdivision Water and Wastewater Utility)
Systems and Public Utility Franchise in)
Franklin and Nash Counties, North Carolina,)
and for Approval of Rates)

NOW COMES Total Environmental Solutions, Inc. and submits this response to the brief of the Lake Royale Property Owners Association.

In its post hearing brief filed on November 22, 2023 Intervenor Lake Royale Property Owners Association (“POA”) asserts a claim against Total Environmental Solutions Inc. (“TESI”) for \$16,000 and requests that the Commission impose as a condition upon the transfer of the CPCN in this docket that TESI pay the POA the \$16,000. The Commission should reject this request. The POA filed a request to intervene in this docket on September 11, 2023. In its request to intervene the POA gave no indication that it intended to seek from the Commission as a condition for approval of the requested transfer that it receive as damages \$16,000 as reimbursement for road repairs. NCUC Rule R1-19(a)(4) requires as a condition for a request for intervention “A statement of the exact relief desired.”

The only evidence in this case addressing the alleged \$16,000 is the testimony at the September 25, 2023 hearing for public witnesses by the POA President Grace Noonan and Dylan Bunch that POA claims it is due \$16,000 for road repairs. Counsel for the POA asked Witness Cox of Red Bird several questions with respect to the \$16,000 at the October 23, 2023 hearing for expert witness testimony. The record in this case contains no documentary evidence supporting the claim. The record contains no invoices, no evidence of bills paid, no correspondence. There is no evidence as to the timing of the repairs, the locations at which the repairs were made, which entity made the repairs. There is no evidence as to what the entity that made the repairs charged for each repair.

There is no evidence as to whether the repairs were made to rectify damage to roads caused by efforts to repair leaks or to make connections for new residents. There is no evidence that the road repairs for which damages are sought were made to rectify situations where the POA was dissatisfied with the initial repairs made by TESI. There is no evidence that the POA first requested repairs by TESI for which damages are sought or TESI's response. There is no evidence or any other pertinent information that would be necessary to support a Commission order imposing a requirement upon TESI to honor this claim.

Ms. Noonan and Mr. Bunch were public witnesses called by the Public Staff at the September 25, 2023 public hearing in this docket. Ms. Noonan and Mr. Bunch were not called as a witnesses by the Intervenor POA. The Public Staff responded to the submissions by applicant Red Bird and TESI addressing issues brought forward at the September 25, 2023 public hearing and made no assertion that reimbursement to the POA for road repairs become a condition for approval of the transfer of the CPCN in this case. The Public Staff and Red Bird entered into a stipulation resolving all issues in the case. The stipulation does not address any claim by the POA that TESI should reimburse the POA for road repairs. At the hearing on October 23, 2023 for expert witnesses no additional evidence was presented suggesting that the POA intended to request a condition such as that set forth in the post hearing brief. The POA sponsored no expert or any other witnesses. The POA provided no advance notice that it

intended to seek as a condition for approval of the transfer of the CPCN that the POA be awarded damages against TESI for road repairs.

As the POA acknowledges in its post hearing brief the Commission is without jurisdiction to award damages against a public utility. *See also, Order Denying Hearing and Finding No Reasonable Grounds Exist to Further Investigate Complaint* in Docket No. W-1148, Sub 13, *In the Matter of Jay Wiese v. Mountain Air Utility Corporation*, dated May, 18 2015. In his complaint Mr. Wiese alleged that a Mountain Air Utility Corporation (“MAUC”) water line ruptured near his residence. The water from the rupture washed out his locust wood steps leading down to the propane tank, damaged many of the planted trees and shrubs in the back of his yard, and knocked out his telephone and Internet service. For relief Mr. Wiese requested that the Commission require MAUC to commence with repairing the damage caused by the line rupture due in part to MAUC’s lack of preventative maintenance and negligence. Mr. Wiese obtained a \$7,887 estimate for all labor and material from Snow Creek Landscaping , LLC. The Commission determined that in essence Mr. Wiese was asking the Commission to order MAUC to pay for the damages that he claimed the water rupture caused to his property. The Commission determined however that it has no jurisdiction to provide Mr. Wiese the relief which he sought.

The Commission also determined that it does not have jurisdiction to award compensatory damages in a complaint proceeding. *See, Sterling v. Duke Power, NCUC Docket No. E-7, Sub 675 (2002), citing State ex rel. N.C. Corporation Commission, v. Southern Railway, 147 N.C. 483, 61 S.E. 271 (1908).* “Because the Commission cannot provide Mr. Wiese the relief which he seeks, it cannot take further action in this matter. The relief which Mr. Wiese seeks can only be obtained in the appropriate General Court of Justice in his county.”

The Commission also found that although Mr. Wiese makes reference to water leaks on MAUC’s water system, the Commission interprets the relief Mr. Wiese seeks as compensation for property damages rather than a requirement that MAUC revise its service and maintenance practices. “The Commission takes notice that MAUC has a pending application for rate relief in

Docket No. W-1148, Sub 9 and potentially requests that ownership in the water system be transferred to another provider. To the extent Mr. Wiese desires to seek relief beyond monetary damages, other dockets are those in which more generic complaints may be advanced.

By asking that the Commission impose as a condition that TESI reimburse the POA for road repairs the POA is asking that the Commission award the POA compensatory damages. Aside from the fact that insufficient evidence exists that would justify such an award, the Commission is without jurisdiction to award monetary damages. The POA allegedly made the road repairs in its role as overseer of the real property interests in the Lake Royale subdivision. The POA is requesting that the Commission award damages for the expenditures the POA made to rectify injury to the roads in the subdivision. These roads are not maintained by any governmental entity. The roads are the private property of the owners within the subdivision.

To the extent that the POA made improvements or repairs to the private roads within the subdivision the POA was acting as the overseer of real property interests in the subdivision. Just as the Commission is without jurisdiction to assess damages, the Commission is without jurisdiction to address claims against public utilities for injury to real property. *See, In Re: Hardin v. Progress Energy Carolinas, Inc.*, Docket No. E-2, Sub 984. (The Commission lacked subject matter jurisdiction over complaints against public utilities that raise issues as to property rights.) *See also, Claude P. Vincent v. Duke Energy Progress, LLC.* (Order dated December 21, 2022 in Docket No. E-2, Sub 1259) (DEP has moved to dismiss Mr. Vincent's complaint on the grounds that it involves only matters of property law, which are within the jurisdiction of the North Carolina court system and not within the jurisdiction of this Commission. The Hearing Examiner agrees and holds that Mr. Vincent's claims regarding an illegal trespass by DEP must be dismissed. Order p. 8).

Had TESI received proper notice of the POA's claims and had the POA provided any evidentiary support for its \$16,000 claim for damages, the evidence TESI would have been prepared to offer in response would have been:

Regarding road repairs, Jack Gibbons, TESI's on-site supervisor and Red Bird's current operator and the operator hired by Red Bird as contractor to handle road repairs would testify that all repairs are up to date. Mr. Gibbons would represent that all those sites referenced by the POA in its brief were repaired. The fact that Red Bird has caught up on road repairs in the three-month period since Red Bird assumed operational responsibility should show Red Bird's commitment to address road repairs in a timely manner in the future.

TESI would demonstrate that neither TESI nor Red Bird is responsible for all needed road repairs at Lake Royale. TESI or Red Bird is responsible for road repairs needed due to damage caused by TESI or its contractors when repairing leaks, installing taps, or otherwise maintaining its systems. However, the POA is responsible for overall road maintenance for which the POA collects POA dues. There are several other utility providers present in the Lake Royale subdivision in addition to TESI (i.e., cable, electrical and phone utilities) whose presence may also contribute to the need for road repairs. Furthermore, due to the large number of homes under construction in the last two to three years, there have been contractors bringing in heavy equipment on large trailers and dump trucks. Since the roads are narrow, some of the trailered equipment cannot make turns without running off the road.

The POA recently billed TESI for \$16,000 of road repairs without prior discussion or approval from TESI's on-site supervisor or CEO. In addition, the invoice provided no backup or detail regarding the specific sites repaired, did not define who performed the repairs, nor did it define the specific cost of materials involved, etc. TESI could not accept responsibility for work it did not approve, and which is not sufficiently documented to verify that work was performed at sites that are TESI's responsibility. Without prior TESI approval or proof, repairs cannot be directly attributed to TESI, and TESI has been unwilling to pay such invoices.

Finally, regarding concerns of poor quality of TESI road repairs, TESI would question whether repairs to which the POA makes reference were completed by TESI and which were made by the POA. TESI has recently been using outside contractors for road repairs and stands by repairs for at least a year after repairs are complete. All roads deteriorate over time and will need upkeep, which is the responsibility of the POA at Lake Royale after initial repairs are complete. TESI had not received complaints regarding concerns over the quality of TESI road repairs until the recent public hearings.

WHEREFORE, the Commission should reject the request of the POA that the Commission impose as a condition for approval of the transfer sought in this docket that TESI pay the POA \$16,000.

Respectfully submitted this 30th day of November, 2023.

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Attorney for Total Environmental
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