

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. W-1300, SUB 92

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Blue Heron Asset Management, LLC, and)	
Liberty Senior Living, LLC,)	
Complainants)	
)	
v.)	ORDER DENYING RELIEF AND
)	REQUIRING FURTHER ACTION
)	
Old North State Water Company, Inc.,)	
Defendant)	

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

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

APPEARANCES:

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

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For Old North State Water Company, Inc.:

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BY THE COMMISSION: On May 26, 2023, Blue Heron Asset Management, LLC (Blue Heron) and Liberty Senior Living, LLC (Liberty, and, with Blue Heron, Complainants) filed a Complaint against Old North State Water Company, Inc. (ONSWC or Respondent).

On May 31, 2023, the Commission issued its Order Serving Complaint.

On June 12, 2023, ONSWC filed a Motion to Dismiss and Answer (Answer).

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

On July 21, 2023, Complainants filed a Reply to Response and Motion for Judgment on the Pleadings (Complainants' Reply).

On September 6, 2023, the Commission issued an Order Scheduling Briefs and Oral Argument (Scheduling Order). The Scheduling Order scheduled an oral argument for October 4, 2023.

On September 13, 2023, Complainants filed a brief (Complainants' Brief) and ONSWC filed a brief (ONSWC Brief).

On September 27, 2023, Complainants filed a response brief (Complainants' Response Brief).

On October 4, 2023, oral argument was conducted as scheduled before a panel of Commissioners.

On November 29, 2023, Complainants and ONSWC filed post-hearing briefs and proposed orders.

COMPLAINT

Complainants, who are both apartment developers, allege that ONSWC has violated N.C. Gen. Stat. § 62-139 and Commission Rule R10-20 by overcharging for the provision of wastewater service to their apartment developments in the Briar Chapel area of Pittsboro, North Carolina. Blue Heron maintains that ONSWC unlawfully charged Blue Heron a connection fee that was not in effect at the time that ONSWC and Blue Heron entered into a contract for ONSWC to provide wastewater service to Blue Heron's apartment complex. Blue Heron states that ONSWC deliberately prevented it from paying for wastewater service until after the Commission had granted ONSWC an increase in its approved connection fee. On the day the Commission granted that increase, ONSWC sent an invoice for connection fees based upon the increased connection fee to Blue Heron. Liberty alleges that it should be charged a connection fee of \$1,500 per REU. Complainants allege that ONSWC collected more than one million dollars above the amount it was legally entitled to charge Complainants for wastewater service.

Further, Blue Heron alleges that ONSWC unlawfully overcharged it for wastewater connection fees and monthly flat rates for wastewater service by disregarding Commission orders on the calculation of residential equivalent units (REUs) and, instead,

calculating REUs based on an inapplicable North Carolina Department of Environmental Quality (DEQ) flow reduction permit.

Complainants contend that ONSWC's pattern of refusing to provide connection-fee invoices to Complainants when requested and instead sending a belated invoice to Blue Heron after the Commission approved an increase in connection fee demonstrates a premeditated scheme to extract millions of dollars in additional fees from its customers.

Complainants request that the Commission:

1. Conclude that ONSWC failed to calculate REUs in accordance with Commission orders and, therefore, unlawfully charged Blue Heron and Liberty greater compensation for a service rendered than that prescribed by the Commission;
2. Conclude that ONSWC failed to issue invoices in good faith in order to circumvent the Commission's applicable tariff orders and unlawfully overcharge Complainants;
3. Conclude that ONSWC must charge Liberty a connection fee of \$1,500 per REU for 50 REUs;
4. Order ONSWC to refund all overcharges Blue Heron incurred in connection with ONSWC's wastewater connection fees and monthly service fees and issue an order accounting for all monetary losses ONSWC's breach of its statutory and regulatory obligations caused;
5. Order that ONSWC is obligated to pay a double refund to Blue Heron for overcharges; and
6. Order ONSWC to pay \$10 per day in penalties for non-compliance with N.C.G.S. § 62-139 since February 28, 2023.

FINDINGS OF FACT

General

1. Blue Heron is a real estate investment management and development firm. Blue Heron controls and manages BHEVBC, LLC, which in turn owns Knoll at Briar Chapel (Knoll),¹ an apartment complex located in Pittsboro, North Carolina.

2. Knoll consists of three multi-family apartment buildings totaling 200 apartment units and one clubhouse building. Each of Knoll's four buildings has a

¹ The original name of the Blue Heron apartment complex was "Perch," so there are some references to the Perch apartments in the record.

separate water meter. Two of the apartment buildings have 3-inch water meters, and one apartment building and the clubhouse have 2-inch water meters.

3. Liberty develops, owns, and manages senior living communities with locations across North Carolina. Liberty controls and manages Inspire at Briar Chapel, LP, which in turn owns Inspire Briar Chapel (Inspire), a 150-unit, 4-story apartment complex for adults 55 and older that is under construction in Pittsboro, North Carolina. Inspire has one 6-inch water meter.

4. Both Knoll and Inspire are in ONSWC's Briar Chapel service territory.

5. On April 20, 2015, in Docket Nos. W-1300, Sub 9 and W-1230, Sub 1, the Commission approved ONSWC's acquisition of the Briar Chapel Utilities, LLC (BCU), wastewater franchise and approved a connection fee for the Briar Chapel subdivision service area of \$1,500 per REU (Sub 9 Order).

6. On March 19, 2021, ONSWC's Manager sent a letter to the Chatham County Director of Permits and Inspections stating that ONSWC is "now allowing commercial connections to the Briar Chapel system."

7. On March 8, 2021, in Docket No. W-1300, Sub 71, ONSWC filed a petition with the Commission seeking to amend its tariff to increase the connection fee for the Briar Chapel subdivision service area from \$1,500 per REU to \$4,000 per REU (Sub 71 Petition). ONSWC stated in the petition that it was currently increasing the capacity of the existing Briar Chapel wastewater treatment plant from 250,000 gallons per day (GPD) to 500,000 GPD and that the primary reason for the increased connection fee is to aid in recovery of the cost of the facility expansion and to provide service for new development. Order Approving Tariff Revision, *In the Matter of Application of Old North State Water Company, LLC for Authority to Amend its Tariff to Increase Wastewater Connection Fees*, No. W-1300, Sub 71, 1 (N.C.U.C. April 19, 2021).

8. On April 19, 2021, in Docket No. W-1300, Sub 71, the Commission issued its Order Approving Tariff Revision, approving ONSWC's request to increase the connection fee for the Briar Chapel subdivision service area from \$1,500 per REU to \$4,000 per REU (Sub 71 Order).

9. In ONSWC's NC Sewer Builder Instructions (Builder Instructions), ONSWC instructs builders to complete the Builder Application for Connection and enclose a check for the tap, contribution in aid of construction (CIAC) tax, and application fees. The Builder Instructions direct applicants to mail the completed applications and checks for fees to ONSWC.

Blue Heron

10. On March 23, 2021, Blue Heron signed and submitted a Water/Wastewater Service Application (Wastewater Application) to ONSWC for the provision of wastewater

connection services to Knoll. The Wastewater Application, a standard form prepared by ONSWC, states: "THIS APPLICATION WILL BECOME A BINDING CONTRACT UPON ACCEPTANCE BY THE UTILITY."

11. On March 23, 2021, ONSWC submitted to Chatham County an Intention to Provide Sewer Service to Blue Heron.

12. ONSWC informed Blue Heron by email on March 23, 2021, that it would provide an invoice for the wastewater connection fees and the CIAC taxes "at a later date."

13. On April 19, 2021, the same date the Commission issued the Sub 71 Order, ONSWC provided Blue Heron an invoice for the connection fees and charged the increased connection fee of \$4,000 per REU. ONSWC calculated the connection fees for Blue Heron to be \$1,082,320 (270.6 REUs x \$4,000).

14. Blue Heron received an invoice for the connection fees and CIAC tax from ONSWC 27 days after ONSWC's email that it would provide an invoice at a later date.

15. Blue Heron calculates that ONSWC charged approximately \$676,450 more than the amount Blue Heron would have owed for Knoll (based on 270.6 REUs) if ONSWC had used the rate of \$1,500 per REU that was in effect on March 23, 2021 when Blue Heron signed the Wastewater Application.

16. On November 29, 2021, ONSWC issued a revised invoice removing a tax charge that it had included in error. That invoice also calculated connection fees based on a rate of \$4,000 per REU.

17. On August 31, 2022, Blue Heron paid the connection fees as invoiced by ONSWC so that Blue Heron could complete construction of the Knoll apartment complex.

Liberty

18. On April 1, 2021, Liberty communicated with ONSWC regarding wastewater services for Inspire.

19. On April 5, 2021, Liberty emailed ONSWC asking what was required to pay the \$1,500 per unit connection fee for Inspire. ONSWC responded to Liberty on April 19, 2021.

20. On April 19, 2021, ONSWC informed Liberty that it would calculate the invoice at the "current tap fee" of \$4,000 per REU. ONSWC calculated the connection fee for Liberty for Inspire to be \$807,400 (201.85 REUs x \$4,000).

21. Liberty calculates that ONSWC invoiced approximately \$504,625 more than the amount Liberty would have owed for Inspire (based on 201.85 REUs) using the rate

of \$1,500 per REU that was effective on April 5, 2021.

Computation of REUs

22. The only definition of REU in the Sub 9 Order is in the Schedule of Rates tariff which defines REU as “one Residential Equivalent Unit.”

23. The Sub 9 Order does not explicitly state how to compute REUs but references the \$1,500 per REU purchase price in the Asset Purchase Agreement (2014 APA) by and between BCU, NNP-Briar Chapel, LLC (NNP), and ONSWC dated October 31, 2014, for the sale of the Briar Chapel wastewater utility system (Briar Chapel Wastewater System or Wastewater System) to ONSWC. The Sub 9 Order states that the purchase price for the Briar Chapel Wastewater System under the APA is \$1,500 per REU for each new connection to the system and for the future expansion of the existing 250,000 GPD wastewater treatment plant.

24. The 2014 APA provides methods of calculating REUs for both single-family residential units and non-residential users. For single-family units in the Briar Chapel service area, REU is a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Briar Chapel Development (250 GPD). A REU for a non-residential development is determined by the meter size, or, if there are no meters, by the design flow divided by 250 GPD. Section 1.27 of the 2014 APA provides the following definition and computational method for REUs:

[A] unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Projects (250). For purposes of this Agreement, the number of RUEs [sic] represented by a non-residential user shall be determined as follows:

- (a) If there is no water or wastewater meter for the non-residential facility, by dividing the design flow of the facility in question, (in GPD) by 250 GPD; or
- (b) If there is a water and/or wastewater meter for the non-residential facility, in accordance with the following chart:

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

25. The APA states that ONSWC, as buyer of the Briar Chapel Wastewater System, is required to pay the seller \$1,500 per REU for each new residential and non-residential connection made to the Briar Chapel Wastewater System and that ONSWC shall continue to collect the \$1,500 per REU connection fee approved in the franchise proceeding for the seller in Docket No. W-1230, Sub 0, for each new connection made to the Briar Chapel Wastewater System and pay such fees to the developer.

26. In Docket No. W-1230, Sub 0, by order issued on December 8, 2009, the Commission granted a certificate of public convenience and necessity (CPCN) to BCU for the Briar Chapel subdivision service area and required BCU to file the executed agreement (BCU Agreement) between NNP and BCU for BCU to acquire the Briar Chapel Wastewater System (Sub 0 Order). The BCU Agreement contained the same computational method for determining a REU for non-residential development as the APA. The BCU Agreement stated that BCU “shall request from the Commission a wastewater connection fee of \$1,500 for each Connection and shall use its best efforts to gain the Commission’s approval of such fee.” “Connection” is defined as any single-family residential connection or REU connection to the Briar Chapel Wastewater System.

27. ONSWC calculates the REUs through reference to the wastewater collection system extension permit authorized by DEQ.

28. For Blue Heron’s Knoll apartment complex, ONSWC divided the projected 51,140 GPD for the development by 189 GPD, resulting in 270.6 REUs for the development.

29. Knoll has two 2-inch meters and two 3-inch meters. According to the chart in the 2014 APA and the BCU Agreement, Blue Heron calculates that Knoll has 46 REUs, which would result in connection fees to ONSWC of \$69,000 (46 REUs x \$1,500).

30. For Liberty’s Inspire apartment complex, ONSWC divided the projected 38,150 GPD for Liberty’s development by 189 GPD, resulting in 201.85 REUs for the development.

31. Inspire has a single 6-inch meter. According to the chart in the 2014 APA and the BCU Agreement, Liberty calculates that Inspire’s single 6-inch meter is equal to 50 REUs, which would result in connection fees to ONSWC of \$75,000 (50 REUs x \$1,500).

Monthly Sewer Utility Service Fee

32. On January 13, 2023, ONSWC issued an invoice to Blue Heron for the first four months of wastewater service. The total amount invoiced for the four months is \$45,782.12, or \$11,445.53 per month (270.6 x \$42.30).

33. Blue Heron states that its Knoll development has 46 REUs, which would result in a monthly wastewater service fee of \$1,945.80 (46 x \$42.30).

COMPLAINANTS' ARGUMENTS

Blue Heron argues that ONSWC and Blue Heron entered into a binding contract for the sale of wastewater service on March 23, 2021 that required ONSWC to charge a connection fee of \$1,500 per REU. Blue Heron contends that ONSWC unlawfully charged Blue Heron a higher connection fee of \$4,000 per REU. In charging a higher connection fee, Complainants argue that ONSWC violated N.C.G.S. § 62-139(a), that prohibits a utility from “charging, demanding, collecting, or receiving greater or less compensation for any service than that prescribed by the Commission,” and Commission Rule R10-20, that provides that “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.” Blue Heron also alleges that ONSWC violated Commission Rule R10-17, that provides that “[a] utility shall, when accepting application for sewer service, give full information to the applicant concerning the type of service to be rendered and rates which will be applicable.” Blue Heron further contends that ONSWC violated N.C.G.S. § 62-139 by improperly calculating the number of REUs for its development. Liberty likewise contends that it is entitled to a \$1,500 per REU connection fee.

Connection Fee Dispute

Contract between ONSWC and Blue Heron Requiring a Connection Fee of \$1,500 Per REU

According to Blue Heron, a wastewater utility must charge the rates that are in effect at the time of sale of the service, not the time of the wastewater interconnection. Complainants' Brief at 7-8. Blue Heron states that North Carolina courts have defined “sale” as the creation of a contract to exchange goods or services for a price. Blue Heron asserts that the sale of wastewater service by ONSWC to Blue Heron occurred when the wastewater contract was entered into on March 23, 2021. *Id.* at 11-12. Blue Heron alleges that N.C.G.S. § 62-139(a) explicitly covers fees charged for services “to be rendered” in the future, and that Commission Rule R10-20 is triggered by the “sale of sewer service,” not the performance of the promised service. Thus, Blue Heron argues that the statute and rule require the wastewater utility to charge the connection fee in effect at the time of sale, not when interconnection occurs. *Id.*

Blue Heron claims that it made an offer to ONSWC to acquire wastewater connection service, the offer was accepted by ONSWC, and a binding contract was thus created. Blue Heron states that it made an offer to ONSWC when it tendered the Wastewater Application to ONSWC on March 23, 2021. Blue Heron alleges that ONSWC accepted the offer on March 23, 2021 because the Wastewater Application includes express language that it will become a binding contract upon acceptance by the utility. Blue Heron also alleges that ONSWC's conduct in submitting the Intention to Provide Service form to Chatham County on March 23, 2021 demonstrates that it accepted Blue Heron's offer. Complaint at 5-6.

Blue Heron maintains that the contract is a binding contract because it contains all material terms for the agreement. Blue Heron asserts that the Wastewater Application effectively contains the \$1,500 per REU connection fee because that connection fee was prescribed as a matter of law by the Sub 9 Order that was in effect on March 23, 2021. Thus, the Wastewater Application did not need to expressly state the connection fee for it to be incorporated into the contract. *Id.* at 10. Blue Heron's position is that once ONSWC accepted the Wastewater Application on March 23, 2021, the sale of wastewater service occurred and ONSWC was required to charge the fee in effect at that time (\$1,500 per REU) according to Commission Rule R10-20. *Id.* at 6.

Complainants allege that ONSWC has a practice of charging customers the fee in effect at the time of accepting the Wastewater Application. Complainants' Brief at 15. The Builder Instructions and the Wastewater Application require a builder to submit "application fees" with the Wastewater Application. Complainants argue that the only way a builder could submit the connection fee along with the Wastewater Application is if the fee is determined at the time of submission of the Wastewater Application. If the fee was determined at the time of interconnection, a builder could not calculate the fees to include with the Wastewater Application because they would be determined at a later time when interconnection is made. Blue Heron states that the Builder Instructions are consistent with the requirement in Commission Rule R10-20 that wastewater utilities charge rates in effect at the time of the sale.

Blue Heron alleges that ONSWC's dissatisfaction with the connection fee that was in effect when ONSWC and Blue Heron entered into the contract does not give it the right to charge customers a connection fee that was not effective at the time of the sale. Blue Heron states that ONSWC wanted to charge them \$4,000 per REU but did not obtain the necessary Commission approval of the increased connection fee in time to do so.

In response to ONSWC's argument that the \$1,500 per REU rate is inadequate to finance the expansion of the Wastewater System, Complainants claim that the \$1,500 per REU connection fee was not arbitrary and unrelated to system expansion. Complaint at 16. Rather, Complainant's argue that the BCU Agreement explicitly planned for a wastewater treatment plant expansion from 250,000 to 750,000 GPD, and ONSWC agreed to expand the plant to 600,000 GPD when it acquired the Wastewater System. *Id.* According to Blue Heron, both the BCU Agreement and the 2014 APA call for future expansion of the Wastewater System and set the connection fee at \$1,500 per REU. *Id.* Complainants contend that if the \$1,500 per REU connection fee was insufficient to pay for the wastewater treatment plant expansion, ONSWC should have properly managed the expansion and timely requested a connection fee increase, which it did not do. *Id.*

Blue Heron argues that the Wastewater Agreement was not a special service contract that would have required approval from the Commission.

Complainants cite to Docket No. W-354, Sub 118 in support of their contention that that the contract between ONSWC and Blue Heron constitutes a sale. According to Complainants, the Commission recognized in that docket that connection fees are CIAC

and CIAC is the result of a sales contract. Here, Complainants argue, ONSWC's connection fees are "a type of CIAC," and ONSWC promised to provide future connection service in exchange for Blue Heron's payment for the cost of such service. Thus, Complainants argue that ONSWC's Wastewater Agreement is a "sale of sewer service."

ONSWC is Estopped from Charging a \$4,000 per REU Connection Fee

Blue Heron argues that ONSWC's conduct estops it from charging the later-approved connection fee of \$4,000 per REU. Complainants' Reply at 14. Blue Heron cites *Ellen v. A.C. Schultes of Md., Inc.* for the proposition that North Carolina recognizes the doctrine of equitable estoppel, which "precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." 172 N.C. App. 317, 321, 615 S.E.2d 729, 732 (2005). Blue Heron notes that the elements of equitable estoppel are a concealment of material facts, the intention that another party will act on that concealment, and knowledge of the real facts. *Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628 (1990). Blue Heron argues that because ONSWC deliberately prevented it from paying for connection service before the Commission issued the Sub 71 Order, ONSWC is estopped from relying on that order to charge higher rates. Complainants' Reply at 14.

Blue Heron did not Waive its Rights to a \$1,500 per REU Connection Fee

Blue Heron asserts that it did not waive its right to relief under N.C.G.S. § 62-139(a) when it tendered payment for connection fees based upon \$4,000 per REU that ONSWC demanded. *Id.* According to Blue Heron, a customer's payment of excessive fees cannot constitute an abandonment of the customer's right to a refund under N.C.G.S. § 62-139(a) because the statutory right to a refund is not triggered until the customer makes the payment. *Id.* at 14-15. Blue Heron states that ONSWC was aware of Blue Heron's objection to ONSWC's calculation of the connection fee and Blue Heron paid the fee under protest because it needed sewer service so that tenants could move into its apartment complex. *Id.* Blue Heron argues that payment made under such circumstances cannot lead ONSWC to "naturally and justly" believe that Blue Heron waived its right to a refund. *Id.*

REU Calculation Dispute

REU is Calculated Pursuant to the 2014 APA and the Sub 9 Order

Complainants argue that the REU for their apartment buildings should be based on the definition of REU in the 2014 APA and the Sub 9 Order. Complainants maintain that in the Sub 9 Order the Commission established that ONSWC should charge \$1,500 for each new connection as a connection fee, that the Commission relied upon the definition of REU as set forth in preexisting agreements that provided a computational formula for REUs, and that ONSWC cannot deviate from that predetermined REU computation. Complainants acknowledge that the Sub 9 Order does not explicitly state how to compute REUs, but point out that it expressly references the \$1,500 per REU

purchase price to which the parties agreed in the 2014 APA. They state that the purchase price for the Briar Chapel Wastewater System under the 2014 APA is \$1,500 per REU for each new connection and for the future expansion. According to Complainants, the 2014 APA provides the method for computing REUs, which is determined by the meters or, if there are no meters, the design flow divided by 250 GPD. Complainants assert that the 2014 APA therefore obligates ONSWC to collect \$1,500 per REU.

Complainants assert that ONSWC improperly calculated the REU for their apartment complexes by utilizing a method from the DEQ wastewater collection extension permit that was not authorized by the Commission. *Id.* Complainants state that ONSWC cannot use the method in the DEQ permit because the DEQ permit is applicable to residential single-family dwellings only and does not apply to Complainants' multi-family apartments. *Id.* at 20. Further, Complainants maintain that the DEQ permit does not modify utility rates authorized by the Commission. *Id.*

Complainants note that other utilities have requested and received connection fees that include explicit calculations of REUs. Order Recognizing Contiguous Extension and Approving Rates, Notification by Pluris, LLC, No. W-1282, Sub 7 (N.C.U.C. Sept. 12, 2011). Complainants point out that ONSWC has not requested an explicit calculation of REUs as part of a rate change. Complainants' Response Brief at 19. Complainants argue that until ONSWC does so, and the Commission approves the change, ONSWC must calculate REUs as set forth in the Sub 0 and Sub 9 Orders. *Id.*

ONSWC Wrongfully Charged Blue Heron on its First Monthly Invoice

Blue Heron alleges that ONSWC's first invoice to Blue Heron for monthly wastewater services contains an error in computing REUs. According to Blue Heron ONSWC may charge \$42.30 per REU per month for sewer service. On February 28, 2023, ONSWC issued an invoice to Blue Heron for the first four months of sewer service and the total for the four months was \$45,782.12, which reflects \$11,445.53 per month. The monthly amount for these four months was based upon 270.6 REUs. Blue Heron contends that since ONSWC must compute REUs by meters (or, if there are no meters, by the design flow divided by 250 GPD), a properly computed REU is 46 REUs, for a monthly sewer fee of \$1,945.80.

Blue Heron disputes ONSWC's claim that, even if the Commission agrees that the connection fee set in the Sub 9 Order must be calculated as the APA defines, the rate increase approved in the Sub 71 Order redefined the calculation of REUs going forward. Blue Heron states that the Commission's Sub 71 Order does not expressly define a new method of calculating REUs, and that ONSWC erroneously infers such a significant change without specific language in the order. Further, Blue Heron reiterates that ONSWC's method of calculating REUs cannot be correct because the DEQ permit ONSWC relies on is applicable to single-family dwellings only. Blue Heron thus alleges that ONSWC has no authority for its method of calculating the amount of Blue Heron's monthly sewer services.

ONSWC'S ARGUMENTS

Connection Fee Dispute

No Contract between ONSWC and Blue Heron Requiring a Connection Fee of \$1,500 Per REU

ONSWC argues that there is no contract between ONSWC and Blue Heron obligating ONSWC to allow Blue Heron to interconnect for \$1,500 per REU.

ONSWC asserts that it acquired the Briar Chapel wastewater treatment plant and collection system from BCU, an operating subsidiary of NNP, the developer of the Briar Chapel subdivision. The Briar Chapel Wastewater System was constructed by NNP and was initially developer-owned. ONSWC acquired the Briar Chapel Wastewater System pursuant to the terms of the 2014 APA, resulting in a zero rate base for the system. ONSWC states that the purchase price in the 2014 APA used a financing method to repay NNP with connection fees received by BCU, which was agreed to in the 2014 APA and was not based on cost of service (COS) principles. Answer at 2; Tr. at 119. BCU remitted the connection fees to NNP to pay NNP for its investment in the Wastewater System that NNP was not contributing to BCU as CIAC. According to ONSWC, the Commission approved BCU's acquisition of the Briar Chapel Wastewater System and acknowledged the \$1,500 connection fee without further COS justification. Tr. at 108.

ONSWC alleges that when it acquired the Briar Chapel Wastewater System pursuant to the 2014 APA, it assumed the obligation to serve structures that builders (such as Blue Heron and Liberty) would construct in the future in the Briar Chapel service area. ONSWC was required by the 2014 APA to expand the capacity of the wastewater treatment plant at its cost so that wastewater service would be available to those builders. Ultimately, this obligation required ONSWC to expand the wastewater treatment plant by an additional 250,000 GPD (from 250,000 GPD to 500,000 GPD). Sub 71 Order at 1; Tr. at 46, 116. ONSWC also had to construct a force main and lift station at its cost to serve demand from future builders, such as Blue Heron and Liberty. Tr. at 46-47, 51. ONSWC alleges that Blue Heron is a "cost-causer" of ONSWC's investments in the Briar Chapel Wastewater System that were needed to provide service to Blue Heron. Tr. at 23, 46.

According to ONSWC, Blue Heron and Liberty acquired properties and took steps to construct their developments with the knowledge that their properties were in ONSWC's service area and that ONSWC had an obligation to serve their properties on terms approved by the Commission. Answer at 3. ONSWC contends that due diligence on the part of Blue Heron and Liberty would have shown that the wastewater treatment plant had to be expanded to serve their developments, and that ONSWC would require builders, such as Blue Heron and Liberty, to provide funding at a rate based on the cost of the expansion. *Id.*

For the expansion of the wastewater treatment plant, in 2021, ONSWC obtained

engineering and cost information and filed its Sub 71 Petition requesting an increased connection fee of \$4,000 per REU to pay for the new infrastructure. Answer at 2; Tr. at 152. ONSWC relied upon COS calculations to support its request for the increased connection, which was calculated to maximize CIAC and reduce usage rates to customers. Answer at 2. ONSWC asserts that it timed its Sub 71 Petition so that the new connection fee would be in effect when ONSWC needed to interconnect new developments, such as Blue Heron's and Liberty's apartment complexes. *Id.* ONSWC did not request an increase in wastewater usage fees, but if it was not granted an increased connection fee for CIAC to expand the wastewater treatment plant it would have had to recover the expansion costs through usage rates. *Id.* at 11.

According to ONSWC, ONSWC's Sub 71 Petition was pending before the Commission before Blue Heron submitted its Wastewater Application on March 23, 2021 and before Liberty made an inquiry to ONSWC about the connection fee for interconnection on April 5, 2021. *Id.* at 11. Specifically, Blue Heron submitted the Wastewater Application 15 days after ONSWC filed its Sub 71 Petition to increase the connection fee with the Commission. ONSWC states that Blue Heron was not prepared to interconnect its apartment buildings when Blue Heron submitted the Wastewater Application. *Id.* ONSWC states that no interconnection facilities were in place on the date Blue Heron submitted the Wastewater Application and Blue Heron was aware it could not interconnect its apartment buildings to the Briar Chapel Wastewater System at that time. Answer at 5.

When ONSWC received Blue Heron's Wastewater Application, ONSWC told Blue Heron that it would provide an invoice at a later date, anticipating that the Commission would rule on its pending Sub 71 Petition to increase the connection fee to \$4,000 per REU. *Id.*

Thereafter, on April 19, 2021, the Commission approved the increased connection fee of \$4,000 per REU in the Sub 71 Order. On that same day, ONSWC provided an invoice to Blue Heron for payment of connection fees based on the connection fee of \$4,000 per REU. *Id.* at 6. As of that date, ONSWC had not interconnected Blue Heron's apartment buildings to the Wastewater System and had not provided any wastewater services pursuant to any Commission-approved tariff to either Blue Heron or Liberty.

ONSWC disputes Blue Heron's claim that a contract for the sale of wastewater services was entered into on March 23, 2021. First, ONSWC argues that an interconnection of pipes through which wastewater flows from an apartment building is not a sale as that term is used with respect to utility fees and charges. Further, even if the interconnection is classified as a sale, no interconnection occurred, and could not have occurred, on March 23, 2021 or on April 19, 2021. In regard to Blue Heron's claim that it submitted an offer to the contract on March 23, 2021, ONSWC asserts that it did not request that Blue Heron submit a Wastewater Application. Answer at 3. Blue Heron instead applied to ONSWC for ONSWC's commitment to provide wastewater service after construction of Blue Heron's development was already underway, but before Blue Heron would need interconnection to the wastewater treatment plant. When Blue Heron

submitted the Wastewater Application, ONSWC accepted the Application and told Blue Heron that it would provide an invoice for connection fees in the future. *Id.* ONSWC states that by accepting the Wastewater Application, ONSWC was simply providing assurance that when and if Blue Heron's project was completed, wastewater capacity and service would be available at the time of needed interconnection. *Id.* at 4.

ONSWC argues that ONSWC and Blue Heron never agreed to a connection fee of \$1,500 per REU. ONSWC points out that Blue Heron's claim that ONSWC and Blue Heron entered into a binding contract for a connection fee of \$1,500 per REU is based on Blue Heron's submittal of the Wastewater Application to ONSWC; however, the Wastewater Application is devoid of any reference to that connection fee. Likewise, ONSWC's submission to Chatham County of the Intention to Provide Service has no reference to a connection fee of \$1,500 per REU. ONSWC also points out that Blue Heron did not submit a connection fee payment to ONSWC with the Wastewater Application. In regard to the payment made by Blue Heron, ONSWC states that Blue Heron is conflating "application fees" with "connection fees." Tr. at 61. The Builder Instructions refer to application fees, rather than the connection fees, and the application fees reimburse ONSWC for the administrative expense of processing the Application, are due with the Application, and are not refundable. *Id.* ONSWC further maintains that it never stated that the connection fee would be \$1,500 per REU. *Id.* at 3. If Blue Heron had asked about the amount of the connection fee, ONSWC would have informed Blue Heron that the connection fee would be the fee that the Commission would approve in the pending docket, as ONSWC "had nothing to hide." *Id.* at 2.

ONSWC states that connection fees such as those at issue here constitute CIAC, and that CIAC that is not passed through to a seller of a wastewater system reduces the rate base and therefore reduces the rates that customers will have to pay for wastewater services. Answer at 3. In other words, CIAC reduces the rate base and thus reduces the return that ONSWC is entitled to receive. ONSWC therefore submits that it is not to ONSWC's financial advantage to increase the connection fee, contrary to Blue Heron's assertions. *Id.* at 12.

ONSWC notes that when the Commission approved the \$4,000 per REU connection fee in its Sub 71 Order, the Commission stated: "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." ONSWC contends that the time for Complainants to raise issues over the way the demand on the Wastewater System developed after 2014 was in the Sub 71 docket.

The Connection Fee Should be Based Upon COS Principles

ONSWC states that the use of connection fees in the context of the acquisition and sale of wastewater facilities serves a different function from the use of connection fees based on COS principles assessed by a wastewater utility to a new builder to finance the construction of post-acquisition improvements to serve customers. In the first context, the connection fees are a financing method to facilitate the sale. In the Sub 9 transaction, the

seller was BCU, owned by developer NNP. The \$1,500 per REU connection fee was to be passed through to NNP, not retained by ONSWC. These connection fees did not constitute net CIAC, as is the case with the \$4,000 per REU charge to Blue Heron that the Commission approved in the Sub 71 Order. The \$1,500 per REU connection fee in the Sub 9 transaction was negotiated and was not based on a COS justification. ONSWC states that the charges to Blue Heron and Liberty for connection fees based on \$4,000 per REU and ONSWC's calculation of REUs were formulated to recover as CIAC the costs for a defined system improvement. If the components of the connection fee are modified, the CIAC will be far lower than anticipated and relied upon to fund the improvements. ONSWC asserts that the correct calculation for REUs must be as invoiced through reliance on current demand measurements for the particular Blue Heron or Liberty project and the cost of the improvements.

ONSWC states that the services it provides and the rates and terms of those services are under the exclusive jurisdiction of the Commission, and that the contracts that ONSWC enters into are regulated by the Commission. ONSWC submits that this dispute must be resolved by reference to N.C.G.S. § 62-139. ONSWC maintains that the cases cited by Blue Heron addressing the timing and substance of contracts outside of the utilities' realm are not relevant to this dispute. ONSWC states that the cases cited by Blue Heron addressing sales are not relevant since the issue here relates to services, not sales. ONSWC argues that if it agreed in 2022 to interconnect Blue Heron at \$1,500 per connection (the connection fee referenced in the 2014 APA), it would have been in violation of N.C.G.S. § 62-139 by charging less than the approved tariff rate at the time of service.

ONSWC states that this Commission has, in several Carolina Water Service, Inc. of North Carolina's (CWSNC) dockets, including Docket No. W-354, Sub 118, addressed the following questions: whether CWSNC was required to charge its tariffed uniform connections fees or was authorized to charge different connection fees upon certain acquisitions; and whether the fees CWSNC collected and then passed through to developers that sold systems to CWSNC should be reflected as CIAC and thereby reduce the rate base. ONSWC states that, in these dockets, the Commission addressed situations where the amount of connection fees was established in asset purchase agreements negotiated between the developer of systems and the utility acquirer and that the connection fees factoring into the purchase prices were not based on COS principles. In those situations, the Commission found that CWSNC had acted appropriately and with the best interests of its customers in mind. Similarly, the Commission endorsed the practice—where the utility, after acquisition, assessed connection fees from new builders and passed the fees through to the developer/seller—as prudent and appropriate. The Commission determined that such connection fees collected and passed through to the developer did not constitute CIAC. In contrast, connection fees assessed under tariffs based on COS principles and approved in advance by the Commission that are retained by the utility to finance system improvements do constitute CIAC and reduce the rate base.

ONSWC argues that connection fees that are negotiated as part of the purchase

price between a developer and a wastewater utility are based on competitive market considerations. The Commission treats them differently from connection fees established in more traditional contexts. The contract-defined connection fees are based upon an arms-length transaction between the acquiring utility and the seller, and each transaction is based upon its own unique circumstances. Therefore, details, such as connection fees, may vary from transaction to transaction. Here, ONSWC states, Blue Heron and Liberty are not privy to or are successors-in-interest to the 2014 APA between NNP and ONSWC. The developer, NNP, received appropriate remuneration for its investments in the Wastewater System through the passed-through \$1,500 per REU connection fees. Thereafter, ONSWC had to expand the wastewater treatment plant by 250,000 GPD and install a force main and lift station to serve new structures, like Blue Heron's and Liberty's apartment complexes. Tr. at 21, 118-19. NNP did not bear this cost; rather, ONSWC had to bear it initially. The \$4,000 per REU connection fee and the number of REUs used in the calculation of connection fees owed were based on traditional COS principles and were calculated to reimburse ONSWC for the expansion of the Wastewater System. The Commission approved the \$4,000 per REU fee in the Sub 71 Order, which supplanted the \$1,500 per REU fee and the REU calculations in the 2014 APA.

ONSWC, again relying on Docket No. W-354, Sub 118, asserts that builders that do not install facilities and have no contract addressing connection fees must pay connection fees established by the Commission on terms the Commission approves based on COS principles. Here, the buildings Blue Heron seeks to connect were not built by NNP, with whom ONSWC negotiated the 2014 APA. ONSWC contends that if Blue Heron's theory is correct and the terms of the 2014 APA and the Commission's Sub 0 and Sub 9 Orders control, for any connection assessed at the time the Blue Heron Wastewater Application was accepted, ONSWC would have to remit the collections to NNP, which would conclude that "it had won the lottery without even purchasing a ticket." ONSWC Brief at 29.

ONSWC asserts that the Commission has determined, again citing Docket No. W-354, Sub 118, that connection fees it approves for builders not addressed in asset purchase agreements and not remitted to the developer constitute CIAC. Here, ONSWC will not remit to NNP any of the connection fees received from Blue Heron. For that reason, the full amount of the connection fees it collects from Blue Heron will constitute CIAC, will reduce rate base, and will ultimately benefit the end use consumers in the Briar Chapel service area.

The Connection Fee is Determined at the Date of Interconnection

ONSWC argues that the connection fee must be \$4,000 per REU because that fee is in effect at the time of interconnection. ONSWC contends that N.C.G.S. § 62-139(a) and Rule R10-20 require that the date of interconnection, not the date that the Wastewater Application is submitted, establishes the time when the connection fee amount is determined. Answer at 4. ONSWC disputes Blue Heron's argument that N.C.G.S. § 62-139(a) covers connection fees for interconnection services to be rendered in the future. ONSWC notes that Complainants' Complaint omits important language from

the statute, which reads in full:

No public utility shall directly or indirectly, by any device whatsoever, charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed by the Commission, nor shall any person receive or accept any service from a public utility for a compensation greater or less than that prescribed by the Commission. (Emphasis added).

ONSWC did not Violate Commission Rules

ONSWC maintains that it did not violate Commission Rule R10-17 and its requirement that information be given to customers concerning the type of service to be rendered and the applicable rates when the utility accepts an application for wastewater service. ONSWC also states that it was waiting for the Commission's ruling in the Sub 71 docket that would determine the applicable connection fee, and it notified Blue Heron of the connection fee amount immediately after the Sub 71 Order was issued.

Blue Heron Waived its Right to Contest the \$4,000 per REU Connection Fee

ONSWC acknowledges that Blue Heron contested paying ONSWC the invoiced connection charge, but asserts that Blue Heron did not file a complaint with the Commission before making the payment or make the payment under protest. Therefore, ONSWC argues that Blue Heron has waived its right to retroactively contest the payment of the connection fees or the subsequent monthly charges for wastewater services.

There is no Contract between ONSWC and Liberty

ONSWC argues that there is no contract between ONSWC and Liberty and that Liberty does not even claim that it entered into a contract with ONSWC before the Sub 71 Order was issued. ONSWC points out that Liberty did not submit a Wastewater Application to ONSWC until after the Commission approved the increase in connection fee in the Sub 71 Order. *Id.* at 4. ONSWC points out that Liberty has not yet interconnected to the Wastewater System, paid connection fees, or paid any monthly usage fee.

REU Calculation Dispute

REU is Calculated Based Upon the Formula in the DEQ Permit

In regard to calculation of the REU, ONSWC argues that it should be calculated based upon the method in the DEQ permit. ONSWC submits that Complainants' method of calculating the REU is not appropriate because Blue Heron and Liberty are not privy to or successors in interest to the 2014 APA between NNP and ONSWC. *Id.* at 4. ONSWC states that Blue Heron and Liberty are in a completely different category than NNP because they never owned the Wastewater System and did not make contributions to

finance the Wastewater System that was constructed or contemplated in the 2014 APA and the Commission's Sub 0 Order. Even if Blue Heron was correct that the Sub 9 Order addressed the billing determinants by reference to the 2014 APA, the 2014 APA provision addressing REUs for various customer demands does so by reference to a single meter per interconnection, not multi-meter, multi-residential structures like Blue Heron's project. Further, ONSWC contends that there are no Commission orders or tariffs addressing how REUs are to be calculated for Complainants. ONSWC submits that prefatory language and findings of fact in orders unrelated to this docket cited by Complainants cannot be used to impose requirements on utilities or customers when the orders have been superseded by subsequent ones. *Id.* at 6.

ONSWC explains its calculation of the REU for Complainants' developments through reference to DEQ requirements:

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 project, and the discharge of 51,140 gallons per day of collected domestic wastewater into Old North State's existing Briar Chapel sewerage 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 gallons per bedroom 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 = $270.58 \times \$4000 = \$1,082,328.04$. 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 likely would occur. Were other potential entities seeking connection to calculate REUs the way you suggest, the capacity very well would be exceeded in short fashion.

Answer at 12-13.

Specifically, ONSWC disagrees with Blue Heron's calculation of the REU pursuant to the alleged contract between ONSWC and Blue Heron. In ONSWC's view, if the terms of the alleged contract are unclear, there is no binding contract. ONSWC notes that Blue Heron bases the 46 REUs on the fact that it has two 2-inch meters and two 3-inch meters and, believes that the computation of REU is dictated by the Sub 9 Order and the 2014 APA. The formula to calculate the REU in the Sub 9 transaction was negotiated by the parties based on facts existing at that time and would not result in a sufficient or

appropriate fee for Blue Heron's project. ONSWC asserts that the Sub 9 Order does not reference any method for computing nonresidential REU or REU for a multi-unit residential structure. Contrary to Blue Heron's position, ONSWC asserts that the Sub 71 Order governs ONSWC's wastewater services to Blue Heron. Further, at the time of the Sub 9 proceeding and the 2014 APA, DEQ had not granted a wastewater collection system extension permit to ONSWC.

ONSWC Correctly Charged Blue Heron on its First Monthly Invoice

ONSWC argues that it correctly calculated the number of REUs in Blue Heron's first monthly invoice. ONSWC states that the reasons for rejecting Blue Heron's claim that it is owed a refund for the monthly usage fees it has paid to date are the same as the reasons for rejecting the claim for a refund for the connection fees paid. According to ONSWC, the Sub 71 Order does not reference the 2014 APA, the \$1,500 per REU connection fee, or the chart in the 2014 APA addressing REU calculation. The tariff in the Sub 71 Order calls for a flat rate sewerage usage rate. If the usage rate is not based on a billing determinant reflecting the demand that Blue Heron's and Liberty's structures place on the Wastewater System, other customers will bear an inordinately large cost of operating and maintaining the system.

Complainants' Response

In their Response Brief, Complainants acknowledge that there are differences between negotiated connection fees and tariff connection fees but assert that those differences are immaterial here. Their argument is that regardless of whether the fee is negotiated or in a tariff, the applicable fee is determined when the contract is formed. Complainants argue that the Commission's action in Docket No. W-354, Sub 118, Order of Clarification, is not relevant here. There, the Commission made clear that, unless there was a negotiated connection fee as part of an approved contract, the utility must charge the tariff rate. Complainants maintain that they have never alleged that they are entitled to a negotiated rate. Rather, they are asking that they pay the uniform tariff that the Commission established in the Sub 9 Order. Complainants state that ONSWC believes that, because the tariff in the Sub 9 Order resulted from the 2014 APA, the uniform tariff is somehow a "negotiated rate" to which Complainants are not entitled, which Complainants state is incorrect. The \$1,500 per REU amount originated in the 2014 APA but became a uniform tariff when the Commission approved it in the Sub 0 and Sub 9 Orders.

DISCUSSION AND CONCLUSIONS

The primary issues are: (1) whether ONSWC and Blue Heron entered into a wastewater contract on March 23, 2021; (2) if a contract was created when ONSWC accepted the Wastewater Application, whether ONSWC is required to charge the connection fee effective as of the date of the contract or when the actual wastewater interconnection occurs; (3) whether a contract exists between ONSWC and Liberty; and (4) the appropriate method for determining the REUs for Blue Heron's and Liberty's

projects.

In regard to the existence of any agreements between ONSWC and Complainants, the Commission concludes that ONSWC and Blue Heron entered into a wastewater agreement on March 23, 2021, but that the agreement does not require ONSWC to charge a connection fee of \$1,500 per REU to Blue Heron. The Commission also concludes that N.C.G.S. § 62-139(a) and Rule R10-20 dictate that the connection fee approved by the Commission at the time of interconnection—here, \$4,000 per REU—is the fee to be paid by the customer at the time of interconnection. The Commission further concludes that ONSWC and Liberty did not enter into a wastewater agreement.

ONSWC and Blue Heron Entered into a Wastewater Agreement

In analyzing the extensive record in this case, the Commission notes that the express language of the Wastewater Application dated March 23, 2021, states that it will “become a binding contract upon acceptance by the utility.” ONSWC’s counsel acknowledged during oral argument that ONSWC accepted the Application on March 23, 2021.

COMMISSIONER KEMERAIT: -- ...[D]id Old North State accept the application for wastewater service as it is? Without your position about terms where the connection fee would be. But was it actually accepted prior to issuance of the Sub 71 Order on April the 19th of 2021, or is that relevant? What is your position about that?

MR. FINLEY: The position of Old North State is that they agreed and told Chatham County that Blue Heron would be able to receive connection to the Old North State system so that Blue Heron could proceed with its building activities. Yes, they agreed to that much, but that's all. And they did not agree to what the price would be. Why did they not agree? Because they were waiting for the Commission to determine what the fee would be based on the application that had been submitted that was justified on the rate that would be charged for the Blue Heron facilities that were being constructed.

COMMISSIONER KEMERAIT: So Mr. Schauer focuses on the word "acceptance." So I'd like for you to just respond about -- based upon was it actually accepted prior to the issuance of the 71 Order.

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

Tr. at 55-57.

Even with the “binding contract” language in the Wastewater Application, the Commission concludes that ONSWC’s acceptance of the Wastewater Application with all

of the blanks (information not filled in) in it, as well as the action of ONSWC sending Chatham County an Intention to Provide Sewer Service, only created an agreement between ONSWC and Blue Heron for ONSWC to begin the necessary actions to be able to provide wastewater service to Blue Heron. The Commission concludes that ONSWC and Blue Heron entered into a wastewater agreement on March 23, 2021, for ONSWC to provide wastewater service to Blue Heron at a future time when Blue Heron is ready to interconnect to the Wastewater System.

Blue Heron argues that the contract requires ONSWC to charge the \$1,500 per REU connection fee because that was the amount of the connection fee in effect when ONSWC accepted the Wastewater Application on March 23, 2021. In contrast, ONSWC contends that ONSWC and Blue Heron never agreed to a connection fee and that the required connection fee is the fee in effect at the time of interconnection. ONSWC notes that for a contract to exist, the parties must agree to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. *Quantum Corp. Funding, Ltd. v. B.H. Bryan Bldg. Co.*, 175 N.C. App. 483, 623 S.E.2d 793 (2006). Under North Carolina law, a contract for service must be certain and definite as to the nature and extent of the service to be performed, the place where and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced. *Rider v. Hodges*, 255 N.C. App. 82, 804 S.E.2d 242 (2017).

The Commission finds that the facts do not support Blue Heron's position. It is undisputed that nowhere in the Wastewater Application is there a reference to a \$1,500 per REU connection fee. Furthermore, even if the Wastewater Application had referenced a \$1,500 per REU connection fee, which it did not, the cover page to the Wastewater Agreement expressly states that "Rates and Miscellaneous Charges are subject to change." Moreover, ONSWC specifically stated in its March 23, 2021 email to Blue Heron that it would provide an invoice for the connection fees "at a later date," which shows that the parties never agreed that ONSWC would charge a connection fee of \$1,500 per REU. The Commission concludes that the agreement between ONSWC and Blue Heron did not obligate ONSWC to charge and Blue Heron to pay a connection fee of \$1,500 per REU.

Further, the Commission is not persuaded by Blue Heron's argument that ONSWC is not permitted to charge the connection fee of \$4,000 per REU approved in the Sub 71 Order because if it did so, ONSWC would be violating the Commission rules, including Rule R10-17(a), which requires that utilities, when accepting an application for wastewater service, give full information to the applicant concerning the type of service to be rendered and rates which shall be applicable. According to Blue Heron, the practical effect of Rules R10-20 and R10-17(a) in this situation is that the rules would require that connection fees be determined and locked in as of the date of a contract, even if the connection fees are subsequently increased by the time of interconnection.

The Commission finds that Blue Heron's position, if taken to its logical conclusion, would yield an absurd result in regard to both rates and connection fees. For example, it

is not at all uncommon for the Commission to grant rate increases to wastewater utilities after the utilities have accepted applications for wastewater service. In those instances, customers are not entitled to continue paying the lower rates that were in effect at the time they submitted their applications for wastewater service after the Commission has granted a rate increase. Furthermore, N.C.G.S. § 62-139(a) provides that a utility is prohibited from charging, demanding, collecting, or receiving greater or less compensation for any service than that prescribed by the Commission. Commission Rule R10-20 provides: “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.” (Emphasis added.) The Commission therefore concludes that N.C.G.S. § 62-139(a) and Rule R10-20 dictate that the connection fee approved by the Commission at the time of interconnection is the fee to be paid by the customer at the time of interconnection. In this case, the connection fee of \$4,000 per REU approved by the Commission at the time Blue Heron interconnects is the fee to be charged by ONSWC. The Commission notes that even if Blue Heron were not familiar with N.C.G.S. § 62-139(a) and Rule R10-20, Blue Heron was put on notice by the cover page to the Wastewater Application that the connection fee is subject to change.

The Commission finds that ONSWC could have avoided misunderstanding and litigation if the Wastewater Application had stated expressly that the connection fee will be the approved fee at the time of interconnection. However, an inartful Wastewater Application cannot overcome the Commission’s rules. It is important to note that if ONSWC were to not charge the connection fee in effect when interconnection is made, ONSWC would be in violation of its approved tariff and unlawfully discriminating among its customers by charging Blue Heron connection fees less than those approved in the Sub 71 Order. See N.C.G.S. § 62-139(a); Commission Rule R10-20. Furthermore, the primary reason for the increased connection fee is to aid in the recovery of costs for the facility expansion and provide service for new development. The Commission directs ONSWC to amend its Water/Wastewater Service Application to prevent any confusion to future applicants.

There is No Contract Between ONSWC and Liberty

In regard to Liberty’s claim that it had a contract with ONSWC, Liberty provides no plausible argument that a contract existed between ONSWC and Liberty. The facts are undisputed that Liberty did not submit a Water/Wastewater Service Application to ONSWC before the Sub 71 Order was issued. Liberty simply suggests that Liberty is entitled to a connection fee of \$1,500 per REU because “Liberty Senior solicited sewer connection services from ONSWC on April 5, 2021, explicitly asking ‘[w]hat do we need to do to pay the \$1,500/unit connection fees . . . ?’” Liberty further suggests that it should be entitled to the \$1,500 per REU connection fee because ONSWC purposefully withheld information regarding the connection fee for 14 days, when the Sub 71 Order was issued. Complaint at 17. For the reasons stated above, and in addition because the record evidence demonstrates that Liberty did not enter into a contract or agreement with ONSWC before the Sub 71 Order was issued, Liberty’s contention that it is entitled to a

connection fee of \$1,500 per REU is without basis.

The Commission therefore concludes that ONSWC is required to collect from Complainants the connection fee that is currently in effect at the time that interconnection is made. Here, ONSWC is required to collect connection fees from Blue Heron and Liberty in the amount of \$4,000 per REU that the Commission approved in the Sub 71 Order. Because the Commission concludes that ONSWC is required to collect the collection fee approved in the Sub 71 Order, the Commission likewise concludes that ONSWC is not in violation of N.C.G.S. § 62-139 and denies Complainants' demand for penalties for Complainants' allegations of non-compliance.

Allegations of Improper Conduct and Business Practices

Both parties raise issues regarding the other's conduct or business practices and whether they are "fair." The Commission has considered those arguments and issues as it has reviewed the entire record but does not give them much weight in concluding as a matter of law that Blue Heron and Liberty are not entitled to a connection fee of \$1,500 per REU.

Appropriate Method for Determining REUs

Regarding the appropriate method of calculating the number of REUs for Blue Heron's and Liberty's projects, neither the 2014 APA nor the tariffs approved in the Sub 0 Order, the Sub 9 Order, or the Sub 71 Order define how to calculate REUs for multi-family residential units. ONSWC maintains that for Complainants the appropriate way to calculate REUs is through reference to the wastewater collection system extension permit authorized by DEQ. Based on this assertion, ONSWC calculates 270.6 REUs for the Knoll apartment complex by dividing the estimated daily discharge demand on ONSWC's facilities required by the project of 51,140 GPD by 189 GPD. Similarly, ONSWC calculates 201.85 REUs for the Inspire apartment complex by dividing the estimated daily usage required by the project of 38,150 GPD by 189 GPD. ONSWC contends that its calculation of the REUs for the Knoll and Inspire apartment complexes are project specific and are appropriate to establish the connection fees to finance the facilities ONSWC must construct to serve Complainants.

Complainants argue that ONSWC did not cite any authority to support this methodology and state that the record is devoid of any evidence explaining how ONSWC determined that 189 GPD is the appropriate daily gallons to use in the calculation. Complainants postulate that ONSWC used data pertaining to the average bedroom count for single-family homes in Briar Chapel (3.35) multiplied by the 56 GPD per bedroom approved by DEQ for single-family homes contained in the July 9, 2013 letter to DEQ provided in ONSWC's application exhibits. According to Complainants, the system extension permit states that the flow reduction is applicable to residential single-family dwellings only and makes no mention of the 189 GPD. They state that the permit only mentions the approval of an adjusted daily sewage design flow rate of 56 GPD per bedroom effective immediately and not the DEQ letter dated September 30, 2013.

At the hearing, Commissioner Kemerait requested from ONSWC's attorney a response to Complainants' statement that the system extension permit that ONSWC refers to for purposes of the calculation of REUs for Complainants is applicable only to residential single-family dwellings and does not apply to multi-family dwellings. ONSWC's attorney responded that "[i]t goes back to the engineering", and that "[t]here's got to be an interpretation there." Tr. at 135-36. ONSWC's attorney further states that "[y]ou look at the engineering behind the rule [a]nd the engineering is that DEQ says you got to have a pipe coming out of these apartment complexes with sufficient capacity for this much flow out of that building." Tr. at 136.

The Commission determines that the evidence in this proceeding is not complete with respect to the methodology that should be used by ONSWC to calculate the REUs for Complainants. The Commission acknowledges that ONSWC's methodology used in this proceeding is similar to the methodology for non-residential customers used by Pluris, LLC, approved by the Commission in its Order Granting Franchise, Approving Rates, and Requiring Customer Notice issued on September 3, 2009, in Docket No. W-1282, Sub 0 (Pluris Order). However, the Commission observes that Appendix B approved by the Commission and attached to the Pluris Order specifically sets forth the definitions of REU for a single-family dwelling and a multi-unit development, and state how the connection fee for non-residential customers shall be calculated. However, in the Sub 71 Order, ONSWC's Schedule of Rates (Appendix A) does not define REU for both a single-family dwelling and a multi-unit development, and it also does not state the methodology for calculating the connection fee for a non-residential customer. Consequently, the Commission directs ONSWC to file a petition in the Sub 71 Docket number later than 20 days after the date of this Order to amend its tariff to expand the definition of REU and include its proposed method of calculating REUs for non-residential customers for review by the Public Staff and approval by further order of the Commission. ONSWC should also include in its petition information to support its use of 189 GPD in the calculation of the connection fees due from a non-residential customer.

Finally with respect to ONSWC's February 8, 2023 invoice to Blue Heron for the first four months of sewer service which reflects monthly wastewater charges of \$11,445.53 per month, the Commission will render its decision on this issue once ONSWC's tariff (Appendix A) included in the Sub 71 Order has been amended and the calculation of REUs that is appropriate for Blue Heron's Knoll development can be determined.

IT IS, THEREFORE, ORDERED as follows:

1. That ONSWC is entitled to collect from Blue Heron the amount of \$4,000 per REU for connection fees that the Commission approved in the Sub 71 Order for the Knoll development;
2. That ONSWC is entitled to collect from Liberty the amount of \$4,000 per REU for connection fees that the Commission approved in the Sub 71 Order for the Inspire development;

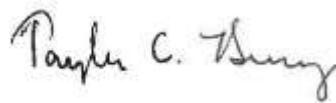
3. That ONSWC is directed to file a petition in the Sub 71 docket no later than 20 days after the date of this Order to amend its tariff to expand upon the definition of REU and include the method of calculating REUs that applies to non-residential customers for review by the Public Staff and consideration by further order of the Commission; and

4. That the Commission will issue a further order concerning the number of REUs to use in the calculation of connection fees for Complainants and ONSWC's February 8, 2023 invoice to Blue Heron for the first four months of sewer service once ONSWC's tariff (Appendix A) included in the Sub 71 Order has been amended and the Commission approves the calculation of REUs for non-residential development.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of April, 2024.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in dark ink, appearing to read "Taylor C. Berry". The signature is written in a cursive, flowing style.

Taylor C. Berry, Deputy Clerk