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December 1, 2023

VIA ELECTRONIC FILING

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 North Salisbury Street
Dobbs Building, Fifth Floor
Raleigh, NC 27603

Re: In the Matter of Application by Red Bird Utility Operating Company, LLC and Total Environmental Solutions, Inc. for Authority to Transfer the Lake Royale Subdivision Water and Wastewater Utility Systems and Public Utility Franchise in Franklin and Nash Counties, NC and for Approval of Rates; NCUC Dockets: W-1146, Sub 13, and W-1328, Sub 10
Lake Royale Property Owners Association's Reply to TESI's Response to Brief

Dear Mr. Dunston:

On behalf of Lake Royale Property Owners Association (Lake Royale POA), we are hereby providing the Association's Reply to TESI's Response to Brief for filing in the above-referenced dockets.

Please do not hesitate to contact me with any questions or concerns regarding this filing.

With best regards,

/s/ *David T. Drooz*

David T. Drooz

cc: Parties and Counsel of Record
NC Public Staff
pbb

A Pennsylvania Limited Liability Partnership

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)

LAKE ROYALE PROPERTY
OWNERS ASSOCIATION
REPLY TO
TESI'S RESPONSE TO BRIEF

NOW COMES the Lake Royale Property Owners Association, Inc. (Lake Royale POA) through counsel and submits the following Reply to the "Response to Brief" filed by Total Environmental Solutions, Inc. (TESI) on November 30, 2023, in this docket.

1. TESI states that "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." The implication is that there is insufficient evidence to support the Lake Royale POA claim that TESI's poor maintenance of its water system cost the Lake Royale POA \$16,000 for road repairs.

However, the sworn testimony of Grace Noonan established the amount of cost and the cause of the cost. (*See T Vol 1, pp 14, 17-19*) That is sufficient evidence to support a condition that the transfer not occur until TESI has reimbursed the Lake Royale POA for those costs that are TESI's fault.

Counsel for TESI had the opportunity to cross-examine witness Noonan about the \$16,000 and chose not to do so. TESI had the opportunity to sponsor a witness at the evidentiary hearing to speak to the merits of Ms. Noonan's testimony about the \$16,000 of costs incurred by the Lake Royale POA to repair problems caused by TESI. They chose not to do so.

Additionally, the one witness at the evidentiary hearing – Mr. Cox, appearing on behalf of the Red Bird Utility Operating Company, LLC – was asked by counsel for the Lake Royale POA about the \$16,000 of road damage caused by TESI. He replied “I don't have an answer for that.” (*T Vol 2, pp 94-95*)

The Lake Royale POA presented competent substantial evidence to support its position, and TESI made the choice to not question that evidence and to not offer any rebuttal evidence. The party with insufficient evidence on the \$16,000 cost is TESI, not the Lake Royale POA.

2. TESI also opposes the position of the Lake Royale POA on the grounds that the Commission is without jurisdiction to award damages against a public utility. That is correct with regard to an order in a complaint case that simply seeks damages from a utility. In the case cited by TESI, the Commission's May 18, 2015, *Order Denying Hearing and Finding No Reasonable Grounds Exist to Further Investigate Complaint* in Docket No. W-1148, Sub 13, involved a complaint seeking compensation for property damage. This was

also the situation addressed in the Commission's March 12, 2005, order in Docket No. E-7, Sub 675, where the complaint for monetary damages was dismissed for lack of jurisdiction.

However, requiring TESI to accept responsibility for its poor maintenance by paying the Lake Royale POA for road repairs is not proposed as an award of damages in a complaint case. Rather, it is proposed as a regulatory condition for the transfer of the utility franchise. This distinguishes the present case from the complaint cases cited by TESI.

A more appropriate citation would be the case of *State ex Rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153 (1987). In that case, the Commission entered an order requiring certain long distance carriers to pay compensation for the unauthorized transmission of some long distance calls. Sprint and MCI appealed, arguing *inter alia* that the Commission lacked jurisdiction to award such compensation for the harmful acts of long distance carriers. With regard to Sprint's position, the Court ruled:

Sprint's primary argument is that the Commission lacks the statutory authority to impose the Plan. It calls the compensation a "penalty" and reasons that N.C. Gen. Stat. 62-312 specifically provides that an action for the recovery of a penalty must be instituted in the North Carolina state court in Wake County in the name of the State on the relation of the Utilities Commission "against the person incurring such penalty," by either the Attorney General, the District Attorney of Wake County, or the injured party. U.S. Sprint concludes that since the compensation required by the Plan amounts to a penalty, the Commission has violated N.C. Gen. Stat. 62-94(b)(2) by instituting the Plan. We disagree.

We do not agree that the compensation plan imposes a "penalty" on U.S. Sprint or any other appellant. We note initially that nowhere in the Commission's proceedings is the compensation referred to by the North Carolina Utilities Commission as a penalty. We find it is more appropriately considered as a prerequisite to receiving the certificate.

Id. at 169. (Emphasis added)

Likewise, with regard to MCI's position, the Court ruled:

MCI first argues that the plan is an improper award of money damages which the Commission is not statutorily authorized to make. MCI's position is that the Commission, "[i]n ordering the compensation plan, . . . improperly mixed its judicial and legislative activities in an attempt to validate an improper award of money damages to the LECs by couching it in the form of a Commission rule." MCI concludes that the "payment of monies to the LEC by MCI . . . can be valid only if viewed as (a) a validly established tariff rate or charge, or (b) as a valid award of damages. " We disagree with the characterization of the compensation plan as money damages and the conclusion that the plan would be valid only if it constituted a tariff or a "valid" award of damages.

We find MCI's argument that the plan constitutes "money damages" essentially the same as U.S. Sprint's argument that the plan amounted to a "penalty." For the reasons expressed earlier in this opinion, we find the compensation plan to be a proper term or condition of certification consistent with the public interest, and not money damages.

(*Id.* at 173) (Emphasis added)

A regulatory condition for a transfer is essentially the same as a "condition of certification consistent with the public interest" as discussed in the *Southern Bell* case. The Commission has jurisdiction to ensure transfers serve the public interest; it does not have jurisdiction to award damages in complaint cases. The Lake Royale POA is requesting the former, not the latter. The Commission has the jurisdiction to grant this request, and it would be in the public interest to do so.

Respectfully submitted this the 1st day of December 2023.

Electronically Submitted

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**ATTORNEY FOR LAKE ROYALE PROPERTY
OWNERS ASSOCIATION, INC.**

OFFICIAL COPY

Dec 01 2023

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LAKE ROYALE PROPERTY OWNERS ASSOCIATION REPLY TO TESI'S RESPONSE TO BRIEF 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 1st day of December, 2023

By: /s/ David T. Drooz