

Troutman Pepper Hamilton Sanders LLP  
301 S. College Street, 34th Floor  
Charlotte, NC 28202



troutman.com

**Kiran H. Mehta**  
D 704.998.4072  
kiran.mehta@troutman.com

**Mindy L. McGrath**  
D 704.916.1522  
mindy.mcgrath@troutman.com

February 22, 2024

Ms. Shonta Dunston  
Chief Clerk  
North Carolina Utilities Commission  
430 N. Salisbury Street  
Raleigh, North Carolina

**Re: Joint Application by Red Bird Utility Operating Company, LLC d/b/a Red Bird Water and Etowah Sewer Company, Inc. for Transfer of Public Utility Franchise and Approval of Rates  
Docket No. W-933, Sub 12  
Docket No. W-1328, Sub 0**

Ms. Dunston:

Enclosed for filing please find Red Bird Utility Operating Company, LLC's Exceptions to the February 7, 2024 Recommended Order.

Please contact me if you or the Commission have any questions regarding this filing.

Best regards,

/s/ Mindy McGrath  
Mindy McGrath

Enclosure

c: Parties of Record w/ Encl.

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Feb 22 2024

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

I hereby certify that a copy of Red Bird Utility Operating Company LLC's Exceptions to the February 7, 2024 Recommended Order was served electronically or by depositing a copy of the same in the United States Mail, first class postage prepaid, at the addresses contained in the official service lists in these proceedings.

This the 22nd day of February 2024.

RED BIRD UTILITY OPERATING COMPANY, LLC

/s/ Kiran Mehta

Kiran Mehta (NC Bar No. 11011)

/s/ Mindy L. McGrath

Mindy L. McGrath (NC Bar No. 35628)

/s/ Molly M. Jagannathan

Molly M. Jagannathan (NC Bar No. 36931)

Troutman Pepper Hamilton Sanders LLP

301 College Street

34<sup>th</sup> Floor

Charlotte, NC 28202

(704) 998-4050

[kiran.mehta@troutman.com](mailto:kiran.mehta@troutman.com)

[mindy.mcgrath@troutman.com](mailto:mindy.mcgrath@troutman.com)

[molly.jagannathan@troutman.com](mailto:molly.jagannathan@troutman.com)

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	)	EXCEPTIONS OF RED BIRD
Etowah Sewer Company, Inc. for Transfer of	)	UTILITY OPERATING
Public Utility Franchise and Approval of Rates	)	COMPANY, LLC

NOW COMES Red Bird Utility Operating Company, LLC (Red Bird or the Company), by and through counsel and pursuant to N.C.G.S. § 62-78 and Commission Rule R1-26(c), and files its Exceptions to the February 7, 2024 *Recommended Order Approving Transfer and Rates, Granting Franchise, Determining Amount of Bond, and Requiring Customer Notice* (Recommended Order). Red Bird respectfully requests oral argument on the following Exceptions:

**EXCEPTION 1**

Finding of Fact 15 and the underlying Evidence and Conclusions supporting this finding are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

GROUND FOR EXCEPTION 1:

The Recommended Order errs in determining that it is necessary, in this transfer proceeding, to: 1) evaluate and establish rate base for Etowah Sewer Company, Inc.'s

(Etowah) wastewater utility system (Etowah System), 2) determine whether and to what extent an acquisition adjustment to rate base is appropriate, and 3) determine whether and to what extent Red Bird may recover due diligence expenses (collectively, the Financial Issues). Specifically, the Recommended Order acts contrary to the legislative intent underlying N.C.G.S. § 62-111(f) and public policy and misapplies the “public interest” prong of N.C.G.S. § 62-111(f).

On June 30, 2023, a significant change in the law applicable to water and wastewater acquisitions was enacted with House Bill 455 (S.L. 2023-67; codified as N.C.G.S. § 62-111(f)), titled *An Act to Expedite Transfer of Water or Wastewater Public Utilities* (the Water Act). The Water Act imposes a new statutory standard and expedited deadlines for the review and processing of transfer applications involving water and wastewater utilities. Under the new standard, the Commission must approve a transfer application if it determines that: 1) 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).

The Recommended Order concludes that it was appropriate to determine the Financial Issues in this transfer proceeding. In so ruling, the Recommended Order rejects Red Bird’s argument that the Water Act does not *require* the Commission to make such determinations in a transfer proceeding, and that the Financial Issues should instead be deferred to a future rate case proceeding when all evidence is available. (Recommended Order at 18-19). The Recommended Order determines that the Water Act does not, on

its face, prohibit the Commission from considering “other factors” in determining whether a transfer is in the public interest. (*Id.*, 17). The Recommended Order reasons that “[b]ecause there is no specific language in the [Water Act] that limits the Commission’s consideration of factors that might affect the public interest, the Commission shall proceed with its usual, customary, and required inquiry into all aspects of anticipated service and rates occasioned by the proposed transfer.” (*Id.*, 18).

This finding of fact is in direct contravention to the legislative intent behind the Water Act. As the Water Act’s title indicates, and the Recommended Order acknowledges, the purpose of the Water Act is to *expedite* transfers. (*Id.*, 17). The Recommended Order claims that there is “no evidence” that the Water Act constrains the Commission’s review of transfer applications and, therefore, the Commission is not limited to reviewing a utility’s adoption of existing rates or proposed rates in determining whether the transfer is in the public interest. (*Id.*, 18). In so holding, the Recommended Order misconstrues Red Bird’s position as advocating for “a lower level of scrutiny in determining whether a transfer is in the public interest.” (*Id.*, 16).

Red Bird is not suggesting, nor has it ever suggested, that the Commission not scrutinize an application under the public interest standard; rather, Red Bird is requesting that the Commission accept the General Assembly’s invitation under the Water Act to simplify transfer proceedings and defer the Financial Issues to a future rate case when complete and accurate amounts will be known, particularly in situations (like this one) when it is manifestly in the public interest to effect the transfer of a small, thinly-capitalized system operator to a larger, well-capitalized utility like Red Bird. Deferring a decision on

the Financial Issues is therefore consistent with the purpose of the Water Act and the public interest standard contained therein.

In proceeding with its “usual” and “customary” inquiry, the Recommended Order disregards the legislative intent underlying the Water Act – namely, that it was implemented to facilitate a *new and more efficient* review of water and/or wastewater transfer applications. The instant proceeding is the first opportunity for the Commission to rule on a transfer application under the Water Act, and thus, it is crucial for the Commission to rule in a manner consistent with the legislative intent underlying the statute. However, rather than review Red Bird’s transfer application consistent with the purpose of the Water Act, the Recommended Order bases its ruling on prior practice and precedent – in effect, acting as if the Water Act were never enacted. This approach is akin to taking a step backward and ignores the deficiencies with the prior statute, which necessitated the amendments contained in S.L. 2023-67. Therefore, by failing to comply with the legislative intent of the Water Act, the Recommended Order is impermissible as a matter of law.

Further, in concluding that the Financial Issues must be decided in the instant transfer proceeding, the Recommended Order is contrary to public policy as it will significantly disincentivize future water and/or wastewater acquisitions in North Carolina. 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. *See Order Scheduling Technical Conference*, Docket No. W-100, Sub 67 at 1 (September 18, 2023) (reiterating the Commission’s 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”); see also *Order Determining Regulatory Treatment*, Docket Nos. W-354, Sub 133 and 134, at 7 (September 7, 1994) (“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.”). The Recommended Order completely fails to address this policy, much less the underlying rationale.

The Recommended Order, if adopted, will create a significant disincentive for future water and/or wastewater acquisitions in North Carolina. Specifically, as Red Bird witness Cox explained in his live testimony, prohibiting Red Bird from recovering its due diligence costs and an acquisition adjustment would result in “future investment in North Carolina [being] [] looked [at] more skeptically.” (Tr. vol. 2, 170-171). Certainly, discouraging future acquisitions of troubled and distressed water and/or wastewater systems by competent and adequately capitalized companies like Red Bird is against the public interest.

Moreover, the Recommended Order incorrectly interprets the “public interest” prong of the Water Act. In making its public interest determination, the Recommended Order states that “[w]hen there is uncontroverted evidence of the Company’s incurrence of costs, its intention to recover those costs, and the impact of that recovery on

ratepayers, the Commission should take into consideration the magnitude of the impact on customer rates to determine whether the ratepayers will be better or worse off after the transfer.” (Recommended Order at 17-18). The Recommended Order then concludes that the Commission “must” determine the rate base and that it should also consider the issues of acquisition adjustment expenses and due diligence expenses because they will impact the future rates of ratepayers. (*Id.*, 20). However, the Recommended Order’s analysis fails to recognize that there is not “uncontroverted” evidence of the final amounts of the Financial Issues.

As Red Bird has made clear throughout this proceeding, because the transaction has not yet closed, the full extent of the Financial Issues is unknown. In addition, determining the impact on future rates requires making assumptions relating to revenue, expenses, rate base, capital structure, rate of return, rate design, etc. (Tr. vol. 2, 284). The future amounts of these key elements of Red Bird’s revenue requirement and rates are currently unknown and unknowable, and as the Commission is well-aware, these types of issues are often heavily litigated in a rate case, and it at this juncture is impossible to know if the underlying assumptions are accurate, let alone “uncontroverted.” As such, the Commission cannot properly evaluate the “magnitude of the impact on customer rates” during the instant transfer proceeding when so many underlying elements remain speculative and unreliable.

Further, the Recommended Order errs in determining that deferring consideration of the Financial Issues to a future rate case is inappropriate because it would “unnecessarily complicate” any future rate case proceeding. (Recommended Order at 29). With respect to the inclusion of due diligence and transactional costs in rate base,



the Recommended Order states that it “is not appropriate” to defer consideration of these costs to a future rate case “especially when Red Bird will likely be seeking to establish uniform rates for multiple newly acquired small utilities.” (*Id.*, 27). To the contrary, the result of the Recommended Order – if accepted by the Commission – would be to unnecessarily complicate transfer proceedings in that buyers will be forced to present evidence typically presented in rate case proceedings. Because buyers neither own the systems subject to the transfer application, nor have access to that level of evidence, it is impossible to ground decisions on the Financial Issues upon all ultimately available evidence.

In this case, it is uncontroverted that certain types of information necessary to establish accurate evidence on the Financial Issues will not be available to Red Bird until post-closing. (Tr. vol. 2, 280). As witness Cox testified, Etowah is an unsophisticated “mom-and-pop” utility that does not have “existing site maps, line maps, . . . plant records,” or “the capital or the expertise to really upgrade or run [its] system.” (*Id.*, 57-58, 70). As an example, witness Beckemeier testified that “initial information . . . provided from [Etowah] led [Red Bird] to believe there were ten tracts of land” to be purchased when in reality there are only five. (Tr. vol. 3, 22). Indeed, only when the transaction closes and Red Bird assumes control of the Etowah System will it be able to fully assess and obtain the information necessary to resolve the Financial Issues. As such, the Recommended Order’s claim that deferring a ruling on the Financial Issues will “unnecessarily complicate” rate cases ignores evidence demonstrating that deferring a ruling on the Financial Issues merely ensures that decisions are based on a robust, complete record. Upholding this aspect of the Recommended Order would put Red Bird

and other similarly situated buyers of water and/or wastewater systems at a distinct disadvantage (particularly buyers of systems which may not have kept accurate or complete books and records) and would likely dissuade such buyers from moving forward with transactions in North Carolina.

The Recommended Order also errs in determining that Red Bird will not be harmed or prejudiced by the Commission ruling on the Financial Issues in this proceeding. Rather than engage with the evidence presented and Red Bird's argument that such determinations are more accurate and appropriate in a rate case proceeding, the Recommended Order summarily dismisses the issue by stating that if the Commission denied all due diligence costs and an acquisition adjustment, that Red Bird's investors would simply bear the loss. (Recommended Order at 19). Additionally, with respect to rate base, the Recommended Order claims that Red Bird was "aware" that the Commission's practice in North Carolina is to establish rate base in utility transfer proceedings. (*Id.*).

However, as explained above, recent changes to N.C.G.S. § 62-111 were enacted to expedite the transfer of water and wastewater public utilities. While the Commission's historic practice may have been to determine rate base in a transfer proceeding, the Water Act now prompts the Commission to defer a determination on the Financial Issues until a future rate case proceeding. The Recommended Order's blanket assertion that Red Bird's investors would simply bear the loss if the Commission denied all due diligence costs and an acquisition adjustment fails to make any inquiry into either: 1) the negative impacts of determining the Financial Issues in this transfer proceeding – namely, Red Bird's ability in a future rate case proceeding to demonstrate that it can provide a

significant public benefit before any rate increases are implemented, and 2) the benefits of deferring a determination on the Financial Issues until a future rate case proceeding. Accordingly, by ignoring evidence, the Recommended Order fails to engage in reasoned decision-making and is therefore arbitrary and capricious.

### **EXCEPTION 2**

Findings of Fact 15 and 21 and the underlying Evidence and Conclusions supporting those findings are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

#### **GROUNDS FOR EXCEPTION 2:**

The Recommended Order errs in establishing the amount of rate base as (\$282,207) because the Commission does not have all pertinent information needed to set rate base in this transfer proceeding. As Red Bird has emphasized repeatedly, the appropriate amount of rate base for the Etowah System cannot be known until the transaction has closed and Red Bird begins to operate the system. In rejecting this argument, the Recommended Order states that it was “not persuaded” that determining rate base in the instant transfer proceeding would be premature. (*Id.*, 19). Specifically, the Recommended Order states that Red Bird witness Thies calculated what he believed to be an “accurate” rate base figure<sup>1</sup> and that any change in rate base calculations once Red Bird owned the Etowah System would be “minimal.” (*Id.*). The Recommended Order

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<sup>1</sup> While Red Bird consistently maintained throughout the proceeding that the Financial Issues should be deferred to the first rate case following the closing, because Red Bird understood that the Public Staff was taking a contrary position, out of an abundance of caution, it elected to provide a calculation using the limited information available to the parties at the time. (Tr. vol. 2, 182).

determines that this evidence demonstrates that Red Bird had all necessary information to set rate base. (*Id.*).

The Recommended Order's limited analysis, however, sidesteps the actual issue (which is that Red Bird does not currently have *all* of the information required to finalize rate base), and instead summarily finds that an *estimated* rate base calculation, allegedly subject to only a “minimal” change once Red Bird takes possession of the Etowah System, is sufficient. (*Id.*). In making this determination, the Recommended Order fails to recognize witness Thies’ testimony highlighting inaccuracies and potential deficiencies in pre-closing documentation provided by sellers, which makes it difficult for buyers to establish and substantiate the rate base for systems prior to ownership.<sup>2</sup> (Tr. vol. 3, 32-34).

Moreover, while witness Thies testified that a *typical* range in percentage change of rate base was 5 to 10 percent, he also testified that he “wouldn’t venture to gamble on what the percentage would be [in this proceeding].” (*Id.*, 34). Therefore, rather than reach a case-specific factual determination, the Recommended Order makes a sweeping generalization that the rate base for the Etowah System will likely only be subject to a 5 to 10 percent change from what the Commission establishes in this proceeding. As a result, because the Recommended Order fails to meaningfully address Red Bird’s

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<sup>2</sup> In any event, the Recommended Order gives no explanation as to why it selected the Public Staff’s rate base calculation of *negative* \$282,207 as opposed to Red Bird’s *positive* rate base calculation of \$426,661. Red Bird witness Thies provided rebuttal testimony challenging the Public Staff’s rate base calculation and argued that the Public Staff omitted new taps from utility plant in service, which resulted in an artificially low rate base value. (Tr. vol. 2, 298-99, 261). Witness Thies also took issue with the Public Staff’s depreciation adjustments underlying its rate base figure. (*Id.*, 300). While Red Bird maintains that rate base should be determined in the context of the first rate case post-closing, the failure of the Recommended Order to weigh or engage at all with Red Bird’s evidence on this issue is yet another example of why the Recommended Order is flawed and should be set aside.

arguments with respect to the appropriate rate base for the Etowah System, the Recommended Order is arbitrary and capricious.

### **EXCEPTION 3**

Finding of Fact 16 and the underlying Evidence and Conclusions supporting this finding are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

#### **GROUNDS FOR EXCEPTION 3:**

The Recommended Order errs in determining that an acquisition adjustment to rate base is not appropriate under the circumstances and evidence presented in the current docket and that it should not be approved for ratemaking purposes. The Recommended Order's erroneous determination that an acquisition adjustment is not in the public interest fails to properly consider Red Bird's evidence demonstrating that approving the transaction benefits customers and that the purchase price Red Bird will pay for the Etowah System is reasonable. Specifically, as witness Cox testified, Etowah's customers will be better off if an acquisition adjustment is approved because Red Bird will 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. (Tr. vol. 2, 48). The Recommended Order makes no mention of these public benefits and instead contains a conclusory statement that Red Bird has 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. (Recommended Order at 22).

The Recommended Order finds that inclusion of an acquisition adjustment in rate base is not justified in part because Red Bird's "justification of the purchase price relie[d] on the incorrect assertion that the Etowah wastewater utility system is troubled or distressed." (*Id.*). The Recommended Order reasons that this reliance is "misplaced due to the absence of supporting evidence" that the Etowah System is troubled or distressed. (*Id.*). However, as discussed in greater detail below, the Recommended Order errs in determining that the Etowah System is not troubled or distressed and fails to properly consider evidence demonstrating that the purchase price was prudent. Specifically, the Recommended Order makes no mention of that fact that the purchase price was negotiated at arm's length between two totally unrelated parties and that the purchase price agreed to was "the lowest negotiated price [Red Bird] could get." (Tr. vol. 2, 48, 61-62). In fact, witness Cox explained at the hearing that it has been difficult for Red Bird to keep the seller engaged and the contract alive due to the time it has taken to approve the transfer application. (*Id.*, 72). Accordingly, the Recommended Order is arbitrary and capricious as it fails to meaningfully engage with this evidence.

Moreover, in evaluating whether Red Bird should be granted an acquisition adjustment, the Recommended Order improperly considers "the future rate impact of the acquisition adjustment." (Recommended Order at 22). However, as explained above, because Red Bird is not proposing to change the currently approved rates for the Etowah System, the future rate impacts of the proposed acquisition adjustment on Etowah's customers are speculative and unreliable. (Tr. vol. 2, 278-79). Further, Public Staff 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). As such, the Recommended Order improperly relies upon purely speculative evidence when ruling on whether an acquisition adjustment is appropriate.

#### **EXCEPTION 4**

Finding of Fact 20 and the underlying Evidence and Conclusions supporting this finding are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

#### **GROUNDS FOR EXCEPTION 4:**

The Recommended Order errs in determining that Red Bird is limited to recovering \$10,000 in due diligence and other transactional costs in this transfer proceeding, finding that it is not in the public interest to allocate all of the due diligence and transactional costs to ratepayers because “the benefits are shared by both the Company and ratepayers.” (Recommended Order at 27). Specifically, the Recommended Order finds that Red Bird’s due diligence and transactional costs benefitted Red Bird by allowing it to estimate the amount of capital required to operate and maintain the Etowah System, discover legal defects to the title, and understand the Etowah System’s operational issues. (*Id.*).

In so finding, the Recommended Order fails to recognize that these are costs a regulated utility is permitted to recover from ratepayers as a cost of doing business and fails to meaningfully address Red Bird’s testimony rebutting witness Franklin’s recommendation that due diligence and transactional costs be limited to \$10,000. Specifically, the Recommended Order fails to properly consider the rebuttal testimony of Red Bird witness Beckemeier that explains why limiting Red Bird’s recovery of due

diligence and transactional costs to \$10,000 is unreasonable. Witness Beckemeier testified that due diligence typically consists of the following: 1) an engineering review of the current operational integrity and deferred maintenance needs of the system; 2) a valuation of system assets; and 3) a determination of real property rights and easement rights. (Tr. vol. 2, 310). 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). 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).

Moreover, the Recommended Order ignores evidence presented at the evidentiary hearing regarding the quality and level of support underlying Red Bird’s due diligence expenses. Witness Cox testified during redirect at the evidentiary hearing that Red Bird was willing to provide the Public Staff with unredacted invoices for due diligence expenses. (*Id.*, 155-57). Witness Cox also explained that the allegedly “irrelevant” invoices – those related to another system – were in fact directly related to the Etowah proceeding. (*Id.*, 156-157). Thus, contrary to the Public Staff’s assertions otherwise, Red Bird presented evidence that the due diligence activities performed 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).



Rather than respond to witness Beckemeier’s testimony, the Recommended Order simply mentions – in one sentence – that witness Beckemeier “described the extensive due diligence and transactional work required to acquire the Etowah [S]ystem.” (*Id.*, 27). By failing to engage with or respond to Red Bird’s evidence concerning due diligence costs, the Recommended Order is arbitrary and capricious.

#### **EXCEPTION 5**

Finding of Fact 17 and the underlying Evidence and Conclusions supporting this finding are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

#### **GROUNDS FOR EXCEPTION 5:**

The Recommended Order errs in determining that Etowah is currently providing safe and reliable service to its customers. The evidence in this proceeding, including the direct testimony of Red Bird witness Cox, which the Recommended Order fails to consider in support of this finding, demonstrates that Etowah has a history of noncompliance resulting in the provision of unsafe and unreliable service. For instance, Etowah currently has two open notices of violation (NOVs), both of which stem from a January 9, 2023 sanitary system overflow (SSO) event. (Tr. vol. 2, 207).

The January SSO event, which inconceivably is not even mentioned in the Recommend Order, resulted in the release of approximately 600 gallons of sewage into the surrounding environment.<sup>3</sup> The Inspection Report, compiled by the NC DEQ and

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<sup>3</sup> Witness Cox explained at the evidentiary hearing that the North Carolina Department of Environmental Quality (NC DEQ) recorded 600 gallons of overflow sewage in a single day; therefore, over the course of the two-week overflow event, sewage overflow was actually much greater than 600 gallons. (Tr. vol. 2, 57).

described in Red Bird witness Cox's testimony, reported that the complainant witnessed the pump station "overflowing for two weeks" and that the emergency contact information was not current, providing no way for the overflow to be reported to Etowah. (*Id.*, 271). The deciding Commissioners state that they are satisfied with Etowah's response to the Inspection Report; however, the Recommended Order does not address the unsafe and unreliable nature of the service being providing that resulted in a two-week long SSO event and, being conservative, the release of over 600 gallons of untreated sewage into the surrounding environment. (*Id.*, 209; Recommended Order at 23).

In addition to the January SSO event, witness Cox's testimony details additional NOV's issued from 2017, including exceedances of fecal coliform in 2018, 2021, and 2023. (Tr. vol. 2, 270). The Recommended Order makes no mention of these events and the health risks associated with the release of sewage into the surrounding environment. Had the Recommended Order considered witness Cox's testimony and the Inspection Report issued by the NC DEQ, it would have reviewed testimony and evidence regarding the risks that such noncompliance poses to human and environmental health (*Id.*, 271). Instead, the Recommended Order ignores Red Bird's evidence and fails to engage in a meaningful discussion of Etowah's past and *currently open* NOV's.

Further, in addition to witness Cox's testimony and the NC DEQ report, the evidence presented in the McGill Report reflects that "four of the six stations do not meet the state minimum design criteria for sewer pump stations outlined in 15A NCAC 02T .0305." The Recommended Order indicates its agreement with the conclusions set forth in the McGill Report, (Recommended Order at 23), but it fails to rectify how the Etowah

System is in “good or average” condition while not meeting the state minimum design criteria.

Finally, and as described below, the Recommended Order also ignores evidence in the consumer statements of position reflecting dissatisfaction with the state of the Etowah System. Accordingly, the Recommended Order’s finding that Etowah is providing safe and reliable service to its customers is contradicted by evidence in the record and is therefore arbitrary and capricious.

### **EXCEPTION 6**

Finding of Fact 18 and the underlying Evidence and Conclusions supporting this finding are unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary and capricious; and an abuse of discretion.

#### **GROUNDS FOR EXCEPTION 6:**

The Recommended Order errs in determining that the Etowah System is not financially distressed. Etowah’s status as financially distressed is undisputed. The uncontested evidence in this proceeding conclusively establishes 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. (Tr. vol. 2, 158). The evidence and testimony demonstrate 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).

The Public Staff did not present any testimony or evidence contradicting Etowah’s status as financially distressed; there is no testimony whatsoever from Public Staff

disputing Etowah’s characterization as “unbankable,” nor is there any evidence disputing Etowah’s inability to access capital markets. However, Commissioners McKissick and Hughes inexplicably and summarily find that “based on the evidence in the record,” Etowah is not financially troubled. (Recommended Order at 25). The Recommended Order cites to no testimony or evidence but instead provides, without any evidentiary basis, that the lack of capital improvements to the Etowah System are “most likely” attributed to Etowah’s nearly 8-year effort to sell its system. (*Id.*). In other words, the Recommended Order manufactures an argument to justify its wholly unsupported conclusion that Etowah is not financially troubled on the basis that there is no competent or material evidence to demonstrate otherwise. Therefore, by disregarding substantial evidence that demonstrates that the Etowah System is financially distressed, and improperly giving weight to speculative and unsupported assertions, the Recommended Order is arbitrary and capricious.

It is also an error of law to determine that the Etowah System is not *operationally* troubled. The Recommended Order states that the record is “devoid of evidence” establishing that the Etowah System is operationally troubled. (*Id.*, 24). Specifically, the Recommended Order states that there is no evidence that the Etowah System has suffered from “various system deficiencies, ongoing environmental regulatory violations, and frequent customer complaints that typify operationally troubled systems either currently or in the recent past.” (*Id.*). In reaching this conclusion, the Recommended Order ignores the *two currently open* NOVs received by the Etowah System.

While the Recommended Order generically acknowledges there have been “recent operational incidents” at the Etowah System, the Recommended Order minimizes

the importance and severity of the NOVs by finding “persuasive” Public Staff witness Franklin’s testimony that “Etowah has demonstrated the willingness, ability, and means to address” these incidents. (*Id.*, 25). However, being willing and able to address a problem is different than actually taking action to correct a problem. Public Staff’s perception that Etowah is willing and able to address the outstanding NOVs does not in and of itself negate the Etowah System’s status as operationally troubled. The Recommended Order cannot be based on aspirational goals or characterizations. Therefore, by giving undue credit to Public Staff’s testimony that the Etowah System is not operationally troubled, the Recommended Order is arbitrary and capricious.

Additionally, as described above, the Recommended Order completely fails to address, much less evaluate, that the two currently open NOVs that resulted from a SSO event that occurred in January 2023 – a year ago – that caused the release of “human health-impacting ... pathogens” potentially affecting 20,000 residents downstream from the Etowah System. (Tr. vol. 2, 58). Inexplicably, the human health risk caused by the SSO event – which certainly qualifies as an “ongoing environmental regulatory violation” – is not mentioned in the Recommended Order.

The Recommended Order also incorrectly relies on Public Staff witness Franklin’s testimony that there were no recent customer complaints regarding the performance of the Etowah System. (Recommended Order at 23). 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 before the Commission, the Recommended Order fails to engage in even a cursory discussion of the consumers' concerns. In sum, the Recommended Order is arbitrary and capricious as it fails to address evidence demonstrating Etowah's status as operationally troubled.

### **CONCLUSION**

For the foregoing reasons, the Recommended Order is unlawful, unjust, unreasonable, and unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; arbitrary or capricious; and/or an abuse of discretion. The Recommended Order should therefore be set aside, and the Commission should issue a ruling consistent with Red Bird's positions as outlined herein and in Red Bird's Proposed Order. Red Bird further requests that the Commission schedule an oral argument on the Exceptions outlined herein.

Respectfully submitted this 22<sup>nd</sup> day of February, 2024.

**RED BIRD UTILITY OPERATING COMPANY, LLC**

/s/ Kiran Mehta

Kiran Mehta (NC Bar No. 11011)

/s/ Mindy McGrath

Mindy McGrath (NC Bar No. 35628)

/s/ Molly M. Jagannathan

Molly M. Jagannathan (NC Bar No. 36931)

Troutman Pepper Hamilton Sanders LLP

301 College Street, Suite 34

Charlotte, NC 28202

kiran.mehta@troutman.com

mindy.mcgrath@troutman.com

molly.jagannathan@troutman.com