

**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.	)	PROPOSED ORDER
	)	ON BEHALF OF
Old North State Water Company, Inc.	)	OLD NORTH STATE
	)	IN SUPPORT OF
Respondent	)	MOTION TO DISMISS

HEARD: Wednesday, October 4, 2023 at 9:00 a.m. in Commission Hearing Room  
2115 Dobbs Building, 430 North Salisbury Street, Raleigh North Carolina

BEFORE: Commissioners Karen K. Kemerait, Presiding, Kimberly W. Duffley and  
Floyd B. McKissick, Jr.

APPEARANCES:

For Blue Heron Asset Management LLC and Liberty Senior Living LLC:

Craig Schauer  
Dowling PLLC  
3801 Lake Boone Trail, Suite 260  
Raleigh N.C. 27607

For Old North State Water Company, Inc.

Edward S. Finley, Jr.  
Edward S. Finley, Jr., PLLC  
2024 White Oak Rd.  
Raleigh, N.C. 27608

BY THE COMMISSION: On May 26, 2023, the Complainants, Blue Heron Asset Management LLC (“Blue Heron”) and Liberty Senior LLC (“Liberty Senior”) filed an unverified formal Complaint in this docket against Respondent, Old North State Water Company, Inc. (“Old North State”). On May 31, 2023, the Commission issued an Order serving the Complaint upon the Respondent. On June 12, 2023, the Respondent filed a verified Motion to Dismiss the Complaint and an Answer to the allegations. On July 10, 2023, the Commission issued an Order serving the Answer and Motion to Dismiss. On July 21, 2023, the Complainants filed their Response to Respondent’s Answer and a Motion for Judgment on the Pleadings. On July 24, 2023, Complainants filed a verification to their Complaint. On September 6, 2023, the Commission issued an Order scheduling briefs and scheduling an oral argument for October 4, 2023. On September 13, 2023 the parties filed briefs in this proceeding. On September 27, 2023 Complainants filed a Responsive Brief in Opposition to Respondent’s Motion to Dismiss. The Commission heard oral arguments from the parties on October 4, 2023.

### **Findings of Fact**

1. Blue Heron alleges that it entered into an express, binding contract with Old North State on March 23, 2021 to obtain the right to interconnect the discharge pipes from its multi-unit apartment complex then under construction to the collection system of Old North State for a payment of \$69,000. The \$69,000 under the alleged express, binding contract was based on a connection fee of \$1,500 per residential equivalent unit. The number of residential equivalent units to produce the \$69,000 was 46.

2. In paragraph 21 of its May 26, 2023 Complaint, verified only months thereafter on July 24, 2023, Blue Heron alleges, “Under North Carolina law, a binding contract is formed by the acceptance of an offer. On March 23, 2021, Blue Heron offered to acquire Respondent’s connection service and Respondent accepted - both by the terms of Respondent’s own application and by Respondent’s conduct of tendering an Intention to Provide Sewer Service. Thus, on March 23, 2021, Respondent and Blue Heron had created a

legally binding contract for Respondent to provide sewer connection services to Blue Heron.”

3. With respect to the Intention submitted to Chatham County, in its unverified Reply Brief of September 27, 2023 Blue Heron alleges, “Third, Old North State misstates Complainants’ position with regard to the relevancy of Old North State’s submitting the Intention to Provide Service form to Chatham County. Blue Heron does not contend that Old North State’s mere intention would constitute an acceptance. Rather, because the acceptance of an offer can be proven by a party’s conduct, Blue Heron points out that Old North State submitted the intention to provide service form - *which is evidence of acceptance* of the Blue Heron offer.”

4. Applicable provisions of the Application to which Blue Heron refers are as follows:

Consumer agrees to promptly pay the application fees, service fees, deposits, late fees, after - hours fees, processing fees and all other charges and fees of Utility (“Charges”) at Utility’s standard rates as set by Utility now or at any future time and to comply with the Utility’s rules, regulations and policies, as modified from time to time by Utility (“Rules”). Utility’s obligation to provide water/waste-water service is subject to (i) Utility’s acceptance of this application and (ii) the provision of any water or sewer license, franchise, easement, right-of-way or other agreements that may exist between Utility and any governmental authority or other person.

5. This introductory language is prefaced by a heading: **THIS APPLICATION WILL BECOME A BINDING CONTRACT UPON ACCEPTANCE BY THE UTILITY.**

6. On page 2 of the application form there is a section for the amount owed for tap fee, application fee, meter fee, total charges and payment method. While Blue

Heron filled out portions of the information requested on page two, these sections having to deal with fees were not filled in.

7. In addition on page 2 of the application form is a section entitled:  
**UPON RECEIPT OF THIS APPLICATION AND PAYMENT OF ALL FEES  
THE METER WILL BE REQUESTED FOR THE DATE TO START SERVICE REQUESTED ABOVE.  
PLEASE ALLOW AT LEAST TWO BUSINESS DAYS FOR PROCESSING YOUR APPLICATION.**

8. Blue Heron made no request for a meter or for a date to start service prior to April 19, 2021.

9. Page 2 also states: "Rates and Miscellaneous Charges are Subject to Change."

10. Old North State provided instruction to Blue Heron to "[c]omplete the Builder Application for Connection and enclose a check for the Tap, CIAC tax and Application Fees. The instruction then states that the builder should "[p]lease mail the completed application and check for fees to Old North State."

11. Blue Heron enclosed no check for a tap fee or any other fee prior to April 19, 2021.

12. The Intention to Provide Service to which Blue Heron refers in paragraph 21 of its Complaint is addressed to Chatham County Central Permitting Division from Old North State Water Company.

13. The Intention states: "Please be advised that we have been granted a certificate of public convenience and necessity by the North Carolina Utilities Commission to provide sewer utility service to the property described below. It is our intention to

provide sewer service pursuant to GS 130A-337. The property owner is listed as BHEVBC, LLC (which is Blue Heron)" and the number of bedrooms is listed as multifamily. The Intention is executed on behalf of Old North State on March 23, 2021.

14. Neither the application form submitted by Blue Heron on March 23, 2021 nor the Intention submitted to Chatham County makes reference to a connection fee of \$1,500, a billing determinant of 46 REUs or a total connection fee of \$69,000 or any other amount.

15. In paragraph 62 its Complaint Blue Heron alleges that "Old North State charged Blue Heron \$4,000 per REU instead of \$1,500 per REU in violation of the Sub 9 order [April 20, 2015 order in Docket Nos. W-1300, Sub 9, W-1230, Sub 1]. On March 23, 2021, ONSWC formed a binding contract with Blue Heron to provide sewer connection services to Blue Heron's Knoll apartment complex in the Briar Chapel service area. Per the Sub 9 order, ONSWC's prescribed connection fee for the Briar Chapel service area on March 23, 2021 was \$1,500 per REU."

16. In paragraph 64 of its Complaint Blue Heron alleges that "Old North State did not calculate REUs in accordance with the Commission's orders. Under the Sub 9 Order and Section 1.27 of the APA [October 31, 204 Asset Purchase Agreement between Briar Chapel Utilities, NNP-Briar Chapel and Old North State], a REU for a non-residential development in Briar Chapel is determined by the meter size, or, if there are no meters, the design flow divided by 250 GPD. Blue Heron has two 2" meters and two 3" meters. According to the chart in both the APA and the BCU Agreement, this results in only 46 REUs."

17. Blue Heron was not a party to the 2014 Asset Purchase Agreement between NNP [Newland] and Old North State.

18. Section 1.27(b) of the 2014 Asset Purchase Agreement between Newland and Old North State addresses non-residential facilities but does not address multi-family residential apartment facilities.

19. Before Blue Heron would have been able to calculate a connection fee based on section 1.27(b) of the Asset Purchase Agreement between Newland and Old North State it would have been necessary for Blue Heron to identify the number of meters it planned to construct in its multi-family residential apartment facility. Blue Heron made no such identification prior to April 19, 2021.

20. Section 1.27(b) of the Asset Purchase Agreement between Newland and Old North State does not address a request for connection fees for facilities with more than one meter.

21. Neither the tariff in the Sub 9 order nor the decretal paragraphs in the Sub 9 order adopt or incorporate the Asset Purchase Agreement to which Blue Heron refers in its Complaint or section 1.27 thereto.

22. The only reference to REUs in the Sub 9 order is the tariff which defines REU as “one residential equivalent unit.”

23. The connection fees approved in Sub 0 [December 8, 2009 in Docket No. W-1230, Sub 0] and Sub 9 [Docket No. W-1300, Sub 9 and W-1300, Sub 1] were negotiated between Newland and Briar Chapel Utilities and Old North State as Newland contributed facilities at \$0.00 cost, and the connection fees were to be remitted to Newland.

24. The record contains no evidence that Blue Heron sought to pay Old North State \$69,000 or any other amount in connection fees prior to April 19, 2021 or at any time prior to August 31, 2022.

25. The record contains no evidence that Old North State took action or failed to take any action that would have prevented Blue Heron from paying a connection fee of \$69,000 or any other amount prior to April 19, 2021 or that prevented Liberty Senior from interconnecting at a rate other than that approved by order dated April 19, 2021 in Docket No. W-1300, Sub 71 [Sub 71].

26. The interaction between Old North State and Blue Heron was initiated first by Blue Heron when it on its own accord obtained an application for service from Old North State.

27. The record contains no evidence that Old North State took any action that would have enticed Blue Heron to file the incomplete application when Blue Heron did so on March 23, 2021.

28. The record contains no evidence that Blue Heron filed or attempted to file its alleged express, binding contract with Old North State with the Commission or sought Commission approval at any time prior to April 19, 2021 or at any time thereafter.

29. On March 8, 2021 Old North State in Docket No. W-1300, Sub 71 filed an application with the Commission to increase connection fees to \$4,000 per REU.

30. The Public Staff reviewed Old North State's application in Docket No. W-1300, Sub 71 and presented it to the Commission for the Commission's approval.

31. The connection fees approved in Sub 71 were uniform fees to be assessed to builders such as Blue Heron and Liberty Senior that interconnected after April, 19, 2021 and that contributed no facilities to Old North State.

32. The connection fees from Blue Heron pursuant to the Sub 71 order were not to be remitted to Newland. This practice is different from the practice addressed in the 2014 Asset Purchase Agreement and addressed in the Sub 9 order under which the \$1,500 connection fees were to be remitted to Newland.

33. On April 19, 2021 the Commission issued its order in Sub 71 approving the increase. In its order the Commission stated that “the primary reason for the increased wastewater connection fee is to aid in recovery of cost of the facility expansion and provide service for new development.”

34. Attached to its application to increase tap fees to \$4,000 per REU was an engineer itemized estimate of the cost necessary to increase the capacity of the Briar Chapel wastewater treatment plant.

35. The undisputed evidence of record is that Old North State must at its own expense increase the capacity of its Briar Chapel wastewater treatment plant from 250,000 GPD to 500,000 GPD and install a force main and lift station to serve builders such as Blue Heron.

36. The record consisting of verified pleadings contains no evidence that Old North State mismanaged its development of sewer collection, treatment and disposal sewer facilities in the Briar Chapel service area.

37. The time and docket for raising complaints with respect to Old North State’s management of its development of its facilities for sewer collection, treatment and disposal of effluent in the Briar Chapel service area would have been in Docket No. W-1300, Sub 71.



38. The timing of Old North State's decision to make capacity available for customers such as Blue Heron and Liberty Senior was Newland's act of turning over to Old North State additional needed spray irrigation capacity for effluent discharge.

39. The permit renewal for the Briar Chapel non-discharge permit shows daily flow reduced to 206,727 GPD (gallons per day) as confirmed by DEQ . In November, 2020, the daily average flow was 202,594 GPD. The 206,727 was close to the permit limit. In addition, on at least one day in November 2020, the flow matched the daily maximum of 313,000 GPD. If either the daily permitted maximum or the daily average flow had been exceeded, the permit would be violated.

40. In February 2021, Old North State's best estimate was that builders currently had 131 homes under construction. Multiplication of the 131 homes by the per home flow 189 GPD resulted in an addition of 24,759 GPD of flow.

41. Old North State determined that it was only a matter of time before more flow would be received than permitted. Also, Newland's "new home velocity" was projected to be at least 20 homes per month. While Newland had committed since the fall of 2020 to turn over more irrigation capacity, no additional permitted capacity was available as of February 2021.

42. As Old North State was already operating so close to its permitted limit, additional connections to the system placed an immediate risk of violating the State environmental permit. Old North State deemed it prudent and necessary to temporarily stop new connections into the sewer system until Newland could bring more irrigation capacity online, certified and approved by the State, allowing Old North State to increase its disposal capacity.

43. The addition of approximately 51,000 gallons per day of demand from Blue Heron could not be accommodated with the existing spray irrigation capacity. DEQ issued a permit that increased the irrigation capacity 318,000 GPD on March 19 2021. Once that permit was issued Old North State began allowing connections to the sewer system again.

44. Section 3.3 of the 2014 Asset Purchase Agreement, encaptioned “Expansion of WWTP,” imposes upon the Buyer ( Old North State), the responsibility for the expansion and for the payment of all costs for the design, permitting and construction of the currently installed 250,000 GPD Wastewater Treatment Plant to 600,000 GPD. The provision indicates that Buyer estimates that “the cost to expand the WWTPP from 250,000 GPD to 600,000 GPD will be \$7.00 per gallon or \$2,450,000.”

45. On March 23, 2021 when Old North State accepted the Blue Heron application that omitted reference to connection fees Old North State represented to Blue Heron that it would provide Blue Heron with an invoice at a later date.

46. Old North State anticipated that it would receive an order from the Commission in response to the Sub 71 request to increase connection fees to \$4,000, which it sought to assess as the appropriate charge to Blue Heron and intended to submit the invoice in reliance upon the Commission’s Sub 71 order.

47. Old North State accepted the incomplete Blue Heron application and provided the Intention to Chatham County on March 23, 2021 to enable Blue Heron to proceed with its project with Old North State’s commitment that Old North State would provide sewer service to the project when construction was complete and service would be needed.

48. Old North State provided Blue Heron with an invoice on April 19, 2021 subsequent to the issuance of the Commission's Sub 71 order increasing connection fees to \$4,000 per REU on that same date.

49. At March 23, 2021 and April 19, 2021 facilities were not in place to allow Blue Heron to interconnect with the Old North State collection system. The discharge facilities to be constructed by Blue Heron were not ready for service, nor was the sewage treatment plant expansion completed. Nor was the force main and lift station complete needed to enable Blue Heron to connect.

50. The record contains no evidence supporting a claim that Old North State's actions estop it from assessing the Sub 71 fees.

51. The record contains no evidence that Old North State violated NCUC Rules R10-17 or 20.

52. The record contains no evidence that Old North State violated the provision in its application form addressing submission of application fees.

53. The Commission's Order in Sub 71 is the order controlling the connection fees between Old North State and Blue Heron and Liberty Senior.

54.. In an e-mail dated March 2, 2022 Kevin Wade of Blue Heron stated "we'd like to get the connection fee settled but need confirmation the sewer is available prior to making any payment."

55. The service rendered for which a connection fee is assessed is "interconnection." It is interconnection through facilities that enable sewage to be discharged from the buildings constructed by Blue Heron to be transmitted through a

sewage collection system to sewage treatment facilities owned and operated by Old North State.

56. No interconnection facilities were completed and in place on the date Blue Heron submitted what Blue Heron designates as an offer, March 23, 2021, or the unidentified date of the receipt of the Intention to Chatham County.

57. Blue Heron knew that the permit authorizing it to connect required that the SD East lift station and force main be completed prior to Blue Heron's being able to connect.

58. The Flow Tracking for Sewer Extensions (FTSE) permit was issued by DEQ July 13, 2020 and stated explicitly that the force main and pump station had to be complete.

59. Blue Heron knew the lift station was not completed in March, and, due to construction delays, the lift station was not completed until July of 2022.

60. Blue Heron acknowledged it had construction defects and debris in its gravity sewer line that had to be corrected prior to making the connection. This is acknowledged by an e-mail dated May 18, 2022 and as late as August 6, 2022 by Blue Heron's contractor.

61. The dates for the completion for the construction projects and their costs are:

Force Main completion: August 4, 2022. Cost: 3,748,900.

Lift Station completion: August 4, 2022. Cost: \$690,148.

Plant completion: October 7, 2022. Cost: \$4,498,627.

Plant was certified by engineer John Phillips to have capacity of 500,000 GPD.

62. No sale of sewer services took place between Old North State and Blue Heron on March 23, 2021. It was not possible to make an interconnection on those dates because facilities would not be in place to enable an interconnection to be made. Substantial delays occurred. In order to make the interconnection Blue Heron had to clean and inspect the lines. The line had numerous construction defects and debris in it.

63. The interconnection with Blue Heron was made on August 31, 2022, and sewerage had been discharged, accepted and processed subsequent to that date.

64. The dispute between the parties addresses the fee to be paid in exchange for the contemplated interconnection due on or before the interconnection was made and charges for the collection of treatment services addressed in the application were provided.

65. Not until August 31, 2022 did Blue Heron pay the April 19, 2021 invoice and interconnect to the Old North State collection system.

66. Blue Heron earlier had contested the requirement by Old North State that it pay the invoice connection charge. Blue Heron had contested the assessed fees in advance of the payment of the fee. Blue Heron had plenty of time to take its complaints to the Commission prior to making the payments or to make the payment under protest. It did neither.

67. Old North State's request for the \$4,000 per REU was pending before the Commission well before Blue Heron submitted its application and before Liberty Senior made any inquiry to Old North State as to a rate for interconnection and before the issuance of the Sub 71 order of approval of new rates.

68. The date on which the Commission issued its approval in Sub 71 was out of Old North State's control. The application had been reviewed by the Public Staff and approved by and submitted by that agency to the Commission for the Commission's approval. The requested increase was to finance system improvements, and expansion of the Briar Chapel WWTP by 250,000 GPD and to construct a force main and lift station that would be needed to serve Blue Heron, Liberty Senior and other consumers.

69. All of this was through public submissions and was widely known in the Briar Chapel subdivision.

70. A cursory due diligence effort would have revealed these facts.

71. Residential customers in the Briar Chapel area were aware of the submission and on March 19, 2021 communicated with the Commission in support, stating that "the new development which is driving these upgrades should help offset the capital cost for the upgrade with an increase in connection fees from \$1,500 to \$4,000 per REU."

72. Blue Heron admits that the Sub 9 order is ambiguous and must be interpreted to produce the \$69,000 Blue Heron asserts to be the correct fee.

73. Blue Heron argues alternatively that should REU be computed based on design flow, the 51,150 GPD of Blue Heron's development should be divided by 250 gallons per day - per the APA and the BCU agreement, Blue Heron's development would be divided by 250 GPD from the APA and the BCU agreement resulting in 204.6 REUs at a fee of \$1,500 per REU. This would result in a fee of only the \$306,840.

74. Briar Chapel for the most part is a single family residential community. For any tariff that the Commission has approved for the wastewater utility the definition of REU has been "one residential equivalent unit." This is the appropriate designation for REUs

for single family residential homes. For non-single family residential homes it is necessary to interpret the designation of REUs in order to calculate an appropriate billing determinant to accurately size sewer collection, treatment and disposal facilities and prevent subsidization from single family residential consumers.

75. As explained as early as in Old North State's letter of May 20, 2021, addressing this same complaint in the May 13, 2021 letter on behalf of Blue Heron, Old North State explained the basis for the connection fee calculation:

The 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. Based on the July 13, 2020 letter to BHBC Apartments, LLC, DWR granted permission for the construction and operation of approximately 444 linear feet of eight inch gravity sewer to serve 183 one and two-bedroom apartments, 17 three bedroom apartments and a clubhouse as part of the Perch [Knoll] project, and the discharge of 51,140 gallons per day of collected domestic waste water into Old North State's existing Briar Chapel sewage collection system. This construction permit controls the amount of wastewater Old North State is responsible to process and forms the correct gpd on which to calculate the connection fees.

Briar Chapel has received from DEQ a flow reduction so that its capacity to treat wastewater is now calculated based on a one and two bedroom homes of 189 gallons per day. Old North State's REU is therefore 189 gpd. Old North State divided the 51,140 GPD by 189 GPD equals  $270.58 \times \$4,000 = \$1,082,328.04$ . Were REUs calculated in the manner you suggest, wastewater at some point would exceed the capacity of the sewage treatment plant as permitted and violations would likely occur. Were other potential entities seeking connection to calculate REUs in the way you suggest, the capacity would be exceeded in short fashion.

76. Only three calculations of the connection fee to be paid by Blue Heron are set forth in the record: \$69,000 consisting of a billing determinant of 46 REUs x \$1,500,

\$306,840 consisting of a billing determinant of 204.6 REU or \$1,082,328 consisting of a billing determinant of 189 GPD = 270.58 x \$4,000.

77. The developer of the Briar Chapel wastewater system is NNP-Briar Chapel (“NNP” or “Newland”). Newland created a public utility subsidiary, Briar Chapel Utilities, into which it transferred the wastewater system. Newland and Briar Chapel Utilities filed for a CPCN to allow Briar Chapel Utilities to charge consumers in Docket No. W-1230, Sub 0.

78. The Commission approved the application on December 8, 2009. The Commission approved connection fees of \$1,500 per REU. Finding of Fact 6. of the Dec. 8, 2009 Order provided that “The developer, NNP-Briar Chapel, LLC, will contribute 80% of the original cost of the entire wastewater utility system serving all present and future phases of Briar Chapel subdivision, including the effluent reclaimed water irrigation facilities.

79. The Commission’s order states that “the purchase price paid BCU to NNP-Briar Chapel for the entire wastewater utility system serving all present and future phases of Briar Chapel subdivision, including the effluent reclaimed water irrigation facilities, will be 20% of NNP-Briar Chapel’s total construction cost.” Finding of Fact 11. stated, “In the future, BCU, at its option, may apply to the Commission for an increased connection fee. Any future increase in connection fee will not modify the requirement for the developer, NNP-Briar Chapel, to contribute 80% of the wastewater utility system capital costs.”

80. In 2014 in Docket No. 1300, Sub 9 Respondent, Old North State, applied to receive the transfer of the CPCN for Briar Chapel from Briar Chapel Utilities. The Commission approved the transfer by order dated April 20, 2015. The rate base at the time of closing was \$0.00. Order, Finding of Fact 5. Old North State sought no change in rates, tariffs or fees from those that had been approved for Briar Chapel Utilities.



81. The only justification for the \$1,500 connection fees and the REUs upon which the connection fees were based was the terms of the negotiated Asset Purchase Agreement dated October 31, 2014 between Newland-Briar Chapel, Briar Chapel Utilities and Old North State. The Commission's order stated "The 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 of the existing 250,000 gallon per day (GPD) wastewater treatment plant (WWTP)." Order, Finding of Fact 8.

82. Under the Asset Purchase Agreement Old North State was to collect connection fees at a rate of \$1,500 per connection and based on residential equivalent units (REUs) as set forth in the Asset Purchase Agreement. Under the Asset Purchase Agreement Old North State was to remit the connection fees of \$1,500 so collected back to BCU/Newland

83. The Commission was not called upon to assess the reasonableness of the connection fees or the REUs that Old North State would be permitted to charge other than to approve the transfer with the knowledge of the terms of the Asset Purchase Agreement. The Commission's order in Sub 9 made no reference to a method for calculating residential equivalent units or any other method for calculating billing determinants through which to establish the total fee per interconnection for non-single family residences or commercial buildings.

84. Blue Heron was not a party to the 2014 Asset Purchase Agreement presented in the application in Sub 9. Nor is Blue Heron a successor in interest to any party to the Asset Purchase Agreement. Other than the connection fees Blue Heron will pay subsequent to the Commission's April 19, 2021 order in Docket No. 1300, Sub 71, Blue Heron has made no contribution of facilities in the Briar Chapel subdivision, nor has it reimbursed any other party for the capital costs incurred to provide utility service in the subdivision.

85. As recited in the Company's 2021 application in Docket No. W-1300, Sub 71, the justification for the increase in the connection fee to \$4,000 per REU is to provide funds from those like Blue Heron and Liberty Senior seeking to interconnect to the Briar Chapel sewer system for expansion of the sewage treatment plant and other investments in order to meet the demand anticipated from interconnection with those consumers. "The primary reason for the increased wastewater connection fee is to aid in recovery of cost of the facility expansion and provide service for new development."

86. Connection fees such as those approved in Sub 71 constitute contributions in aid construction.

87. Connection fees such as those approved in the Sub 0 and Sub 9 orders of \$1,500 do not constitute contributions in aid of construction because they are remitted to the developer, Newland, which contributed the initial and subsequent wastewater system facilities to the wastewater utility at no cost.

88. Contributions in aid of construction not passed through to a seller constitute reductions to rate base and therefore reduce the rates end users in the Briar Chapel development will pay for sewage services they receive.. Contributions in aid of construction, by reducing the rate base, reduce the return Old North State is entitled to receive. Therefore, it is not to the financial advantage of Old North State to increase the connection fees.

89. A February 28, 2023 letter is the first claim made on behalf of Liberty Senior, and Liberty Senior had not yet interconnected, paid a connection fee or any monthly usage fees.

90. Liberty Senior makes no claim that it has any agreement to receive interconnection entered into prior to the April 19, 2021 Commission order in Docket No.W-1300, Sub 71.

91. The beginning timeline with respect to Old North State's correspondence with Liberty Senior is as follows: On March 19, 2021 Old North State received an e-mail from Tanya Matzen with Newland-Briar Chapel that Liberty Senior Living was trying to secure permits but was not sure when construction would commence. Old North State did not receive any correspondence or contact with Liberty Senior Living. On March 19, 2021 Old North State received a signed FTSE for Liberty Senior Apartments.

92. On March 31, 2021 Old North State received a phone call from Thad Moore of Liberty Senior wanting to know if Liberty Senior could purchase capacity with the current FTSE. Moore was advised that FTSE for the project was permitted at 38,150 gpd.

93. On April 9, 2021 Old North State received plans for the Briar Chapel Active Adult.

94. On April 19, 2021 Old North State informed Thad Moore with Liberty Senior Living that Old North State would calculate an invoice connection fee. Old North State asked for a clarification on Moore's mailing address.

95. On April 19, 2021 Old North State provided Thad Moore on behalf of Liberty Senior Living with a builder application and tap fee invoice. Old North State also provided the April 19, 2021 Commission order in Sub 71. On April 20, 2021 Thad Moore stated that Liberty Senior had prepared a financial model for the project for only \$1,500 per unit for 150 units.

96. On April 20, 2021 Old North State advised Thad Moore that the tap fee increase had been applied for several months earlier. Old North State advised that the plant expansion to be recovered through the increased connection fees was driven by the commercial demands, and the Utilities Commission agreed to increase the fees accordingly. Only 17 months later, on February 11, 2022, did Old North State receive construction documents from Liberty Common Skilled Nursing.

97. The appropriate billing determinant is 189 per GPD as invoiced to Blue Heron and Liberty Senior on April 19, 2021.

98. The REU billing determinant Old North State used to bill Blue Heron and Liberty Senior is 189 per GPD. Old North State, based on historic demand upon its sewage treatment and disposal facilities, obtained from the Division of Environmental Quality a flow reduction from a higher number per GDP.

99. The record in this docket contains no evidence that Old North State mismanaged the construction of sewage treatment facilities in its efforts to meet the demand on its system as development within the service area proceeded.

100. Old North State had to construct a force main and lift station to serve Blue Heron and Liberty Senior properties in addition to expanding the capacity and the sewage treatment plant.

101. The invoice to Blue Heron of \$1,082,328 for interconnection represents only approximately 12% of the \$9,024,301 cost of these facilities.

102. The invoice to Liberty Senior of \$807,400 for interconnection represents only approximately 9% of the \$9,024,301 costs of these facilities.

103. The billing determinants upon which Old North State calculated its invoices for Blue Heron and Liberty Senior are based upon calculations obtained from DEQ for the specific projects Complainants are constructing and differ from the billing determinants in section 1.27 of the 2014 Asset Purchase Agreement provided as an exhibit in Sub 9, which were generic in nature and calculated to reimburse Newland for facilities Newland contributed and not to reimburse Old North State for the costs it incurred to construct the facilities for which it received no reimbursement from Newland.

104. Old North State does not control the demand that will be placed on its system by structures built within its certificated service territory.

105. The timing of the construction of facilities by Old North State to serve Blue Heron and Liberty Senior was based on Newland's making capacity available in the spray irrigation facilities.

106. Had Old North State not made the improvements at issue, the demand placed on the system by Blue Heron would have caused Old North State to violate its DEQ permit.

#### **Evidence and Conclusions For Finding of Fact Nos. 1 through 88**

The evidence supporting all findings of fact and conclusions are contained in the pleadings of the parties in this docket, the submission by the Respondent in response to questions by the Commission, the representations made by the parties at the October 4, 2023 oral argument, the Commission's files and orders in Docket No. W-1230, Sub 0, Docket No. W-1300, Sub 9, Docket No. W-1300, Sub 71 and Docket No. W- 354, Sub 118.

#### **Express Contract by Blue Heron with Old North State To Obtain Interconnection at \$1,500 to Obtain Interconnection Based on 46 REUs**

In order for Blue Heron to prevail in this docket it is necessary for Blue Heron to prove that it had obtained a binding, enforceable obligation requiring Old North State to make interconnection with the Old North State Briar Chapel collection system before April 19, 2021 when the Commission changed Old North State's tariff to increase connection fees to \$4,000 per REU based on a billing determinant that would allow Old North State to recover a pro rata share of the costs it would incur to serve non-single family residential customers such as Blue Heron.

The Commission determines that for multiple reasons Blue Heron fails to meet its burden to demonstrate any such commitment existed prior to April 19, 2021. Blue Heron's allegation that it was a recipient of a binding, express contract entitling Blue Heron to make interconnection at \$69,000 or at any fee less than that assessed by Old North State on April 19, 2021 fails for a number of reasons. In the first place, there was no binding, express contract obligating Old North State to allow Blue Heron to interconnect at any identifiable connection fee prior to April 19, 2021. Blue Heron justifies its claim for the establishment of this obligation on one sentence in the application Blue Heron submitted on March 23, 2021: "This application will become a binding contract upon acceptance by the Utility." Blue Heron ignores multiple other provisions in the application that contradict any allegation that this sentence alone creates a binding obligation by Old North State to provide service at any stated connection fee. The application required Blue Heron to fill in the amount owed for "tap fee" among other fees and payment method. Blue Heron neglected to provide any information in response to those requirements in the application form.

The application form requires a consumer such as Blue Heron "to promptly pay ... all other charges and fees of Utility at Utility's standard rates as set by Utility now or at any future time ...." Blue Heron failed to comply with this requirement in the application by paying any fee, connection fee or otherwise, prior to April 19, 2021. The application form requires a consumer

such as Blue Heron to comply with utilities regulations and policies, as provided from time to time by the Utility. Among those regulations and policies to which Old North State must comply are requirements of this Commission that any contract for services between a utility and its customer must be submitted to and approved by the Commission. Blue Heron failed to comply with this provision in the form prior to April 19, 2021. The application form requires a consumer such as Blue Heron “to be subject to the provision of any water or sewer license or franchise or other agreement that may exist between the Utility and any governmental authority.” Blue Heron failed to seek approval from the Commission obligating Old North State to provide connection at any stated fee prior to April 19, 2021. Such approval would have been required under Old North State’s license or franchise (its Certificate of Public Convenience and Necessity) from the Commission.

On page 2 of the application form, the following provision appears: “Upon receipt of this application and payment of all fees the meter will be requested for the date to start service requested above. Blue Heron submitted nothing in response to this requirement prior to April 19, 2021. The reference to “the date to start service requested above” shows clearly that the operative date at which any agreement to provide service occurs is the date interconnection takes place. Page 2 of the application states “rates and miscellaneous charges are subject to change.” This provision in the application would have enabled Old North State to alter any calculation of connection fees in the application that Blue Heron provided between the time the application was submitted on March 23, 2021 and the time interconnection was actually made. Interconnection was made on August 31, 2022, many months after April 19, 2021. Indeed, Old North State would have violated the terms of its tariff as approved on April 19, 2021 had it permitted Blue Heron to interconnect after April 19, 2021 at a fee less than that approved by the Commission on April 19, 2021.

Upon receipt of the incompletely filled out application on March 23, 2021 Old North State notified Blue Heron that Old North State would submit an invoice at a later time. Comp. p. 2. This notification is evidence that by accepting the incomplete application on March 23, 2021

Old North State had made no commitment to provide Blue Heron with interconnection service on March 23, 2021 or at any time prior to April 19, 2021 at any agreed upon connection fee.

Blue Heron admits it had no meeting of the mind in March-April 2021: “We’d like to get the connection fee settled and need confirmation the sewer is available prior to making payment.” Letter, March 2, 2022. Resp. p. 8

In its belatedly verified (July 24, 2023) Complaint Blue Heron alleges that Old North State’s submission of the Intention to Provide Service to Chatham County constituted creation of a binding, express contract. Comp. p. 8 The Intention makes no reference to any connection fee. Any representation to Chatham County that would have made reference to a connection fee would not have constituted a commitment to Blue Heron. In Blue Heron’s September 27, 2023 Reply Blue Heron contradicts the verified allegations in its complaint by acknowledging that the submission of the Intention created no express, binding contract. Reply p. 3. The Commission determines that the submission of the Intention to Chatham County by Old North State creates no commitment by Old North State to provide Blue Heron interconnection at any stated connection fee by April 19, 2023 or by any other date.

#### **Evidence and Conclusions for Finding of Fact Nos. 16-23**

No tariff or Commission order prior to April 19, 2021 addressing rates for Old North State in its Briar Chapel service area addresses or approves a billing determinant for a multifamily apartment project such as Blue Heron’s for establishing a connection fee on April 19, 2023 or at any time thereafter. Blue Heron seeks to rectify this omission by claiming that section 1.27(b) of the 2014 Asset Purchase Agreement between Newland and its affiliate, Briar Chapel Utilities, and Old North State provides the missing information. Comp. p. 9-10, ¶¶ 40.-41. The Commission determines that for any number of reasons Blue Heron has failed to support this assertion. Significantly, without a decretal paragraph or approved tariff imposing upon Old North State requirements of section 1.27(b) of the Asset Purchase Agreement, Blue



Heron's allegation must fail. Blue Heron even is unable to point to any language in the Sub 9 or the Sub 0 orders outside a decretal paragraph or tariff provision justifying its reliance upon section 1.27(b) of the 2014 Asset Purchase Agreement.

Section 1.27(b) of the 2014 Asset Purchase Agreement between Newland and Old North State addresses non-residential facilities but does not address multifamily residential apartment facilities. Comp., p.9-10. Before Blue Heron would have been able to calculate a connection fee based on section 1.27(b) of the Asset Purchase Agreement it would have been necessary for Blue Heron to identify the number of meters it planned to construct in its multifamily residential apartment facilities. Before April 19, 2021 Blue Heron made no such designation. Section 1.27(b) of the Asset Purchase Agreement does not address a request for connection fees for facilities of more than one meter. Comp. pp. 9-10, ¶¶ 40.-41. The Blue Heron facility at issue has four meters. Comp., p.12, ¶ 48.

The only language in the orders states that the Asset Purchase Agreement reference addresses the purchase price through which Newland conveyed wastewater facilities to Briar Chapel Utilities and then to Old North State. Sub 9 order, p. 3., ¶ 8.; Sub 0 order, p. 2. The significance of this limited recital in the Sub 0 and Sub 9 orders is that the Commission acknowledges that the \$1,500 connection fee per REU and any reference in the Asset Purchase Agreement to the calculation of REUs establishes the agreement under which Newland conveys utility facilities to Briar Chapel Utilities and ultimately to Old North State at no cost and that Briar Chapel Utilities and Old North State will remit to Newland the connection fees so collected as partial reimbursement to Newland for the facilities it installed and conveyed. Sub 9 order, p. 3, ¶ 8.

The Commission agrees with Old North State that the \$1,500 connection fee and the REU requirements in the 2014 Asset Purchase Agreement address the situation where the developer of the initial Briar Chapel wastewater system, Newland, installed and financed the system that it conveyed to the utility that would operate the system at a \$0.0 cost basis and

would receive partial reimbursement from the utility through connection fees as established in the contract through remittance thereof. The Commission agrees with Old North State that the precedent of the Commission's orders in Docket No. W-354, Sub 118 is controlling. In that docket the Commission recognized and approved the practice followed by Carolina Water Service, which is likewise followed by Old North State here, of establishing connection fees in contracts from the installing developer and the utility in reliance upon financing devices that remit to the developer connection fees. In these situations the connection fees and the billing determinants are based upon negotiated terms and need not be supported by traditional cost of service determinations. In these situations both the negotiated connection fee and the billing determinant are interdependent. Both elements used to calculate the collection fee amount are relied upon by the developer and the utility to calculate the negotiated contribution and reimbursement. Resp. p.5.

The Commission determines that Blue Heron is in a completely different position than Newland. Old North State must construct a force main and the lift station to serve Blue Heron, and, under the terms of the 2014 Asset Purchase Agreement, Old North State must incur the substantial costs to expand the capacity of the sewage treatment plant. This expansion is needed to serve Blue Heron. Blue Heron is the cost causer of the expenditures Old North State must undertake. Unlike Newland, Blue Heron has contributed no facilities and no costs toward the construction of facilities Old North State must undertake to serve Blue Heron and make Blue Heron's development plans possible. Resp. p. 6.

**Evidence and Conclusions for Finding of Fact Nos. 23, 31-32.**

Under no circumstances would it have been appropriate for Blue Heron prior to April 19, 2021 to receive a contract permitting Blue Heron to interconnect at \$1,500 per REU through a calculation of REU by reference to the 2014 Asset Purchase Agreement that was a negotiated calculation of a connection fee. Even if it had been appropriate, as neither the Sub 9 tariff or the Sub 9 order addressed the REU through which to calculate a connection fee for Blue Heron,

it would have been necessary for the Commission to address and approve the connection fee to which Blue Heron asserts it was entitled. Blue Heron neither sought nor obtained any such Commission approval prior to April 19, 2021. While Blue Heron now contests this contention, in effect by filing its complaint in this docket in 2023, Blue Heron by its actions admits that for its alleged contract to be enforceable, it must obtain the Commission's approval. Blue Heron's complaint was filed many months after April 19, 2021, subsequent to the Commission's order in Sub 71.

As the Commission ruled in its orders in Docket No. W-354, Sub 118, it was important and necessary that the parties in Sub 9 submit the Asset Purchase Agreement to the Commission for its consideration and oversight. But the level of regulation the Commission provided was limited. The level of regulation was in full accord with the provisions cited in Old North State's brief, page 26-27, from Docket No. 354, Sub 118:

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

Emphasis added

The Commission determines that Blue Heron has no right under the terms of the 2014 Asset Purchase Agreement or under any other equitable consideration to take advantage of the terms of that 2014 Asset Purchase Agreement prior to April 19, 2021 or at any time thereafter.

Blue Heron finds itself in the situation also addressed by the Commission in W- 354, Sub 118:

Although CWS relies primarily upon its contracts with the seller to determine the connection fees charged within the service area, occasions arise where the connections

are made that are not covered by any contract. For example, the developer may complete the sales of homes within the subdivision and leave a number of lots without new homes. Subsequently someone else will buy the lots and construct homes in situations not covered under the contract with the original developer. **In other situations, a portion of the subdivision will be sold by the original developer to a third party before homes are constructed.** CWS may have no contract with the subsequent developer of the new section.

\* \* \*

Without a provision in the Company's tariff authorizing it to assess connection fees in those situations, CWS would have difficulty collecting any connection fees at all.  
Emphasis added

The Commission determines that it would be improvident for the Commission to approve a request that deprives or constrains a wastewater utility from collecting appropriate collection fees from builders and developers. This deprives the general body of its ratepayers from a contribution in aid of construction and requires customers that did not cause an expense to pay for it.

In conclusion, the Commission determines that the submission by Blue Heron of an application for service and the acceptance of the application by Old North State contain no reference to a connection fee of \$1,500 or any other rate. The application does not address REUs. Without these essential terms upon which Blue Heron bases its entire claim, there is no contract permitting Blue Heron to interconnect at \$1,500 per connection based on 46 REUs on April 19, 2023 or at any time thereafter. No connection fee was submitted to Old North State with the application. Any dealings between the Old North State and Chatham County would not have addressed the rate or fee Blue Heron would pay Old North State for the provision of utility service. Old North State would provide no sewage service to Chatham County. Blue Heron fails to explain how an "intention" would constitute an acceptance even if it were to Blue Heron, the party Blue Heron apparently maintains to have made the offer and even though the intention does not mention \$1,500 per REU.

## Evidence and Conclusions for Finding of Fact Nos. 28, 50

### Enforceability of a Contract With Blue Heron That Was Not Approved by the Commission

The Commission determines that any contract Blue Heron would have entered into on March 23, 2021 allowing Blue Heron to Interconnect at \$1,500 at 46 REUs for \$69,000 was not permissible under any Old North State tariff and was not enforceable because it was not approved by the Commission. Blue Heron does not seek to enforce a tariff. Comp. p. 6, ¶ 21; p.14, ¶ 62. No tariff was in place prior to April 19, 2021 that addressed an appropriate method for calculating a billing determinant for a multi-unit residential apartment complex such as that Blue Heron sought to interconnect to the Old North State collection system. This is not a case like 97+ percent of the applications in Briar Chapel where the builder or owner of a single family residence seeks to interconnect to the Old North State collection system in accordance with a tariff that calls for a connection fee of \$1,500 based on a billing determinant of an REU defined “as one residential equivalent unit.” Respondent’s Nov. 9, 2023 response to Commission questions, p.4. Were that the case, no further Commission approval would be required. The terms of the tariff would control and require no interpretation. Blue Heron concedes, as it must, that its multi-residential apartment complex must pay fees based on more than a single \$1,500 fee or even four \$1,500 fees. Oct. 4 transcript p. 78, l. 21 – p. 79, l. 7. Blue Heron seeks to enforce what it alleges to be an express, binding contract. Without reliance on the 2014 Asset Purchase Agreement Blue Heron’s complaint fails.

Blue Heron relies as its primary authority N.C. Gen. Stat. § 62-139. That statute is encaptioned **Rate varying from schedule prohibited; refunding overcharge; penalty** and prevents providing or receiving a service other than one “prescribed” by the Commission. Blue Heron relies upon a contract never approved by the Commission as a rate schedule or a tariff. On March 23, 2021 no tariff on behalf of Old North State existed that approved the terms of the express contract Blue Heron claims was entered into on that date. The terms of the tariff (a)

would have required allowing multi-residential apartment buildings constructed by builders on property other than that developed by Newland to interconnect at an identified fee and calculated REU, (b) would have applied to builders that had contributed no infrastructure to obtain interconnection at a connection fee of \$1,500 per residential equivalent unit, and (c) would have calculated REUs pursuant to the 2014 Asset Purchase Agreement, between Newland, Briar Chapel Utilities and Old North State. The tariff approved in Sub 9 defined REU as one residential equivalent unit. The reference in the tariff to the billing determinant made no reference to the Asset Purchase Agreement. Blue Heron was not a party to the Asset Purchase Agreement. Blue Heron was not a successor in interest to the Asset Purchase Agreement. Comp. Exhibit I. Blue Heron's complaint, not its ever evolving theories in unverified submissions thereafter, is not that the Commission find Old North State to have violated the tariff approved in Sub 9 but to have failed to comply with an express, binding contract based on an agreement allegedly entered into on March 23, 2021.

Even though no contract was entered into containing a rate, Blue Heron claims that it obtained an express, binding contract with Old North State on March 23, 2021 authorizing Blue Heron to interconnect its apartment buildings at \$1,500 per REU of 46 at a rate of \$69,000. As this alleged contract was based on missing terms that did not comport with the outstanding Old North State tariff in effect at the time approved in Sub 9 or the tariff requested in the pending application in Sub 71, this alleged contract would have required approval by the Commission as a special service contract after entered into for it to be enforceable even if there had been no disagreement as to some of its terms. No request was made to the Commission on March 23, 2021 or at any time thereafter for approval of this alleged contract that was based on terms not set forth in any Old North State tariff.

The authorities Blue Heron cites on page 10 of its September 13, 2023 Reply Brief are not those authorized under Charter 62 and under this Commission's jurisdiction. Blue Heron cites *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 789, 786 S.E.2d 255, 264 (2016) for the proposition that resort to the law in effect at the time a contract is entered into rectifies

missing terms. The N.C. Ass'n of Educators case does not support that position. The contracts at issue in that case were between teachers and their school boards and were not missing terms needed for there to be a meeting of the minds or a consummated contract. Provisions of the contracts other than those addressing tenure were enforceable and in place. The N.C. Ass'n of Educators case is not in any respect on all fours with the case the Commission must address here. Moreover, the Court ruled that changes in the Career Status Law purporting to limit rights under the employment contracts could not be enforced retroactively.

Even if Blue Heron were correct that a contract that omits an essential term such as the rate and the billing determinant may be rectified through resort to the outstanding law existing at the time of execution of the contract, the Commission determines that Blue Heron failed to go to the Commission and obtain an order that would have rectified this omission before April 19, 2021. No contract between Old North State and Blue Heron existed on March 23, 2021 allowing Blue Heron to interconnect at \$1,500 per REU of 46 for a rate of \$69,000. If such a contract had existed it would not have been enforceable because it would not have been approved by the Commission.

The issue in the N.C. Ass'n of Educators case is not one addressing any dispute arising under Chapter 62 of the General Statutes. The statute Blue Heron asserts as the law which subsists at the time and the place of the making of the Blue Heron contract is N.C. Gen. Stat. § 62-139. As addressed at length by the parties, while Blue Heron asserts that its right to service under that statute arose at the time of the alleged contract, Old North State maintains that the statute addresses obligations of the parties at the time service is rendered, which took place 17 months subsequent to the entering of the alleged contract. The Commission agrees with Old North State. The holding of the N.C. Ass'n of Educators case does nothing to aid the Commission in resolving that fundamental dispute.

The N.C. Ass'n of Educators case did not address a contract between teachers and their school boards with missing essential terms such as the length of the contract, the terms of compensation or terms outlining tenure. There was no issue of failure of the contracting parties

to have a meeting of the minds as is the case before the Commission here. The Court addressed reading into valid and consummated contracts statutory context addressing tenure.

Blue Heron's real argument is that section 1.27 of the 2014 Asset Purchase Agreement and the Commission's order in Sub 9 establishing rates for connection fees of \$1,500 provide the missing information absent from the alleged March 23, 2021 contract between Old North State and Blue Heron. Section 1.27 of the 2014 Asset Purchase Agreement and the Commission's order in sub 9 are not laws in any respect equivalent to the State's Career Status Law.

More to the point, N.C. Gen. Stat. § 139(a) cited by Blue Heron addresses enforceability of utility rates in effect at the time of service. As discussed in great detail by Old North State in its filings in this docket, the date service was provided to Blue Heron was August 31, 2022, not March 23, 2021 when Blue Heron submitted its incomplete application. The Commission agrees.

The Commission on occasion approves special service contracts, for example, for the state's local gas distribution companies such as Piedmont Natural Gas. Approval of such contracts is necessary when no approved tariff authorizes the particular service offering at issue. The Commission addressed the generic topic of special service contracts in its order dated March 25, 2019 in Docket Nos. M-100, Sub 148, G-9, Sub 731 and G-9, Sub 737. In that case the issue was the extent to which Piedmont should be required to flow through the reduction in the federal corporate income tax rate to customers with whom Piedmont had entered into special service contracts in addition to its more traditional customers whose rates have been set through tariffs in Piedmont's general rate case dockets. The applicant must seek approval and meet a test showing that the non-tariffed offering is justified.

The test to be employed in determining the rates for special service contracts in the context of natural gas service are stated in Docket No. G-9, Sub 722 (Order dated Jan. 6, 2022): Special contracts may be structured with (a) a demand charge that recovers the plant investment required to serve the customer, (b) margin and fixed gas components, (c) other negotiated volumetric components that provide system contributions, or (d) other contributions that result in a benefit to the system. Moreover, according to the



Public Staff, the volumetric rate component should be comparable with the type of volumetric contribution paid by interruptible and firm tariffed transportation customers on the LDC's system.

*Id.* at 59. Emphasis added.

The Commission determines that it would have been necessary for any contract approval Blue Heron had sought before April 19, 2021 to have complied with similar requirements. Old North State argues persuasively that had Blue Heron sought Commission approval, Old North State would have resisted such a request. Respondent's Oct. 13 Brief, p. 11. The Commission agrees with Old North State that any request for approval of any such contract would have been denied. Among other objections, the contract would have undercharged for the services rendered and would have violated N.C., Gen. Stat. § 62-140. Not only would the contract have omitted the required contribution, it would have given Blue Heron a rate that was not compensatory and that would have been discriminatory and prejudicial to other similarly situated Old North State customers such as Liberty Senior, which would not have been entitled to this non-compensatory rate.

#### **Authorities Cited by Complainants That Do Not Involve Utilities Under Chapter 62**

The Commission determines that the authorities Complainants cite addressing disputes not involving public utilities or not involving appeals from Utilities Commission orders are inapposite. The Commission determines that Blue Heron cites no authorities appropriately addressing the facts the Commission must address and the legal issues the Commission must resolve in this docket. The services Old North State provides and the rates and terms of service without question are under the exclusive jurisdiction of the Utilities Commission. The cases Blue Heron cites addressing the timing and substance of contracts by the Superior Court outside of those addressing public utility services simply are not relevant to this dispute. Moreover, cases addressing "sale" cited by Blue Heron are inapposite because the issue here is service, not sale, to the extent the two terms are to be distinguished in applying the rules and statute. The word "sale" cannot be found in the statute at issue.

All contracts Old North State enters into, be they agreeing to interconnection, contracts addressing the rate of interconnection and contracts for accepting and processing wastewater are regulated by this Commission. Blue Heron filed this complaint in the Commission, not the Superior Court. The dispute is one to be resolved by reference to N.C. Gen. Stat. § 62-139. Had Old North State agreed in 2022 to interconnect Blue Heron at \$1,500 per connection at the REU referred to in the APA between Newland, Briar Chapel Utilities and Old North State when Blue Heron was able to interconnect, Old North State would have violated the statute by charging less than the approved tariffed rate in place at the time of service. The service rendered in 2022 and to be rendered in March-April 2021 was interconnection. No service was provided in March-April 2021. Blue Heron maintains that a sale occurred in March or April of 2021.

No enforceable, express and binding contract existed between Blue Heron and Old North State upon Blue Heron's submission of an application for interconnection on March 23, 2021 at a rate of \$1,500 per connection at 46 REU. This rate was an essential element of the alleged contract for which no representation to a sale was made and no agreement reached. As explained in detail above, the connection fee addressed in Sub 0 and in Sub 9 through reference to the 2014 Asset Purchase Agreement between Newland, Briar Chapel Utilities and Old North State addressed connection fees to be assessed on properties developed and constructed by Newland alone. Contrary to Blue Heron's allegations, the law which subsisted at the time and place of the application was not any law that imposed upon Old North State a requirement to allow interconnection for the buildings Blue Heron was constructing at \$1,500 per connection.

Blue Heron argues that the rate for interconnection of \$1,500 was established on March 23, 2021 through reference to laws which subsisted at that time even though that rate is not mentioned in the alleged contract between Old North State and Blue Heron. At the same time Blue Heron argues inconsistently that Old North State violated provisions of the Commission's rules requiring the utility to inform consumers of the rates to be assessed for the services contracted for at the time of application. Comp. p. 15, ¶¶ 69-73. If Blue Heron obtained

through its own actions a binding, express contract or was the recipient of a consummated sale on March 23, 2021, any failure by Old North State to inform would have been of no consequence. The Commission determines that Blue Heron cannot have it both ways. Blue Heron cannot rely upon what it maintains to be the law in effect at the time of its application to supply terms missing from the parties' written documentation to bind Old North State to the outdated rate and claim that it was injured by failure of Old North State to inform Blue Heron of the terms of the missing but superimposed binding terms. Moreover, the laws subsisting at the time of the alleged contract, March 23, 2021, was that found in Chapter 62 overseen by this Commission. Any outstanding Commission order would not supply a rate of \$1,500 per 46 RUE at \$69,000.

Blue Heron goes to great lengths to argue that Old North State expressly contracted to provide the interconnection service to Blue Heron in March or April 2021. Blue Heron bases these arguments on the application Blue Heron submitted and actions Old North State took through communications to Chatham County. When it comes to the complaint by Liberty Senior, made well after the initial claims by Blue Heron, the allegation is, "On April 5, 2021, Liberty Senior emailed ONSWC President John McDonald explicitly asking '[w]hat do we need to do to pay the \$1,500/unit connection fees associated [its apartment development]'? 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." Comp .p. 8. There was no express contract with Liberty Senior prior to the Sub 71 order. An "inquiry" that is "ignored" does not a contract make. This is where Complainants drop back into yet another theory, estoppel. The alleged action or inaction constituting estoppel is the alleged "scheme" of waiting to send an invoice until the Commission issued its Sub 71 order. The Commission determines that this argument fails to pass any test of reasonableness. The Commission determines that, to the contrary, the scheme is that undertaken by the Complainants to avoid paying their fair share of the sewerage plant expansion and other costs to enable their building projects. As addressed

elsewhere in this order, a utility cannot by acts or omissions of estoppel commit to provide service not set forth in a Commission approved schedule or tariff.

In addition, the Commission notes the contradictory rationale advanced by Complainants to support the Blue Heron claim versus the rationale to support the Liberty Senior claim. When Old North State informs Blue Heron that Old North State will submit an invoice later, Complainants allege this as an inequitable bait and switch. When Old North State does not respond immediately to Liberty Senior's inquiries, Complainants claim silence as grounds to estop Old North State from denying Liberty Senior interconnection at \$1,500 per connection. "They lulled Liberty Senior into waiting. They didn't say, "Hold on, or you know, "We're not going to do that," or "We'll get back to you," or "It'll be two weeks." They were just silent. October 4 transcript, p. 98, ll. 9-12.

#### **Evidence and Conclusions for Finding of Facts Nos. 62 -63**

##### **Blue Herons Arguments That a Sale Occurred on March 23, 2021**

The Commission determines that no sale took place between Old North State and Blue Heron on March 23, 2021. Technically speaking, an interconnection of pipes through which sewerage flows from an apartment building is made with the collection system owned and operated by a sewer utility is not a sale as that term is commonly used with respect to public utility regulation and with respect to utility fees and charges. A sale commonly refers to the provision of a commodity, an obligation to make a commodity available or receipt of a commodity (such as wastewater by the sewer utility) by the public utility from the end use customer. Interconnection is a one-time event as opposed to recurring acceptance and treatment of wastewater. Even if one were to attempt to classify an interconnection as a sale, the Commission determines that no interconnection occurred on March 23, 2021 or April 19, 2021. It would have been impossible to make an interconnection on those dates because facilities were not in place to enable interconnection to be made. Substantial delays occurred. In order to make the interconnection. Blue Heron had to clean and inspect its lines. The line

had numerous connection defects and debris in it. The force main from SD East lift station was not complete, so Complainants could not be served physically. Resp., pp. 8-9.

The Commission determines that for there have been a valid sale between the public utility, Old North State, and the consumer of the utility's services, just like the enforceability of a contract, the sale must be for a service authorized by the Commission under schedules or tariffs. In Blue Heron's complaint that Old North State completed a sale for interconnection to Blue Heron on March 23, 2021, there was no tariff or schedule in place containing the terms under which the alleged sale took place. Blue Heron failed to seek Commission approval of the alleged sale on March 23, 2021 or at any time thereafter.

#### **Evidence and Conclusions for Finding of Facts Nos 45-52**

##### **Complaints' Allegations That Actions or Inactions by Old North State Prevented Complainants from Interconnecting Under Rules Existing Prior to April 19, 2021**

The Commission determines that Old North State took no action and engaged in no inaction that led Blue Heron to fail to obtain a \$1,500 connection fee. The Commission determines that Blue Heron's claims that Old North State's actions impeded Blue Heron from receiving interconnection for a fee of \$1,500 at 46 GPD are inconsistent, invalid and baseless.

After Old North State had applied to the Commission for an increase in the connection fees to charge builders such as Blue Heron but before the Commission had issued its order approving the request, Blue Heron submitted an unsolicited application for interconnection. Respondent's Nov. 9 response to the Commissions' questions, p. 4. In order for Blue Heron to proceed with its facility in order for ultimate interconnection, it was necessary for Old North State to inform Chatham County that Old North State had received its application and approved the request for interconnection. Resp. p. 3. The Commission determines that Old North State took no action to entice or to bait Blue Heron into submitting the application when it did. *Id.*

By accepting the application at least to the extent Old North State committed to interconnect (but not as to the connection fee to be paid) in order to allow Blue Heron to proceed without complications from Chatham County, Old North State expressly stated that it would send an invoice for the connection fees at a later time. Old North State had agreed to allow interconnection.

Old North State had not agreed to interconnect at any particular fee. Old North State had no ulterior motive in proceeding in this fashion. Old North State had justified its request to increase the connection fees to \$4,000 based on the REUs it has relied upon to offset the cost of the 250,000 gpd expansion and the construction of the lift station and force main and other facilities that it would need to serve Blue Heron, among other builders. Old North State's Application, Sub 71. Had Old North State wished to enhance its profits, it would not have requested an increase in connection fees but would have left unreimbursed its investment in the 250,000 GPD expansion, the force main and the lift station and increased its rate base. Resp., p.9. The Commission determines that these facts refute the claim that Old North State's motives were as Blue Heron asserts. Blue Heron provides no response to Old North State's justification for its actions. The Commission determines that mere unsupported allegations that have not even any common sense rationale are not persuasive.

Furthermore, the Commission determines that if Blue Heron had a binding, express contract or a consummated sale on March 23, 2021, Old North State's alleged nefarious actions or inactions would have been immaterial. The Commission agrees with Old North State that to the extent that Blue Heron fails to reimburse Old North State for the costs incurred to extend service, Old North State will be forced to recover these costs from the consumers in Briar Chapel. While Blue Heron opines through counsel that Old North State conceivably could have acted imprudently in the timing or expenditure of its investments, Blue Heron provides no facts to support its musings. The Commission's order in Sub 71 justifies the increase in the connection fees to recover the costs in question based on the Public Staff recommendation. Old North State had been constrained from enabling connections to its system by delays by

Newland in making capacity available in the spray irrigation distribution areas. Old North State was experiencing inflows into its system that would have resulted in exceedances and penalties from the Division of Environmental Quality without the needed additional capacity in the spray irrigation distribution areas. Respondent's responses to Commissioners' October 4 questions, p 3.

Shortly after receiving the Blue Heron application the Commission approved the requested \$4,000 per interconnection. After investigation and after obtaining information from the Division of Water Resources to determine the demand Blue Heron would place on its system, Old North State immediately thereafter invoiced Blue Heron as promised. Resp., pp.12-13. Seventeen months later, after substantial construction activities, including installing and clearing piping permitting Blue Heron's facilities to be interconnected with the collection system of Old North State, Blue Heron paid the invoiced connection fees and the interconnection was made.

The Commission determines that the procedure Old North State followed was one of extending Blue Heron a favor to avoid delays from Chatham County and also to assess Commission approved connection fees to obtain appropriate contributions in aid of construction to minimize Old North State's investment, all to the benefit of Briar Chapel consumers. The Commission determines that there is no evidence of a scheme or of a bait and switch. There is no evidence of a deceptive trade practice. There is no evidence of a failure to charge Commission approved rates for which penalties should be assessed. There was no persuasive evidence of a contract with Blue Heron to charge a \$1,500 connection fee at 46 REUs to be violated. There were no Commission orders or tariffs not followed.

#### **Evidence and. Conclusions for Findings of Fact Nos. 24-28, 50**

#### **Complainants' Allegations That Old North State Actions Constitute Estoppel**

The Commission determines that there were no acts of estoppel. The Commission determines that had Old North State acted as Blue Heron argues it should have acted, Old North State would have undercharged Blue Heron and violated N.C. Gen. Stat. § 62-319 by so doing. Blue Heron seeks to avoid reimbursement to Old North State for its appropriate pro rata share of the cost of the sewage facilities needed to serve Blue Heron's buildings and instead to make those costs the responsibility of the Briar Chapel end user consumers on the theory that several weeks passed after Old North State accepted an application and sent an invoice. The Commission also rejects Blue Heron's accusations, unsupported by any verified evidence or even any verified accusations, that Old North State should bear these costs without reimbursement on the theory that Old North state has mismanaged the development of its facilities.

The Commission determines that Complainants' belated estoppel argument, which conflicts with their binding express contract and sale arguments, is an effort to provide some theory to justify Liberty Senior's tenuous, belated claim. Liberty Senior has no claim based on a binding express contract prior to the Commission's Sub 71 order or a claim for a sale at \$1,500 at the time of a submitted application. The Commission determines that Blue Heron cannot have it both ways. If Blue Heron had an enforceable, express contract or a completed sale, Old North State's actions or inactions with respect to submitting an invoice are not material to Blue Heron's claim. Irrespective of this convoluted series of conflicting claims, there is no estoppel. A theory of estoppel cannot serve to establish a right on behalf of a consumer of public utility service where there is no Commission approved tariff or schedule available.

Complainants argue that Old North State's March-April 2021 "tactics" of not submitting an invoice 27 days before the Commission issued its order in Sub 71 impeded their ability to take advantage of the 2014 Asset Purchase Agreement calculated rates of \$1,500 at 46 REUs (for Blue Heron) set forth in the table in the Asset Purchase Agreement presented in Sub 9. Reply, pp.12-13. Complainants argue that Old North State "deliberately prevented" Complainants from paying the rates that were in effect at the time of sale. Reply, p. 8. Complainants argue



that the fact that Old North State had been waiting for an anticipated rate increase does not excuse its conduct of “intentionally foiling” Complainants attempt to pay the rates in effect at the time. Reply, p. 14, n. 5. The Commission concludes that this is an unintended admission that no express, binding contract or consummated sale occurred on March 23, 2021.

Complainants argue forcefully, though unpersuasively, that the connection fee rate at the time Blue Heron submitted its application was \$1,500 per REU. Complainants argue forcefully, though unpersuasively, that the table set forth in the 2014 Asset Purchase Agreement determines the REUs based on the meters in their projects. The Commission determines that Old North State did nothing preventing Complainants from paying the rates they claim were dictated by the Asset Purchase Agreement at any time they wished. Indeed, Old North State’s application form requires applicants to enclose a check for the Tap fees with the application. Comp. ¶120, Ex. D. Blue Heron failed to comply. The Commission determines that a wait of 27 days to submit an invoice to comply with Commission policy to reduce rates to end use customers is not a “tactic” or an act of “deliberate prevention” or an effort to “intentionally foil” anyone from paying what should have been paid. Moreover, the Commission determines, as Old North State argues, that had Complainants paid only what they maintain they owed, they would have been required to pay the remainder at the time of the interconnection, the time of the provision of service.

Complainants argue that Blue Heron had a binding, express contract on March 23, 2021 to receive interconnection at \$1,500 per 46 RUE for a fee of \$69,000. Blue Heron argues that the billing determinants should have been calculated through reference to the 2014 Asset Purchase Agreement chart that establishes REUs on the basis of meter size. Blue Heron knew the size of the meters it planned to install. Complainants argue alternatively that Blue Heron completed a sale (purchase) on March 23, 2021 entitling Blue Heron to interconnection at \$1,500 for 46 REUs for a fee of \$69,000. As addressed above, the Commission determines that these theories are incorrect. If they were correct, however, nothing Old North State did by waiting 27 days to

send an invoice deprived Blue Heron of its alleged contract and purchase rights. Blue Heron could have paid the \$69,000 whenever it wished.

Having paid an engineer to provide an estimate of the cost to expand the sewage treatment plant and having applied to the Commission for an increase in connection fees in anticipation of service to commercial facilities like Blue Heron's, Old North State maintains that it had no intention of providing Blue Heron with an invoice for a connection fee calculated at a rate of \$1,500 per REU. Moreover, even if there was no needed expansion and no pending application before the Commission to increase connection rates, it would not have been possible for Old North State to provide Blue Heron with an invoice at the time Old North State accepted its application and agreed to provide service. The tariff in effect on March 23, 2021 for service to be provided then addressed the connection fees as follows:

Connection Fee	\$1,500 per REU.
----------------	------------------

The tariff set forth the monthly flat rate sewer service fee at \$42.30 per REU. This tariff item is footnoted. The footnote states "REU is one Residential Equivalent Unit."

Neither the tariff nor the order in Sub 9 approving the tariff addresses how to compute the billing determinant for a multi-unit apartment complex. Neither the tariff nor the decretal paragraphs in the order nor the prefatory language in the order addresses how to calculate the billing determinants for a multi-unit apartment complex.

Even if Blue Heron's invalid theory were correct that the 2015 order had addressed billing determinants by reference to the 2014 Asset Purchase Agreement, the Asset Purchase Agreement provision addressing REUs for various customer demands does so by reference to a single meter per interconnection, not multi-meter, multi-residential structures like the Blue Heron project. Comp. pp. 9-0, ¶ 40. Consequently, application of the chart in the APA would have been subject to different interpretations.

Before Old North State could issue an invoice Old North State was required to conduct an investigation and analysis to determine the appropriate billing determinants for the unique demands the Blue Heron project would impose. Old North State needed information Blue Heron did not supply in its application such as the various meter sizes or the DEQ permit information. Comp. ¶ 17, Ex. B. Old North State conducted its investigation and analysis and submitted an invoice 27 days later. 27 days is less than the monthly billing cycle for sewer service. Old North State submitted its invoice 17 months before Blue Heron was ready to interconnect.

### **Evidence and Conclusions for Finding of Fact No. 51**

#### **Complainants Allegations of Failure by Old North State to Comply With Commission Rules**

Blue Heron argues that Old North State failed to comply with Commission Rule R10-20:

No utility shall charge or demand or collect or receive any greater or less or different compensation for sale of sewer service, or for any service connected therewith, than those rates and charges approved by the Commission and in effect at that time.

The Commission determines that this rule only recites the requirements of N.C. Gen. Stat. § 62-139. While the rule uses the word “sale”, the Commission determines that this is simply a rough paraphrase of the identical concept in the statute. The language in the statute controls. The utility offering of interconnection at issue is “service.” The words of the rule are “sale for sewer service, or for service connected therewith.” Emphasis added. To the extent there was a “sale,” it was the sale of sewerage collection, treatment and disposal services. The interconnection service was a “service connected with” the sale of the other services. The interconnection by Old North State with Blue Heron is a service, not a sale of a service.

Interconnection alone provides nothing to consume. It provides a pathway through which a commodity can be accepted, treated and disposed.

Blue Heron also cites Commission Rule R10-17, Information to Customers. Subdivision (a) states:

Information as to service and rules .- 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.

The Commission determines that the type of service at issue was interconnection. Old North State notified Blue Heron of the rate Blue Heron would be assessed (the Commission approved rate) 27 days after Blue Heron submitted its application. Old North State was awaiting the imminent ruling from the Commission determining the rate for the interconnection service that would be in effect at any time Blue Heron would be in a position to receive that service. The Commission's ruling came 27 days after the submission of the Blue Heron application, and Old North State then informed Blue Heron what the rate would be. The Commission determines that Old North State's actions were in compliance with this rule to the maximum extent possible under the facts in existence at the time. Old North State could have done nothing more to provide "full information." Old North State's actions constitute virtual compliance with the Commission's rule.

The intent of this rule is not entirely clear. Ostensibly, the intent of the rule is to provide potential consumers with an opportunity to construct facilities elsewhere, without the service territory of the utility to whom the application is submitted. Perhaps the intent of the rule is to inform a builder such as Blue Heron of the cost it will incur from the utility so that the builder can install its on self-serve sewage treatment facilities. In this case a delay of 27 days in providing Blue Heron with the interconnection costs would not have prevented Blue Heron from making the self-serve choice. Blue Heron submitted its application to Old North State on March 23, 2021. Old North State responded to the application with respect to price on that same date by saying that Old North State would submit an invoice in the future. 27 days later,

on April 19, 2021 immediately after the Commission issued its order in Sub 71 increasing the connection fees to \$4,000 per REU, Old North State, as promised, submitted the invoice.

On March 23, 2021 and April 19, 2021, Blue Heron was well under way with its project. No evidence exists that Blue Heron owned any land on which to construct a wastewater treatment facility. It had no permit from DEQ to discharge effluent from any wastewater treatment plant it might have contemplated. It had no contractor to construct a wastewater treatment facility. It had no permission from Chatham County to proceed with its construction on the assumption that Blue Heron would construct and operate a self-owned sewage treatment system. The Commission determines that it is not creditable for Blue Heron to suggest that Old North State's short delay impeded Blue Heron's option to build its own sewerage facilities.

On April 19, 2021 Blue Heron was in receipt of Old North State's invoice. Blue Heron did not pay the invoice for another 17 months. Blue Heron was aware at that time of what Old North State intended to charge for interconnection. Blue Heron had 17 months to choose not to interconnect with Old North State but to construct its own sewage treatment facilities. The Commission determines that Blue Heron's argument that Old North State's delay of 27 days deprived Blue Heron of an opportunity to self-build sewage treatment facilities for its multi-unit apartment complex must fail.

Perhaps the intent of the rule is to avoid a surprise to a customer when later billed for service. The Blue Heron building(s) was well underway when it submitted its application to Old North State. Blue Heron was 17 months away from needing interconnection to receive sewerage service, so the 27 day delay resulted in no injury from that perspective. Irrespective of any connection fees Old North State would have quoted at the time of the application, Blue Heron was beyond the point of constructing its facilities elsewhere.

Blue Heron had been informed of the fee when confronted with a bill. The bill was not paid until Blue Heron was ready to connect. Old North State accepted the application well before Blue Heron would need to interconnect to assist Blue Heron in avoiding obstacles and delays imposed by Chatham County. Blue Heron's only purported injury is inability to receive the old, outdated fee to which it was not entitled. The Commission agrees with Old North State that Blue Heron's purported but uncompensable injury is Old North State's sewer customers' reward.

The Commission determines that a utility like Old North State cannot unilaterally quote a connection fee that differs from the connection fee the Utilities Commission approves. In this instance, if Old North State hypothetically had represented to Blue Heron that the connection fee would be \$500 per connection based on an arbitrarily selected REU, such representation would have been unauthorized. It would have violated N.C. Gen. Stat. § 62-139. The Commission determines that Blue Heron argues in error in maintaining that the delayed quoting of the connection fee for 27 days pending the Commission's order in Sub 71 entitles Blue Heron to the Sub 9 connection fees on the theory that Old North State did not quote the pending fee 27 days earlier. If, for arguments sake, Old North State has violated this rule, the remedy would not be that Blue Heron receive interconnection at \$1,500 per REU.

#### **Complainants' Allegations That the Commission's Rules Are Not Legislative**

The Commission determines that Old North State was in compliance with the Commission's rules. The Commission determines that cases cited by Blue Heron requiring Old North State to comply with Blue Heron's interpretation of the Commission's rules are inapposite. The Commission's authority to establish rules is governed by N.C. Gen. Stat. § 62-31. The Commission shall have and exercise full power and authority to administer and enforce the provisions of this chapter, and to make and enforce reasonable and necessary rules and regulations to that end. Rulemaking is an exercise of the delegated legislative authority of the Commission to supervise and control the public utilities of the state and to make reasonable

rules and regulations to accomplish that end. *State ex rel. Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E. 2d 862 (1978). While the Utilities Commission is an administrative agency of the state government, and general tenets of administrative law are applicable to its activities unless modified by statute, the Commission is not bound by the Administrative Procedures Act that controls the activities of many other state agencies. *State ex rel. Utilities Commission v. Nantahala Power and Light Co.*, 326 N.C. 190, 388 S.E.2d 118 (1990).

The Attorney General's failure to appeal the Utilities Commission order promulgating Rule R1-17(h), which established certain procedures for participation by natural gas utilities in exploration and drilling programs and for making applications for rate adjustments to recover costs and account for revenues associated with such programs, did not foreclose review of the lawfulness of the procedure approved in that order, since the Commission's action was legislative, not judicial, in nature. *State ex rel. Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978). While the Commission is called upon to exercise its judicial function under N.C. Gen. Stat. § 62-60 in resolving issues in this complaint docket and in determining the application of its rules to the facts in dispute, the Commission's promulgation of Rule R 10-17 is an exercise of the Commission's legislative function.

The Commission determines that Old North State's virtual compliance with the rule constitutes acceptable compliance based on the facts at issue. Many of the Commission's procedural rules are outdated. Many are not followed. Many are waived. The Commission may adopt its own rules governing pleadings, and has power to waive or suspend rules and it may enlarge or restrict the inquiry before it unless a party is clearly prejudiced thereby. *State ex rel. Utilities Commission v. Carolinas Committee for Industrial Power Rates and Area Development Inc.*, 257 NC. 560, 126 S.E.2d 325 (1962). The Commission's filing requirements call for many copies of documents. These rules were passed before filings by electronic submission. The Clerk's Office does not require compliance with all of these rules. The Commission rule requires motions to strike testimony to be filed five days before start of the hearing. NCUC Rule R1-24(f)(4). This rule is seldom enforced.

Blue Heron cites *N.C. Department of Justice v Eaker*, 90 N.C. App. 30, 38, 367 S.E.2d 392, 398 (1988) for the proposition that an agency's regulations have the force of law and must be strictly followed and enforced. *Eaker* has no precedential value in this case. The dispute in *Eaker* was whether the policy at issue in *Eaker* was promulgated pursuant to the State Personnel Commission's statutory authority under N.C. Gen. Stat. § 126-4. The court held that the legislature had delegated, to the extent of the Commission's statutory powers, its own legislative powers over the state's personnel system. Pursuant to its statutory authority, the Personnel Commission promulgated a policy requiring the State's departments and agencies to systematically consider certain factors determining which employees should be retained once a department or agency has decided to implement a reduction in its work force. Consequently, ruled the court, the policy has the force of law and must be strictly followed and enforced. *Eaker* distinguished cases such as *Farlow v. Bd. Of Chiropractic Examiners*, 76 N.C. App. 202, 332 S.E.2d 696 (1985). In *Farlow*, the court held that an administrative agency's failure to follow its own rules requires reversal only where "its failure to do so would result in a substantial chance that there would be a different result from what the result would be if the rule or followed." The court also quoted *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914 (1986) for the same proposition. The court said both cases involve only an agency's failure to follow its own procedural rules.

The Commission determines that its rule at issue in this case, R10-17, is procedural, not the expression of a policy. *Farlow* and *Leipart* control; not *Eaker*. Had Old North State failed to comply within NCUC Rule R10-17, the result would not have been altered.

#### **Evidence and Conclusions for Finding of Fact No. 52**

#### **Complainants Allegations That Old North State Violated instructions In Its Application**



The Commission determines that Old North State has not violated the instructions in its application form addressing the submission of application fees.

Blue Heron argues that Old North State's instructions for completing applications require a builder to submit application fees along with the application itself. Reply, pp. 11-12.

The practice was memorialized in its own instructions to builders seeking sewer services, which require 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 the 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 instructions to builders - which calculate fees at the time of the application- is consistent with RuleR-10-20's requirement that the sewer utilities charge rates in effect at the time of sale.

The all too obvious fallacy in this argument is that Blue Heron is conflating "application fees" with "connection fees." Blue Heron admits as much in its September 27, 2023 Reply. The instructions on the application form distinguished between an "application fee" and a "service fee" and "all other charges." Application fees are to reimburse Old North State for the administrative expense of processing a builder's application. The application fee is due with the application and is not refundable. Connection fees are to reimburse Old North State for investment in utility infrastructure. See Docket No. W-1300, Sub 71. If no interconnection, the fees probably are refundable if paid in advance.

Even if Blue Heron had not conflated application fees with connection fees, the Commission determines that this argument has no persuasive value. The application form requires tap fees as well as application fees to be submitted with the application. As addressed in substantial detail in this order Blue Heron maintains that it had an express, binding contract to pay as a connection fee \$69,000. Nothing prevented Blue Heron from submitting that connection fee with the application. It should be noted that the language in the application form indicates that the application fees or tap fees are non-refundable. The application form of Old North State has

not been reviewed by or approved by the Utilities Commission. The terms in the application form have not been required as part of any regulatory conditions or code of conduct required by the Utilities Commission. As such, whether or not connection fees paid in advance of interconnection where interconnection does not take place are refundable would be subject to a ruling by the Commission irrespective of language in the Old North State application form.

#### **Evidence and Conclusions for Finding of Fact Nos. 24-28, 50, 89-96**

##### **Liberty Senior's Claims to Entitlement to Connection Fees Prior To April 19, 2021**

With respect to the claim by Liberty Senior, a distinguishing factors between that claim and the claim of Blue Heron is that Complainants' February 28, 2023 letter is the first claim made on behalf of Senior Liberty, and Senior Liberty had not yet interconnected, paid a connection fee or any monthly usage fees. Moreover, Liberty Senior has no valid, much less a colorable, claim that it has any agreement to receive interconnection based on any agreement entered into prior to the April 19, 2021 order in Docket No.W-1300, Sub 71.

The timeline with respect to Old North State's correspondence with Liberty Senior is as follows: On March 19, 2021 Old North State received an e-mail from Tanya Matzen with NNP-Briar Chapel that Liberty Senior Living was trying to secure permits but was not sure when construction would commence. Old North State did not receive any correspondence or contact with Liberty Senior Living. On March 19, 2021 Old North State received a signed FTSE for Liberty Senior Apartments. On March 31, 2021 Old North State received a phone call from Thad Moore of Liberty Senior wanting to know if Liberty Senior could purchase capacity with the current FTSE. Moore was advised that FTSE for the project was permitted at 38,150 gpd. On April 9, 2021 Old North State received plans for the Briar Chapel Active Adult. On April 19, 2021 Old North State informed Thad Moore with Liberty Senior Living that Old North State would calculate an invoice connection fee. Old North State asked for a clarification on Moore's mailing

address. On April 19, 2021 Old North State provided Thad Moore on behalf of Liberty Senior Living with a builder application and tap fee invoice. Old North State also provided the April 19, 2021 order in Sub 71. On April 20, 2021 Thad Moore stated that Liberty Senior had prepared a financial model for the project for only \$1,500 per unit for 150 units. On April 20, 2021 Old North State advised Thad Moore that the tap fee increase had been applied for several months earlier. Old North State advised that the plant expansion to be recovered through the increased connection fees was driven by the commercial demands, and the Utilities Commission agreed to increase the fees accordingly. Only 17 months later, on February 11, 2022, did Old North State receive construction documents from Liberty Common Skilled Nursing. Resp. pp. 16-17.

Likewise, in addition to these distinctions the justification for reducing the invoiced connection fee for Liberty Senior must be rejected for a number of the reasons set forth above justifying the rejection of the claims on behalf of Blue Heron.

#### **Evidence and Conclusions for Finding of Facts Nos. 97-106**

##### **Complainants' Claims of Entitlement to Billing Determinants Based On a 2014 Asset Purchase Agreement**

The REU billing determinant Old North State used to bill Blue Heron and Liberty Senior is 189 per GPD. The Commission determines that these are the appropriate billing determinants to be used to calculate the connection fees to be paid by Complainants. Old North State, based on historic demand upon its sewage treatment and disposal facilities, obtained from the Division of Environmental Quality a flow reduction from a higher number per GPD. Old North State's application to the Commission justified the \$4,000 per connection to finance the cost of the expansion of the sewage treatment plant from 250,000 gallons per day to 500,000 gallons per day and other costs to serve builders such as Blue Heron and Liberty Senior.

Old North State had to construct a force main and lift station to serve the Blue Heron and Liberty Senior properties. Resp., pp. 4, 8-9, 11, 12, 15. Part of the cost justification before the Commission was an engineering analysis and detailed, item-by-item estimated cost justification for the sewer plant expansion. With respect to Blue Heron, Old North State reviewed the DEQ documentation submitted with respect to its apartment complex. Based on this information Blue Heron has obtained permission through its permit to serve 183 one and two-bedroom apartments, 17 three bedrooms apartments and a clubhouse as part of the project. Therefore, there is a discharge demand on Old North State's facilities of 51,140 gallons per day. The expansion is engineered to meet this demand among other demand anticipated in the service area. Old North State divided the 51,140 gallons per day by 189 gallons per day. This produced a gallons per day of 270.58. The 270.58 was multiplied by \$4,000. The product was \$1,082,328. This amount represents only a limited portion of the \$9,024,301 cost of the sewage treatment plant expansion and construction of the other facilities. Respondent's Response to the Commission's questions at the October 4, 2023 hearing, p.1. For Liberty Senior the same process was employed. For Liberty Senior the REUs were 201.85, resulting in a fee of \$807,400.

Old North State's calculation of the billing determinates for Blue Heron and Liberty Senior was based upon specific information addressing the unique demands of the Blue Heron and Liberty Senior multi-unit residential buildings. These billing determinants differed from the billing determinants in section 1.27 of the 2014 Asset Purchase Agreement provided as a submission in the Sub 9 docket but not referred to or incorporated into the Sub 9 order. Those billing determinates were generic in nature to be applied indiscriminately to unidentified buildings potentially to be constructed in the future without any distinction as to the actual discharge capabilities of the piping or the requirements of any DEQ permit. Those billing determinants were negotiated between Newland and ultimately Old North State to calculate potential connection fees that would be remitted to Newland in order to defray the costs Newland incurred to construct the wastewater facilities it contributed to the utility. In contrast, the billing determinants Old North State used to assess Blue Heron and Liberty Senior were project specific and are used to establish the connection fees to finance facilities Old State must

construct and pay for to serve Complainants. Based on these critical distinctions the Commission determines that the billing determinants used by Old North State to bill connection fees to Blue Heron and Liberty Senior were reasonable and based upon legitimate cost of service principles and should form the basis of the connection fees Blue Heron and Liberty Senior should pay.

The initial 250,000 GPD sewage treatment plant, the disposal facilities such as the additional upset pond, the affluent storage pond and the reuse spray effluent irrigation facilities and the transmission collection facilities that will be used to provide service to Complainants in addition to the expansion were financed by Newland and were contributed to Old North State at no cost. Sub 9 Order, Finding of Fact 8, p. 3. Blue Heron will receive service from these facilities. It is therefore only reasonable and proper that Complainants bear their fair share of the new expansion made to meet their demand. Moreover, as addressed in great detail above, as Old North State receives connection fees from builders such as Complainants, the fees constitute contributions in aid of construction and reduce rate base to keep rates to end users low.

Blue Heron argues, without any proof or without even any verified pleading, that Old North State's need to expand the sewage treatment plant can be traced to improper planning and management. The Commission approved the increase in connection fees in Sub 71 based on the justification that improvements such as the 250,000 GPS expansion were needed and justified. The Public Staff brought the request to the Commission with a recommendation for approval. The Public Staff audited and examined the justification for the increase before advocating approval. In that context, an unsupported allegation of improper planning carries no persuasive weight. Moreover, Old North State does not control the demand that will be placed on its system by structures built within its certificated service territory. Old North State bears the responsibility to meet that demand over which it has no control. Old North State has no authority to dictate to property owners what type of structures they build and the demand those structures will place on its system. On the other hand, builders like Blue Heron and Liberty Senior do have the ability and the responsibility to conduct a due diligence when they

obtain property and determine to develop it the status of utility services and the potential need for expansion for which they will be responsible.

In response to Old North State's arguments that the \$1,500 per REU connection fee is inadequate to finance the anticipated system expansion, Complainants as expected cite back yet again to the 2014 Asset Purchase Agreement and the even earlier agreement with Briar Chapel Utilities addressing system expansion. Complainants argue, "Notably, both the BCU Agreement and the APA call for future expansion and set the connection at \$1,500 per REU. If the fee somehow became inadequate for planned expansion, then it was Old North State's burden to prudently manage the expansion and timely request any needed rate changes." Reply, p. 16. In response to that argument the Commission agrees that the answer is that that train has already left the station. Old North State requested the increase to the connection fee in 2021. In approving the \$4,000 connection fee in its order in Docket No. W-1300, Sub 71 the Commission states, "The primary reason for the increased wastewater connection fee is to aid in recovery of the cost of facility expansion and to provide service for new development." The time to have complained over the way the demand on the wastewater system developed after 2014 was in the Sub 71 docket. The Commission determines that that order is now in the books, and Complainants must live with it. Complainants' new residential Briar Chapel neighbors made their views known in the Sub 71 case. Complainants, the sophisticated businesses, apparently were asleep at the switch. Moreover, as shown in Old North State's submissions as a late-filed exhibit to the Commission's questions asked at the October 4 hearing, the timing of the construction of the facilities at issue was based upon Newland's making capacity available in the spray irrigation facilities. In addition, these submissions show that had Old North State not made the improvements at issue, the demand placed on the system by Blue Heron would have caused Old North State to violate its DEQ permit.

The Commission determines that the undisputed, verified evidence in this case is that Old North State is required to incur the cost to expand its facilities including expanding the sewage treatment plant and constructing a lift station and force main to be able to provide

service to Blue Heron and Liberty Senior. Counsel for Complainants' musings and speculations are nothing more than musings and speculations. Complainants have made no allegation and have presented no verified pleading that the facilities to which Old North State refers were caused by any cost causer other than builders such as Blue Heron and Liberty Senior. Likewise, there is no evidence and no supported allegation that Old North State has mismanaged its planning of additions to the sewage treatment system in Briar Chapel that would justify a disallowance of costs. The verified evidence submitted by Old North State at the request of the Commission is that the timing of the additions Old North State must undertake to serve Blue Heron and Liberty Senior were based upon the timing of expansion of the spray irrigation facilities by Newland. There is no verified allegation or verified evidence that Old North State has been imprudent or unreasonable in incurring the costs it seeks to recover from Blue Heron and Liberty Senior. Old North State justified the increase in connection fees, which the Commission approved Sub 71, based on the filing that Old North State made that was audited by the Public Staff and that resulted in a Public Staff recommendation that the increase be approved. Consequently, the Commission determines that the argument by Complainants that should the Commission allow them to interconnect at a cost less than that approved in Sub 71 the shortfall would not be recovered from other customers who did not cause the costs must be rejected. Complainants have moved for judgment on the pleadings. The argument counsel makes here cannot be found in any of Complainants' pleadings.

#### **Evidence and Conclusions for Finding of Fact Nos. 1-106**

#### **Complainants' Claims of Entitlement To Periodic Usage Fees Based on Billing Determinants Established In The 2014 Asset Purchase Agreement**

The Commission determines that Blue Heron provides no basis to support its claim that ongoing sewage usage fees should be based on billing determinants prescribed in the Asset Purchase Agreement between Newland, Briar Chapel Utilities and Old North State.

Blue Heron asserts that it is owed a refund for the monthly usage fees it has paid to date. The reasons for rejecting that claim are the same as the reasons for rejecting the claim for a refund of the connection fee. In addition, Blue Heron cannot claim that any commitment to limit the connection fee based on the alleged contracts addressed above constrained Old North State from charging the commodity charge approved by the Commission in its order in Docket No. W-1300, Sub 71 on the basis of appropriate billing determinants after the interconnection was made, sewerage accepted and bills submitted for services provided in arrears. The Sub 71 order makes no reference to the 2014 Asset Purchase Agreement, the \$1,500 connection fee or the chart in the Asset Purchase Agreement addressing the calculation of REUs for non-residential single family residences.

The tariff calls for a flat rate sewerage usage rate. In determining the usage Old North State relied upon information obtained from DEQ, which issued its permit to Blue Heron based upon determinations DEQ made that the piping through which wastewater discharges were made were appropriately sized to adequately accomplish the discharge. Unless the usage rate is based on a billing determinant reflecting the demand the Blue Heron and Liberty Senior structures place on the Old North State system, other customers will bear an inordinately large cost of the operating and maintaining the system. Homeowners will be subsidizing the operational costs of the commercial users.

#### **Evidence and Conclusions for Findings of Fact Nos. 64-67**

#### **Old North States Assertions of Waiver by Blue Heron**



The Commission determines that by paying the connection fees assessed by Old North State without making payment under protest Blue Heron has waived its right to obtain relief under Its Complaint. Complainant earlier had contested the requirement by Old North State that they pay the invoiced connection charge. Resp. p. 10. Therefore, Complainants had contested the assessed fees in advance of its payment of the fee. Complainants had plenty of time to take their complaints to the Utilities Commission prior to making the payment or to make the payment under protest. They did neither. *Id.* Complainants have waived their right retroactively to contest payments of the connection fee or the subsequent charged commodity charges. Where, after expiration of an old contract between a city and the electric company regarding electric current, and during deadlock regarding terms to be included in the new contract, the company continued to bill the city monthly in accordance with rates prescribed by the schedule on which the old contract was based, and the city continued to make payments in accordance with bills rendered, payments made without protest on a month-to-month basis constituted at each month an election to pay on the basis of the old schedule and a waiver as to that month of the right to any contract under the company's new schedule containing lower rates. *City of High Point v. Duke Power Company*, 120 F.2d 866 (4<sup>th</sup> Cir. 1941). Where, after expiration of an old contract between a city and the electric company regarding electric current and during deadlock regarding terms to be included in the new contract, the company rendered monthly statements based on rates contained in the old contract, the city, which, with full knowledge of the facts, paid bills as rendered, could not recover any part of the payments on the ground that the city should have been charged lower rates contained in the company's new schedule. *City of High Point v. Duke Power Company*, 34 F. Supp. 339, affirmed 120 F.2d 866 (4<sup>th</sup> Cir. 1941).

In its complaint, unverified when filed, Blue Heron alleges, "On August 31, 2022, Blue Heron after having notified ONSWC of its objection to its calculation of the connection fee, paid the connection fee under protest so that Blue Heron could complete construction of the Knoll apartment complex." After thoroughly reviewing its records Old North State under oath denied Blue Heron's allegation the Blue Heron paid the connection fee under protest. On page 20 of its September 27, 2023 reply brief, Blue Heroin addresses its efforts to contest the assessed fees in

advance of its payments of the fee. In order to avoid waiver under the cases cited above a complainant in the position of Blue Heron must not only contest the utility fees and charges being assessed but it must show that when it paid the contested fee it accompanied the payment with the statement that the payment was being made under protest. Either Blue Heron is raising an issue of fact that it must prove through evidence of making a payment under protest or it is confusing the act of contesting the fee with the act of paying the fee under protest. Tellingly, Blue Heron cites no specific evidence detailing the timing of alleged payment under protest or the method of payment (wire or mail delivery) or the language through which Blue Heron set forth its protest. On page 100 of the hearing transcript ll. 9-15, Complainants represent that Liberty Senior paid the invoiced tariff “under protest.” Blue Heron should show that both complainants actually did make payment under protest. Blue Heron has moved for judgment on the pleadings. For many reasons addressed above the Commission denies Blue Heron’s motion for judgment in its favor on the pleadings. Even if the Commission were to agree with Blue Heron otherwise, before Blue Heron could prevail in this docket Blue Heron must provide documented evidence that it paid the connection fees with an accompanying statement that it paid them under protest.

IT IS THEREFORE ORDERED as follows:

1. The Complaint of Blue Heron and Liberty Senior Is dismissed on the grounds that Complainants have failed to state a claim for relief upon which relief can be granted pursuant to rule 12(b)(6) of the North Carolina Rules of Civil Procedure.
2. The Complaint of Blue Heron is dismissed on the grounds that Blue Heron has waived its rights to the relief requested because Blue Heron has paid connection fees and usage fees properly assessed against it without making such payments under protest.

3. The Complaint of Liberty Senior is dismissed because no existing case and controversy has been alleged in the Complaint as to Liberty Senior and its allegations are premature and are not ripe for consideration.
4. The Complaint of Blue Heron and Liberty Senior is dismissed on the grounds that Old North State has appropriately charged Complainants under the appropriate Commission orders in effect at the time any service was provided to Complainants.
5. The connection fees and commodity fees charged Complainants have been calculated with the appropriate connection fees and billing determinants so as to minimize usage rates to end users in the Briar Chapel service area.
6. Complainants' Motion for Judgment on the Pleadings is denied.

ISSUED BY ORDER OF THE COMMISSION

This the \_\_\_\_ day of \_\_\_\_\_, 202\_\_\_\_

NORTH CAROLINA UTILITIES COMMISSION

\_\_\_\_\_

Clerk

Respectfully submitted this 29th day of October, 2023.

Edward S. Finley, Jr., PLLC  
/s/Edward S. Finley, Jr.  
Edward S. Finley, Jr.  
2024 White Oak Rd.  
Raleigh N.C. 27608  
919-418-4516  
[edfinley98@aol.com](mailto:edfinley98@aol.com)

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Proposed Order was duly served upon parties of record either by depositing same in a depository of the United States Postal Service, first class postage prepaid, or by electronic delivery.

This the 29<sup>th</sup> day of November 2023

Edward S. Finley, Jr.,

/s/ Edward S. Finley, Jr.

Edward S. Finley, Jr., PLLC  
2024 White Oak Rd.  
Raleigh, NC 27608  
919-418-4516  
edfinley98@aol.com

COUNSEL FOR OLD NORTH STATE  
WATER COMPANY, LLC