

PLACE: Dobbs Building, Raleigh, North Carolina
DATE: Wednesday, October 4, 2023
TIME: 9:01 a.m. to 11:47 p.m.
DOCKET: W-1300, Sub 92
BEFORE: Commissioner Karen M. Kemerait
Commissioner Kimberly W. Duffley
Commissioner Floyd B. McKissick, Jr.

IN THE MATTER OF:

ORAL ARGUMENT

Blue Heron Asset Management, LLC, and
Liberty Senior Living, LLC,
Complainants

v.

Old North State Water Company, Inc.,
Defendant



A P P E A R A N C E S:

FOR BLUE HERON ASSET MANAGEMENT, LLC, AND

LIBERTY SENIOR LIVING, LLC:

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P R O C E E D I N G S

COMMISSIONER KEMERAIT: Good morning,
everyone. Let's come to order and go on the
record, please.

My name is Karen -- Commissioner --
excuse me. My name is Commissioner
Karen M. Kemerait, and with me this morning are
Commissioners Kimberly W. Duffley and
Floyd B. McKissick, Jr.

I now call for hearing, Docket Number
W-1300, Sub 92, which is a hearing to discuss the
matter of Blue Heron Asset Management, LLC, and
Liberty Senior Living, LLC, that I'll refer to
going forward as Claimants -- Complainants, against
Old North State Water Company, Incorporated, which
I'll refer to going forward as Old North State or
Respondent.

Going forward, as I mentioned, I will
refer to Blue Heron Asset Management, LLC as Blue
Heron and Liberty Senior Living, LLC as Liberty
Senior Living. And, as I mentioned, I will refer
to Blue Heron and Liberty Senior Living
collectively as Complainants and I will refer to
Old North State Water Company as Defendant or

1 Respondent going forward.

2 On May 26, 2023, the Complainants filed
3 a formal Complaint in this Docket against the
4 Respondent.

5 On May 31, 2023, the Commission issued
6 an Order serving the Complaint upon the Defendant.

7 On June 12, 2023, the Defendant filed a
8 Motion to Dismiss the Complaint and answering the
9 allegations.

10 On July 10, 2023, the Commission issued
11 an Order Serving the Answer and Motion to Dismiss.

12 On July 21, 2023, the Complainants filed
13 the Response to Defendant's Answer and a Motion for
14 Judgment on the Pleadings.

15 On September 6, 2023, the Commission
16 issued an Order Scheduling Briefs and the Oral
17 Argument that is being held this morning.

18 On September 13, 2023, the parties filed
19 Briefs in this proceeding.

20 On September 27, 2023, Complainants
21 filed Response Briefs in Opposition to Respondent's
22 Motion to Dismiss.

23 And I now call upon counsel for the
24 parties to announce their appearances for the

1 record, beginning with counsel for the
2 Complainants.

3 MR. SCHAUER: Good morning.
4 Craig Schauer on behalf of the Complainants, Blue
5 Heron and Liberty Senior.

6 COMMISSIONER KEMERAIT: Good morning,
7 Mr. Schauer.

8 MR. SCHAUER: Good morning.

9 MR. FINLEY: May it please the
10 Commission, my name is Edward Finley appearing on
11 behalf of the Respondent, Old North State Water
12 Company, Inc.

13 COMMISSIONER KEMERAIT: Good morning,
14 Mr. Finley.

15 MR. FINLEY: Good morning.

16 COMMISSIONER KEMERAIT: And are there
17 any preliminary matters that need to be addressed
18 prior to beginning the oral argument?

19 MR. FINLEY: Not from this end.

20 MR. SCHAUER: I don't believe so.

21 COMMISSIONER KEMERAIT: Okay. And so
22 let me -- I'll briefly describe how we're gonna be
23 handling the oral argument.

24 The order for the Oral Argument will be

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1 the Complainants will present their argument first
2 and then argument for -- from the Respondent.

3 And then I will allow the Complainants'
4 attorney a very short period of time for rebuttal
5 oral argument if you choose to provide rebuttal
6 argument.

7 And I also wanted to --

8 MR. FINLEY: Madam Chairman, can I
9 address that?

10 COMMISSIONER KEMERAIT: Yes, Mr. Finley.

11 MR. FINLEY: Our motion is prior to the
12 Complainants' motion -- judgment on the pleadings.
13 And so I think we have the right to go first, if
14 you don't mind.

15 COMMISSIONER KEMERAIT: Would you like
16 to be heard, Mr. Schauer?

17 MR. SCHAUER: It makes no difference to
18 the Complainants about the order of arguments.
19 Whatever pleases the Commission and works with Old
20 North State is fine with us.

21 COMMISSIONER KEMERAIT: Okay.
22 Mr. Finley, we'll allow you to go first.

23 And then, as I mentioned when I was
24 talking about rebuttal argument, I will allow

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1 attorneys for both parties to have a very short
2 period of time for rebuttal argument if either of
3 you choose to do so. Okay.

4 And I also wanted to let both attorneys
5 know that the Commission has read all of the
6 pleadings and the briefs very carefully, so we are
7 very familiar with -- with the -- with the
8 information that's been presented and the
9 arguments. So with your oral arguments, you can be
10 very succinct and focus just on the very contested
11 issues.

12 So with that, Mr. Finley, you may begin.

13 MR. FINLEY: Thank you, Madam Chair.

14 This is "The Case of the 27 Days." A
15 subtitle might be "The Case of 17 Months."

16 The Complainant Blue Heron, with the
17 burden of proof, struggles to persuade the
18 Commission that 27 days before April 19, 2021, when
19 the Commission increased connection fees in the
20 Sub 71 Docket for the Briar Chapel subdivision,
21 Blue Heron slipped in under the wire and pinned
22 down the right to pay connection fees based on 2014
23 and 2015 documents.

24 Blue Heron, as it turned out, did not

1 need an interconnection for 17 months at the end of
2 August 2022.

3 The stated justification by the
4 Commission for increasing the connection fees on
5 April 19, 2021, was to recover costs Old North
6 State would incur caused -- Old North State would
7 incur caused by the builders, such as Blue Heron,
8 to increase capacity in the sewage treatment plant
9 and facilities, such as the lift station and force
10 main, needed to serve Blue Heron.

11 Let me talk a little bit about the
12 context of this dispute.

13 Blue Heron engages Old North -- accuses
14 Old North State of engaging in a scam. A scam. A
15 better description is that Blue Heron is engaged in
16 a scramble.

17 We ask the Commission to appreciate
18 where the financial implications of its decision in
19 this case lie.

20 If you agree with Blue Heron, Blue Heron
21 saves money it did not anticipate spending. If you
22 agree with Old North State, the using and consuming
23 public of Old North State's services in the Briar
24 Chapel subdivision save financially in the rate

1 that they pay.

2 So from a purely financial perspective,
3 Old North State's position is detrimental to its
4 financial interests.

5 Old North State seeks to obtain
6 contributions in native construction to reduce its
7 rate base and, by so doing, its ability to earn on
8 its investment in the Briar Chapel subdivision.

9 Seldom are the financial interests of
10 the utility and the using and consuming public and
11 the body of its -- the general body of its
12 ratepayers aligned, such as the dispute in this
13 case is. There is -- this is one of those rare
14 cases where the alignment takes place.

15 So there is no scam. There is no
16 incentive for Old North State to scam Blue Heron.
17 There's no financial opportunity to do that.

18 Now, Blue Heron -- these are the
19 allegations in the Complaint.

20 Blue Heron bases its case on its
21 allegation that it entered into an express binding
22 contract with Old North State on December -- on
23 March 23, 2021, to obtain the right of
24 interconnection to interconnect the discharge pipes

1 from its multiunit apartment complex to the
2 collection system of Old North State for a payment
3 of \$69,000.

4 The \$69,000, under the express binding
5 contract, is based on a connection fee of \$1,500
6 per residential equivalent unit, and the number of
7 residential equivalent units is 46, to get to
8 \$69,000.

9 A contract is an agreement between two
10 or more parties. There must be a meeting of the
11 mind. What is the justification for the express
12 binding contract upon which Blue Heron bases its
13 case?

14 The alleged contract must be final and
15 binding before April 19, 2021, for Blue Heron to
16 prevail in this case.

17 There is the allegation that Blue Heron
18 submitted to Old North State an application on
19 March 23, 2021.

20 Here it is. Two pages. You've got it
21 in the file there. And on the second page here,
22 about the middle, there are lines for tap fee,
23 application fee, meter fee.

24 Those lines are blank. There's nothing

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1 filled in there. There's no number for connection
2 fee, application fee, meter fee, or total charges.

3 Then there's the notification of Old
4 North State provided to Chatham County, received at
5 some unspecified time, informing Chatham County of
6 Old North State's willingness to provide sewer
7 services to the Blue Heron multiunit apartment
8 complex.

9 Here it is. It's one page. All of it
10 is filled in by hand. There's no number in here
11 for \$69,000 for 46 RUs or for anything else as
12 having to do with the price to be paid for this
13 service.

14 Now, the -- let's see here. Let me give
15 you a little spoiler alert. What Blue Heron says
16 about this document in its Complaint is a little
17 bit different than what they said in their reply --

18 COMMISSIONER KEMERAIT: On which
19 document are you talking about? The application?

20 MR. FINLEY: No. The intention to
21 provide sewer service.

22 COMMISSIONER KEMERAIT: Thank you.

23 MR. FINLEY: I'll come back to that
24 later.

1 Old North State agreed to provide sewer
2 service to Blue Heron. Old North State complied
3 with that commitment.

4 Now, it was the sum and substance of the
5 express binding agreement between the two parties
6 before the Commission's Order on April 19, 2023, in
7 Sub 71.

8 Old North State agreed for Blue Heron to
9 interconnect, as a favor to Blue Heron, so that the
10 requirements of Chatham County could be met and
11 Blue Heron could proceed with its project.

12 Interconnection took place on August --
13 August 31, 2022, 17 months after all this. That
14 was the date the service was provided pursuant to
15 G.S. § 62-139.

16 There could be no binding express
17 contract to allow interconnection at \$69,000 in a
18 contract that omits the essential terms, the
19 \$69,000.

20 In its Complaint, Blue Heron does not
21 assert that it is entitled to interconnection at
22 \$69,000 pursuant to a tariff on March 23, 2021,
23 that allows it to make interconnection on that date
24 at that price. The Complaint is contract,

1 contract, contract.

2 Now, if you look at their reply filed
3 last week, it's a little into tariff, tariff,
4 tariff.

5 What's the difference? The difference
6 is the Brief that Old North State filed pointed out
7 to Blue Heron that a contract not approved by the
8 Commission, no matter when it is entered into and
9 no matter who the parties are, if it is between the
10 public utility and its using and consuming public,
11 it's not worth anything until it is approved,
12 allowed by this Commission. So that's why there's
13 a change in the position taken by Blue Heron.

14 So what does Blue Heron say to address
15 the significant omission of the \$69,000?

16 Blue Heron points to an Order issued by
17 the Commission in Docket Number W-1300, Sub 9, in
18 2015.

19 Here it is. Here's the order. Little
20 short order.

21 In that docket, the Commission approved
22 the transfer of the certificate of public
23 convenience and necessity from Briar Chapel
24 Utilities to Old North State.

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1 The Order stated that there would be no
2 charge -- no change in rates of any kind. It
3 reissued the tariff for Old North State, the same
4 tariff it had issued for Briar Chapel Utilities in
5 2009.

6 No change with respect to connection
7 fees. The tariff said \$1,500 per REU. And the
8 tariff defines "REU" as one residential equivalent
9 unit. That's what the tariff says.

10 The tariff says nothing about a billing
11 determinant for multiunit apartment complexes.
12 There is nothing in the Order that supports Blue
13 Heron's claim that the billing detriment for a
14 multiunit apartment complex is 46 residential
15 equivalent units.

16 In its Complaint, Blue Heron does not
17 base the claim on the tariff approved in the Sub 9
18 Order. Blue Heron focuses on the October 2014
19 Asset Purchase Agreement between NMP, the developer
20 of this system, Newland, and its wholly owned
21 subsidiary Briar Chapel Utilities, and Old North
22 State.

23 So what does the Sub 9 Order say about
24 the Asset Purchase Agreement? Let me -- let me

1 read it to you. It's brief.

2 Finding of Fact 8, page 3, of this
3 Order:

4 "Briar Chapel Utilities, NMP, and Old North
5 State entered into an asset purchase
6 agreement on October 31, 2014. Briar Chapel
7 Utilities is a wholly owned subsidiary of NMP
8 Briar Chapel, the developer of the Briar
9 Chapel subdivision."

10 And this is the pertinent phrase in this
11 next sentence:

12 "The purchase price. The purchase price for
13 the Briar Chapel wastewater utility system
14 under the APA is \$1,500 per residential
15 equivalent unit for each new connection and
16 the future expansion of the existing
17 250,000-gallon-per-day wastewater treatment
18 plant. Old North State will pay the
19 collected connection fees to Briar Chapel
20 Utilities on a quarterly basis."

21 And that's important, too. Those
22 connection -- collection -- connection fees that
23 are collected are turned back to the subsidiary of
24 the owner, NMP.

1 This Order does not incorporate the
2 October 2014 Asset Purchase Agreement into the
3 terms by reference. The Asset Purchase Agreement,
4 not the Order or the tariff, does contain
5 provisions that allow the parties to that agreement
6 to calculate the billing determinants for
7 non-single-family residential units.

8 Blue Heron is not a party to that asset
9 purchase agreement under the provisions of the
10 Asset Purchase Agreement to which Blue Heron
11 points.

12 The billing determinants for the
13 commercial buildings are based on meter size. And
14 they put a lot of stock on that. That is how Blue
15 Heron calculates the 46 REUs. No Commission Order
16 addresses or allows that.

17 What is significant about the Sub 9
18 Order is that the connection fees Old North State
19 is to collect at the rate of \$1,500 per residential
20 equivalent unit are to be paid to Briar Chapel
21 Utility and then on to NMP, which, again, is the
22 wholly owned owner of Briar Chapel Utilities.

23 NMP paid for the sewer infrastructure in
24 the Briar Chapel subdivision. NMP contributed the

1 infrastructure to the Old North -- to Old North
2 State at a cost of \$0.0, decreed on paragraph 5 of
3 this Sub 9 Order: "The rate base at the time of
4 closing is \$0.0."

5 This is a crucial distinguishing factor
6 that Blue Heron fails to appropriately acknowledge
7 in this dispute.

8 So \$1,500 connection fee and the
9 building determinants addressed in the 2014 Asset
10 Purchase Agreement constituted the mechanism
11 through which NMP would be reimbursed for a part of
12 the money it invested in the sewer system that it
13 conveyed to Old North State at zero cost.

14 The mechanism has nothing to do with the
15 connection fees a subsequent builder, like Blue
16 Heron and the Briar Chapel service area, would pay
17 to Old North State.

18 And we cited to the Commission in our
19 Brief the Sub 118 Order back in the 1990s having to
20 deal with Carolina Water Service.

21 To put all this in context, it was
22 important and necessary that the parties to the
23 Sub 9 Docket submit the Asset Purchase Agreement to
24 the Commission for its consideration and oversight,

1 but the level of regulation the Commission provided
2 was limited.

3 The level of regulation was in full
4 accord with the provisions cited by Old North State
5 in its Brief on pages 26 and 29 from the Docket
6 Number 354, Sub 118 Order.

7 So let me just read to you a couple of
8 sentences out of that:

9 "The varying competitive market forces
10 dictate what compensation the seller requires
11 for the facilities conveyed in an arms-length
12 transaction to CWS and the price CWS is
13 willing to pay for those facilities. The
14 sales price for the systems are not regulated
15 per se, for there is no tariff or Commission
16 rule controlling the price of the utilities
17 CWS acquires. However, regulation does exist
18 in the form of oversight in certificate of
19 public convenience and necessity proceedings
20 or subsequent general rate cases."

21 So Blue Heron has no right, under the
22 terms of the Asset Purchase Agreement or under any
23 other equitable considerations, to take advantage
24 of the 2014 Asset Purchase Agreement.

1 Blue Heron finds itself in a situation
2 also addressed back in the 1990s in the W-354,
3 Sub 118 case.

4 I'll read another excerpt from that:

5 "Although CWS relies primarily on its
6 contract with the seller" -- with the
7 seller -- "to determine the connection fees
8 charged within the service area, occasions
9 arise where the connections are made that are
10 not covered by any contract.

11 "For example, the developer may complete the
12 sales of homes within the subdivision and
13 leave a number of lots without new homes.
14 Subsequently, someone else will buy the lots
15 and construct homes in situations not covered
16 under the contract with the original
17 developer."

18 And this is another important sentence:

19 "In other situations," like we have here, "a
20 portion of the subdivision will be sold by
21 the original developer to a third party
22 before homes are constructed. CWS may have
23 no contract with the subsequent developer for
24 new -- for the new section. Without a

1 provision of the Company's tariff authorizing
2 it to assess connection fees in those
3 situations, CWS would have difficulty
4 collecting any connection fees at all."

5 Now, the last thing the Commission
6 wants, in my view, is to deprive or constrain the
7 wastewater utility from collecting the appropriate
8 collection fees for builders and developers.

9 So let's talk about the next pertinent
10 document here, and that's the Commission's Sub 71
11 Order.

12 The situation Old North State found
13 itself in in 2021 is the same that is described in
14 that Sub 118 Order in the 1990s. The Asset
15 Purchase Agreement between NMP and Old North State
16 did not address property with a subdivision no
17 longer developed by NMP.

18 Old North State needed the tariff for
19 which it sought and obtained approval in the Sub 71
20 Docket.

21 In that Docket, the tariff approved
22 dictates the terms under which the Blue Heron must
23 receive connection services that took place in
24 August 2022, 17 months later. The fee is \$4,000,

1 not \$1,500.

2 Old North State must expand. The sewage
3 treatment plant must construct a lift station. It
4 must construct a force main to be able to serve
5 Blue Heron.

6 The connection fees that Old North State
7 will in 2021 and did subsequently charge Blue Heron
8 in 2021, when Blue Heron was in a position to
9 connect, was retained -- is being retained by Old
10 North State. It will not be passed through to NMP.
11 It will be retained.

12 COMMISSIONER KEMERAIT: And, Mr. Finley,
13 just for clarification about that, under the Sub 9
14 Order, it does refer to the connection fees being
15 transferred as part of the purchase price to NMP
16 Briar Chapel.

17 Can -- when did that situation change so
18 that Old North State would then be retaining the
19 collected connection fees and not transmitting them
20 to NMP Briar Chapel?

21 MR. FINLEY: When Old North State began
22 to provide services for other builders, such as Old
23 North -- such as Blue Heron and Liberty Senior,
24 that was not being developed anymore by NMP. So

1 the agreement between NMP and Old North State
2 ceased to exist at that time for -- at least for
3 Blue Heron to pay those fees back to NMP.

4 COMMISSIONER KEMERAIT: And none of the
5 Commission orders address, as far as I can tell,
6 that change in how the connection fees -- to
7 which -- to which entity the connection fees would
8 be paid; is that correct?

9 MR. FINLEY: Almost. What you say and
10 what the Commission says in Sub 71, it says:

11 "The primary reason for the increased
12 wastewater connection fees is to aid recovery
13 of the cost of facility expansion and to
14 provide services to the new development."

15 And so you can't do that if you're gonna
16 turn that right around and give it to somebody
17 else.

18 COMMISSIONER KEMERAIT: Okay.

19 And just for clarification, we are gonna
20 be reserving our questions for the end of the oral
21 argument. But I did appreciate the clarification
22 on that point.

23 MR. FINLEY: Well, then, interrupt me at
24 any time.

1 And unlike what happened in Sub 71, what
2 is referred back -- passed through to NMP will
3 off- -- let's see. Where am I?

4 What is -- what is collected now will
5 offset the cost Old North State must incur to build
6 the infrastructure that will be used to serve Blue
7 Heron, as I said a moment ago. And Blue Heron was
8 the cost-causer of the investment to serve it, so
9 they ought to pay it.

10 Not only are the terms in the alleged
11 March 23, 2001 -- 2021 contract allowing Blue Heron
12 to connect at \$69,000 are not set forth therein,
13 but the alleged contract was never submitted to nor
14 approved by the Commission.

15 And again, you can have the most
16 beautiful contract in the world between a public
17 utility and the using and consuming public that
18 pays fees to the public utility and has service
19 from the public utility, but unless it is filed
20 with, allowed to go into effect by, or approved by
21 the Commission, that's a different type of contract
22 than exists in other contexts.

23 Blue Heron alleges in its Complaint not
24 that it is entitled to service under the tariff.

1 Blue Heron's allegation is that it is entitled to
2 be served under the express binding contract
3 between Blue Heron and Old North State. The
4 allegation depends on the 2014 Asset Purchase
5 Agreement.

6 So the fundamental addition --
7 additional omission to the Commission's approval
8 with respect to the alleged binding express
9 contract in the Order from the Commission approving
10 the contract is that the Commission did not approve
11 it. So, in truth and in fact, that ends the story.

12 The interconnection took place on
13 August 2022. That is the date of the
14 interconnection service for which Blue Heron was
15 the recipient, and not March 23, 2021.

16 April 19, 2021, the Commission, in the
17 Docket W-1300, Sub 71, had approved the connection
18 fee of \$4,000 per REU. And this is that Order
19 right here dated March 19, 2021.

20 It does not say -- what does it say
21 about the \$4,000 connection fee? "The primary
22 reason for the" -- I read it a moment ago.

23 "The primary reason for the increased
24 wastewater collection fee is to aid recovery

1 of the cost of the facility expansion to
2 provide service for new development."

3 Now, Old North State makes a -- is
4 confronted with a sales argument by Blue Heron in
5 another theory.

6 In my opinion, that's a recognition
7 [sic] by Blue Heron that its claim is not binding
8 with the express contract, if you want to know the
9 truth about it.

10 Blue Heron recast its claim into one of
11 a purchase of interconnection on March 23, 2021, at
12 \$69,000.

13 Blue Heron apparently believes that
14 sophisticated developers can obtain connection
15 service under the layaway plan. Even when folks
16 reserve Christmas presents from merchants on July
17 on the layaway plan, they don't get it for nothing.
18 They've got to pay a fee for it.

19 Blue Heron allegedly bought the
20 connection services on the layaway plan on
21 March 23, 2021, that it was unable to claim or to
22 receive until 17 months later on August 31, 2022.

23 Not only did they not pay for the
24 alleged \$69,000, they didn't even pay the

1 application fee.

2 Of course, if you read their Brief, they
3 spent several paragraphs talking about the
4 application fee when, apparently, according to the
5 Reply, they actually meant the connection fee. I
6 guess they didn't know the difference until we
7 pointed that out to them.

8 Just as there was no binding express
9 contract on March 23, 2021, there was sale no sale
10 or purchase, either.

11 For there to be a legitimate purchase,
12 there must be approval by this Commission and the
13 consummation of the purchase on March 23 --
14 March 23, 2021. Neither existed then.

15 Blue Heron knew that it had no binding
16 commitment to receive an interconnection at \$69,000
17 prior to August 2022.

18 In the file, there is an email of
19 March 2, 2022, by Mr. Kevin Wade of Blue Heron.
20 Here's what he said:

21 "We'd like to get the connection fee settled
22 but need confirmation the sewer is available
23 prior to making any payment."

24 They knew they had no contract before

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1 this Order came out in Sub 71.

2 Now, let me address -- switch gears a
3 little bit.

4 COMMISSIONER KEMERAIT: Mr. Finley,
5 before you switch gears, I did say I was gonna
6 reserve questions, but there's two that --

7 MR. FINLEY: Okay.

8 COMMISSIONER KEMERAIT: -- that I would
9 like clarification about.

10 You've said that there was no meeting of
11 the minds between the parties on the essential
12 terms of what the agreement provide -- to provide
13 sewer service would be. And you said that there's
14 no meeting of the minds on March the 23rd of 2021.

15 Was there ever a meeting of the minds?
16 And what is Old North State's position about the
17 date that that meeting of mind about the amount
18 that would be charged for connection fees? What --
19 when was the meeting of the minds, or was there
20 ever a meeting of the minds?

21 MR. FINLEY: There has been no meeting
22 of the minds as to the interconnection fee between
23 the parties. One party says \$69,000; the other one
24 says 1,000,080 plus some dollars.

1 COMMISSIONER KEMERAIT: So your position
2 is is that there has never been a contract or
3 agreement between the parties about the amount of
4 the connection fees.

5 MR. FINLEY: That's right. And it's
6 gonna be up to the Commission to ultimately say.
7 But you can't have an agreement such as this having
8 to do with connection fees until the Commission
9 approves it.

10 COMMISSIONER KEMERAIT: Okay.

11 MR. FINLEY: Now, there has been an
12 agreement from the very start that Old North State
13 would interconnect Blue Heron. That was the
14 agreement before the Sub 71 Order came out. And
15 they've got to fit in that window in order to be
16 able to take advantage of these old connection
17 fees, the \$1,500.

18 COMMISSIONER KEMERAIT: Okay. And then
19 a related question. You've mentioned a couple of
20 times that the Commission has to approve the
21 agreement for connection fees and what the amount
22 is.

23 Is the Commission required to approve
24 connection fee agreements if they're based upon the

1 established tariff?

2 MR. FINLEY: Well, you have a -- you can
3 have an established tariff that it says -- and
4 there are established tariffs. And they say
5 connection fee of \$1,500, a connection fee of
6 \$4,000 per REU. And both of these tariffs in Sub 9
7 and Sub 71 say an REU equals 1 residential
8 equivalent unit. So, yes, you've approved it.

9 But when you get into multimeter
10 residential and commercial buildings, then there's
11 a need to interpret what that -- what 1 REU --
12 1 REU means in order to get the -- in order to get
13 the fee.

14 COMMISSIONER KEMERAIT: So your argument
15 is that, because there's some question about the
16 definition of "REU," the Commission needed to
17 review and approve the connection fee agreement?

18 Is that -- is that -- the reason why I'm
19 asking is because my understanding is is that many
20 utilities do not submit their connection fee
21 agreements or their applications to the Commission
22 for approval. It's just a routine matter that --
23 that the applications are received and processed
24 and then connection occurs.

1 Or is that incorrect? Is your position
2 that the Commission needs to approve every
3 application for a connection fee?

4 MR. FINLEY: The application to charge a
5 rate, any rate, has got to be at least submitted to
6 the Commission.

7 Now, there are situations where just the
8 submission of an application and allowed to go into
9 effect is an approval. Other situations is you've
10 got to drill down, and if there's differences of
11 opinion, you've got to approve it.

12 But you can't have agreements out here
13 between a public utility and its using and
14 consuming public that has any effect whatsoever
15 unless it is either filed with and allowed to go
16 into effect by the Commission or approved by the
17 Commission.

18 Now, the level of -- of -- the level of
19 approval differs from case to case, yes.
20 Certainly, that's the case. But it can't be just
21 out here in ether space.

22 COMMISSIONER KEMERAIT: And does Old
23 North State -- does it file their application?

24 So for other builders that are seeking

1 to receive wastewater treatment for their new
2 developments, does Old North State file their
3 applications or their agreements with the
4 Commission for connection fees for new builders?

5 MR. FINLEY: These are the only ones I
6 know about.

7 COMMISSIONER KEMERAIT: Okay. Okay.

8 MR. FINLEY: But they -- again, no
9 matter who files it, unless it is filed with,
10 allowed to go into effect, or approved by the
11 Commission, then it is subject to not being
12 enforced.

13 COMMISSIONER KEMERAIT: Okay. You may
14 proceed. I interrupted you during your argument.

15 MR. FINLEY: No, no. That's fine.

16 But I have recited to you in the
17 foregoing recitation what the Commission needs to
18 know to resolve this Complaint document, in my
19 opinion.

20 However, the Complaint moves beyond its
21 allegations of an enforceable, binding express
22 contract entered into on March 23, 2021, or a sale
23 of services on that date, into some rather bizarre
24 allegations accusing Old North State of all sorts

1 of misdeeds.

2 Blue Heron alleges willful deceptive
3 trade practices. Bait and switch. Scheming.
4 Deliberate scheme tactics. Misconduct.
5 Concealment of material facts.

6 Purposefully withholding information.
7 Intentionally falling complaints. Complaints
8 attempt. Violations of statutes. Violations of
9 rules. Conduct deserving punishment through
10 assessment of penalties.

11 Blue Heron asked for a double refund of
12 all overcharges and penalties of \$10 per day since
13 February 28, 2023.

14 To me, that's spaghetti, ravioli,
15 rigotini [sic], macaroni, fettuccine. You throw it
16 up against the wall and -- that's what that is.

17 Deceptive trade practices? You know,
18 you've got a nice logo behind you there. I believe
19 it says "North Carolina Utilities Commission." It
20 doesn't say "Federal Trade Commission."

21 The Wake County Superior Court is
22 located up on Fayetteville Street and the Chatham
23 County Superior Court is in Pittsboro.

24 The Blue Heron proceeds as though the

1 Commissioners are gullible Superior Court jurors
2 easily swayed by name-calling.

3 Quite to the contrary. You are the
4 experts in resolving disputes under Chapter 62.

5 All of Blue Heron's platitudes and
6 bromides extracted from cases litigated in the
7 Superior Court are of almost no use in resolving
8 the dispute here because we're talking about
9 Chapter 62.

10 The gist of these majority of
11 allegations is that Blue Heron was deceived into
12 submitting its application on March 23, 2021,
13 without a commitment on the part of the Old North
14 State to allow Blue Heron to pay the rate in the
15 2014 Asset Purchase Agreement to which Blue Heron
16 was not a party nor an intended recipient.

17 Instead, according to the allegation,
18 Blue Heron -- Old North State coerced Blue Heron
19 into submitting its application on that date when
20 Old North State always intended to charge Blue
21 Heron the rate it had requested in the -- 15 days
22 earlier in Sub 71.

23 What a crime that was. What a crime
24 that was. That's what they're being accused of,

1 all this stuff.

2 Well, that -- that assertion makes
3 absolutely no sense. Think about it.

4 Blue Heron's main assertion is that it
5 had a binding express contract on March 23, 2021,
6 that allowed it to interconnect at \$69,000.

7 If that contract is valid, if it had a
8 binding agreement on March 23, 2021, then nothing
9 Old North State could have done with respect to
10 representations it made or failed to make to Blue
11 Heron that would have negated the commitment set
12 forth in the alleged binding express contract.

13 If the bait in the bait and switch, the
14 enticement, was to trick Blue Heron into submitting
15 an application before the rate change, how is Old
16 North State to benefit from that? The connection
17 fees reduce rate base.

18 So let's talk a little bit about
19 Rule R10-17. Blue Heron makes a big issue out of
20 that.

21 Blue Heron claims that Old North State
22 violated Commission Rule R10-17. Under this
23 allegation, Old North State accepted the Blue Heron
24 application without representing to Blue Heron what

1 the rate of interconnection would be.

2 Again, if Blue Heron had a binding
3 express contract or a consummated sale at the time
4 of the submission of the application on
5 March 23, 2021, any omission Old North State might
6 have made under the Commission's rule would have
7 been completely immaterial because they -- they
8 claim they knew what the fee was. They could have
9 paid it any time they wanted to. Old North State
10 told Blue Heron it would send an invoice later.

11 COMMISSIONER KEMERAIT: Mr. Finley, was
12 there any discussion between Old North State and
13 Blue Heron about what connection fee was going to
14 be charged for their development?

15 MR. FINLEY: The record is devoid of
16 that. At this point, I know of -- I know of
17 nothing like that.

18 COMMISSIONER KEMERAIT: Okay. Thank
19 you.

20 MR. FINLEY: Now, an application had
21 been filed with the Commission. People within the
22 Briar Chapel subdivision knew about it, knew what
23 was being requested. The customers chimed in on
24 it. But if there was discussion between the

1 parties as to what the rate would be, it's not in
2 the record at this point.

3 Later, when the invoice was to be sent
4 was dictated by the anticipated Commission Order in
5 response to the pending request to increase rates
6 to recover costs to serve Blue Heron.

7 If Blue Heron needed an invoice for its
8 alleged contract to be enforceable or its purchase
9 to be consummated, then Blue Heron had no binding
10 express contract or consummated sale on
11 March 23, 2021.

12 All these allegations just run into each
13 other in conflict with each other. They make no
14 sense.

15 Let me talk a little bit about
16 contributions in aid of construction. That is the
17 concept that underlies what is going on here:
18 contributions in aid of construction.

19 Now, I'm going to regress a minute here.

20 Since returning to the private practice
21 of law in 2019 without the benefit of skilled
22 executive assistance that I could rely upon before,
23 I had to develop some limited proficiency in
24 operating the computer and the word processor. It

1 wasn't easy.

2 One of the features is a little
3 magnifying glass up in the top right-hand corner.
4 One can go to that space, and you're working on a
5 document, you know, and you print in the name and
6 put in the words, and they will tell you within the
7 document where you can find referent to that.

8 Contribution in aid of construction.
9 Right.

10 Well, what we were served with by Blue
11 Heron was PDF documents. I'm learning about
12 there's a difference between Word documents and PDF
13 documents. Well, you can't look for a PDF document
14 without the little magnifying glass.

15 So I had to go back and look through all
16 these filings that Blue Heron has made: their
17 letters, their Complaint, their Brief, their Reply,
18 their Initial Brief. And I was looking for
19 "contributions in aid of construction."

20 To me, that's the underlying concept
21 that needs to be identified here. I couldn't find
22 it anywhere.

23 So -- but it did -- it has come up since
24 Old North State filed its Brief. And in the Reply

1 that was filed last week, for the first time Blue
2 Heron starts to address contributions in aid of
3 construction.

4 There were plenty of references in all
5 these documents to scheme and tactics and foisting
6 on Blue Heron and accusatory adjectives and
7 adverbs, but I couldn't find "contributions in aid
8 of construction" before that. Not until last week.

9 All those -- in the discussion last
10 week, there was discussion of who pays the tax
11 gross-up due to the change in the tax laws, along
12 with some other word salad addressing contributions
13 in aid of construction. And it has nothing to do
14 with this case.

15 The scheme and tactic that Old North
16 State had relied upon in assessing Blue Heron
17 \$4,000 per connection based on the demand of Blue
18 Heron is going to place on the system.

19 The purpose is to obtain funds that will
20 reimburse Newland -- in contradiction to the funds
21 that is to reimburse Newland, these are
22 contributions -- these are real contributions in
23 aid of construction that Old North State keeps and
24 it reduces the rate base.

1 They are contributions of funding by a
2 party other than the investor owner. They are used
3 for the construction of public utility
4 infrastructure. The term means exactly what it
5 said.

6 Had Old North State not formulated the
7 mechanism in this fashion, the costs would have
8 been borne by the consumers of its sewer utility
9 services.

10 Funny. Blue Heron never acknowledges
11 the detrimental impact of that. Blue Heron even
12 suggests in their reply that Old North State should
13 remit part of the \$4,000 to Newland and not reduce
14 the rate base. All Blue Heron is concerned about
15 is Blue Heron's payments.

16 So I ask you: Who is the proponent of a
17 scheme here? Who is it who is seeking to pay a fee
18 for services for interconnection that took place on
19 August 2022 that is less than the approved by the
20 Commission is ordered in place on that date? I ask
21 you that.

22 And I challenge Blue Heron to explain
23 how Old North State was the beneficiary of Blue
24 Heron's alleged scheme. A beneficiary of the

1 collection of contributions in the aid of
2 construction to offset costs caused by Blue Heron
3 is the Briar Chapel using and consuming public.

4 If you don't believe me, look at what
5 the residential Briar Chapel customers told you in
6 their submission to the Commission.

7 See the March 19, 2021, letter in your
8 file from Liz Rolison of StopChapelNorth [sic],
9 where she says, and I quote:

10 "We agree with Mr. McDonald of ONSWC. The
11 new development which is driving these
12 upgrades should help offset the cost -- the
13 capital cost for the upgrade with an increase
14 of connection fees from \$1,500 to \$4,000 per
15 residential equivalent unit."

16 Now, Liberty Senior is a late addition
17 to this dispute. This is what I refer to as the
18 "me too, please" assertion.

19 Liberty Mutual [sic], even by their own
20 allegation, has no binding express contract. There
21 was no consummated sale on April 19, 2021. There
22 is no estoppel either, and you can't estop yourself
23 into a contract to be approved by the Commission.

24 So let me move on, then, and talk about

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1 the next allegation that we have to address here,
2 and that's the Blue Heron usage fees as opposed to
3 the connection fees.

4 Blue Heron, in addition to its claim
5 that it was overcharged for the interconnection,
6 claims that the periodic quarterly charges under
7 the tariff approved in Sub 71 overcharged Blue
8 Heron.

9 Blue Heron cannot claim that the Order
10 in Sub 9 or the 19 -- or the 2014 Asset Purchase
11 Agreement, of which they are not a party in 2014,
12 can be relied upon to establish the usage or
13 consummation rate.

14 The new tariff is dated April 19, 2021.
15 The \$42.30 rate per REU for Old North State is the
16 same rate that has existed since the Commission
17 first established rates for Blue Chapel [sic]
18 subdivision.

19 The usage rates under the Sub 71 tariff
20 were calculated on a flat-rate basis. So the issue
21 with respect to the periodic usage rates is the
22 building determinant again -- we've talked about
23 that some -- multiplied by the \$42.30 per REU.

24 As it did with respect to calculating

1 the REU for the interconnection, Old North State
2 has calculated the billing determinant for the
3 usage charge by reference to the demand that the
4 Blue Heron facilities can place on the Old North
5 State sewage system.

6 Old North State must be prepared to
7 accept, process, or treat sewage and discharge
8 effluent at the time of the system peak.

9 Old North State looked to DEQ, the
10 environmental regulator, permit to determine the
11 peak demand that Blue Heron could place on the Old
12 North State system.

13 DEQ must assure that the piping it
14 authorizes Blue Heron to construct under its permit
15 has sufficient capacity to remove wastewater
16 generated within the project. Otherwise, you can
17 imagine what type of catastrophic events occur.

18 This is how Old North State calculated
19 the building determinants against which the \$42.30
20 was calculated.

21 If Old North State escapes its
22 obligation to pay its fair share, the rest of the
23 using and consuming public in the Briar Chapel
24 service area will subsidize Blue Heron. Surely,

1 the Commission will not countenance that.

2 Now, Blue Heron again argues that the
3 building determinant under the new rates should be
4 based on the terms of the 2024 [sic] Asset Purchase
5 Agreement to which, once more, it was not a party.
6 There is no justification whatsoever to support
7 that.

8 The Commission reapproved the \$42.30 per
9 REU in its Sub 71 Order. Again, unless the
10 building determinant against which the \$42 is
11 multiplied accurately recovers the costs Old North
12 State will incur to serve Blue Heron, the cost Blue
13 Heron imposes on the system must be recovered from
14 other Old North State customers.

15 The best indication of the demand Blue
16 Heron places on the Old North State system is the
17 permit issued by DEQ that takes into account the
18 size of the pipes Blue Heron has installed and
19 through which wastewater is discharged into the Old
20 North State systems.

21 Those pipes have been sized under the
22 DEQ permit based on the number of single and
23 multiple apartments and other spaces in the Blue
24 Heron holding.

1 So it ought to be perfectly obvious to
2 the Commission what is going on here.

3 On March 8, 2021, Old North State
4 applied to the Commission to increase the
5 connection fees to \$4,000.

6 On March 23, 2021, before the Commission
7 could issue its Order approving connection fees on
8 April 15, 2021, Blue Heron, to use my phrase,
9 rushed in and tried to obtain a commitment to
10 interconnect at the old lower rate before the
11 Commission issued its Order raising the connection
12 fees. There was no incentive offered by Old North
13 State.

14 So I ask you again: Who is it that who
15 was engaged in the scheme here or who was engaged
16 in a scam? Who is it who was trying to obtain a
17 rate that is less than the rate the Commission
18 approved in Sub 71 and that must be adhered to to
19 comply with G.S. § 62-139?

20 Now, we've talked about the fact that
21 the tariff in Sub 9 and the tariff in Sub 91 [sic]
22 do not go into detail about RUs. Like we said, an
23 RU is 1 residential equivalent.

24 And so we're, you know, not gonna charge

1 these people who have all this apartment complexes
2 and so on and so forth the \$4,000 alone. You've
3 got to -- that's got to be interpreted. It does
4 have to be interpreted.

5 REU is equal to one residential
6 equivalent. Neither tariff addresses
7 nonresidential construction. Both require
8 interpretation. Both tariffs. Both orders.

9 The connection fee in Sub 9 is \$1,500
10 per REU; the connection fee in Sub 71 is \$4,000 per
11 REU.

12 In order to assess that the correct
13 intended dollar amount for interconnection, the fee
14 and the billing determinant are interdependent. If
15 you up one and lower the other, you haven't
16 accomplished anything.

17 The two numbers are multiplied to get
18 the correct fee. If one number does not accurately
19 represent recovery of an appropriate cost, the cost
20 recovery will be inaccurate.

21 In Sub 9, the calculation of the RE --
22 of the fee and the REU are a negotiated number
23 between Newland, the developer, and Old North
24 State. The costs are going to be collected and

1 remitted back to Newland. It's a completely
2 different purpose than the connection fees in
3 Sub 71.

4 The calculation was to reimburse Newland
5 for the facilities it contributed. The reference
6 to the REU multiple was the APA between Newland and
7 Old North State. No other cost would serve as
8 justification.

9 That contract was filed with the
10 Commission, so the Commission had limited
11 regulation of it. But it didn't look behind those
12 numbers because they were gonna be collected on
13 behalf of Newland and remitted to it, much as that
14 controversy addressed in the 1990s having to do
15 with Carolina Water Service.

16 And those calculations have not had
17 nothing to -- absolutely nothing to do with people
18 like Blue Heron.

19 In Sub 71, Old North State had to pay
20 for the expansion of the sewage treatment plant
21 from \$250,000 -- 250,000 gallons to 500,000 gallons
22 and the lift station and the force main.

23 These costs were incurred in order to
24 serve Blue Heron. Different cost and different

1 facilities at issue in Sub 9 and Sub 71.

2 An estimate of the sewage treatment
3 plant expansion was submitted to the Commission as
4 part of the application in Sub 71 to justify the
5 \$4,000 per REU.

6 Old North State looked to the Division
7 of Water Resources permit indicating the demand
8 Blue Heron facilities would place on the system to
9 determine multiple REUs.

10 So the Commission has two choices. It
11 has two numbers that are being presented to it.

12 Old North State says the number is
13 \$1,082,320. That's based on a fee of \$4,000 and an
14 REU of 189 based on the DEQ numbers it received.

15 The other number is \$69,000, based on a
16 fee of \$1,500 and an REU of 46 taken from the Asset
17 Purchase Agreement to which Blue Heron was not a
18 party.

19 One of those is accurate and correct.
20 One of those is not. The larger one is correct and
21 the smaller one is not.

22 I know you're --

23 COMMISSIONER KEMERAIT: Mr. Finley, the
24 Sub 9 Order, for clarification, does it define

1 "REU"?

2 MR. FINLEY: It does. It says an REU
3 equals one residential equivalent unit.

4 COMMISSIONER KEMERAIT: Right.

5 MR. FINLEY: Both tariffs, that's all
6 they say.

7 COMMISSIONER KEMERAIT: Right.

8 MR. FINLEY: Both tariffs.

9 COMMISSIONER KEMERAIT: So "residential
10 equivalent unit" is not specifically defined in
11 either the Sub 9 or the Sub 71 Order?

12 MR. FINLEY: Other than beyond saying it
13 is -- there's a little footnote down there that
14 says "one residential equivalent unit."

15 And so -- so how many -- how many
16 equivalent units are there in these
17 multi-residential development projects?

18 COMMISSIONER KEMERAIT: Uh-huh.

19 MR. FINLEY: Right. That's got to be --
20 that's got to be interpreted.

21 COMMISSIONER KEMERAIT: And what is
22 the -- as I mentioned, I was gonna save questions
23 till the end.

24 But what is the practice of utility --

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1 of wastewater utilities of the Commission when --
2 when they -- the definition of "RU" is simply
3 stated as "1 residential equivalent unit"?

4 How is -- how do wastewater utilities
5 determine in practice how to do that? And has the
6 Commission -- is the Commission involved in making
7 that determination?

8 MR. FINLEY: You've got to be involved
9 because, again, it's a tariff. And if there's a
10 dispute over a tariff, then you don't go to
11 Superior Court and you don't go to the Federal
12 Trade Commission. You come to the North Carolina
13 Utilities Commission.

14 And the tariff has got to be approved by
15 the Commission. If there is something that needs
16 to be interpreted, the Commission has to interpret
17 it.

18 Now, Blue Heron cites a Pluris tariff, I
19 think, where that tariff goes into detail about
20 something beyond.

21 You know, most of these subdivisions,
22 all you've got is houses on there, so you've got
23 one line, one service line, 3/4 of an inch or
24 whatever it is. And so that completely -- the

1 one REU, or one residential unit, that usually --
2 there's no problem because you don't have
3 commercial developments like this.

4 One was cited where the Commission and
5 the parties went into detail. That did not happen
6 here.

7 COMMISSIONER KEMERAIT: So, Mr. Finley,
8 what you're asking the Commission to do, is it your
9 position is is that there is no definition from
10 Commission orders about one -- what one residential
11 equivalent unit is, and so you're asking the
12 Commission to make that determination in this
13 matter. Is that -- is that your position?

14 MR. FINLEY: I think that the Commission
15 has to.

16 But my real position is Blue Heron says
17 you go to that Asset Purchase Agreement in
18 October 2014, and that is not -- has not been
19 approved by the Commission. That Order in Sub 9
20 does not refer to that as far as determining what
21 the REU is.

22 And so you can't use that Asset Purchase
23 Agreement to come in here and say that the fee --
24 the connection fee is \$69,000 for these multiunit

1 residential systems.

2 COMMISSIONER KEMERAIT: Okay.

3 MR. FINLEY: So that complaint has got
4 to fail. That's the position here.

5 COMMISSIONER KEMERAIT: Okay.

6 MR. FINLEY: Now, if there's a dispute
7 about -- if you want to get into that at some
8 point, that's not what they say. They say that
9 they're entitled to \$69,000.

10 And if you want to go look, now, there's
11 some -- there's some unjustification [sic] given to
12 the Commission. There's the estimate of what the
13 expansion of the sewage treatment plant would cost.
14 That's a confidential exhibit submitted with the
15 application to increase the fees in Sub 71. And
16 you got to build a lift station and you got to
17 build a force main.

18 And we know what that costs now. We
19 know what that costs now, and the forecast is that
20 that's gonna be expensive. And if we want to get
21 into that, we might want to raise these connection
22 fees going forward and come up with a different
23 REU.

24 But what I'm telling you is that it is

1 one -- that's the definition, and it is -- it
2 doesn't fit. It doesn't expand on what is needed
3 in respect to these -- this situation.

4 But it is not that 2014 Asset Purchase
5 Agreement, because that is an agreement that was
6 not relied upon by the Commission.

7 Now, let me address a few of the things
8 that we saw for the first time last week, if you'll
9 indulge me just a few minutes more, in the Reply
10 Brief.

11 In its Reply Brief filed last week, Blue
12 Heron for the first time addresses the Old North
13 State argument that Blue Heron is in a completely
14 different position than NMP.

15 Blue Heron addresses that difference as
16 one between parties to a negotiated agreement and
17 parties paying fees under a uniform rate.

18 Blue Heron's dichotomy completely misses
19 the point. It is not only that the agreement, such
20 as the one between NMP and Old North State, is
21 negotiated, but it is because NMP built and
22 contributed the facilities for service to Old North
23 State.

24 The negotiated contract is a financing

1 device through which developers, such as NMP,
2 receive reimbursement for the costs they incurred.

3 The tariff, such as the one approved in
4 Sub 71 under which Blue Heron must pay for
5 interconnection, addresses builders who have
6 contributed nothing. They are in a completely
7 different position than NMP.

8 NMP contributed this system at zero
9 costs, but you got to -- you got to spend all sorts
10 of money to serve Blue Heron. The utility does.

11 So it is not simply a dichotomy between
12 negotiated and non-negotiated contracts. It's a
13 contract between the developer who builds and
14 contributes the system on the one hand and the rate
15 to builders, like Blue Heron, who contributed
16 nothing, on the other.

17 Now, let me get back. I told you and
18 gave you a little hint that I'm gonna talk to you a
19 little bit more about this intention to provide
20 sewer service.

21 Here's what Blue Heron says in its Brief
22 filed last week on page 3:

23 "Third, Old North State misstates" -- accuses
24 us of misstating -- "the complainant's

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1 position regarding the relevancy of the Old
2 North -- of Old North State submitting the
3 intention-to-provide-service form to Chatham
4 County."

5 Here's the -- here's the operative sentence:
6 "Blue Heron does not contend that Old North
7 State's mere intention would constitute an
8 acceptance."

9 Let me read that again:

10 "Blue Heron does not contend that Old North
11 State's mere intention would constitute an
12 acceptance."

13 Then they go on:

14 "Rather, because the acceptance of an offer
15 can be proven by a party's conduct, Blue
16 Heron points out that Old North State
17 submitted the intention-to-provide-service
18 form, which is evidence of its acceptance of
19 the Blue Heron offer."

20 You know, a lot of dancing on the head
21 of a pin here.

22 Well, let me go -- let's go back to the
23 Complaint. Now, that was verified, admittedly, way
24 after the bill was submitted.

1 Here's what they said in their Complaint
2 on page 6, paragraph 21:

3 "Under North Carolina law, a binding contract
4 is formed upon the acceptance of an offer.

5 On March 23, 2021, Blue Heron offered to
6 acquire Respondent's connection service, and
7 Respondent accepted both by the terms of the
8 respondent's own application and -- and by
9 Respondent's conduct of tendering an
10 intention to provide service. Thus, on
11 March 23, 2021, Respondent and Blue Heron had
12 created a legally binding contract for
13 Respondent to provide sewer service to Blue
14 Heron."

15 They said in their contract that that --
16 this thing is as an acceptance.

17 COMMISSIONER KEMERAIT: Mr. Finley, a
18 question about that.

19 I -- I know your position is that there
20 was no meeting of the minds --

21 MR. FINLEY: Right.

22 COMMISSIONER KEMERAIT: -- and so there
23 was no contract. So I understand that.

24 But did Old North State accept the

1 application for wastewater service as it is?

2 Without your position about terms where the

3 connection fee would be.

4 But was it actually accepted prior to
5 issuance of the Sub 71 Order on April the 19th of
6 2021, or is that relevant? What is your position
7 about that?

8 MR. FINLEY: The position of Old North
9 State is that they agreed and told Chatham County
10 that Blue Heron would be able to receive connection
11 to the Old North State system so that Blue Heron
12 could proceed with its building activities.

13 Yes, they agreed to that much, but
14 that's all. And they did not agree to what the
15 price would be.

16 Why did they not agree? Because they
17 were waiting for the Commission to determine what
18 the fee would be based on the application that had
19 been submitted that was justified on the rate that
20 would be charged for the Blue Heron facilities that
21 were being constructed.

22 COMMISSIONER KEMERAIT: So Mr. Schauer
23 focuses on the word "acceptance." So I'd like for
24 you to just respond about -- based upon was it

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1 actually accepted prior to the issuance of the 71
2 Order.

3 MR. FINLEY: It was accepted -- it was
4 accepted with all those blanks in it that I showed
5 you.

6 COMMISSIONER KEMERAIT: Okay. Thank
7 you.

8 MR. FINLEY: So it didn't have
9 nothing -- it was accepted for purposes of allowing
10 them to proceed with their building, but it was not
11 accepted for purposes of what the price would be.

12 COMMISSIONER KEMERAIT: Thank you.

13 COMMISSIONER DUFFLEY: I'd like to ask a
14 follow-up to that question.

15 You spoke earlier about the requirements
16 for Chatham County and you talk about how -- that a
17 favor was being done so Blue Heron could proceed
18 with construction. Could you explain that a little
19 bit further?

20 And, also, was there a discussion
21 between the two parties about that issue?

22 If you -- first, though, if you could
23 just describe the requirements of Chatham County
24 and this favor that was being done.

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1 MR. FINLEY: Well, we talked about DEQ.
2 They've got to approve the permit to construct the
3 discharge pipes for Blue Heron and Liberty Senior.

4 You know, I'm not an expert on this, but
5 Chatham County also has to give its permission in
6 the building process, before you can proceed too
7 far in constructing a multi-residential building
8 such as this, in their permitting process to
9 understand, have some assurances that when these
10 buildings are constructed, there's gonna be some
11 place that the sewage can be discharged and
12 processed.

13 COMMISSIONER DUFFLEY: Thank you for
14 that answer.

15 And was there any discussion between the
16 parties about that issue?

17 MR. FINLEY: There's nothing in the
18 record about that. But you got to assume that
19 they're -- you know, that's -- I would assume so,
20 but I don't know what that discussion was.

21 COMMISSIONER DUFFLEY: Okay. Thank you.

22 COMMISSIONER McKISSICK: The application
23 that was submitted back on April 23rd, at what
24 point in time, if ever, was it signed by the

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1 utility? Because the -- I have not seen one that
2 was actually signed by the utility, being Old North
3 State.

4 MR. FINLEY: I don't know the answer to
5 that.

6 COMMISSIONER McKISSICK: Don't know the
7 answer to it?

8 MR. FINLEY: No.

9 COMMISSIONER McKISSICK: Would it be
10 your contention --

11 MR. FINLEY: You know, they received the
12 application. It was submitted by Blue Heron, so.

13 COMMISSIONER McKISSICK: Right. So, I
14 mean, would it be your contention that it didn't
15 become a binding contract until signed?

16 MR. FINLEY: That's not our contention.

17 Our contention is that it was not a
18 binding contract as to the connection fee in the
19 REUs until a meeting of the mind was held and until
20 the Commission approved the rate. It wasn't a
21 binding commitment as to the rate until then.

22 COMMISSIONER McKISSICK: Okay. So
23 signature would be irrelevant, in your mind?

24 MR. FINLEY: It wouldn't be irrelevant.

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1 But as far as I'm concerned, the standard today
2 would be controlling.

3 COMMISSIONER McKISSICK: Okay. Thank
4 you.

5 MR. FINLEY: Let's get back to what this
6 allegation was about, what -- what this thing
7 accepted.

8 You know, you're familiar with the old
9 saw: If you don't have the law, argue the facts.
10 If you don't have facts, argue the law. And if you
11 don't have either one, you pound on the table and
12 impugn the integrity on the other side.

13 But what is not permissible is to make
14 an allegation in the Complaint and then accuse the
15 other side of misrepresenting that and coming back
16 and not adhering to what the Complaint said.

17 I want to read you a few other examples
18 of this. You know, you got to sort of look at the
19 credibility of the parties in front of you when you
20 make a decision such as this.

21 Here's what the Reply Brief says on
22 page 12, footnote 3. And I'm getting to the last
23 part here.

24 In their briefing, Complaint --

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1 "Complainants mistakenly stated that the
2 instructions required builders to tender
3 application fees rather than the tap fees.
4 Complainants Brief, page 11. Complainants'
5 mistake caused Old North State to believe
6 that Complainants were conflating application
7 fees and connection fees."

8 What?

9 "As the instruction states, the builders were
10 asked to submit application fees and
11 connection fees with them."

12 Not a question of what Old North State
13 believed. We just write what they said. They did
14 conflate it.

15 Here's another quote here. Brief, page 15:

16 "Complainants have never argued that they
17 are entitled to a negotiated rate. To the
18 contrary, Complainants only ask that they
19 pay a uniform tariff of \$1,500 per REU that
20 the Commission established in Sub 9 -- in the
21 Sub 9 Order.

22 Old North State seems to believe that the
23 uniform tariff in Sub 9 Order was a product
24

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1 of the Asset Purchase Agreement, the uniform
2 tariff is somehow a negotiated rate to which
3 Complainants are not entitled."

4 And we talked about this a moment ago.
5 That's not right.

6 "The rate in Sub 9 Order is a negotiated rate
7 between the" -- that's the negotiated rate --
8 "between the developer, NMP, that contributed
9 the facilities to the Old North State."

10 "The Sub 9 rate is not the uniform rate under
11 Sub 118 -- W-354, Sub 118. The first uniform
12 rate was addressed for Briar Chapel under the
13 reasoning of Sub 118 and Sub 71."

14 "Blue Heron is in the category of the
15 builder, like those addressed in Sub 118,
16 that were not part of the Asset Purchase
17 Agreement that resulted in the contribution
18 in aid of construction."

19 Blue Heron has contributed nothing.

20 Now, Commissioners, you and your capable
21 staff will, I assume, continue to review the
22 pleadings and filings in this case.

23 And I ask you, respectfully, please be
24 careful to make sure when you look at what Old

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1 North State said to go back to what we said. And
2 don't go to the interpretation that Blue Heron
3 tells you that we said because in too many
4 situations, they're not the same.

5 Now, let me read you a couple of --

6 COMMISSIONER KEMERAIT: Mr. Finley, how
7 much more do you have? Because we -- we still have
8 a number of questions for both parties. So we --

9 MR. FINLEY: I'm on the last page, but I
10 am at your pleasure.

11 COMMISSIONER KEMERAIT: Okay. Please
12 continue, but try to wrap it up.

13 MR. FINLEY: I'm getting there. It's
14 big print on the last page.

15 COMMISSIONER KEMERAIT: Okay.

16 MR. FINLEY: We just want this out on
17 page -- we view this as an important case, and we
18 want you to have the best of our presentation.

19 Blue Heron Reply Brief, page 9:

20 "Complainants acknowledge that estoppel
21 might not be particularly material to Blue
22 Heron's claim against Old North State because
23 Blue Heron had already entered into an
24 agreement with Old North State by the time

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1 Old North State withheld the invoice and,
2 therefore, an agreement already existed."

3 You know, that's right.

4 "Therefore, had Old North State failed to
5 comply with Rule 10-17 requiring Old North
6 State to inform Blue Heron the terms of the
7 service at the time it received the
8 application, such failure would be
9 immaterial."

10 Again, the arguments, they bump into
11 each other all over the place.

12 One last thing. In the Reply Brief, it
13 says:

14 "Notably in this docket" -- we're talking
15 about these rules again -- "the Commission is
16 exercising its judicial and not its
17 legislative function in applying the rules to
18 the facts at hand."

19 In resolving the dispute, the Commission
20 arguably is exercising its judicial function. The
21 question, however, is when the Commission approved
22 Rules R10-17 and R-20 [sic], was it exercising a
23 judicial function then or a legislative function
24 then?

1 You know, that's the issue here. When
2 it approved those rules, well, that was no judicial
3 function. That was a legislative function. That's
4 the issue here. The issue is not who is arguing
5 about what in this case.

6 These are procedural rules and not
7 substantive rules, and we think those arguments
8 that Blue Heron makes are of now account.

9 So I'm finished with the direct
10 argument, and we ask you again to dismiss this
11 Complaint.

12 COMMISSIONER KEMERAIT: Thank you,
13 Mr. Finley.

14 Mr. Schauer.

15 MR. SCHAUER: If I could briefly handout
16 three exhibits, that should expedite my argument?

17 COMMISSIONER KEMERAIT: Yes, please.

18 (Pause.)

19 COMMISSIONER KEMERAIT: And,
20 Mr. Schauer --

21 MR. SCHAUER: Yes.

22 COMMISSIONER KEMERAIT: -- I assume that
23 you will be -- will be focusing on these arguments.

24 But I think what the Commission is

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1 primarily interested in is whether there was a --
2 whether there was a contract, the meeting of minds,
3 all of the essential terms, on March 23rd of 2021,
4 and whether the 20 -- 2014 Asset Purchase Agreement
5 is determinative for the definition of "one
6 residential equivalent unit."

7 So I think that those are the two issues
8 that we are most interested in.

9 MR. SCHAUER: Okay. Thank you,
10 Commissioner.

11 And if I could -- that fits well with
12 the focus of my argument.

13 So I think I'm gonna skip the facts. I
14 feel like those are very well established. And I
15 think the Commission -- or I suspect the
16 Commissioners are wrestling with, maybe, three
17 questions. I'd like to add one additional one.

18 And the first one is: Are connection
19 fees determined at the time of the agreement or at
20 the time of the performance of the service?

21 And I would like to touch on that
22 briefly. One of the exhibits should help me walk
23 through that quickly.

24 The second one is: Was their an

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1 agreement here? Which we've already talked about,
2 and I'll address that.

3 And then the third one is: Does the
4 Sub 9 Order incorporate the calculation of REU as
5 set forth in the two purchase agreements that we've
6 talked about? And I'll address that third.

7 So starting with the first issue,
8 whether or not fees are determined at the time of
9 the agreement or the service, I believe the law is
10 that the -- in this case, the fees are determined
11 at the time of the agreement and not service.

12 And if you look at the handout, I'd like
13 to start with just Chapter 62.

14 And so when I was looking at the
15 statutes, I looked at Section § 62-139(a). And it
16 struck me that when the General Assembly enacted
17 this statute, it said that the comp- -- it says
18 "compensation for any service rendered or to be
19 rendered." In other words, it talked about the
20 rendered services and services to be rendered in
21 the future.

22 And I think that's relevant, because I
23 think the General Assembly acknowledged that
24 there's two types of sales of utility services.

1 There are services rendered, which is
2 when the sale occurs at the performance of the
3 service.

4 And when the service is performed,
5 that's when you look at it and say, "Well, what
6 rate is applicable at the time of service? That's
7 the rate that we're gonna apply for this sale."

8 And when I think of that, I think of
9 util- -- I think of electricity sales. You know,
10 you consume electricity over the course of the
11 month. The service is rendered. You look at the
12 time that the service is rendered. That determines
13 what you're gonna pay for electricity.

14 But the General Assembly acknowledged
15 that there's a different type of sale of service as
16 well. There's a sale of services to be rendered.
17 And I think that's what we have here.

18 That's when a sale occurs based on an
19 agreement to provide a future service, right? And
20 in that instance, the effective rate is the rate at
21 the time of the agreement, not at the later date
22 when this service is performed.

23 And I feel like that's what Old North
24 State and Complainants are disagreeing about in

1 this case.

2 Now, at first this distinction didn't
3 make much sense to me, and I hope you'll indulge me
4 a little. But then I thought about the sales of
5 birthday cakes at grocery stores.

6 So when you go to a grocery store,
7 there's two ways to buy birthday cakes. You can
8 either buy it at the refrigerated section or you
9 can buy a custom-ordered cake. And there are two
10 sales, and the type of sale is informative in terms
11 of how you determine the price.

12 If you're like me and you buy a
13 refrigerated cake, you go in, and you realize you
14 can walk in any day of the week and you can buy a
15 cake and the price of the cake is determined based
16 on the day you buy the cake.

17 It can be \$17 on Monday. It can be on
18 sale for \$15 on Friday. Next week, it might be
19 \$20. Right? The price is what it says on the box
20 the day you pick up the cake, because the sale
21 occurs at the moment you pick up the cake when the
22 service is rendered.

23 That's in contrast to customer-ordered
24 birthday cakes, so the way my wife orders birthday

1 cakes.

2 So that happens when a customer goes in
3 and they orders a cake to be picked up at a later
4 date, right? The price is determined when you
5 placed the order, at the time of agreement.

6 And so if the cake is priced at \$17 at
7 the time of agreement, when you go pick it up a
8 week later, the grocery store can't say, "Well, now
9 that we're providing you cake, cakes are now \$19.
10 You owe us \$19."

11 No. The price is determined at the time
12 of the agreement for the service to be rendered at
13 the later date.

14 And I think Section § 62-193
15 acknowledges that reality occurs in utility
16 services.

17 You know, the Commission doesn't only
18 set rates for services that -- at the time they're
19 performed, services rendered. The Commission also
20 sets the rate to be charged when a utility sells a
21 future service.

22 And a connection service is like the
23 custom-ordered cake. There's an agreement that the
24 utility -- you're gonna pay the utility a price to

1 provide a service at a later date in the future.

2 The sale happens at the time of the agreement, not
3 at the time of performance.

4 Yes?

5 COMMISSIONER KEMERAIT: Yeah.

6 Mr. Schauer, the question about that is for
7 connection fees, though, it was about 17 months
8 between the time that the application was submitted
9 and then the interconnection actually took place.

10 What is the period of time where too
11 much time passes for -- when rates are no longer in
12 effect? Because we're talking about over a year
13 period of time between the time that the
14 application was submitted and interconnection
15 happens.

16 What period of time would be reasonable
17 to say that -- that that -- that that connection
18 fee amount that was in effect when the application
19 was submitted is no longer an appropriate or
20 reasonable connection fee? Or is that a relevant
21 question?

22 MR. SCHAUER: So, actually, I don't
23 think there is a period of time at which the
24 Commission or utility could say, "Oh, well, your

1 connection service occurred so far after the
2 agreement that we're now allowed to charge you a
3 different price for the connection."

4 And I think that actually relates to the
5 fourth point on the handout, which is these are
6 contributions in aid of construction.

7 The Commission's acknowledged that in
8 certain orders. The definition of a contribution
9 in aid of construction is set forth in the Heater
10 Utilities decision, which I cite in the Brief, maps
11 with what's going on here.

12 And I think that's relevant because when
13 a developer or a ratepayer is choosing whether or
14 not to pay a connection fee, they're currently not
15 connected to the system, and so they're making a
16 choice.

17 They're deciding, "Am I gonna pay for
18 the utility to construct the facilities necessary
19 for me to receive wastewater removal, or am I gonna
20 build it myself?" Right? "Am I a large developer
21 who has the resources to build it myself?"

22 And I might determine, based on the
23 price they offer me, I'm gonna go do it myself.
24 And so they have a choice to make.

1 And to say that you can make a choice
2 based on a price on day one, and then it turns out,
3 by the time things are constructed, it was more
4 expensive than the utility expected and so
5 therefore they can change their price, I don't
6 think that's fair for the developer, and it makes
7 it very difficult for them to make a decision.

8 And I think the fact that the price
9 attaches at the time of agreement and isn't subject
10 to change is recognized in the Utility Commission
11 cases where they discuss the tax liability for
12 contributions in aid of construction.

13 I mean, I note that I'm not an expert in
14 this space. But the taxation of CAIC seems like it
15 changes every three years.

16 And no matter what the taxation is, the
17 Commission seemed to say in the orders that I read,
18 "We're gonna look at the time the agreement was
19 made, not when the service was rendered, not when
20 the service was performed or later payments were
21 made." It's all about the time of the agreement.

22 And I think that's consistent with the
23 position that the agreement determines the price
24 and it can't be changed later.

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1 COMMISSIONER KEMERAIT: So, Mr. Schauer,
2 kind of a follow-up, and this would be more of a
3 hypothetical question.

4 Your position is the date of agreement
5 is determinative as opposed to the date of
6 interconnection.

7 What if, during an extended period of
8 time of 17 months or longer for a utility, that the
9 utility determined that in order to interconnect a
10 developer and additional developers, at that point
11 they decided that they had to increase the capacity
12 of the wastewater treatment plant in order to
13 connect the new development?

14 Is your position that -- that that would
15 still -- the price at the time of agreement would
16 still be determinative and that future requirements
17 for the system for CIAC for, for example, expanding
18 the plant, I mean, how would a utility or the
19 Commission grapple with that situation?

20 MR. SCHAUER: So this is a novel
21 hypothetical for me. But I still think the utility
22 would be required to honor the price at the time of
23 the agreement.

24 And I think it's because -- again,

1 trying to work through this hypothetical.

2 To the extent service is delayed for
3 whatever reason and at the time service is rendered
4 it's determined that the wastewater facilities need
5 to be expanded, I assume that expansion isn't
6 because of that lone developer. It's because of
7 other developers.

8 And so the cost of that expansion
9 should -- it would seem to me to be fair for the
10 utility to honor the price that it made to the
11 original developer.

12 And then to the extent that it cost more
13 because that developer's additional needs are
14 married with all the other -- you know, the
15 community's additional needs, that the community,
16 because of the -- that the community can't, you
17 know, carry the share of the additional costs.

18 And to the extent -- you know, to the --
19 I think Mr. Finley emphasizes the point that
20 there's financial implications in recognizing our
21 calculation of the connection fee in this case.
22 And we recognize that.

23 And what he seems to say -- and I'm not
24 sure this is accurate -- is he seems to say, "Well,

1 if you don't side with Old North State, ratepayers
2 are gonna be punished here."

3 And I'm not sure that's the case.
4 Because my understanding is that, to the extent Old
5 North State needs to collect more for the fact that
6 it's not collecting enough from these two
7 developers, it needs to come to the Commission and
8 ask for a rate increase.

9 And that rate increase is gonna be based
10 on the expectation that it prudently managed its
11 construction operations and the collection of fees.

12 And I would say that if a utility
13 miscalculated what it should be charging to
14 developers to the point that it now needs to
15 collect more from others to pay for it, maybe the
16 utility shouldn't be able to collect that from the
17 ratepayers.

18 Maybe that's something that's on the
19 utility for not properly managing how it estimates
20 costs, how it comes to the Commission to ask for
21 rate increases, and how it manages construction.

22 So I'm not willing to accept as, you
23 know, the gospel that ratepayers are going to
24 have -- be forced to pay for the increased costs of

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1 construction if the Commission honors the prices
2 that I believe it should be honoring for
3 complainants.

4 COMMISSIONER KEMERAIT: Thank you.

5 MR. SCHAUER: Sure.

6 COMMISSIONER KEMERAIT: Commissioner
7 Duffley.

8 COMMISSIONER DUFFLEY: Mr. Schauer,
9 before you move on, you made a comment that -- that
10 a developer has a choice: either let the utility
11 build themselves or they would build the
12 facilities.

13 And how can you make that choice if you
14 don't know the price?

15 MR. SCHAUER: So I don't think you can.
16 Which is why -- which is why they were asked -- you
17 know, my clients were asking for the price at the
18 time and which is why I think that the price can't
19 change once it's agreed to.

20 And now here I think one of the points
21 Mr. Finley made as well, there is a disagreement
22 over what the price is. And that's true. But both
23 parties acknowledge that the Commission sets the
24 price, and we both agree that what the Commission

1 says is what we're gonna pay.

2 So I think there was a clear meeting of
3 the minds on compensation. There's not a defined
4 number, because interpretation is required, but
5 both parties agree: However the Commission
6 interprets it, that's what the complainants are
7 gonna pay.

8 COMMISSIONER DUFFLEY: Okay. But I
9 heard you say that -- just go to that "meetings of
10 the mind" question.

11 MR. SCHAUER: Sure.

12 COMMISSIONER DUFFLEY: Because you're
13 saying that there wasn't a price and that -- that
14 your client asked Mr. Finley's client to figure out
15 that price.

16 So can you address that meeting of the
17 minds, please?

18 MR. SCHAUER: Yeah. And I apologize. I
19 think I would have -- I was putting together two
20 points in a way that maybe confused my answer.

21 So as to the meetings of the mind, which
22 I think where I ended up going with my answer to
23 your question, the law is very clear. A contract
24 incorporates the law as it stands at the date of

1 the contract.

2 The law in North Carolina is the
3 Utilities Commission sets rates. Whatever the
4 Utility Commission says the rates are, that's the
5 price that you have to pay. And I think both Old
6 North State and, certainly, Complainants understood
7 that.

8 Now, they may disagree over how the
9 Utility Commission should set the rates in this
10 case. But no one's saying, "Based on what the
11 Utilities Commission says, we're gonna rip up the
12 contract because there's no meeting of the minds."

13 They re both saying, "Commissioners,
14 please tell us what it is, and that's gonna resolve
15 the dispute. We disagree what it is. We can't
16 resolve it ourselves. So please tell us what it
17 is."

18 So I do think there's a meeting of the
19 minds, because the law incorporates the rates as
20 they stand, and both parties recognize that the
21 Commission sets the rates, you know, consistent to
22 its rules and the tariff orders, and that settles
23 the matter.

24 COMMISSIONER KEMERAIT: And,

1 Mr. Schauer, just following up as well.

2 Is your position that, if the Commission
3 were to determine that there was not a meeting of
4 minds, that your position is that the date of
5 application being submitted to Old North State is
6 determinative for the date -- so the two questions
7 are: What date applies to the date the connection
8 fees are applicable? Is it the date of the
9 application or is it the date of interconnection?

10 If there is not a meeting of the minds
11 because the terms are not included in the
12 application, are you -- is your position still
13 remains that the date of the application is the
14 date that is based upon the Commission -- the
15 Commission tariff that's in effect at the time of
16 the application? Is that your position as well?

17 MR. SCHAUER: It is. And I would
18 reiterate that we do strongly believe that there
19 was a meetings of the minds for the reasons set
20 forth.

21 And as an example, you know, to the
22 extent you order electricity from Duke and you
23 misunderstand how rates are calculated, you can't
24 go back and say, "Well, I don't owe you because I

1 didn't understand how rates were calculated."

2 It's like, "Well, no. You understood
3 that the Commission sets rates. They determine
4 that." So long as the rates are calculated
5 consistent with the Commission, there was a meeting
6 of the minds. It's just that it wasn't precise on
7 that one term.

8 But the precision didn't matter because
9 the parties couldn't negotiate rates in this case,
10 right?

11 We couldn't say, "Well, regardless of
12 what the Commission says, let's cut a bargain that
13 all we're going to pay is \$1,200 per REU." That
14 would be a violation, and that's not allowed.

15 And so what they did is they said,
16 "We're going to pay the tariffed rates under
17 Sub 9."

18 But there's -- you know, it turns out
19 there's a disagreement on how exactly that applies
20 in this context, and we leave it to the Commission
21 to decide.

22 And so I do think there was a binding
23 contract with the meeting of the minds on all
24 essential terms.

1 COMMISSIONER KEMERAIT: Okay. Thank
2 you.

3 COMMISSIONER McKISSICK: So is it your
4 contention, when the application was submitted on
5 March 23, 2021, at that point in time, just a
6 submittal of the application alone created a
7 contract?

8 MR. SCHAUER: So it wasn't just the
9 submittal. It was Old North State's acceptance.
10 And I think their acceptance is established in
11 three ways.

12 One, the application itself says in
13 capital bold letters with asterisks next to it, you
14 know: "Acceptance of this application creates a
15 contract." So that's evidence of the contract.

16 Their acceptance was evidenced by their
17 conduct. You know, we mentioned the intention
18 to -- I think the intention to provide service for
19 them, which was submitted to Chatham County.

20 And Old North State would not have
21 submitted that form if they did not accept the
22 application and say, "Yes, we're providing
23 service." In fact, they were telling the County,
24 "We will provide connection service to Blue Heron."

1 And then thirdly, I mean, I think
2 repeatedly in the Brief and even today in oral
3 argument, Old North State has admitted, "We've
4 accepted the application."

5 So it's not just the submission. There
6 has to be acceptance. But it seems that acceptance
7 isn't in dispute here, because Old North State has
8 admitted it.

9 COMMISSIONER McKISSICK: And in terms of
10 payment, do you think any payment was necessary or
11 required? What do you think the point in time
12 where payment would have been tendered?

13 MR. SCHAUER: So I don't think payment
14 was necessary. And I want to talk about the
15 estoppel argument briefly.

16 We anticipated, based on Old North
17 State's conduct, that they were gonna say, "Well,
18 the contract isn't created until you pay us," and
19 that's why they withheld the invoices.

20 In other words, they prevented us from
21 paying \$1,500 per REU because they were going to
22 take the position that it's when payment occurred
23 that the contract is created. Turns out that's not
24 their legal argument.

1 So we forecasted an issue of estoppel
2 for Blue Heron that doesn't matter because that's
3 not what Old North State is arguing.

4 But I do think that the payment, in
5 terms of the creation of contract, is immaterial.
6 Because when they're submitting the application,
7 you have a promise from the developer: We will pay
8 the fees in exchange for your promise to connect.
9 When you connect, when we pay, we'll figure out in
10 the future. But we both agree that we're gonna do
11 X in exchange for you doing Y.

12 COMMISSIONER McKISSICK: And if there's
13 ambiguity related to essential terms and
14 conditions, do you believe there is a meeting of
15 the minds to the point where a contract is formed
16 and that there are essential terms and conditions
17 that are -- apparently, the parties don't agree
18 upon?

19 MR. SCHAUER: So where those terms
20 aren't set by law, I think there may not be a
21 meeting of the minds.

22 But when the law says these are the
23 terms, you cannot negotiate them, then there
24 doesn't need to be a meeting of the minds on those

1 terms. Because in some ways maybe they're not
2 essential because they're already -- they've
3 already been dictated.

4 COMMISSIONER MCKISSICK: Okay. Thank
5 you.

6 COMMISSIONER KEMERAIT: Mr. Schauer,
7 following up on that, the Application states:

8 "The customer agrees to promptly pay the
9 application fee, service fees, late fees, and
10 after hours fees, et cetera, at the utility's
11 standard rate as set by the utility."

12 How do you interpret "promptly," and are
13 you -- and is your client in violation of that
14 requirement of promptly making that payment?

15 MR. SCHAUER: So I don't believe so.

16 If I could find -- let me -- one second,
17 Commissioner. Let me --

18 So, you know, when I look at the
19 language, it says "application fee, service fees,
20 late fees, after hour fees." It's not clear that
21 they are -- it doesn't specifically say "tap fees"
22 or "connection fees," which are terms that Old
23 North State has used in the instructions. So it's
24 not clear that it applies to connection fees.

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1 Here, I also -- I think, to the extent
2 that prompt payment of connection fees was
3 expected, it seems like it was waived by Old North
4 State since they didn't say, you know, "There's no
5 contract because you didn't pay us quickly."

6 You know, they accepted the fact that
7 there are some issues in terms of the construction
8 of the facilities and when we can connect. They
9 seemed to accept the fact that you can wait a
10 little while till you pay us until the facilities
11 are ready, which is what the parties did.

12 COMMISSIONER KEMERAIT: Thank you.

13 COMMISSIONER DUFFLEY: You just
14 mentioned about standard rates.

15 MR. SCHAUER: Uh-huh.

16 COMMISSIONER DUFFLEY: And could you
17 talk a little bit about the argument that in the
18 Sub 9 it was a negotiated rate, and your clients,
19 the developer, sits in a different position than
20 new ones? So it's that uniform rate versus a
21 negotiated rate.

22 So I'm assuming that when you say
23 "standard rate," you think -- and let's just assume
24 that the negotiated rate should apply as the

1 standard rate.

2 MR. SCHAUER: Well --

3 COMMISSIONER DUFFLEY: Or are you
4 arguing that is the standard rate?

5 MR. SCHAUER: So I think, with the Sub 9
6 Order, and really with the Sub 0 Order, they
7 started with a negotiated rate in a contract.

8 But then what happened is one of those
9 parties, the utility, came to the Commission and
10 said, "Will you make this negotiated rate that we
11 negotiated as part of an asset purchase agreement?
12 Will you make this the uniform connection rate that
13 we apply to everybody going forward?"

14 And the Commission said, "Yes. We
15 approve that. The rate you're requesting is
16 reasonable. We're gonna make that the rate."

17 And so the Sub 0 Order did that for BCU,
18 and BCU started charging that to customers as the
19 connection fee.

20 And the Sub 9 Order did that for Old
21 North State, right? It said, "We see there is an
22 asset purchase agreement. We understand you're
23 asking to make that a uniform tariff. We are
24 making that the uniform tariff going forward." And

1 that's the tariff that my clients are asking to be
2 applied to them.

3 It's not a negotiated tariff. It may
4 have originated as a negotiated tariff, but once
5 the parties came to the Commission and, said, "Will
6 you make this part of a tariff order?" it became a
7 uniform tariff applied to everyone. And that's
8 what we're asking to be applied to us.

9 COMMISSIONER DUFFLEY: Okay. And what
10 about the position that the parties are not
11 similarly situated? The developers were not
12 similarly situated.

13 MR. SCHAUER: So I -- in candor, I don't
14 fully understand the nuances of that argument that
15 Old North State is making.

16 But I think to the extent -- I mean, we
17 acknowledge we were a party to the Asset Purchase
18 Agreement, right? So to that extent, we're not
19 similarly situated.

20 But Old North State came to the
21 Commission and said, "Please approve our ability to
22 charge every developer and new resident who wants
23 to connect \$1,500 per REU."

24 And once they did that, they're saying,

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1 "We don't care if you're not similarly situated,
2 Blue Heron and" -- I'm referring to my clients back
3 here -- "Blue Heron and Liberty Senior, because the
4 Commission said we can charge you the same rate.
5 So the fact that you're not similarly situated no
6 longer matters. The Commission says we apply the
7 \$1,500 per REU rate to everybody going forward.
8 It's the uniform tariff."

9 COMMISSIONER DUFFLEY: Okay. Thank you.

10 COMMISSIONER KEMERAIT: And,
11 Mr. Schauer, following up as well. And I'll ask
12 this same question to Mr. Finley. This deals with
13 negotiated rates.

14 Is it your position -- your position is
15 is that the standard rate that was in effect on
16 March the 23rd of 2021 is the connection fee that
17 applies, the rate that was approved -- the
18 connection fee rate that was approved by the
19 Commission.

20 Is your position that if Old North State
21 wanted to charge a different rate than it was
22 applying for the \$4,000 per REU, that that would be
23 a negotiated rate that would have to be included in
24 the application in order for it to be effective?

1 And I'll ask the same question of
2 Mr. Finley.

3 So again, this relates to the date that
4 the approved rates are applicable for either date
5 of contract or the time of interconnection.

6 MR. SCHAUER: So that's an interesting
7 question, and I think I'm gonna answer it. And if
8 my answer doesn't make sense, I apologize. I may
9 not fully understand the question.

10 But our position is, on March 23, 2021,
11 the Sub 9 Order dictated that the uniform tariff
12 for connection fees was \$1,500 and that is what Old
13 North State had to charge Blue Heron.

14 If Old North State wanted to charge
15 \$4,000 at that time, on March 23rd, it would have
16 had to negotiate that rate, and that contract would
17 require approval from the Commission.

18 Because, on March 23, 2021, Sub 9 said
19 the only rate you can charge people is \$1,500.
20 Anything else would be a negotiated rate that
21 requires Commission approval.

22 That's not what happened. The parties
23 agreed you're gonna pay the tariff rate. It's just
24 that Old North State and the parties disagree what

1 tariff applies.

2 Old North State says, "Well, we -- the
3 agreement was on that date, but we're gonna look to
4 when service was. Service occurred under the
5 \$4,000 tariff. That's the one we think you should
6 pay."

7 COMMISSIONER KEMERAIT: Thank you. And
8 I'll be asking Mr. Finley the same question.

9 MR. SCHAUER: You know, two last points
10 on my handout about the sale versus -- the time of
11 sale being at the agreement versus service.

12 I note that Rule R10-20, the Commission
13 picked up on the focus of the sale. It doesn't
14 say, you know, "the rate in effect at the time of
15 service." It says "the time of sale."

16 Which I interpret as the Commission
17 acknowledging at the time that there are two
18 different types of sales of utility services:
19 sales of services that are rendered; sales of
20 service to be rendered.

21 Because the service may differentiate
22 from the time of sale, they focused on the time of
23 sale, saying it's in the -- you know, what's in
24 effect at the time of sale is what matters.

1 And then the last point, the third
2 point, which I want to circle back to, is the
3 practice.

4 You know, it strikes me that Old North
5 State says, "When you submit the application, it
6 creates an agreement. And when you submit the
7 application, we ask builders to go ahead and send
8 us the tap fees."

9 Now, if tap fees weren't dictated or
10 weren't determined until the time of service, which
11 could be a month later, in this case 17 months
12 later, why were they asking all of these builders
13 to submit tap fees at the time of the creation of
14 the agreement?

15 I think the argument that they're
16 making, that it's based on service is inconsistent
17 with their practice of trying to collect tap fees
18 at the time of agreement.

19 COMMISSIONER KEMERAIT: Mr. Schauer,
20 following up on that point, can you respond to Old
21 North State's position that, if a builder did
22 provide tap fees that ended up being less than was
23 required at the time of interconnection, that they
24 would be, at that point, invoiced or billed for the

1 remaining amount that would be due at the time of
2 interconnection?

3 MR. SCHAUER: Well, so that's a -- I'll
4 answer it in the -- with the first assumption that
5 the party -- you know, Old North State and the
6 developer agree on what the tap fees are and, you
7 know, the developer just happens to submit, you
8 know, maybe what maybe was a deposit, half of that.

9 I think Old North State would be allowed
10 to then invoice them for the balance, because
11 they've agreed that we're entitled to the full
12 \$1,500 per REU. You can't just pay \$750. You owe
13 us the balance of \$750. So I think they would be
14 allowed to collect the whole.

15 So we've touched on the creation of a
16 contract, and I think I'm gonna move on from that
17 unless there's additional questions.

18 But I did want to --

19 COMMISSIONER McKISSICK: One quick
20 question.

21 MR. SCHAUER: Yes.

22 COMMISSIONER McKISSICK: Why didn't
23 you-all submit the tap fees earlier? I mean, at
24 the time the application went in, why didn't you

1 just go ahead and tender a check at that time in
2 terms of what you anticipated or believed them to
3 be?

4 MR. SCHAUER: Well, so, Commissioner, at
5 the time, I was not in conversation with Blue
6 Heron. It is a sophisticated operation. I don't
7 know if it was sophisticated enough for them to
8 know how to calculate the tap fees in the absence
9 of an invoice.

10 If you recall, they submitted the
11 application and asked for an invoice, and they
12 didn't get one until later.

13 And so my impression is they may have
14 been ready and willing to submit the tap fees at
15 the time, but they didn't have the information they
16 needed to do so.

17 But again, I wasn't there.

18 COMMISSIONER McKISSICK: You weren't
19 there.

20 MR. SCHAUER: So I don't know. I don't
21 know exactly why they didn't do it at the time.

22 COMMISSIONER McKISSICK: Would you not
23 assume there would be some due diligence that they
24 needed to exercise or should have exercised to make

1 that determination at that critical time,
2 considering what happened within three days?

3 MR. SCHAUER: You know, I'm not sure.
4 I'll be honest. I'm a lawyer, and there are many
5 times when I don't do the due diligence you'd
6 expect a lawyer to do.

7 I mean, when I signed up with my utility
8 contract with Duke Energy, I didn't read it. I
9 just signed it and said, "Whatever the rates are,
10 the rates are."

11 Again, I don't -- I don't know the facts
12 here. But they may have just said, you know, their
13 experience is connection fees are set by law.
14 Whatever the connection fees are, they'll pay them.
15 And so they didn't feel like there was a need to do
16 due diligence at the time.

17 COMMISSIONER McKISSICK: Okay. Thank
18 you.

19 MR. SCHAUER: But again, I want to
20 preface that your -- Commissioner, that is a little
21 bit of speculation. I don't have the facts and
22 they're not in the record.

23 COMMISSIONER McKISSICK: I understand.

24 COMMISSIONER DUFFLEY: One follow-up to

1 that.

2 Maybe I've misunderstood the facts of
3 the case, but I thought I heard Mr. Finley state
4 there's an email where it's saying: Let's figure
5 out and settle what those tap fees are.

6 So could it be that they didn't pay the
7 tap fees because they were still negotiating the
8 tap fees versus they just didn't -- were not
9 sophisticated enough to calculate the tap fees?

10 MR. SCHAUER: So what we're doing is
11 we're now talking about two different sets of
12 communications.

13 So the Blue Heron communication, Blue
14 Heron's the group that submitted the application,
15 had an agreement, didn't mention tap fees. They
16 asked for an invoice, right? There's an agreement
17 on March 23rd.

18 We're now moving into Liberty Senior.

19 COMMISSIONER DUFFLEY: Oh, right.

20 MR. SCHAUER: And I'd love to talk --

21 COMMISSIONER DUFFLEY: Right. Thank
22 you.

23 MR. SCHAUER: -- about them next.

24 COMMISSIONER DUFFLEY: Thank you.

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1 MR. SCHAUER: So Liberty Senior said --
2 they were aware of the tap fees, right?

3 You know, I don't know what
4 conversations they had before I got involved. But
5 my understanding is, you know, they independently
6 came into this situation and then, through as being
7 developers kind of in the same community, this
8 happened to you with Old North State, this happened
9 to us. Then they found a lawyer, they found me,
10 we're here.

11 So Liberty Senior must have done more
12 due diligence than Blue Heron, it looks like, and
13 so they apparently were aware that there's a \$1,500
14 tap fee, and they asked for the application form in
15 order to be able to form a contract so that the
16 \$1,500 tap fee could apply.

17 They did their due diligence. They
18 wanted to pay \$1,500 per REU.

19 Old North State didn't send them the
20 application form, right? And that's where the
21 estoppel argument kicks in.

22 You know, estoppel is pretty similar. A
23 party can't assert rights if they take conduct that
24 makes asserting those rights unfair.

1 And our position is if Liberty Senior is
2 saying, "We want to pay \$1,500 per REU. We're
3 ready to enter an agreement," and Old North State
4 doesn't respond for two weeks, doesn't provide them
5 the materials necessary to form a contract; then,
6 when a new rate kicks in, provides them the
7 materials necessary to form a contract, that's
8 unfair, right?

9 They lulled Liberty Senior into waiting.
10 They didn't say, "Hold on," or, you know, "We're
11 not gonna do that," or, "We'll get back to you,"
12 or, "It'll be two weeks." They were just silent.

13 And then after the new rate kicked in,
14 they said, "Here's the materials. Now we can form
15 an agreement. And under the law as we see it, that
16 agreement would be formed under the new tariff,"
17 and they'd be subject to \$4,000 per REU.

18 So we're taking the position that a
19 contract for Liberty Senior wasn't formed in time
20 under the Sub 9 tariff, but the reason it wasn't
21 formed was because Old North State's intentional
22 conduct. And so Old North State is therefore
23 estopped from arguing or saying, "Well, we're not
24 gonna honor our contract under Sub 9," because Old

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1 North State is the one who prevented Liberty Senior
2 from creating that contract.

3 COMMISSIONER DUFFLEY: And thank you for
4 reminding me that was an email from Liberty.

5 So going back to Blue Heron -- and I
6 think I asked this question already or someone has.
7 So there was no discussion regarding the tap fees
8 between Blue Heron and Old North State?

9 MR. SCHAUER: I don't know, and there's
10 certainly nothing in the record about it. So I
11 don't know if there was any discussion.

12 COMMISSIONER DUFFLEY: Okay.

13 MR. SCHAUER: It's not something I'm
14 aware of.

15 COMMISSIONER DUFFLEY: Okay. Thank you.

16 COMMISSIONER KEMERAIT: And regarding
17 Liberty Senior, when did Liberty Senior actually
18 interconnect? Were they in a position and ready to
19 interconnect when they asked for the application,
20 or was that -- we know about 17 months for Blue
21 Heron. What about for Liberty Senior?

22 MR. SCHAUER: So my understanding -- and
23 this isn't in the record. I'm not sure Liberty
24 Senior has connected yet.

1 They were a little slower in the
2 development process in terms of the actual
3 construction and all the permits they need, whereas
4 Blue Heron was a little further along.

5 And so I'm not for sure, but I don't
6 believe Liberty Senior has connected yet.

7 One update, and I mentioned this to
8 Mr. Finley.

9 Leading up to the hearing, I did learn
10 that Liberty Senior has since paid the connection
11 fee that Old North State demanded in order to, I
12 guess, receive some building permits and kind of
13 move further along in the process, and they did so
14 under protest. And so I mentioned this to
15 Mr. Finley.

16 In light of that factual development
17 post complaint, I think Liberty Senior would be
18 taking the position that they're now entitled to a
19 refund, not just a declaration of what their fee
20 would be.

21 And I didn't know, as a housekeeping
22 matter, if maybe the parties could submit a
23 stipulation to just kind of update that fact and
24 kind of include it in the discussion.

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1 Something that I'd be happy to discuss
2 with the Commissioners, but I did want to kind of
3 provide that update.

4 COMMISSIONER McKISSICK: When did either
5 Liberty Senior or Blue Heron first learn that the
6 rates had the potential to increase? I mean,
7 wasn't it common knowledge that there was an
8 application pending?

9 MR. SCHAUER: I don't know. I don't
10 know when they learned about that.

11 I came to this several months, if not
12 maybe a year, later, when this had kind of -- I
13 mean, I think Blue Heron, at least, had worked with
14 other counsel at some point to try to look into
15 this issue, and so I'm not sure when they became
16 aware of it.

17 I mean, they certainly became aware of
18 if on April 19th, when they got an invoice and they
19 were notified that your tap fees are now \$4,000.

20 COMMISSIONER McKISSICK: So you have no
21 idea relative to prior to receiving that
22 notification?

23 MR. SCHAUER: I don't know.

24 I would -- I'd venture this argument

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1 that even if they did know tap fee -- that there
2 was an application pending to increase connection
3 fees and they were trying to -- Mr. Finley had it
4 cleverly, you know, get in under the wire, you
5 know, sneak in at the last minute, I think the law
6 entitles them to do so, right?

7 I mean, Old North State had an
8 obligation to change its connection fees in time so
9 that certain developers would pay the connection
10 fees they needed.

11 To the extent Old North State moved too
12 slowly, that doesn't -- that -- you know, that
13 doesn't allow them to kind of retroactively say,
14 "Oh, well, you guys, you guys applied too quick.
15 You created contracts too quick. We still get to
16 charge you the \$4,000 that we really wanted to even
17 though you created contracts too early and even
18 though you intentionally tried to create a contract
19 early to avoid the greater fee."

20 Because the law said at the time the
21 agreement is created, it's the -- you know, the fee
22 that is applicable under Sub 9. You know, if the
23 developers were sophisticated and knew that, I
24 still think they'd be entitled to the fee

1 consistent with the law.

2 They're simply saying, you know, "This
3 is what the law says. We're taking advantage of
4 the law. Old North State, you moved too slow.
5 It's to our benefit." I think they'd be allowed to
6 take that.

7 But, to be clear, I'm not sure that's
8 what happened. I have no evidence that they were
9 aware, or at least Blue Heron was aware, of an
10 upcoming fee change.

11 COMMISSIONER McKISSICK: Okay.

12 COMMISSIONER DUFFLEY: But --

13 COMMISSIONER McKISSICK: Go ahead.

14 COMMISSIONER DUFFLEY: A follow-up to
15 that. But what about utility regulation principle
16 and cost of service, that if you're a cost-causer,
17 then you need to pay your appropriate cost of
18 service?

19 MR. SCHAUER: So that calculation I
20 believe was factored into the Sub 9 Order, right?

21 And so when Old North State showed up in
22 2014, it determined that \$1,500 per REU was an
23 adequate connection fee to cover the costs of
24 services of developers going forward.

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1 And so the fact that, maybe, costs were
2 increasing and they needed to increase the
3 connection fee in the future means that they were a
4 little slow to calculate cost of service and maybe
5 a little slow to implement new rates.

6 But that doesn't mean that they can kind
7 of pull those new rates into the past and charge
8 them to customers who they really wish they had
9 charged them. They just moved too slow to
10 implement those cost-of-service principles.

11 COMMISSIONER KEMERAIT: And I understand
12 your argument or perspective that Old North State
13 may have moved slowly in requesting increased
14 connection fees.

15 But can you address whether the
16 expansion of the wastewater treatment plant for an
17 additional 250 gallons per day and the force main
18 and lift station, was that expansion of capacity
19 and availability of the force main and lift
20 station, were both of those necessary in order to
21 provide service to both of your clients?

22 MR. SCHAUER: I don't know the answer to
23 that question.

24 COMMISSIONER KEMERAIT: Okay.

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1 MR. SCHAUER: That might be -- I don't
2 know.

3 I will say, now that you mention this,
4 that the future expansion wasn't a surprise. If
5 you look back at the agreement that Briar Chapel
6 Utilities signed in 2009, it mentioned that there
7 was gonna be an expansion up to 750-gallons per
8 day. Like, there's a forthcoming expansion.

9 The Asset Purchase Agreement, again in
10 2014, referenced the exact same expansion.

11 And, actually, Old North State put a
12 price to it. They said, "We estimate it's gonna be
13 about \$2 million." And so they were factoring in
14 cost of service.

15 And so, you know, to the extent they
16 were a little untimely in updating their costs and
17 implementing their rates, I don't believe that's --
18 that's not the fault of my clients, and they
19 shouldn't be prevented from paying the rates that
20 were applicable at the time.

21 COMMISSIONER KEMERAIT: Okay. Thank
22 you.

23 And I will ask Mr. Finley that same
24 question at a later time.

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1 MR. SCHAUER: So, if I could, I'd like
2 to talk about the calculation of REUs. And if you
3 could look at the handout that says -- and it makes
4 the argument for me at the top. The Sub 9 Order
5 incorporates the agreement's definition of REU.

6 I'm gonna, kind of, use this to walk
7 about -- to talk about how to construe the Sub 9
8 Order.

9 So going back to 2009, there was the BCU
10 agreement. And the BCU agreement is very clear.
11 It obligates BCU to go to the Commission and ask
12 for the ability to collect a connection fee of
13 \$1,500 per REU, with "REU" being defined in the
14 agreement.

15 And so that's exactly what BCU did. It
16 came to the Commission and said, "We have an
17 agreement."

18 I noticed that the Sub 0 Order
19 acknowledges that there was an agreement, and it
20 actually -- the agreement was submitted as part of
21 the application in Sub 0.

22 And BCU shows up and says, "We would
23 like the ability to collect the \$1,500 per REU that
24 we're obligated to collect per our purchase

1 agreement."

2 So there's no question. I don't think
3 there's any question that BCU, when it was asking
4 for a \$1,500 per REU connection fee, was asking for
5 a connection fee as calculated by the purchase
6 agreement that it had signed, and the purchase
7 agreement that obligated it to ask for the ability
8 to collect that connection fee.

9 Fast-forward to 2014. Old North State
10 signs its Asset Purchase Agreement. The Asset
11 Purchase Agreement makes three important points.

12 First, it says that the purchase price
13 is \$1,500 per REU.

14 Second, Old North State agrees -- it
15 promises that it will continue to collect the exact
16 same connection fee that Briar Chapel Utilities had
17 asked the Commission to collect in the Sub 0 Order
18 going forward.

19 And then it defines "REU." And,
20 notably, it defines "REU" in the exact same way as
21 the 2009 BCU agreement. There is consistency.

22 Old North State then comes to the
23 Commission and says, "Can we please collect the
24 same rates that BCU asked to collect, the \$1,500

1 per REU connection fee?"

2 And there's two important parts of the
3 Order, and these are -- so -- and I'll touch to the
4 arrows in a second.

5 But paragraph 11 of the Sub 9 Order, the
6 Commission acknowledged. It says, "We know what
7 you're doing, Old North State. We know that you're
8 coming in and you're asking for approval of the
9 rates that we already approved in Sub 0."

10 Like, notice how it says:

11 "Requested approval of the
12 Commission-approved \$1,500 per REU."

13 "We know what you're doing here. You're
14 wanting a continuation of BCU's rates."

15 Then in paragraph 8, it's very
16 interesting. It talks about the purchase price.
17 It says that the purchase price is \$1,500 per REU,
18 and it says, "Old North State, we know what you're
19 doing with these connection fees. You're paying
20 BCU consistent with the Asset Purchase Agreement."

21 And so, in other words, at the time that
22 the Commission entered the Sub 9 Order, there was a
23 prior BCU agreement where it said, "Can we please
24 collect the fees as defined in the agreement?" And

1 the Commission said yes in Sub 0.

2 Then Old North State shows up in 2014
3 and says, "Hey, can we continue to collect the
4 exact same fees that BCU asked in Sub 0?"

5 And, by the way, you know from the Asset
6 Purchase Agreement that the calculation of REU is
7 the exact same.

8 And in the Commission's actual Order, it
9 acknowledges that Old North State is trying to
10 continue to collect the exact same fees that BCU
11 first wanted to collect back in 2009.

12 And the Commission says, "We know what
13 these fees are going to. These fees are going to
14 go right back to BCU, per the Asset Purchase
15 Agreement, to pay what is owed."

16 And Old North State seems to now be
17 arguing somehow that it was paying, I guess, Briar
18 Chapel one calculation of a connection fee under
19 the Asset Purchase Agreement, but then it was
20 permitted to calculate however it wanted to collect
21 the -- to calculate the REU and the connection fee
22 going forward from any of the residents.

23 Which doesn't seem to map. It would
24 seem the Commission would understand whatever

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1 you're collecting from ratepayers and turning over
2 to BCU, it's gonna be the same, which means the
3 same definition has to apply.

4 COMMISSIONER KEMERAIT: Okay.

5 MR. SCHAUER: And so that's -- sorry.

6 COMMISSIONER KEMERAIT: No. You may
7 finish, and then I have a question.

8 MR. SCHAUER: Well, so that's why we
9 take the position that the Sub 9 Order, even though
10 it doesn't explicitly incorporate the Asset
11 Purchase Agreements, it does clearly implicitly
12 incorporate the agreements by acknowledging them
13 and acknowledging the history that led to the
14 \$1,500 per REU.

15 COMMISSIONER KEMERAIT: And in regard to
16 how to calculate the REU, you're talking about the
17 2014 Asset Purchase Agreement.

18 And the definition under -- I'm sure
19 you've seen it -- Section 1.7 of Definitions for
20 REU refers to the wastewater flow of a
21 single-family unit in the development. And it says
22 that the number of REUs represented by a
23 nonresidential user shall be determined as follows.

24 There is no -- there is no definition

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1 for -- for commercial or -- or multifamily in the
2 Asset Purchase Agreement. So how do you reconcile
3 that with your position about how REUs should be
4 calculated?

5 MR. SCHAUER: And I'm sorry,
6 Commissioner, are you -- you're looking at -- is
7 this the 2014 agreement?

8 COMMISSIONER KEMERAIT: Yes. On page 5.

9 MR. SCHAUER: Okay. Section 1.27?

10 COMMISSIONER KEMERAIT: Section 1.27.

11 MR. SCHAUER: Yes.

12 COMMISSIONER KEMERAIT: Yes.

13 MR. SCHAUER: So the way we read it is
14 there is an acknowledgement of a single-family
15 unit, right? That's defined.

16 No one's arguing -- no one's taking the
17 position that we're a single-family unit. So that
18 means we would fall into a nonresidential user,
19 which would be a multifamily unit such as these two
20 apartment complexes. Therefore, you look at (a) or
21 (b) to determine what we are.

22 So, now, granted, it doesn't say
23 "commercial"; it doesn't say "multifamily"; but it
24 seems to acknowledge two categories of potential

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1 users. Either you've got single-family units or,
2 I'd say, you've got everybody else.

3 We're not single-family. Therefore,
4 we're everybody else. Which means you would look
5 to 127 sub (a) or sub (b) to determine the
6 calculation of REU.

7 COMMISSIONER KEMERAIT: And under
8 subsection (a) and (b), what is your position about
9 how "REU" should be defined?

10 MR. SCHAUER: Yes. So our position is
11 that the meter should apply.

12 So if you look at (a), it says, if there
13 is no water or wastewater meter for the
14 nonresidential facility, then you divide by 250.

15 Well, both of my clients have meters,
16 and we've set forth what the meters are in the
17 Complaint. And so we believe that the REU
18 calculation's actually based on subsection (b),
19 which assigns an REU based on the size and the
20 number of meters, which is what we've argue in our
21 Complaint.

22 Go ahead.

23 COMMISSIONER KEMERAIT: And your
24 position is is that the Commission, even though the

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1 Commission orders have not specifically defined
2 "REU" in this manner and have not specifically
3 referenced the 2014 Asset Purchase Agreement, that
4 you are asking the Commission to go back to that
5 2014 Asset Purchase Agreement?

6 MR. SCHAUER: We are. Because we
7 believe it was incorporated implicitly both in
8 Sub 0 and Sub 9.

9 If I could, Commissioner, the last
10 exhibit is actually a calculation of alternative
11 different fees.

12 And so what we attempted to do is we
13 acknowledged the Commission's gonna have to
14 interpret what to do here based on the calculation
15 of REU and the fee to be applied. And so we tried
16 to set forth all the various iterations that the
17 Commission might consider.

18 And so we did it both for Blue Heron and
19 Liberty Senior. We talk about what I believe are
20 the three methods of calculation that are
21 applicable here.

22 The first is looking at the Asset
23 Purchase Agreement and applying the meter. And
24 what you can see is for that very top line, you

1 know, you don't look at design flow. You don't
2 look at flow rate. There's 46 REUs, and there's a
3 footnote that explains how we got that.

4 We believe you apply the \$1,500
5 connection fee, and there you get to the \$69,000
6 connection fee.

7 We acknowledge that the Commission might
8 read the Order differently and it might say, "Well,
9 you know what, we're going to say you're a
10 single-family unit. We're gonna say that
11 subsection (a) applies," and so you might apply
12 250. So we've provided an alternative calculation.

13 The one calculation that we strenuously
14 object to is what Old North State is doing here.
15 What they're doing is applying a flow reduction
16 permit issued by DEQ which says that the flow rate
17 is 189. And they're applying that to these
18 nonresidential, these multifamily units, and we
19 don't believe that can be permissible.

20 That's not allowed, one, because it's
21 certainly not referenced in the Order; two, it's
22 not referenced in the Asset Purchase Agreements;
23 and, most importantly, that flow reduction permit
24 says it's only applicable to single-family

1 dwellings.

2 So that -- that reduction, that
3 reduction from 250 to 189 doesn't even apply to my
4 clients. So we're not sure how Old North State can
5 come to that calculation.

6 So we feel most strenuously, at the very
7 least, Old North State's preferred calculation of
8 REU cannot be accepted, and it's one of the two
9 alternatives preferably set out in the Asset
10 Purchase Agreement.

11 And then we've also applied the
12 different -- you know, the \$1,500 per 4,000 -- or
13 \$4,000 REU to kind of lay that out as well.

14 I believe that's the entirety of my
15 argument. I'd be happy to answer additional
16 questions if they come up.

17 COMMISSIONER KEMERAIT: I do have -- I
18 have asked most of the questions that I had planned
19 to do at the end.

20 But can you refer to the Sub 71 Order?
21 And the fourth paragraph.

22 This is a question about equities. And
23 the fourth paragraph states that:

24 "Old North State is currently increasing the

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1 capacity of the existing Briar Chapel
2 wastewater treatment plant from
3 250,000 gallons per day to 500,000 gallons
4 per day. The expansion of the plant is
5 anticipated to be completed in
6 December 2021."

7 And then it goes on to say:

8 "The primary reason for the increased
9 wastewater connection fee is to aid in
10 recovery of the cost of the facility
11 expansion and to provide service for new
12 development."

13 From an equitable or equity perspective,
14 why should your client not be included in what the
15 Commission is viewing as new development that would
16 be applied to the CIAC?

17 MR. SCHAUER: For two reasons, the first
18 of which is, while Old North State is presenting
19 the argument that it's unfair to make my clients --
20 for my clients to not pay the \$4,000 rate, we
21 believe it's unfair for Old North State to
22 retroactively apply a rate that it should have
23 asked for an increase for earlier.

24 The second is, you know, granted the

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1 Commission should consider the equities, but we
2 don't believe the equities trump the Commission's
3 rules, which say that, you know, it is the price at
4 the time of the sale.

5 And so I don't believe that the
6 equitable consideration is one that can allow the
7 Commission to overwrite or ignore the rules that
8 are applicable here.

9 And then the third consideration is, you
10 know, we -- to the extent there are financial
11 implications of applying the Sub 9 Order to my
12 clients, those financial implications shouldn't be
13 borne by my clients nor the ratepayers.

14 They should be born by Old North State
15 because it's their obligation to get the rates it
16 needs to construct the facilities necessary to
17 provide service to the customers. It's not the
18 customers' obligation.

19 COMMISSIONER KEMERAIT: Okay. Thank
20 you.

21 And so we'll go on to rebuttal. I think
22 we need to move pretty quickly, so I'm gonna limit
23 both parties or both attorneys to no more than two
24 minutes for rebuttal. And then we do have

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1 questions -- follow-up questions for both
2 attorneys.

3 MR. FINLEY: Okay. Let me just -- we've
4 addressed every argument that they have made in
5 great detail and refuted all of them. None of them
6 are worth 2 cents.

7 This last argument that it ought to be
8 Old North State that absorbs these costs, if these
9 are reasonable and prudent costs, Old North State
10 is not going to absorb them. They're going to be
11 paid by somebody. And if they're not paid by these
12 people, they're going to be paid by the other
13 ratepayers.

14 I ask you to please be careful about
15 what is said in these documents.

16 Mr. Schauer said that when we said
17 Kevin Wade of Blue Heron stated we'd like to get
18 the connection fees settled but need confirmation
19 the sewer available prior to making any payment,
20 that's Blue Heron. That's not Liberty Senior.

21 Pay attention to what these people say.
22 Half of what they say is not even borne out by the
23 facts.

24 It's clear in this record that a lift

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1 station, a force main has got to be in -- put in
2 place for these people. It's not that they don't
3 know about it. It's all over these pleadings.
4 It's all over the communications that they sent.

5 The other thing is, they're conflating
6 uniform fees -- uniform fees and negotiated fees.

7 The Asset Purchase Agreement is
8 essential to their position. The Asset Purchase
9 Agreement is a negotiated agreement with NMP which
10 dedicated and gave the facilities to the utility.

11 Blue Heron is -- that is a negotiated
12 rate. What is in Sub 9 is based on that Asset
13 Purchase Agreement. It was meant to collect a fee
14 and remit it back to NMP.

15 It is not the uniform fee that is
16 addressed in Sub 118. The only uniform fee that is
17 in issue here is the Sub 71 fee, and there was no
18 agreement that entitles these people to the Sub 9
19 or the Asset Purchase Agreement fee prior to when
20 these rates went into effect on April 2021,
21 April 19, 2021.

22 COMMISSIONER KEMERAIT: Thank you,
23 Mr. Finley.

24 Mr. Schauer, do you have anything?

1 MR. SCHAUER: I have no further
2 rebuttal.

3 COMMISSIONER KEMERAIT: So we're gonna
4 take a five-minute break and then we'll come back
5 for questions for the attorneys.

6 (At this time, a recess was taken from
7 11:02 a.m. to 11:08 a.m.)

8 COMMISSIONER KEMERAIT: Okay. We'll go
9 back on the record.

10 And, Mr. Finley, I'll start with some
11 questions for you. Many -- many of the questions
12 have already been answered, but prior to your oral
13 argument, there was a long list of questions for
14 both sides.

15 So the questions I'm gonna be asking are
16 coming -- are my questions and also some staff
17 questions for clarification.

18 And the first question is: Are both
19 Blue Heron and Liberty Senior apartment complexes
20 covered under the CPCN that was issued in the
21 W-1300, Sub 9 Order that's dated April the 20th of
22 2015?

23 MR. FINLEY: Let me see if I can kind of
24 answer that if I understand what the question is.

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1 COMMISSIONER KEMERAIT: And let me ask
2 the follow-up question, because I think that the --
3 that this may help you to answer the question.

4 Under -- we talked about Finding of Fact
5 Number 8 under the Sub 9 Order that states that Old
6 North -- that the current planned build-out of the
7 wastewater utility system is 2,516 connections.

8 So I think that what we're trying to
9 understand is that it anticipated that -- that Blue
10 Heron and Liberty Senior would be included in the
11 additional 2,516 connections, so they would be part
12 of that CPCN.

13 MR. FINLEY: Well, let me take a -- the
14 other provision in the Asset Purchase Agreement, it
15 says that -- that Old North State will be
16 responsible for expanding the sewage treatment
17 plant beyond the 250,000 gallons.

18 But -- so you get a CPCN for a defined
19 service territory as Briar Chapel and something
20 else.

21 And NMP, Newland, is the initial
22 developer of that sewage -- of that service area,
23 right? They're gonna build this, that, and the
24 other things.

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1 But what happens often, and it's
2 addressed in the Sub 118 Order that I mentioned
3 earlier today, they will sell part of the --
4 Newland will sell to somebody else, a new
5 developer, the ability to come in to that service
6 territory and build something else, right? And
7 that's what happened here.

8 Newland had the property. It was
9 developing the subdivision Briar Chapel. At some
10 point, it said, "Well, I'm gonna" -- then there's a
11 piece left. They built a lot of houses and built
12 this and built that.

13 But there was a commercial area that was
14 developed by Blue Heron and Liberty Senior, so NMP
15 is out of the picture.

16 That part of the service territory is
17 still in the CPC -- covered by the CPCN, but then
18 you have to look to see who's got to pay for the
19 facilities that are gonna be needed to serve that
20 commercial area. And that's the justification for
21 the Sub 71 application as far as the connection fee
22 is concerned.

23 It was changed -- the petition was
24 changed to cover the buildings of those assets --

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1 built out of those assets by somebody else other
2 than NMP, and with respect to Blue Heron.

3 The Asset Purchase Agreement, which is
4 not incorporated into any Order, you go back to
5 look to that to see whether the -- whether the fees
6 that are collected from Blue Heron and Liberty
7 Senior are admitted back to NMP, and they are not.

8 COMMISSIONER KEMERAIT: And so in that
9 Sub 9 Order, when we talk about the build-out of
10 2,516 additional customers, at that time, was
11 the -- was the intention that the build-out would
12 be all residential customers, or was there a belief
13 that there would be commercial customers as well at
14 that time?

15 MR. FINLEY: I don't know the answer to
16 that. But I do know that, after seeing many, many,
17 many of these situations over the past, what you
18 started out with in 2014 or 2015 very often, after
19 you go through this economic condition, that
20 economic condition changes, and whatever you
21 intended to do to begin with is not what you
22 necessarily ended up with.

23 COMMISSIONER KEMERAIT: Okay. And the
24 question that I asked Mr. Schauer during his

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1 argument is: For Blue Heron and Liberty Senior,
2 was -- an order for them to be served by Old North
3 State, was the expansion of the wastewater
4 treatment plant and the construction of the force
5 main and lift station, was that required in order
6 to serve those two customers?

7 MR. FINLEY: Absolutely, it was. It's
8 all in the record all over the place. It's in the
9 correspondence between the parties. Sure, it is.
10 There can be no question about that. The fact that
11 they act like they didn't know that is incredible
12 to me.

13 COMMISSIONER KEMERAIT: Okay.

14 MR. FINLEY: The answer is absolutely,
15 yes.

16 COMMISSIONER KEMERAIT: Okay.

17 And so I'm gonna move on to the Sub 71
18 Order. And the Sub 71 Order states that, for the
19 full build-out of the Briar Chapel subdivision,
20 there will be approximately 414 additional
21 commercial customers and 180 new residential
22 customers.

23 Of those 414 commercial customers, do
24 you know how many of them have interconnected since

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1 issuance of the Sub 71 Order?

2 MR. FINLEY: I do not know that. I know
3 that Liberty Senior has not. They are a long way
4 from moving on with their project. But I don't
5 know the answer to that.

6 COMMISSIONER KEMERAIT: Okay. Do you
7 know whether commercial customers, other than Blue
8 Heron, have interconnected to the system since the
9 issuance of the Sub 71 Order?

10 MR. FINLEY: I do not know, and that's
11 certainly not in the record anyplace.

12 COMMISSIONER KEMERAIT: And do you know
13 the date that the capacity -- that the construction
14 of the capacity increase in the wastewater
15 treatment plant to 500,000 gallons per day along
16 with the completion of the force main and the lift
17 station, the date that all of that was completed?
18 Do you have that information?

19 MR. FINLEY: I do not have that. I can
20 get it if you want it, but it's not in the record
21 right now.

22 COMMISSIONER KEMERAIT: We would request
23 a late-filed exhibit of the date of completion of
24 both expansion and force main and lift station.

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1 MR. FINLEY: Be happy to provide that.

2 COMMISSIONER KEMERAIT: Okay.

3 And again referring to the Sub 71 Order
4 that refers to commercial customers at Briar
5 Chapel, of the commercial customers -- and if you
6 don't know, we'd ask for a late-filed exhibit about
7 this, too.

8 Of any commercial customers that have
9 connected to the wastewater system, are any of them
10 multifamily residential buildings, such as --
11 similar to Blue Heron?

12 MR. FINLEY: That's not in the record.
13 We would be happy to get it for you.

14 COMMISSIONER KEMERAIT: Okay. And along
15 with a general description of the commercial
16 customers that have connected to the system since
17 the Sub 71 Order.

18 MR. FINLEY: Yes, ma'am. Sure.

19 COMMISSIONER KEMERAIT: What type of
20 customers they are.

21 MR. FINLEY: Surely.

22 COMMISSIONER KEMERAIT: And since we've
23 talked about not having the date for when the
24 expansion of the wastewater treatment plant was

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1 completed, if you know this answer, please tell us.
2 If not, please include this in the late-filed
3 exhibit.

4 But was the expansion of the wastewater
5 system to the additional 250,000 gallons per day
6 complete when Old North State sent the
7 March 19, 2021, letter to the Chatham County
8 Director of Permits?

9 MR. FINLEY: I think the answer is
10 clearly no, but we'll -- but I don't know that for
11 a fact, and we'll get you the answer.

12 COMMISSIONER KEMERAIT: Okay.

13 And this is a question from staff, if
14 you know the answer to this, Mr. Finley.

15 On March the 19th of 2021, Old North
16 State's president sent a letter to the Chatham
17 County Director of Permits and Inspections stating
18 that Old North State was, quote, "now allowing
19 commercial customer" -- excuse me -- "commercial
20 connections to the Briar Chapel system."

21 What changes had occurred to the
22 wastewater treatment system between the acquisition
23 in 2015 and the -- and March 2021 that enabled Old
24 North State to now allow commercial connections?

1 So we want to know if the -- what was
2 constructed, whether the expansion was completed in
3 relation to the date of that letter.

4 MR. FINLEY: We'll get you that
5 information.

6 COMMISSIONER KEMERAIT: Okay.

7 So we've reviewed Commission Rule
8 R10-17, and the application form that Old North
9 State was using in this particular -- provided to
10 Blue Heron didn't include all of the information
11 that was required by the rule, specifically about
12 the rates that will be applicable as stated in Rule
13 R10-17.

14 Can you respond to whether -- whether it
15 was necessary for rates to be included and why the
16 application form did not include information that
17 was required by the rule?

18 MR. FINLEY: Well -- 17.

19 The application that was submitted by
20 Blue Heron on March 23, 2021, that was submitted by
21 them. They filled it out and sent it in. It was
22 on the form from the Old North State that did not
23 have the rate in it.

24 And it didn't have the rate in it, from

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1 Old North State's perspective, because there was a
2 pending application March 8, 2021, to the
3 Commission to increase the connection fees to
4 \$4,000.

5 Old North State is not gonna say, "Well,
6 just pick something out of the air and say that's
7 what it is." We're not gonna go back to the Sub 9
8 rates because getting ready to change those rates.
9 We anticipated a change any day now.

10 And so they weren't able to do it at the
11 time they received the application, but the minute
12 that they did get the Order from the Commission in
13 Sub 71, then they provided the information.

14 But put it in context. I mentioned this
15 earlier.

16 Blue Heron is saying, "I knew the" -- "I
17 had a contract. I was assured that I could pay
18 \$69,000 and interconnect."

19 And so to the extent that this was a
20 delayed provision of information under this
21 Rule 17, they couldn't be -- they couldn't be
22 harmed by that if they knew what the rate was and
23 they had calculated it based on these things that
24 they have alleged to today.

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1 \$69,000. They say, "I had an
2 enforceable contract, binding contract, on
3 March 23, 2021."

4 So the fact that the -- that that's a
5 reason for the delay in giving them the information
6 under the Sub 71 Order, because the Order wasn't
7 out yet.

8 But they claim that they had a contract
9 that wasn't even gonna be bound by the Sub 71
10 Order. So it was -- it was virtual compliance with
11 the Order in light of the facts existing at the
12 time.

13 COMMISSIONER KEMERAIT: And to make sure
14 that I understood what you said, is -- and I don't
15 know that this is in the record.

16 Did Old North State provide the
17 application to Blue Heron to fill out and complete
18 and return to Old North State, or did they obtain
19 it from Old North State's website and do it on
20 their own? Or is that in the record for how -- for
21 what the process --

22 MR. FINLEY: I don't think that's in the
23 record anyplace.

24 COMMISSIONER KEMERAIT: Yeah. I thought

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1 you had provided -- just testified -- or just
2 provided some information about how that happened,
3 and I didn't see it in the record.

4 And then in regard to the application
5 form, it states really on the first line that this
6 application will become a binding contract upon
7 acceptance by the utility.

8 And can you state again why the language
9 about it becoming a binding contract upon
10 acceptance, why it is not a binding contract? Can
11 you --

12 MR. FINLEY: Well, it assumes -- number
13 one, it assumes that those lines on the second page
14 will be filled in as to what the price will be, for
15 one thing.

16 And, you know, terms and conditions that
17 a utility publishes on its web page or it submits
18 to a potential customer, that's all well and good.

19 But it's up to the Public Utilities
20 Commission -- it's up to you folks -- to approve or
21 disapprove those types of things, again, to the
22 extent that that's not reasonable and prudent and
23 it's not something that you ultimately approve.

24 You've got to approve the relationship

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1 between the public utility and the using and
2 consuming public.

3 So answer number one is the application
4 was not complete because it didn't have the lines
5 filled in as to the price.

6 But, number two, some of the things --
7 I'll give you an example.

8 There's something in that application
9 that says these fees are not -- these fees are not
10 refundable.

11 Well, listen. That's a good thing to
12 say in an application. But if Blue Heron pays
13 \$1 million and it gets to the point, for whatever
14 reason, they don't build that building and don't
15 interconnect, I don't think the Utilities
16 Commission is gonna, "Well, that application said
17 it's not refundable." I just don't think that's
18 what's gonna happen.

19 The point is there that you can say a
20 lot of things in a form. The form has not been
21 approved by the Utilities Commission, and whatever
22 is said in that form is not binding on you because
23 the contract, the agreement, the fee, the charge,
24 the REUs has got to be approved by the Commission.

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1 It's got to be approved by the Commission.

2 And when Blue Heron says, "I've got a
3 contract based on an asset purchase agreement,"
4 that they're not a party of, that was not intended
5 to benefit them, and base their whole claim on
6 that, same rule applies. You're not bound by that.

7 COMMISSIONER KEMERAIT: Okay. And
8 follow-up question to that similar to what I asked
9 Mr. Schauer.

10 It states -- the application form states
11 that the customer agrees to promptly pay, and then
12 it proceeds to describe the fees that are required
13 to be promptly paid.

14 What is your position about whether
15 those fees were promptly paid?

16 MR. FINLEY: They were not promptly
17 paid. They got their -- you know, Blue Heron makes
18 a big deal about getting the invoice the same day,
19 within hours that the Sub 71 Order came out.

20 They didn't pay that for 17 months.
21 They didn't pay that for 17 months. You know why?
22 Because the date of the service was
23 August 31, 2022. That's the date that is the
24 important date, not the date of some contract that

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1 was entered into to which they were even not a
2 party.

3 COMMISSIONER KEMERAIT: So, Mr. Finley,
4 following up on that, if interconnection is not
5 possible for a number of months -- here it was
6 about 17 months -- why did Old North State send the
7 invoice 16 months advance of the time of
8 interconnection?

9 Why was -- why was -- why was it not
10 sent closer to the time of interconnection, since
11 the -- since your position is is the date of
12 interconnection is the appropriate date for
13 determination of connection fees that are due?

14 MR. FINLEY: Well, answer number one is
15 that they didn't know when the interconnection
16 would take place. A lot of that depended upon how
17 Blue Heron constructed its building.

18 But we do have this rule here, R10-17.
19 And they said they want, you know, information as
20 to -- at the time of the receipt of the
21 application.

22 They did not -- they delayed giving that
23 information at the time of the receipt of the
24 application, again, because they were waiting to

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1 see what the rate was going to be.

2 They couldn't just say, "Connection fee,
3 \$500." That would have been compliance with the
4 rule, but it would have been a meaningless
5 compliance. So they waited 27 days, and the minute
6 they got the Order from the Commission, then they
7 told them what the -- you know, they deserve to
8 know what the fee was gonna be, even if they
9 weren't ready to take it at that particular time.

10 Now, if something happened in those
11 17 months and there was a Sub 72 and the connection
12 fee went up to \$5,000, then I don't care what kind
13 of agreement somebody has or what the tariff said
14 on March 23 or April of 2021. The fee that the
15 Commission approves at the time of the
16 interconnection is what controls.

17 COMMISSIONER KEMERAIT: And then moving
18 on to the issue about how to define "REU."

19 Can you respond to the complainant's
20 statement that the system extension permit that Old
21 North State refers to for purposes of calculation
22 of REUs is applicable only to residential
23 single-family dwellings and does not apply to
24 multifamily dwellings?

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1 MR. FINLEY: Yes. Again, it goes back
2 to the engineering. There's got to be an
3 interpretation here. It's not set forth in either
4 tariff, the tariff in Sub 9 or the Sub 71. It says
5 "1 residential equivalent unit."

6 So if you've got all these apartments
7 out -- units out there, you're not gonna charge
8 \$1,500 for the whole building or \$4,000 for the
9 whole building, so you've got to look behind that
10 little simple definition and find out what it
11 means.

12 You ask Mr. Schauer about this Asset
13 Purchase Agreement. That's a little bit vague,
14 too. It doesn't address multi-residential units
15 either.

16 So you have to take -- but you look at
17 the engineering behind the rule. And the
18 engineering is that DEQ says you got to have a pipe
19 coming out of these apartment complexes with
20 sufficient capacity for this much flow out of that
21 building.

22 And then Old North State has said,
23 "Well, if that's what they can discharge into my
24 system, I need to have enough capacity in the

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1 sewage treatment plant and need to have a force
2 main and then I need to have a lift station that's
3 big enough to take it."

4 So that's the interpretation that they
5 use. It's a completely reasonable interpretation.
6 But there has to be some interpretation that has to
7 take place.

8 The question is was that a reasonable
9 interpretation. It's certainly more reasonable
10 than anything else you've heard in here today.

11 And you've got to have with that
12 sewerage to flush the toilet and the whatever it is
13 comes out of those pipes, you've got to have enough
14 capacity to treat it.

15 And if you don't get it from these
16 people who are imposing that demand on the system,
17 you're gonna have to get it from somebody else.

18 Somebody's gonna have to pay for it.
19 Somebody's gonna have to pay for it. And if it's
20 not the people who cause it, then it's gonna be the
21 other people that are just got homes out there.

22 COMMISSIONER KEMERAIT: And, Mr. Finley,
23 I'm going to just read a staff question to you.
24 And you have -- I think you've answered it in part

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1 for a bunch of -- several other questions. But if
2 you could just provide a concise answer for this
3 question so it'll be clear in the transcript.

4 Old North State argues that, even if
5 Blue Heron was correct that the Sub 9 Order
6 addressed the billing determinants by reference to
7 the Asset Purchase Agreement, the Asset Purchase
8 Agreement addressing REUs for various customer
9 demands does so by reference to a single meter per
10 interconnection, not multimeter, multi-residential
11 structures like Blue Heron's project.

12 Would you provide an example of the type
13 of nonresidential customer that would have a single
14 meter per interconnection for which this REU
15 formula and the Asset Purchase Agreement would be
16 applicable?

17 MR. FINLEY: Well, now, I'm no expert on
18 building multiunit apartment complexes. But
19 theoretically, rather than having four, five, six
20 meters, you know, or pipes, I guess, you could only
21 have the one and there is some consolidation within
22 the structure so that the discharge is through the
23 one pipe.

24 You know, I'm just speculating because I

1 don't know.

2 COMMISSIONER KEMERAIT: Okay.

3 MR. FINLEY: But that's -- that's a
4 possibility.

5 But again, interpretation is required
6 because the facts we have here are not covered by
7 either that chart in the 2014 Asset Purchase
8 Agreement to which, again, Old North State is not a
9 party.

10 Back up one more time. That is between
11 Newland and, ultimately, Old North State.

12 And the big distinction there is that,
13 as we quoted in the Sub 118 Order from Carolina
14 Water Service, Newland built it. Newland gave it
15 to Old North State. And that's a financing
16 mechanism to get the money back to Newland to
17 properly reimburse them for what they did.

18 That was not meant for people like Blue
19 Heron that come along many years later, and people
20 like Blue Heron who contributed nothing to this.
21 They've got to pay for what they need to serve
22 their facilities. That's the distinction here,
23 that people completely ignore that.

24 COMMISSIONER KEMERAIT: And then,

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1 Mr. Finley, the last question is in Docket W-1282,
2 Sub 7, and this is a docket for Pluris:

3 "The number of REUs is determined by taking
4 the design capacity for each nonresidential
5 customer as set forth in Administrative Code
6 15A NCAC 02T.0114" -- I don't expect you to
7 know that offhand -- "and dividing that
8 design flow capacity by 360."

9 Does Old North State plan to add to its
10 tariff for Commission approval the method to
11 calculate REUs related to connection fees for a
12 nonresidential customer, for example, as Pluris has
13 done?

14 Are you -- is Old North State going to
15 proactively in the future correct this problem with
16 the Commission?

17 MR. FINLEY: That's a good question.
18 That's a completely legitimate question, and you've
19 got some capable staff asking those questions
20 through you.

21 It needs to be addressed either in the
22 resolution of this case or perhaps in a subsequent
23 filing, yes.

24 COMMISSIONER KEMERAIT: Okay.

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1 MR. FINLEY: It needs to be addressed.

2 COMMISSIONER KEMERAIT: Okay. Thank
3 you.

4 Mr. Finley, let me see if my fellow
5 Commissioners have any questions.

6 COMMISSIONER DUFFLEY: Just a follow-up
7 to that commercial customer question that
8 Commissioner Kemerait was asking, the
9 second-to-last question, and then the last
10 question.

11 Are you aware, are there different
12 categories of nonresidential commercial customers?
13 Because it seems like the flow for a office
14 building where there are part-time workers would be
15 different than a multifamily dwelling.

16 Are you familiar with any type of
17 strat- -- stratification by any company regarding
18 different commercial customers?

19 MR. FINLEY: Well, I'm not an expert in
20 any of that, and then that would be up to DEQ and
21 the permit that they give somebody to build a
22 structure.

23 They'll look at what the anticipated
24 discharge within -- if it's a, you know, industrial

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1 customer -- and, I mean, I'm speculating now, so
2 excuse me for that.

3 They're gonna look to see what the
4 discharge is from that building based on what
5 they're told in their investigation, right?

6 And to the extent that what that
7 building discharges is different than somebody
8 else, my assumption is that the piping that they
9 will approve and the capacity of that piping will
10 be different depending on what they learn about
11 that discharge and what their rules and regulations
12 say.

13 But, you know, somebody can answer that
14 more completely and competently than I can.

15 COMMISSIONER DUFFLEY: Okay. Thank you.

16 And then --

17 (Pause.)

18 COMMISSIONER DUFFLEY: Okay. I think I
19 have the answer to that. Thank you for that,
20 Mr. Finley.

21 COMMISSIONER McKISSICK: Has Old North
22 State amended, modified, or revised its application
23 in any respect in light of the way things have
24 worked out in this particular case or controversy?

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1 MR. FINLEY: I do not know the answer to
2 that. I can find that out for you, but I do not
3 know the answer to that.

4 COMMISSIONER McKISSICK: If you could.

5 I mean, if there is an application that
6 is different from the one that was used in this
7 time frame -- and specifically we're referring to
8 March 23rd of '21, you know, in that general window
9 of time -- if you could file that as a late-filed
10 exhibit, I'd just be curious to see if it remains
11 the same or if there's any -- any references that
12 have changed, anything that's incorporated by
13 reference, or anything that clarifies the potential
14 ambiguity which exists as a result of the
15 application that was used and the circumstances
16 that have unfolded in this case.

17 MR. FINLEY: We'll find that out for
18 you.

19 COMMISSIONER McKISSICK: All right.
20 Thank you.

21 MR. FINLEY: But I will say that, for
22 the most part, what you've got is you've got a
23 residence. 90 percent of the customers have got
24 a -- you know, a 3/4 of an inch service line. And

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1 that definition of REUs, that's what it's for.

2 It does not cover these other types
3 of -- that come on not regularly. But we'll find
4 the answer to you on that.

5 COMMISSIONER McKISSICK: And I guess the
6 other question: Have your practices changed if
7 your applications have remained the same? Do you
8 know if they are different?

9 MR. FINLEY: Well, we'll give you the
10 answer to that.

11 But again, what is unusual about this
12 situation -- well, there are several things unusual
13 about it, but the timing of it is significant.

14 That was a short window between
15 March 8, 2021, and April 15, 2021, when, arguably,
16 some old rates applied and they were gonna change.

17 Nobody knew exactly when the rates were
18 gonna change, but they did change on
19 April 15, 2021.

20 And there was -- if it were me, if I
21 were Blue Heron or Liberty Senior, I would be
22 getting -- I would be scrambling, too.

23 But the trouble is, too bad. There was
24 no contract that they can rely upon that allows

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1 them to do that.

2 And if they're saying that they have a
3 contract that determines the rates that they are to
4 pay from the public utility that provides them with
5 services, you've got to get that contract approved
6 by this Commission for it to be enforceable. So
7 they had a difficult task in front of them.

8 COMMISSIONER McKISSICK: And I fully
9 respect and understand that, and it certainly
10 appears that the Complainants were aware of the
11 potential change and there was a rush to get this
12 submitted. But notwithstanding that, I was just
13 curious about some of the other --

14 MR. FINLEY: We'll try to get you the
15 answers to your questions, certainly.

16 COMMISSIONER McKISSICK: Sure. Thank
17 you.

18 COMMISSIONER KEMERAIT: Thank you
19 Mr. Finley.

20 MR. FINLEY: You're welcome.

21 COMMISSIONER KEMERAIT: And then I think
22 that almost all of my questions have been already
23 asked and answered.

24 The last question that came from staff,

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1 though, is that Old North State states in its
2 materials that if Blue Heron had asked about what
3 the connection fees would be, Old North State would
4 have told them that it would be the Sub 71 rates.

5 Can you explain why Blue Heron didn't
6 discuss the matter of the rates and didn't have it
7 included specifically in the application if they --
8 if Blue Heron wanted to have the \$1,500 connection
9 fees applied to their interconnection?

10 MR. SCHAUER: I can't, because I don't
11 know the facts surrounding what they knew and the
12 communications they were having with Old North
13 State at the time. I'm sorry.

14 COMMISSIONER KEMERAIT: Okay. Thank
15 you.

16 Any questions?

17 COMMISSIONER DUFFLEY: Just one.

18 Do you acknowledge what Mr. Finley
19 stated, that Blue Heron also asked about the rates
20 after the application?

21 MR. SCHAUER: So my -- my understanding
22 is the communication he's referencing might be
23 significantly after the application when they were
24 talking about where are we on getting connected.

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1 I believe that the delay in connection
2 was because certain things that Old North State had
3 to perform weren't done yet, and so Blue Heron was
4 checking in on them.

5 And so I think the conversation about
6 what the fees and the payment was at that later
7 date. I don't know specifically what communication
8 he's referencing, though.

9 COMMISSIONER DUFFLEY: Okay. For the --
10 on the record, what communication? Can you point
11 to that communication, Mr. Finley?

12 MR. FINLEY: That is in the record. It
13 is an email of March 2, 2022, from Kevin Wade of
14 Blue Heron.

15 And here's his question:

16 "We'd like to get the connection fee settled
17 but need confirmation the sewer is available
18 prior to making any payment."

19 March 2, 2022. Kevin Wade of Blue
20 Heron, not Liberty Senior.

21 Now, there's all sorts of conversation
22 in the record about Liberty Senior and all those
23 conversations about what's going on about when they
24 want this and when they want that. But this is

1 Kevin Wade of Blue Heron.

2 COMMISSIONER DUFFLEY: Okay. Thank you.
3 I just wanted to make it clear for the record.

4 COMMISSIONER McKISSICK: Mr. Finley,
5 suppose they had submitted the application, you
6 know, Blue Heron, and they had tendered at that
7 time a check for the \$1,500 per unit, you know, and
8 it had been accepted, hypothetically?

9 I guess your contention -- what would
10 your contention be relating to whether a contract
11 was ever formed?

12 MR. FINLEY: Well, if it were me, I'd
13 say, "We didn't send you -- we told you -- we told
14 you we were gonna send you an invoice later."

15 And what they -- what they were
16 conveying with that was we were waiting to see what
17 the Commission does in the Sub 71 case.

18 And I think I would -- if it were me, I
19 would have written back and said, "Thank you for
20 this. We're gonna hold it until we see what the
21 Commission does. And if they deny what we've
22 requested, we'll give you what they approve. If
23 not, we're gonna hold you to the new rate that
24 we" --

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1 But the Commission has got to approve
2 any rate that Old North State charges Blue Heron,
3 period.

4 COMMISSIONER McKISSICK: And I know I
5 asked you this earlier, but is your contention that
6 it was not necessary for Old North State, at any
7 point in time, to sign the application to -- you
8 know.

9 I mean, the application that was
10 tendered, or submitted, I should say, where it has
11 the line down there "utility signature" with a date
12 that could be completed.

13 MR. FINLEY: This one is signed.

14 COMMISSIONER McKISSICK: Oh. You have
15 one that is signed?

16 MR. FINLEY: Yeah.

17 COMMISSIONER McKISSICK: And what is it
18 dated?

19 MR. FINLEY: March 23, 2021.

20 COMMISSIONER McKISSICK: And it's signed
21 by someone on behalf of Old North State?

22 MR. FINLEY: That's what it says,
23 "utility signature." But again, it's got the --

24 COMMISSIONER McKISSICK: Okay.

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1 MR. FINLEY: -- missing stuff back here.

2 COMMISSIONER McKISSICK: Right. I know.

3 The missing information on the back as well.

4 MR. FINLEY: Right.

5 COMMISSIONER McKISSICK: Okay. I had
6 not seen the one that was actually signed.

7 MR. FINLEY: Yeah.

8 COMMISSIONER McKISSICK: Thank you.

9 COMMISSIONER KEMERAIT: Okay. I think
10 we've asked all -- Mr. Schauer, did you have
11 something to add?

12 MR. SCHAUER: If I could offer a
13 response to two questions to Mr. Finley that I'd
14 like to have a little bit of an opportunity to
15 speak on in brief?

16 COMMISSIONER KEMERAIT: Yes. Be brief,
17 but you may respond.

18 MR. SCHAUER: Thank you.

19 So Mr. Finley said emphatically that
20 there's no evidence that expansion was not
21 necessary. In other words, my clients were the
22 straw that broke the camel's back.

23 I'm not sure that's -- I don't think
24 that evidence is in the record and I'm not sure

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1 that's true.

2 I mean, I know in 2015, when Old North
3 State applied, there were 669 connections. When
4 they asked for a rate increase in 2019, there were
5 over 2,000 residential connections and 21
6 commercial connections.

7 And to say that two additional
8 connections are what put the facility, you know,
9 over the edge, I don't think that's supported by
10 the record.

11 And so I think if, to the extent that's
12 a position they're gonna take, we'd ask that they
13 submit some evidence in support of that, and, I'd
14 hate to say it, but possibly we'd be able to engage
15 in some discovery on that factual issue.

16 And so that's the only response I wanted
17 to add.

18 MR. FINLEY: Can I respond to that?

19 COMMISSIONER KEMERAIT: Yes, Mr. Finley.

20 Can you -- what I'd like -- I'd like for
21 us to be focusing on what's in the record in this
22 proceeding.

23 MR. FINLEY: Yeah. Yeah, yeah, yeah.

24 COMMISSIONER KEMERAIT: So could you

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1 tell us whether that is, in fact, in the record?

2 MR. FINLEY: Well, if I heard what he
3 said, you've got the Commission's Order in Sub 71.
4 We've all read this two or three times.

5 "The primary reason for the increased
6 wastewater connection fee is to aid in the
7 recovery of the cost of the facility
8 expansion and to provide service for new
9 development."

10 That's what you -- that's what the
11 Commission said as to why they gave the Order to
12 increase the connection.

13 That was an application. It was
14 audited. It was presented to you by the Public
15 Staff. There was an engineering estimate behind
16 that, you know.

17 There's more information in the record,
18 if you'd like to see it, but if there's any -- how
19 there could be any question about that is beyond
20 me.

21 COMMISSIONER KEMERAIT: So to respond to
22 your statement, we are going to consider only the
23 information that's in -- that has been filed in the
24 record, so there will be no need for additional

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1 information about this to be filed or discovery.

2 MR. SCHAUER: Okay.

3 So just in response to Mr. Finley's
4 point, and then I will be done.

5 You know, I note that the Commissioners
6 pointed out that Old North State provided notice to
7 Chatham County in March that it was accepting new
8 connections, which suggest there was capacity on
9 the system, and I suspect Old North State would
10 request a rate increase in anticipation of future
11 construction with some buffer left in the existing
12 system to cover additional connections.

13 So again, I'm not certain that there's
14 evidence that my clients were the proverbial
15 straw -- you know, the proverbial straw that broke
16 the camel's back. Thank you.

17 COMMISSIONER KEMERAIT: Thank you very
18 much.

19 So we've come to the end of the oral
20 argument with the questions, and I want to thank
21 both attorneys for your excellent oral arguments
22 and your professionalism with this matter.

23 And we will adjourn the oral argument
24 and we will request proposed orders 30 days after

1 the transcript has been prepared.

2 Thank you.

3 We'll go off the record.

4

5 (Oral argument adjourned at 11:47 a.m.)

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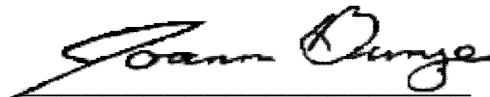
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CERTIFICATE OF REPORTER

STATE OF NORTH CAROLINA)
COUNTY OF WAKE)

I, Joann Bunze, RPR, the officer before whom the foregoing oral argument was conducted, do hereby certify that any witnesses whose testimony may appear in the foregoing oral argument were duly sworn by me; that the foregoing proceedings were taken by me to the best of my ability and thereafter reduced to typewritten format under my direction; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

This the 17th day of October, 2023.



JOANN BUNZE, RPR

Notary Public #200707300112

