

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

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

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

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POST-HEARING BRIEF OF RED BIRD UTILITY OPERATING COMPANY, LLC

Red Bird Utility Operating Company, LLC d/b/a Red Bird Water (Red Bird or the Company) hereby submits its Post-Hearing Brief (Brief) to the North Carolina Utilities Commission (Commission) in the above-captioned dockets. For the reasons detailed herein, the Commission should:

- Approve the Joint Application for Transfer of Public Utility Franchise and for Approval of Rates (Application) filed in these dockets, and in so doing, maintain the rates currently being charged by Etowah Sewer Company, Inc. (Etowah); and
- Defer to a future rate case the issues of: (1) whether or to what extent the Commission should allow an acquisition adjustment in connection with the proposed transfer of Etowah's wastewater system; (2) whether or to what extent due diligence costs incurred by Red Bird in connection with the transfer of Etowah's wastewater system may be recovered; and (3) the appropriate rate base for the Etowah System.

Contemporaneously with this Brief, the Company is also filing a Proposed Order that contains detailed Findings of Fact and Evidence and Conclusions of Law on all issues in these proceedings.

INTRODUCTION AND BACKGROUND

On October 8, 2020, Red Bird and Etowah filed the Application seeking authority to transfer the wastewater utility system and public utility franchise serving approximately 455 customers in the Etowah Community in Henderson County, North Carolina (Etowah System), from Etowah to Red Bird.¹ The Application also sought Commission approval for Red Bird, upon transfer, to continue charging Etowah's

¹ Red Bird filed with the Commission supplemental and additional materials in support of the Application on October 19 and 22, 2020; May 14, and October 7, 2021; February 15, and August 17, 2022; and August 15, 2023.

presently approved monthly rates that were established in Docket Nos. W-933, Sub 10 and M-100, Sub 138, and which have been in effect since January 1, 2016.

The Commission’s decision in this matter must be made against the backdrop of a significant statutory change recently enacted by the General Assembly. 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 (the Water Act). The Water Act 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.”²

Red Bird has met the new statutory standard. The fact that Red Bird meets both prongs of the Water Act is uncontested. The Public Staff – North Carolina Utilities Commission (Public Staff) does not challenge Red Bird’s contention that the Etowah System is financially distressed, and the Commission has long held that the public interest supports transfer of financially troubled water and wastewater systems to parties capable of investing in them. Nor does Public Staff contend that the transfer will adversely affect service to the public; thus, the “public interest” prong of the

² House Bill 455, Section 1.(a) (relating to transfer applications filed after the Act becomes law) and Section 1.(b) (relating to transfer applications pending as of the date the Act becomes law).

statutory standard is met. Public Staff also concedes that Red Bird possesses the necessary “technical, managerial, and financial capabilities” required by the Water Act.

In fact, Public Staff’s opening statement at the hearing began with Public Staff stating, “you will hear today that the **Public Staff believes that the Company has the technical, managerial, and financial capabilities to operate the Etowah System[.]**” (Tr. vol. 2, 14 (emphasis added)). Counsel flatly stated in these same opening remarks that “**Public Staff does not oppose the transfer of the Etowah System to Red Bird**” but insisted that the transfer be conditioned upon further determinations by the Commission. (*Id.* (emphasis added)). These further determinations relate to the only issue Public Staff actually contests in this case – whether the “public interest” prong of the Water Act’s statutory standard demands Commission action *now*, in *this* proceeding, to determine: (1) whether or to what extent the Commission should allow an acquisition adjustment to rate base in connection with the transfer of the Etowah System, (2) 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 (3) the appropriate rate base for the Etowah System (collectively, the Financial Issues).³

Public Staff’s articulation of the “public interest” prong of the new statutory standard in the Water Act is contrary to the express purpose of the Water Act, which, as the Act’s title indicates, is to *expedite* transfers. Public Staff’s interpretation is also

³ Public Staff witness Franklin also testified that Red Bird has the financial, managerial, and technical capability to provide wastewater services to the Etowah System’s customers, and recommended that the Commission approve the transfer, albeit subject to the Commission’s determination of the Financial Issues. (Tr. vol. 2, 211).

far too narrow, as the Financial Issues raised by Public Staff are not all-encompassing of the public interest determination. Rather, 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.

Red Bird is the type of well-capitalized utility that the Commission's policy in favor of acquisition and transfer directly references; indeed, Public Staff agrees with this assessment. And there is also no question that Etowah is the type of thinly-capitalized, financially troubled utility to which the Commission's policy is directly applicable. The uncontested evidence in this case proves that Etowah is not "bankable" – that is, that it does not possess the ability to access the capital markets in order to raise the funds necessary to invest in its system.

Accordingly, acquisition of the Etowah System by Red Bird should be approved, and consideration of the Financial Issues should be deferred until the first post-acquisition rate case for the Etowah System.

DISCUSSION AND ARGUMENT

I. RED BIRD MEETS THE WATER ACT'S STATUTORY STANDARD AND THE COMPANY'S APPLICATION SHOULD BE APPROVED

As noted above, the Water Act requires the Commission to approve a transfer application involving water and/or wastewater utilities if it finds that (1) that the transfer "is in the public interest, [and] will not adversely affect service to the public under any existing franchise," and (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). Red Bird’s Application satisfies this statutory standard, and the Company is therefore entitled to its approval. Because Red Bird and the Public Staff agree that Red Bird possesses the technical, managerial, and financial capabilities necessary to operate the Etowah System, the Company’s Brief does not address this prong of the Water Act, but rather, focuses on whether the transfer “is in the public interest, [and] will not adversely affect service to the public under any existing franchise.” (*Id.*)

The evidence introduced in this proceeding 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. 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.”).

In this case, Public Staff asserts that the Etowah System is not a “troubled” or “distressed” system, but its contention is limited only to Etowah’s current operational capabilities. (Tr. vol. 2, 211-12). As explained further below, Public Staff’s contention is not true – but even if it were accepted as true, current operational capabilities of the transferee alone are not determinative. In the Topsail Order, for example, the Commission separately assessed the transferee’s financial and operational capabilities and found that the transfer of the utility franchise to the acquiring entity should be approved even though the system did not then currently exhibit operational challenges, because the transferee was clearly a financially troubled public utility. (Topsail Order, 16).

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. Accordingly, the Commission should approve the transfer of the Etowah System to Red Bird.

A. Etowah’s Uncontested Status as a Financially Distressed Utility Means that the Transfer of its Utility Franchise to Red Bird is in the Public Interest

Evidence and testimony from both Red Bird and Public Staff witnesses demonstrates that Red Bird has the financial capability to make needed investments in Etowah’s wastewater system consistent with the Commission’s policy encouraging larger private utilities to acquire troubled systems. In his pre-filed 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, LLC (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.” (*Id.*, 233). Similarly, in his live testimony before the Commission in Docket Nos. W-1146, Sub 13 and W-1328, Sub 10 – a recent proceeding involving the transfer of a water and wastewater system in Franklin and Nash Counties, North Carolina to Red Bird (TESI Proceeding) – witness Hinton testified that he was “reasonably comfortable that the Company [*i.e.*, Red Bird] will be able to acquire

additional capital and make [] capital investments.” (*Application for Transfer of Public Utility Franchise and Approval of Rates of Total Environmental Solutions, Inc to Red Bird Utility Operating Company LLC*, Docket Nos. W-1146, Sub 13; W-1328, Sub 10, Tr. vol. 2, 222-23). Red Bird witness Cox also testified in this proceeding that it was his understanding, based upon witness Hinton’s testimony in the TESI proceeding (which he attended), that any concerns Public Staff may have had about Red Bird’s funding “were alleviated.” (Tr. vol. 2, 155).

The uncontested evidence in this proceeding also proves that Etowah is the type of thinly-capitalized, financially troubled utility to which the Commission’s policy is directly applicable. In his live testimony, Company witness Cox referred to Etowah as an unsophisticated “mom-and-pop” company that was “afraid of regulation (*id.*, 70), and explained in detail 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). Witness Cox also noted that Etowah “has lost money for almost every single year in the last five years” (*id.*, 56-57), and that Etowah does not view itself as has “hav[ing] the capital or the expertise to really upgrade or run this system.” (*Id.*, 57).⁴

⁴ Etowah’s lack of resources is especially concerning given the system’s extensive investment needs, which in this regard are mirrored by many systems across North Carolina. See N. C. Dep’t of Env’t Quality, North Carolina’s Statewide Water and Wastewater Infrastructure Master Plan – The Road to Viability 1 (2017), https://files.nc.gov/ncdeq/WI/Authority/Statewide_Water_and_Wastewater_Infrastructure_Master_Plan_2017.pdf (stating that “[o]ver the next 20 years, capital cost estimates for water system needs range from \$10 to \$15 billion, while costs for wastewater system needs range from \$7 to \$11 billion – more likely at the higher end of these ranges”). Witness Cox referred to this report in his testimony, calling it a “roadmap” to what the agency itself considers to be distressed. (Tr. vol. 2, 59-60). The report itself defines a “viable” system as “one that functions as a longterm, self-sufficient business enterprise, establishes organizational excellence, and provides appropriate levels of infrastructure maintenance, operation, and reinvestment that allow the utility to provide reliable water services now and in the future.” (*Id.*, 268 fn. 3). Etowah is the opposite of “viable”; by contrast a well-financed utility system

While Public Staff witness Franklin claims that the Etowah System is not distressed or troubled, he conflates operationally troubled with financially troubled. (*Id.*, 211-12).⁵ But as the Commission has already observed, a (currently) operationally viable system may not be financially viable. In the Topsail Order itself, the Commission found that transfer of the utility franchise was in the public interest and should be approved because NTWS was financially troubled, even if the wastewater system itself was not then-currently operationally troubled. The Commission concluded that the NTWS transfer was in the public interest and would benefit customers by ensuring the long-term viability of the system, “in that it will be owned and operated by a professional utility company with the technical, managerial and financial capability to ensure the long-term provision of adequate service.” (Topsail Order, 22). This description fits hand in glove with the transfer of the Etowah System from Etowah to Red Bird.

Notably, Public Staff does not include any testimony contradicting Etowah’s financially troubled status. There is no testimony whatsoever from Public Staff 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

operator, like Red Bird, is indisputably “viable” and the ideal candidate to operate such a system so as to meet North Carolina’s water and wastewater investment needs.

⁵ As demonstrated below, witness Franklin is incorrect about the operational viability of the Etowah System.

have a burden of production in order to overcome the presumption that utility's contentions are valid).

In sum, the evidence undisputedly demonstrates that Red Bird, unlike Etowah, is a well-capitalized utility and, as such, the public interest would be best served by approving the transfer of the Etowah System to Red Bird.

B. Public Staff's Contention that the Etowah System is Currently Operationally Viable is Incorrect and Irrelevant to the Commission's Transfer Determination in this Proceeding

Asked by the Commission at the evidentiary hearing how Public Staff responded to Red Bird's contention that the Etowah System was both financially and operationally troubled, Public Staff witness Franklin answered only with respect to the system's *operations*:

So if you look at the definition of a troubled system in Docket W-1000, Sub 5,⁶ in that Order approving transfer and denying acquisition that was issued January 6, 2020 [*sic*], it determines that a system is *operationally troubled* if it has various system deficiencies, ongoing environmental regulatory violations, and frequent customer complaints.

(Tr. vol. 2, 249 (emphasis added)). As discussed above, Public Staff's focus on the current operational viability of the Etowah System does not negate the public's interest in transferring the system to Red Bird in light of the undisputed nature of Etowah's *financial* non-viability, and Public Staff's focus on the current operational viability of the Etowah System is therefore irrelevant to Red Bird's transfer request. But more importantly, witness Franklin's assessment is incorrect in that it ignores the

⁶ Topsail Order, 21.

real deficiencies of the Etowah System. Accordingly, were the Commission to even reach this issue it should reject witness Franklin's assessment.

As Red Bird witness Cox testified in his pre-filed rebuttal testimony, "the poor condition of Etowah's facilities combined with its substandard operations history qualify the system as 'distressed.'" (*Id.*, 268). He expanded on this in his live testimony noting that:

- The Etowah System has been out of compliance with its wastewater discharge permit for "almost the entirety of the last five years";
- 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;
- Over the last five years there have been basically no additions to plant in service; and
- Per a communication that *Red Bird* (not Etowah, the system operator) received from the North Carolina Department of Environmental Quality (DEQ), a lift station had been overflowing for two weeks without action by Etowah, with a recorded sanitary sewer overflow of 600 gallons per day.

(*Id.*, 56-58). Witness Cox testified further 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 (emphasis added)). And he noted that what 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.*, 38).

Witness Franklin, while certainly an engineer, is *not* in the wastewater business. So, while he acknowledges (as he must) the eleven NOVs received by the Etowah System between September 1, 2020 and October 1, 2023, he impermissibly minimizes their importance. He even minimizes the importance of the two *currently*

open NOVs, indicating that Etowah had taken action to address them. (Tr. vol. 2, 209). He does so even in the face of his acknowledgment that the two open NOVs result from the sanitary sewer overflow event discussed by witness Cox, an event that occurred in January 2023 – a year ago. (*Id.*). Had DEQ been satisfied with Etowah’s response to the open NOVs it would have closed them - not contacted Red Bird about them. The agency is clearly unsatisfied with Etowah’s response and is looking to Red Bird (*if* it acquires the Etowah System) to remedy the situation. As witness Cox explained in his live testimony, the sanitary sewer overflow event resulted in the release of “human health-impacting ... pathogens” potentially affecting 20,000 residents downstream from the Etowah wastewater treatment plant. (*Id.*, 58). As such, permitting Etowah to continue to operate its system “pose[s] a human health risk.” (*Id.*, 59). Inexplicably, that human health risk is downplayed by Public Staff.

Public Staff witness Franklin also incorrectly claims that the Public Staff did not receive any customer complaints from Etowah’s wastewater customers. (*Id.*, 208). To the contrary, consumer statements of position in this proceeding express complaints directly associated with the Etowah System. Specifically, Mr. Ray Crombe, a wastewater customer of Etowah, submitted a consumer statement of position on October 23, 2023, in which he stated that Etowah’s wastewater system “is in dire need of repair and an upgrade.” (Crombe Exhibit 1, Tr. Ex. vol. 1, 14). Additionally, Mr. David O’Connor, a wastewater customer of Etowah, submitted a consumer statement of position on October 23, 2023, in which he stated that he was “grateful that a company like Red Bird is willing to take over the existing operations, which are currently at or over capacity, and make the improvements necessary to

bring them into compliance with the regulations that protect our environment.” (O’Connor Exhibit 1, Tr. Ex. vol. 1, 13). Although these indications of consumer dissatisfaction with the Etowah System were provided to the Public Staff before witness Franklin filed his testimony, he opted not to even mention them in his testimony.

Accordingly, should the Commission even wish to address the issue, Public Staff’s argument that the Etowah System is not distressed or troubled should be rejected because it is unsupported by the evidence. Instead, the evidence supports a finding by the Commission that the Etowah System is distressed or non-viable and that the public interest would be best served by transferring the Etowah System to Red Bird, a utility that is both financially and operationally capable of operating the Etowah System as a viable utility.

II. THE FINANCIAL ISSUES CAN AND SHOULD BE ADDRESSED IN A LATER RATE CASE PROCEEDING

Public Staff asserts that the “public interest” prong of the Water Act’s new statutory standard requires that the Financial Issues be decided now. (Tr. vol. 2, 249 (Public Staff “does not believe that the Commission can determine if a transfer is in the public interest if it does not know the impact of -- to rate base and customer rates of the acquiring utilities proposed acquisition adjustment and due diligence expenses.”)). Public Staff is wrong. It is neither necessary nor appropriate to decide the Financial Issues in the context of this transfer proceeding. Rather, they should be deferred to the first post-acquisition general rate case for the Etowah System.

First, while witness Franklin testified that he knew of no Commission precedent deferring financial issues to a later proceeding (*id.*, 248), he referenced

extensively in his testimony the Topsail Order, and the Topsail Order itself refers to precedent in which this indeed occurred. See Topsail Order, 24 (*citing In re Carolina Water Service, Inc. of North Carolina*, Docket Nos. W-354, Subs 74, 79, 81, Eightieth Report of the North Carolina Utilities Commission: Orders and Decisions 342, 394 (1990) (*Carolina Water II*)). In *Carolina Water II*, the Commission addressed in a post-acquisition rate case several proposed rate base adjustments for smaller water and wastewater utilities previously acquired by Carolina Water. See *Order Granting Partial Rate Increase*, Docket Nos. W-354, Subs 74, 79, 81, at 398-99 (June 15, 1990). Even in the Topsail Order the Commission clearly treated the transfer and acquisition adjustment issues as separate matters – the Commission approved the transfer request on the basis that it was in the public interest, but simultaneously denied the acquisition adjustment. (Topsail Order, 16-22 (approving transfer); *id.*, 22-33 (rejecting adjustment)). It is true that in Topsail both issues were decided in the same proceeding, but the acquiror asked that they be decided in the same proceeding. Here, by contrast, Red Bird has expressly asked that they *not* be decided in the same proceeding.

Second, regardless of Commission precedent from other proceedings, Public Staff conceded in this case that the Commission has the power to address the Financial Issues in a future rate case:

Q. Does the Commission have the authority to set rates in a next general rate case regardless of whether future rate impacts upon Red Bird's ownership are evaluated in this proceeding?

A. Yes.

(Tr. vol. 2, 252). Public Staff has therefore conceded that determination of the Financial Issues is not *required* now, and that the Commission could, if it chooses, determine them later.

To be sure, Public Staff witnesses Franklin and Feasel indicate in their testimony that for practical reasons it might be desirable for the Commission to make a determination of the Financial Issues in this proceeding (*id.*, 253-54), but the mere fact that something may be desirable – from Public Staff’s viewpoint – does not make it required. There is nothing preventing the Commission from deciding the Financial Issues later (in the rate case context), just like all the other jurisdictions in which Red Bird affiliates have acquired small, thinly capitalized water and wastewater utilities. As demonstrated in this Docket, Red Bird’s affiliates routinely capitalize and include acquisition-related costs in rate base in their respective consolidated rate case proceedings, which take place *after* the respective transfer applications are considered and approved. (Late Filed Exhibit 1, December 14, 2023).

Moreover, there are in fact compelling practical reasons to determine the Financial Issues later. The main reason being that the parties’ and the Commission’s knowledge of the actual condition of the Etowah System is at this time limited in that Red Bird is not currently in control of the Etowah System. Further, as the transaction has not yet closed, the full extent of due diligence costs or rate base adjustments is unknown. For the Commission to make a determination now would prejudice Red Bird’s ability in a later-filed rate case to “demonstrate that ... [it] can provide a significant public benefit.” (Tr. vol. 2, 163). For example, were Red Bird to acquire information post-acquisition that would significantly impact in its favor the

determination of public benefit, it may never be able to use that information if the Commission makes a determination on an acquisition adjustment in this proceeding. Such a result would run contrary to the Public Utilities Act, which demands that any rate approved by the Commission must be fair to both the utility and its customers. N.C.G.S. § 62-133(a); *State ex rel. Utilities Comm'n v. Carolinas Committee for Industrial Power Rates, etc.*, 257 N.C. 560, 571 (1962) (“A rate must not only be fair, just and reasonable to the consumer, but fair, just and reasonable to the utility.”).

As the Commission explained in the Topsail Order, “whether the acquiring utility paid too much for the acquired utility and whether the customers of both the acquired and acquiring utilities are better off after the transfer than they were before that time . . . [are] the two truly relevant questions which ought to be considered in any analysis of acquisition adjustment issues.” (Topsail Order, 27). In Topsail, the Commission cited *State ex rel. Utilities Commission v. Village of Pinehurst*, 99 N.C. App. 224 (1990), *aff'd* 331 N.C. 278 (1992) for the proposition that all relevant factors must be considered in analyzing the appropriateness of utility transfer applications. Of necessity, however, *all* factors cannot be evaluated in this proceeding if they are not actually known. Thus, for example, 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 this proceeding. (Tr. vol. 2, 277-80). After all, the purchase price will only be known once the transaction has actually closed, nor are final due diligence costs known until after closing (*id.*, 280), as witness Franklin himself conceded. (*Id.*, 242-43). As such, any decision on the requested

acquisition adjustment should be deferred until the acquisition closes when complete information is available.

In *Topsail*, the Commission emphasized that a ruling adverse to UI (the acquiring utility) on the acquisition adjustment issue would not impact the transfer of NTWS's franchise to UI because UI's obligation to acquire the franchise was not dependent upon its determination of the adjustment issue. (*Topsail Order*, 29). By contrast, in this case Red Bird has the authority to terminate the acquisition in the event of an adverse regulatory ruling.⁷ Any decision on whether to terminate the transaction would of course be dependent upon what the Commission actually decides (*Tr. vol. 2*, 75), but termination of the transaction would decidedly *not* be in the public interest given the Etowah System's concededly "unbankable" status, its outstanding NOV's related to a sanitary sewer overflow event that threatened human health, and its inability or unwillingness to adequately address its system deficiencies.

Once the acquisition closes, Red Bird would not be able to "back out of the deal." (*Id.*, 170). Further, in a future rate case proceeding, Red Bird will have the ultimate burden of proof to show that (1) any acquisition adjustment it seeks to make to Etowah's rate base is prudent and will result in just and reasonable rates, (2) any due diligence costs it chooses to submit for recovery were prudently incurred and will likewise result in just and reasonable rates, and (3) the proposed rate base value for the Etowah System is just and reasonable. Accordingly, post-closing and assuming

⁷ Red Bird Utility Operating Company, LLC, *Confidential Application Attachment G – Purchase and Sale Agreement* (August 23, 2019) (providing, in relevant part, that "Buyer may terminate this Agreement if the necessary regulatory approvals are not fully and unconditionally granted to Buyer in a form satisfactory to Buyer (as determined in Buyer's sole and absolute discretion).").

the Financial Issues are deferred to a rate case, *all* the risks associated with the Financial Issues are upon Red Bird. As witness Cox testified, this risk is very clear: “We put all the cash up. We do all the improvements. And we hope to get recovery.” (*Id.*, 77). If, however, the Commission denied an acquisition adjustment and due diligence expenses in a future proceeding, *only* Red Bird “would bear that loss . . . but nothing happens in terms of benefits to customers . . . [or] to quality [of] service.” (*Id.*, 171). But Red Bird will have undertaken this risk at a time when the transaction has closed, the Etowah System belongs to Red Bird, and all of the knowable facts are indeed known. That is simply not the case today.

Finally, Public Staff (through counsel) asserts that customers, in the interest of “transparency,” deserve to know future potential rate impacts. (*Id.*, 15). There are multiple responses to this assertion. First, customers *do* know the immediate rate impact of the transaction, were the Application to be approved – there will be no impact; the rates will be the same. Second, witness Franklin conceded that for purposes of this case and the “public interest” prong of the Water Act’s new statutory standard, the “relevant rates . . . are those that will be in effect post-closing.” (*Id.*, 252). Third, the future impacts of the Financial Issues on Etowah’s customers are speculative and unreliable. (*Id.*, 277-80). The elements necessary to determine a future revenue requirement – e.g., revenue, expenses, rate base, capital structure, rate of return, rate design, etc. – are not currently known. (*Id.*, 284; Tr. vol. 3, 25-26). However, evidence supporting this rate information would be available in a future rate case proceeding. (Tr. vol. 3, 25-26). As such, deferring a decision on the Financial Issues will allow the impact on rates to be fully considered. (Tr. vol. 2, 277-80).

The Commission recently acknowledged the speculative nature of future rate impacts in its *Order Granting Red Bird's Motion and Approving Customer Notice* in Docket Nos. W-938, Sub 6 and W-1328, Sub 8 (Sept. 25, 2023) (Baytree Notice Order). In the Baytree Notice Order, the Commission approved Red Bird's proposed Notice to Customers, which notably did not include Public Staff's projected future rate impacts. Instead, the Notice to Customers approved in the Baytree Notice Order stated that (i) Red Bird proposed to adopt Baytree's existing rates, (ii) Red Bird anticipated making investments to address specific system needs, and (iii) such investment would cause rates to increase in the future, subject to approval by the Commission. Baytree Notice Order at 2.

Fourth, despite Red Bird's declared intent to seek consolidated rates, Public Staff's estimated future rate impacts, in addition to being completely speculative, incorrectly calculate rates on a stand-alone basis. (Tr. vol. 2, 284-85, 301). Based on the experience of Red Bird's affiliates in other states, consolidation can have a significant impact on rates and that impact cannot realistically be determined without knowing how many systems Red Bird will own and operate at the time of its first rate case proceeding. (*Id.*, 301). Consequently, Public Staff's rate design – which is system-specific – misrepresents Red Bird's intention insofar as future rates are concerned and likely distorts the impact of consolidation. (*Id.*, 284-85, 301).

In sum, contrary to Public Staff's recommendation, deferring the Financial Issues to a future rate case proceeding will not harm or disadvantage any customer or party to this proceeding, (*id.*, 280), and there is no requirement that the Commission must rule on the Financial Issues as part of a transfer proceeding.

Moreover, deferring the Financial Issues to a future rate case is entirely consistent with the Water Act which is designed to expedite and streamline the process for approving a transfer application. Rather, as explained above, the Financial Issues are more appropriately determined in the context of a rate case proceeding. (*Id.*, 277-80).

CONCLUSION

For the reasons articulated herein, the Company indisputably has established that:

- Red Bird meets both prongs of the Water Act and its Application should therefore be approved; and
- The Financial Issues should be deferred to the first general rate case for the Etowah System.

Red Bird has demonstrated that the proposed acquisition “is in the public interest, will not adversely affect service to the public under any existing franchise” and that it “has the technical, managerial, and financial capabilities necessary to provide public utility service to the public.” N.C. Gen. Stat. § 62-111(f). The Commission should approve the Company’s Application.

Respectfully submitted this 12th day of January, 2024.

**RED BIRD UTILITY OPERATING COMPANY,
LLC**

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