STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1300, SUB 92

In the Matter of Blue Heron Asset Management, LLC and Liberty Senior Living, LLC, Complainants, v. Old North State Water Company, Inc. Respondent.	))))))))	**COMPLAINANTS' REPLY TO RESPONDENT'S RESPONSE, MOTION TO DISMISS, AND ANSWER** **AND** **MOTION FOR JUDGMENT ON THE PLEADINGS**

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Complainants Blue Heron Asset Management, LLC ("Blue Heron") and Liberty Senior Living, LLC ("Liberty Senior") (together, "Complainants"), pursuant to the Commission Rule R1-9, Rule 12(c) of the N.C. Rules of Civil Procedure, and the Commission's July 10, 2023 *Order Serving Answer and Motion to Dismiss*, submit this Reply to the Response, Motion to Dismiss, and Answer ("Response") filed in the above-captioned proceeding by Old North State Water Company, Inc. ("Respondent" or "Old North State") and this Motion for Judgment on the Pleadings.

As explained below, Old North State's Response is unsatisfactory. In fact, the Answer admits all of the material facts that establish Complainants' claims. Complainants therefore request that the matter be set for oral argument on the Motion to Dismiss and Complainants' Motion for Judgment on the Pleadings.

INTRODUCTION

In its Response, Old North State admits that it wanted to charge, and did charge, Blue Heron rates that were not in effect at the time Old North State entered into a contract to serve Blue Heron's apartment complex. Old North State attempted the same tactic for an apartment complex being built by Liberty Senior. Old North State does not cite a single piece of legal authority—no statute, case, Commission rule, or Commission order—that supports its attempt to charge customers rates that were not yet in effect at the time of sale. That is because this practice is against the law.

In addition to charging rates that were not yet in effect, Old North State has refused to calculate residential equivalent units ("REUs") in compliance with the Commission's rate orders. Instead, Old North State has opted to calculate REUs based on a NCDENR flow-reduction permit (which is applicable only to single-family residences, not apartment

complexes). The Commission—not the utility or NCDENR—decides how a utility calculates its rates.

Complainants ask merely that they be charged the rates prescribed by the Commission at the time of sale. Because Old North State's Answer admits all of the material facts alleged in the Complaint, this matter can be resolved on the pleadings. Therefore, Complainants ask that the Commission deny Old North State's motion to dismiss and simultaneously grant Complainants their requested relief based on the pleadings.

STATEMENT OF FACTS

In its Answer, Old North State admitted the following factual allegations.

I. The Parties.

Blue Heron and Liberty Senior are real-estate development companies that own property in Old North State's service territory. Compl. ¶¶ 1–2. Blue Heron operates and manages Knoll, a multi-unit apartment complex located in Pittsboro, NC. *Id.* ¶ 11. Liberty Senior is constructing Inspire, a four-story apartment complex for senior citizens located in Pittsboro, NC. *Id.* ¶ 14.

II. Old North State withholds Blue Heron's invoice.

On March 23, 2021, Blue Heron signed and submitted a Water/Waste-Water Service Application (the "Application") to Old North State for the provision of sewer connection services to Knoll. *Id.* ¶ 19, Ex. B. Upon receiving the Application, Old North State told Blue Heron in an email that it would provide an invoice for the connection service "at a later date." *Id.* ¶ 22, Ex. E. The same day it received Blue Heron's Application, Old North State submitted to Chatham County an Intention to Provide Sewer Service to Blue

Heron (the "Intention to Provide Sewer Service"). *Id.* ¶ 19, Ex. C.

Twenty-seven days later, on April 19, 2021, Old North State finally sent Blue Heron an invoice. That day, the Commission had issued a tariff order in Docket No. W-1300, Sub 71 increasing Old North State's connection fees for the relevant service area (the "Sub 71 Order"). *Id.* ¶ 24. Prior to the Sub 71 Order, the prescribed connection fee was $1,500 per REU as set in Docket No. W-1300, Sub 9 (the "Sub 9 Order"). *Id.* ¶ 25. The new Sub 71 Order increased the connection fee to $4,000 per REU. *Id.* At 3:21 PM on April 19, 2021, Old North State sent Blue Heron an invoice for the connection fee, citing the newly established rate of $4,000 per REU. *Id.* ¶ 26, Ex. 26.

Old North State calculated the connection fee for Blue Heron to be $1,082,320.00—approximately $676,450 more than what Blue Heron would owe had Old North State used the rate of $1,500 per REU that was in effect on March 23, 2021. *Id.* On August 21, 2022, Blue Heron—after notifying Old North State of its objection to the connection fee calculation—paid the connection fee under protest in order to complete construction of the Knoll development. *Id.* ¶ 29.

III. Old North State withholds Liberty Senior's invoice.

On April 1, 2021, Liberty Senior began communicating with Old North State regarding waste-water management services. *Id.* ¶ 31, Ex. H. On April 5, 2021, Liberty Senior emailed Old North State's President, John McDonald, explicitly asking, "What do we need to do to pay the $1,500/unit connection fees associated with [Inspire]?" *Id.* ¶ 32. Liberty Senior did not receive a response for 14 days.

At 2:24 PM on April 19, 2021—the day the Commission increased Old North State's tariffs—Old North State informed Liberty Senior that it would calculate the invoice

at the "current tap fee" of $4,000 per REU. *Id.* ¶ 34. An hour later, Old North State provided Liberty Senior with the invoice that Liberty Senior had requested two weeks prior. *Id.* ¶ 35. Old North State calculated the connection fee for Liberty Senior to be $807,400—approximately $504,625 more than what Liberty Senior would owe had Old North State used the rate of $1,500 per REU that was in effect on April 5, 2021. *Id.*

IV. Old North State does not calculate REUs as prescribed in the Sub 9 Order.

The rate Old North State should have charged at the time—$1,500 per REU—was established as part of the Commission's approval of Old North State's acquisition of the sewer franchise from Briar Chapel Utilities, LLC ("Briar Chapel Utilities") in Docket No. W-1300, Sub 9. The Sub 9 Order states that "[t]he purchase price for the Briar Chapel wastewater utility system *under the APA is $1,500 per residential equivalent unit (REU) for each new connection and the future expansion* . . . ." Sub 9 Order, at 3 (¶ 8) (emphasis added).

Section 1.27 of Old North State's asset purchase agreement with Briar Chapel Utilities (the "APA")—which was filed with the Commission in the Sub 9 docket—provides a definition for REU that includes an express computational method. Residential equivalent unit is defined as:

> [A] unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Projects (250). For purposes of this Agreement, the number of RUEs [sic] represented by a non-residential user shall be determined as follows:
> (a) If there is no water or wastewater meter for the non-residential facility, by dividing the design flow of the facility in question, (in GPD) by 250 GPD; or
> (b) If there is a water and/or wastewater meter for the non-residential facility, in accordance with the following chart:

Meter Size	REU
less than 1"	1
1"	2.5
1.5"	5.0
2"	8.0
3"	15.0
4"	25.0
6"	50.0

Id. ¶40, Ex. I. As set forth the APA, an REU for a non-residential development is determined by the meters or, if there are no meters, the design flow divided by 250 GPD. *Id.* ¶ 41.

Section 3.2 of the APA states that Old North State was to pay the seller $1,500 "per REU for each new residential and non-residential connection made to the Wastewater Utility System. *Buyer [Old North State] will continue to collect the $1,500 per REU Connection Fee approved in the franchise proceeding for the Seller in Docket No. W-1230, Sub 0, for each new connection made* to the Wastewater Utility System and pay such fees to Developer." *Id.*, Ex. I (emphasis added).

In the W-1230, Sub 0 docket, the Commission approved Briar Chapel Utilities' initial acquisition of the sewer system. *Id.* ¶ 43. Section 1.32 of Briar Chapel Utilities' agreement to acquire the sewer system (the "BCU Agreement") recites the same express computational method as found in Section 1.27 of the APA. *Id.* ¶ 43, Ex. J. Section 5.3(b) of the BCU Agreement also states that Briar Chapel Utilities "shall request from the Commission a wastewater connection fee of $1,500 for each Connection and shall use its best efforts to gain the Commission's approval of such fee." *Id.*, Ex. J (Section 5.3). In Docket No. W-1230, Sub 0, Briar Chapel Utilities requested, and the Commission approved, the connection fee of $1,500 as required by the BCU Agreement. *See* Recommended Order, *Application by Briar Chapel Utilities, LLC, for a Certificate of*

Public Convenience and Necessity to Provide Sewer Utility Service in Briar Chapel Subdivision in Chatham County, North Carolina, and for Approval of Rates, Docket No. W-1230, Sub 0 (Dec. 8, 2009).

Old North State did not compute REUs as set forth in the agreements and the Commission's orders. For the Knoll apartments owned by Blue Heron, Old North State divided the apartment's 51,140 gallons per day ("GPD") for Blue Heron's development by 189 GPD, and then claimed that the development has 270.6 REUs. *Id.* ¶ 47. Knoll, however, has two 2-inch meters and two 3-inch meters. *Id.* ¶ 48. According to the chart in both the APA and the BCU Agreement, this results in only 46 REUs.[1] *Id.* For Liberty Senior's Inspire, Old North State divided the projected 38,150 GPD for Liberty Senior's development by 189 GPD, and then claimed that the development has 201.85 REUs. *Id.* ¶ 49. According to the chart in both the APA and the BCU Agreement, Inspire's single 6-inch meter results in only 50 REUs.[2] *Id.* ¶ 50.

V. Old North State miscalculated REUs for Blue Heron's sewer-service rate.

On or about January 13, 2023, Old North State issued an invoice to Blue Heron for the first four months of sewer service. *Id.* ¶ 53. The total amount invoiced for the four months was $45,782.12, which reflects $11,445.53 per month. *Id.* ¶ 54. This monthly total is based on 270.6 REUs. *Id.* ¶ 55. Had Blue Heron's REUs been calculated as prescribed by the Commission, the Knoll development would have had 46 REUs, resulting in a monthly sewer fee of $1,945.8 per the Sub 71 order.

[1] Although Old North State admits the number of meters at Knoll, it denies the resulting REU calculation. *See* Resp. at 25 (¶ 48).

[2] Old North State denies this allegation based on lack of information. *See* Resp. at 25 (¶ 50).

ARGUMENT

Old North State refuses to charge Complainants the rates in effect at the time of sale and refuses to calculate REUs as established in the Commission's orders. Old North State's Response admits the material factual allegations and fails to provide a legal justification for its conduct. Therefore, Complainants ask the Commission to deny the Motion to Dismiss and grant Complainants judgement on the pleadings.

I. STANDARD OF REVIEW

The Commission evaluates a motion to dismiss under same standard as a court interpreting North Carolina Rule of Civil Procedure 12(b)(6). *See, e.g.*, Order Denying Motions to Dismiss, Allowing Motion to Consolidate, and Scheduling Hearing, *In re Piedmont Nat. Gas Co. v. Pub. Serv. Co. of N.C.*, Docket No. G-5, Sub 508 (Sept. 3, 2009), at 3. A motion to dismiss under Rule 12(b)(6), "tests the legal sufficiency of the complaint. In ruling on the motion, the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Lamb v. Styles*, 263 N.C. App. 633, 637, 824 S.E.2d 170, 174 (2019) (internal quotations omitted). A motion to dismiss under Rule 12(b)(6) should not be granted "unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Cube Yadkin Generation, LLC v. Duke Energy Progress, LLC*, 269 N.C. App. 1, 7, 837 S.E.2d 144, 149 (2019) (emphasis omitted).

Similarly, under Rule 12(c), the court takes the admitted factual allegations of the complaint as true. *See Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). "The standard of review for a Rule 12(c)

motion is whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment." *Id.*

II. OLD NORTH STATE CANNOT CHARGE RATES THAT WERE NOT IN EFFECT AT THE TIME OF SALE.

A sewer utility must charge the rates prescribed by the Commission, and it must charge the prescribed rates in effect at the time of sale of the service. Old North State did not charge the rates in effect at the time of sale of interconnection services—and it deliberately prevented Complainants from paying the rates that were in effect at the time of sale. Old North State's Response fails to provide a valid excuse for its misconduct.

A. The rate Old North State must charge Blue Heron is determined by the date Old North State entered into a contract with Blue Heron.

North Carolina law prohibits a utility from selling its services at a rate higher than allowed by the Commission. Old North State entered into a contract for the sale of services on March 23, 2021, when the fee for the service was $1,500 per REU. Despite entering into a binding contract on that date, Old North State charged Blue Heron $4,000 per REU.

Section 62-139(a) of the General Statutes prohibits a utility from charging, demanding, collecting, or receiving "greater . . . compensation for any service rendered or to be rendered . . . than that prescribed by the Commission." N.C. Gen. Stat. § 62-139(a). Notably, the statute explicitly covers fees charged for services "to be rendered" in the future. Thus, the General Assembly contemplated situations—as occurred here—in which a utility customer would contract for utility services to be performed in the future.

In furtherance of this statute, the Commission's regulations prohibit a sewer utility from charging, demanding, collecting, or receiving "any greater . . . compensation *for sale of sewer service* . . . than those rates and charges approved by the Commission *and in effect*

at that time." N.C.U.C. Rule R10-20. To be clear, Rule R10-20 is triggered by the "sale of sewer service"—not by the *performance* of the promised service; thus, the Rule requires that the sewer utility charge the rate "in effect at that time" *of sale*. Rule R10-17(a) corroborates this reading. Rule R10-17(a) provides that "[a] utility shall, when accepting application for sewer service, give full information to the applicant concerning type of service to be rendered and *rates which will be applicable*." N.C.U.C. Rule 10-17(a) (emphasis added). To inform a customer of the "rates which will be applicable," the sewer utility must disclose the rates in effect at the time of sale—this is because the utility does not know what rates might be applicable at the time of future performance. Although Old North State claims "[t]he date of interconnection establishes the time the rate for connection fees is charged," Resp. at 4, it provides no authority for this assertion—an assertion that is contradicted by Rules R10-20 and R10-17. The Commission's rules are binding on the parties and the Commission. *N.C. Dep't of Just. v. Eaker*, 90 N.C. App. 30, 38, 367 S.E.2d 392, 398 (1988) (agency's regulations have "the force of law and must be strictly followed and enforced"), *overruled on other grounds by, Batten v. N. C. Dep't of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990).

Here, the sale of sewer service to Blue Heron occurred on March 23, 2021. "The plain meaning of 'sale' is 'a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).'" *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (quoting Webster's Third New International Dictionary 2003 (1966)). "Sale" is also defined as "any barter or other exchange" of a good or service for consideration. *See id.* at

344, 549 S.E.2d at 903 (citing N.C. Gen. Stat. § 18B–101(13)). Thus, North Carolina courts have defined "sale" as the creation of a *contract* to exchange goods or services for a price.

A contract was formed on March 23, 2021, by an offer and an acceptance. *See, e.g.*, *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823 (1960) (a binding contract is formed upon the acceptance of an offer). To start, Blue Heron made an offer to acquire Old North State's connection service by tendering the necessary Water/Waste-Water Service Application. *See* Compl. ¶ B. Old North State contends that Blue Heron's tender of the application could not be an offer because the application did not state the applicable connection fee, and an offer missing a material term is not a valid offer. *See* Resp. at 7. North Carolina law says otherwise. "[L]aws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.'" *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 789, 786 S.E.2d 255, 264 (2016) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (1934)). The rates for connection service were prescribed as a matter of law by the Commission. *See* N.C. Gen. Stat. § 62-139(a). The application did not need to state the prescribed rates in order for the rates to be incorporated into the offer and subsequent contract.[3]

Old North State then accepted Blue Heron's offer to form a binding contract. Old North State's acceptance is established by two sets of allegations. First, the very language

[3] Despite Old North State's assertion, it is irrelevant whether Complainants conducted "due diligence" about Old North State's pending rate application. Resp. at 3 ("Had Blue Heron asked, ONS would have willingly informed Blue Heron that the connection fees would be at the rate the Commission would approve in the pending docket."). A pending rate application—and a utility's hope for collecting higher rates in the future—does not allow a utility to evade its obligation to charge the rates set by law at the time of sale. *See* N.C. Gen. Stat. § 62-139(a); N.C.U.C. Rule R10-20.

in Old North State's own Water/Waste-Water Service Application conspicuously states: "THIS APPLICATION WILL BECOME A BINDING CONTRACT UPON ACCEPTANCE BY THE UTILITY." *Id.* ¶ 18. In fact, Old North State admits, repeatedly, in its Response that it accepted the application, *see* Resp. at 3 ("ONS accepted the application[.]"), 4 ("ONS accepted an application[.]")—Old North State just refuses to admit its acceptance created a contract. Second, Old North State's acceptance is also established by its subsequent conduct. "An acceptance by conduct is a valid acceptance." *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002). On the very date it received the application, Old North State submitted the Intention to Provide Service form to Chatham County. Compl. ¶ 19. Old North State's communication to Chatham County was clear: We have a contract to connect Blue Heron, and we intend to perform—there is no question that it had accepted Blue Heron's offer.

Furthermore, Old North State has a practice of charging customers the fee in effect at the time of accepting an application. The practice was memorialized in its own instruction for builders seeking sewer services, which requires a builder to submit "application fees" along with the application itself. *See* Compl. ¶ 20; *id.*, Ex. D. The only way a builder could submit the connection fee along with the application is *if the fee was determined at the time of the application*. If the fee was determined at the time of connection—as Old North State now insists, Resp. at 4—then a builder could not calculate the fees to include with the application because they would be dictated by the later-to-be-revealed date of service. Old North State's own instructions to builders—which calculates

fees at the time of the application—is consistent with Rule R10-20's requirement that sewer utilities charge rates in effect at the time of sale.[4]

In summary, once Old North State had accepted the application on March 23, 2021, the "sale of sewer service" had occurred and Old North State was required to charge the prescribed fee "in effect at that time." N.C.U.C. Rule R10-20. The fee in effect at the time was $1,500 per REU.

B. Old North State's conduct estops it from charging a later-approved rate.

Despite all of the foregoing, Old North State deliberately charged Blue Heron and Liberty Senior rates that were not in effect at the time of sale. Because of Old North State's deliberate conduct, it is estopped from charging rates that were later approved by the Commission.

Although Old North State received a completed application form and tendered the Intention to Provide Service on March 23, 2021, Old North State told Blue Heron that it would provide an invoice for the contracted-for connection service "at a later date." *Id.* ¶ 22. Then Old North State sat tight for almost a month as it waited for the Commission to approve its rate increase. Liberty Senior was the victim of a similar tactic. On April 5, 2021, Liberty Senior emailed John McDonald explicitly asking "[w]hat do we need to do to pay the $1,500/unit connection fees associated with [its apartment development]"? *Id.* ¶

[4] Old North State seems to argue that the date of interconnection must determine the connection fee because, otherwise, if Old North State "had charged Blue Heron the connection fee [at the time of sale] and had Blue Heron never completed the project," then Old North State would have been required to refund the connection fee. Resp. at 4. Yet Old North State's practice is to collect connection fees at the time of application—i.e., well in advance of actual connection—so it is accustomed to the possibility of issuing refunds. Indeed, here, Old North State invoiced Complainants immediately on April 19, 2021—more than a year before it was able to connect them—and, thus, invited the risk of having to issue a refund if interconnection never happened.

32. Mr. McDonald ignored the inquiry for two weeks. Then, on April 19, 2021—after the new tariff was established—Old North State issued within an hour invoices to Blue Heron and Liberty Senior that used the new connection fee of $4,000 per REU. *Id.* ¶¶ 26, 34–35.

Old North State intentionally prevented Blue Heron and Liberty Senior from making a payment before the Commission issued its rate order and then, once the order was issued, churned out invoices to its waiting customers. In fact, Old North State confessed its deliberate scheme in its Response: Old North State withheld invoices from Blue Heron and Liberty Senior "anticipating that the NCUC would rule upon and hopefully approve the pending request to set the connection fee at $4,000 per REU[.]" Resp. at 4.

North Carolina recognizes the doctrine of equitable estoppel, which "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Ellen v. A.C. Schultes of Md., Inc.*, 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005) (internal quotation marks omitted). The elements of equitable estoppel are a concealment of material facts, the intention that the concealment will be acted on by the other party, and knowledge of the real facts. *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628 (1990).

Here, Old North State intentionally concealed that it was going to withhold invoices—which were necessary for payment—until the Commission had issued an order to increase Old North State's rates. Simply put, Old North State baited Blue Heron and Liberty Senior to sit tight while Old North State waited to swap out its current rates for the

higher rates requested in the pending application.[5] Then, on the day the rate increase was granted, Old North State sent both clients invoices *within the same hour*. Because Old North State deliberately prevented Blue Heron and Liberty Senior from paying for connection service before the Sub 71 Order was issued, Old North State is estopped from relying on the Sub 71 Order to charge higher rates.

C. Blue Heron did not waive its right to relief under Section 62-139(a).

Old North State contends that Blue Heron waived its right to seek a refund under Section 62-139(a) because it tendered the amount demanded by Old North State. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (internal quotation omitted). "A waiver is implied when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Id.* at 12, 558 S.E.2d at 206–07 (internal quotation omitted).

A customer's payment of excessive fees cannot constitute an abandonment of the customer's right to a refund under Section 62-139(a) because the statutory right to a refund

[5] Old North State defends its tactic by explaining that its request to increase rates "was pending before the Commission well before" Complainants sought to contract for connection services and the timing of the Commission's ultimate "approval was out of ONS's control." Resp. at 11. The fact that Old North State had been waiting for an anticipated rate increase does not excuse its conduct of intentionally foiling Complainants' attempts to pay the rates in effect at the time.

Furthermore, Old North State's new allegations about the delay in connecting Blue Heron, *see* Resp. at 8–9, are outside the scope of a motion to dismiss. *See Charlotte Motor Speedway, LLC v. Cty. of Cabarrus*, 230 N.C. App. 1, 5, 748 S.E.2d 171, 175 (2013) ("matters outside the complaint are not germane to a Rule 12(b)(6) motion." (quotation omitted)). The new allegations are also immaterial because, even though Blue Heron had reservations about making a payment before Old North State had resolved its delays in constructing the sewer facilities, the delays did not change the fact that the parties had already entered into a contract on March 23, 2021, and the connection fee was determined by the time of the contract—not the time of connection.

is not triggered *until the customer makes the payment*. The act that triggers a statutory right cannot also be an act that waives that very right. Moreover, here, Old North State has long known of Blue Heron's objection to Old North State's calculation of the connection fee, *see* Resp. at 6 n.1, and Blue Heron paid the connection fee under protest, *see* Compl. ¶ 29. Plus, Blue Heron was compelled to pay an incorrect fee because it needed sewer service so that tenants could move into its apartment complex; a utility cannot extract an excessive payment from a customer under duress and then argue that the customer's payment was a waiver of the statutory right to seek a refund. Thus, Blue Heron's tendering of payment *under protest and duress* did not lead Old North State to "naturally and justly" believe Blue Heron had waived its right to a refund. *See Medearis*, 148 N.C. App. at 12, 558 S.E.2d at 206–07.[6]

D. Dissatisfaction with currents rates does not empower a utility to charge customers a rate that is not in effect at the time of sale.

Old North State's justification for charging connection fees that were not in effect at the time does not rest in the law, but in Old North State's frustration that it failed to secure an earlier increase in the connection fees. In short, Old North State had really hoped to charge Complainants $4,000 per REU, but it did not get the necessary order in time—so it had to take matters into its own hands. A utility's failure to timely seek a desired rate increase does not give the utility license to remedy its mistake by charging customers the desired rates.

[6] Old North State's reliance on *City of High Point v. Duke Power Co.*, 120 F.2d 866 (4th Cir. 1941), is misplaced. *See* Resp. at 10. The case did not concern Section 62-139(a)'s statutory right to a refund. *See High Point*, 120 F.2d at 867–69. In addition, the Fourth Circuit found an implied waiver based on a customer making monthly payments for three years without protesting the payments. *See id.* In contrast, Blue Heron tendered a single payment under protest.

Old North State objects that the rate in effect at the time of sale—$1,500 per REU—is inadequate to finance anticipated system expansion. Resp. at 2. Old North State restates this objection in various forms: Protesting that the $1,500-per-REU fee was merely a "negotiated" purchase-price mechanism, *id.* at 5, 14, 15, and threatening to increase rates across all ratepayers, *id.* at 5. But the $1,500-per-REU fee was not some arbitrary number, unrelated to system expansion. To the contrary, the original BCU Agreement explicitly accounted for a system expansion from 250,000 to 750,000 GDP. *See* Compl., Ex. J (Sections 1.44, 1.45). Likewise, when Old North State acquired the system, it promised to be responsible for "expand[ing] the currently installed 250,000 GDP Wastewater Treatment Plant to 600,000 GDP[.]" *Id.*, Ex. I (Section 3.3). Notably, both the BCU Agreement and the APA called for future expansion and set the connection at $1,500 per REU. If that fee somehow became inadequate for the planned expansion, then it was Old North State's burden to prudently manage the expansion and timely request any needed rate changes. *Cf.* Order, *In the Matter of Cardinal Pipeline Co., LLC Depreciation Rate Study As of Dec. 31, 2020 in the Matter of Application of Cardinal Pipeline Co., LLC, for an Adjustment in Its Rates & Charges*, No. G-39, Subs 39, 77 (Oct. 14, 2022) (recognizing utility has "an opportunity to recover its reasonable operating expenses and earn a fair return on its rate base under prudent management"). Old North State's failure to timely request a rate increase for a long-anticipated (and promised) system expansion does not justify its conduct here.

III. OLD NORTH STATE MUST COMPUTE REU CONSISTENT WITH THE COMMISSION'S ORDERS.

In Docket No. W-1300, Sub 9, the Commission established that Old North State was allowed to charge "$1,500 per REU" as a connection fee. In establishing this rate, the

Commission relied upon the definition of REU as set forth in preexisting agreements, which provided a computational formula for REU. Old North State is not permitted to deviate from this predetermined computation of REU.

The $1,500-per-REU rate was established as part of the Commission's approval of Old North State's acquisition of the Briar Chapel Utility sewer franchise in Docket No. W-1300, Sub 9. *See* Recommended Order, *In the Matter of Application by Old North State Water Company, LLC, and Briar Chapel Utilities, LLC, for Authority to Transfer Sewer Franchise in Briar Chapel Subdivision in Chatham County, North Carolina, to Old North State Water Company, LLC, and for Approval of Rates*, Dockets No. W-1300, Sub 9, W-1230, Sub 1 (Apr. 20, 2015) [herein after "Sub 9 Order"]. Although the Sub 9 Order does not explicitly state how to compute REU, the order expressly references the $1,500 per REU purchase price to which the parties agreed in the Asset Purchase Agreement ("APA"). The Sub 9 Order states that "[t]he purchase price for the Briar Chapel wastewater utility system *under the APA* is *$1,500 per residential equivalent unit (REU) for each new connection* and the future expansion . . . ." *See* Sub 9 Order, at 3 (¶ 8) (emphasis added).

The APA, which was filed with the Commission in Sub 9, provides a definition for residential equivalent units that includes an express computational method:

> [A] unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Projects (250). For purposes of this Agreement, the number of RUEs [sic] represented by a non-residential user shall be determined as follows:
> (c) If there is no water or wastewater meter for the non-residential facility, by dividing the design flow of the facility in question, (in GPD) by 250 GPD; or
> (d) If there is a water and/or wastewater meter for the non-residential facility, in accordance with the following chart:

Meter Size	REU
less than 1"	1
1"	2.5
1.5"	5.0
2"	8.0
3"	15.0
4"	25.0
6"	50.0

Compl., Ex. I (Section 1.27). As set forth the APA, an REU for a non-residential development in Briar Chapel is determined by the meters or, if there are no meters, the design flow divided by 250 GPD.

In addition to this express computation, the APA states that Old North State was to pay the seller $1,500 "per REU for each new residential and non-residential connection made to the Wastewater Utility System. Buyer will *continue to collect the $1,500 per REU Connection Fee approved in the franchise proceeding for the Seller in Docket No. W-1230, Sub 0*, for each new connection made to the Wastewater Utility System and pay such fees to Developer." Compl. Ex. J (Section 3.2). Thus, the APA (1) obligates Old North State to collect a connection fee of $1,500 "per REU," (2) defines how to compute REU in Section 1.27 of the APA, and (3) incorporates the Commission's prior approval of this connection fee in Docket No. W-1230, Sub 0.

In the tariff order in Docket No. W-1230, Sub 0, the Commission approved Briar Chapel Utility's initial acquisition of the sewer system and referenced Briar Chapel Utility's agreement to acquire the sewer system (the "BCU Agreement"). *See* Recommended Order, *Application by Briar Chapel Utilities, LLC, for a Certificate of Public Convenience and Necessity to Provide Sewer Utility Service in Briar Chapel Subdivision in Chatham County, North Carolina, and for Approval of Rates*, Docket No. W-1230, Sub 0 (Dec. 8, 2009) [hereinafter the "Sub 0 Order"]. The BCU Agreement had

the exact same definition for residential equivalent units—i.e., with the same express computational method—as found in the APA. *See* Compl., Ex. J (Section 1.32). In addition to having the same definition of REU, the BCU Agreement states that Briar Chapel Utility "shall request from the Commission a wastewater connection fee of $1,500 for each Connection and shall use its best efforts to gain the Commission's approval of such fee." *Id.*, Ex. J (Section 5.3(b)).[7] This clause establishes that the Commission and the parties understood that the Commission's approval in the Sub 0 Order of "$1,500 per REU" incorporated the computation of REU as set forth in Section 1.32 of the BCU Agreement.

In sum, the original BCU Agreement expressly defined "REU" and obligated Briar Chapel Utility to seek the Commission's approval of a $1,500 "per REU" as defined in the agreement. Briar Chapel Utility sought and received such approval in Docket No. W-1230, Sub 0. Then, in the APA by which Old North State acquired the system from Briar Chapel Utility, Old North State had promised to continue to collect the same $1,500-per-REU connection fee that Briar Chapel Utility had asked the Commission to approve in W-1230, Sub 0 docket. In the Sub 9 Order, the Commission approved Old North State's continued collection of the $1,500-per-REU connection fee as was first established and defined by the BCU Agreement and again defined verbatim in Old North State's own APA.[8]

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[7] "Connection" is defined in Section 1.10 as "any single family residence or RUE [sic] connection[.]" Compl., Ex. J (Section 1.10).

[8] Per the Commission orders and the asset purchase agreements, the REUs for each Complainant should be calculated based on meter size of a non-residential user. *See* Compl. ¶¶ 47–50. In its prior correspondence with Old North State, Complainants acknowledged a potential alternative calculation of REU based on dividing a facility's flow by 250 GPD. *Id.*, Ex. I (referencing sections 1.27 of the APA). This computation would be appropriate only if the Commission were to determine the meter-based method was inapplicable here. Old North States points to a potential alternative calculation as proof that there was never a binding contract between Blue Heron and Old North State. *See* Resp. at 11, 13. This

Despite the Commission's orders and these contractual agreements, Old North State insists that "[t]he appropriate way to calculate residential equivalent units is through reference to the wastewater collection system extension permit authorized by the Division of Water Resources of the State." Resp. at 12. Old North State makes this assertion without any citation to legal authority or explanation for its reasoning. Most notably, Old North State does not (and cannot) point to the either the Sub 9 Order or the Sub 0 Order as justification for this assertion.

The weakness of Old North State's argument for calculating REU is further exposed by the system extension permit upon which Old North State relies for its desired calculation. That NCDENR permit "is applicable to residential single family dwellings *only*." Compl., Ex. L (emphasis added). By its own language, the permit is not applicable to Complainants' multi-family developments.[9] Moreover, the NCDENR permit does not purport to modify utility rates authorized by the Commission, nor does the letter make any mention of REU, REU calculations, or connection fees.

Old North State's final protest against calculating REU as defined in the agreements is that the Commission's adherence to the predetermined method of calculating REU would

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position is baseless. The Rules of Civil Procedure "permit pleading in the alternative, and that theories may be pursued in the complaint even if plaintiff may not ultimately be able to prevail on both." *James River Equip., Inc. v. Mecklenburg Utilities, Inc.*, 179 N.C. App. 414, 419, 634 S.E.2d 557, 560 (2006) (internal quotation marks omitted). Complainants are free to make the argument that there is an alternative way to calculate REUs based on the Commission's ultimate interpretation of the APA.

[9] Old North State is mistaken that the sewer treatment plant would somehow be overwhelmed by wastewater if the Commission were to require Old North State to calculate REU correctly, as its had agreed to in its own APA. *See* Resp. at 13. REU is merely a method of calculating the fees a customer will pay for its volume of wastewater; a change in the calculation of REU does not increase (or decrease) the customer's volume of wastewater.

be unfair to Old North State. *See* Resp. at 13–15. Complainants hope this protest falls on deaf ears. Old North State argues that the REU calculation set forth in the APA is from 2014 and therefore outdated. Resp. at 13. Even if the calculation is outdated, Old North State cannot unilaterally revise the REU calculation; only the Commission can alter the calculation, and its orders have never done so. Old North State also argues that, if the Commission requires it to adhere to the correct REU calculation, the Commission's tariff order in Sub 71 "would be nullified." Resp. at 15. Even accepting this argument, the correct remedy would be for Old North State to seek a rate adjustment—not for Old North State to continue to miscalculate REUs.

IV. OLD NORTH STATE OVERCHARGED BLUE HERON ON ITS FIRST MONTHLY INVOICE.

Old North State's first invoice to Blue Heron for sewer services suffers from the same error in computing REU. Old North State is permitted to charge $42.30 per REU a month for sewer service. Compl. ¶ 52. On February 8, 2023, Old North State issued an invoice for the first fourth months of sewer service and the total for the fourth months was $45,782.12, which reflects $11,445.53 per month. *Id.* ¶ 54. This monthly total would be based on 270.6 REUs. As already established, Old North State must compute REU by meters (or, if there are no meters, by the design flow divided by 250 GDP). A properly computed REU would be 46 REUs, for a monthly sewer fee of $1,945.8.

Old North State seems to contend that, even if the Commission agrees that the connection fee set in Sub 9 must be calculated as defined in the APA, the rate increase in Sub 71 redefined the calculation of REU going forward. Resp. at 16. Yet, the Commission's order in Sub 71 does not expressly define a new method of calculating REU. Old North State wishes to infer such a significant change based on nothing actually said in

the order. Moreover, Old North State's inferred method of calculating REU—which relies on the 189 GPD metric stated in a NCDENR permit—cannot be correct because that permit set a reduced flow that "is applicable to residential single family dwellings *only*." Compl., Ex. L (emphasis added). Old North State has no authority—from the Commission or otherwise—for its desired method of calculating Blue Heron's monthly commodity rate.

CONCLUSION

For the reasons stated above, Complainants find Old North State's Response to be unacceptable. Because Old North State has admitted all of the key factual allegations in the Complaint, Complainants respectfully move the Commission to issue an order entering judgement on the pleadings in favor of Complainants. Complainants request the opportunity for oral argument on this dispute.

Respectfully submitted, this 21st day of July, 2023.

By: /s/ Craig D. Schauer

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Complainants' Reply to Respondent's Response, Motion to Dismiss, and Answer and Motion for Judgment on the Pleadings has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 21st day of July, 2023.

By: /s/ Craig D. Schauer
Craig D. Schauer