STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. W-1300, SUB 92

In the Matter of Blue Heron Asset Management, LLC and Liberty Senior Living, LLC, Complainants, v. Old North State Water Company, Inc. Respondent.	))))))))	**COMPLAINANTS' RESPONSE BRIEF IN OPPOSITION TO OLD NORTH STATE'S MOTION TO DISMISS**

Craig D. Schauer
DOWLING PLLC
3801 Lake Boone Tr., Suite 260
Raleigh, North Carolina 27607
Telephone: (919) 529-3351
cschauer@dowlingfirm.com

Attorney for Complainants

TABLE OF CONTENTS

Complainants Blue Heron Asset Management, LLC ("Blue Heron") and Liberty Senior Living, LLC ("Liberty Senior") (together, "Complainants"), pursuant to the Commission's September 6, 2023 Order Scheduling Briefs and Oral Argument, submit this Brief in Opposition to the Motion to Dismiss filed by Old North State Water Company ("Respondent" or "Old North State").

INTRODUCTION

Complainants contend that Old North State must charge them the $1,500/REU connection fee that was applicable at the time Blue Heron entered into—and Liberty Senior attempted to enter into—a connection-service agreement with Old North State. Complainants also contend that Old North State's calculation of REU is inconsistent with the Commission's tariff orders. In defending its fees, Old North State argues that it is allowed to charge the connection fee that is applicable at the time it eventually provides connection service and it can use its preferred calculation of REU for the fee.

This matter comes before the Commission on cross motions: Old North State has filed a motion to dismiss; and, because Old North State's Answer admits all the material facts, Complainants have filed a cross motion for judgement on the pleadings. The parties agree that the dispute is a question of law that the Commission can resolve on the pleadings.

Notably, because the questions of law and arguments in the parties' cross motions overlap, Complainants have already addressed many of Old North State's arguments in their Brief Supporting Motion for Judgment on the Pleadings filed on September 13, 2023 (referred to as "Complainants' Brief"). Complainants, therefore, have structured their brief as a section-by-section response to the arguments Old North State has made in its Brief in Support of Motion to Dismiss and, to avoid the repetition of arguments in their earlier brief,

Complainants have summarized and cited to their arguments in Complainants' Brief whenever possible.

ARGUMENT

Complainants respond to Old North State's arguments as follows:

I. Blue Heron has a binding and express connection-service contract with Old North State to receive connection at $1,500/REU.

Old North State argues that there was no contract formed on March 23, 2021, when Old North State accepted Blue Heron's connection application. Old North State's argument is unavailing for several reasons.

First, Old North State argues that there could not have been a connection-service contract because the application did not specify the amount of connection fees that Blue Heron would have to pay. *See* Respondent's Br. at 4 ("This application makes no reference to the fee per connection or the method for calculating the billing determinants for non-single family residences[.]"); *id.* at 9. ("Without these essential [connection fee] terms upon which Blue Heron bases its entire claim, there is no contract[.]"). As explained in Complainants' Brief, contracts incorporate the law that exists at the time the contract is made. *See* Complainants' Br. at 9–10. Because the connections fees were set by law, there was no need to specify them in the application. *See id.* In response, Old North State points out that the applicable tariff "order is ambiguous and must be interpreted" and, therefore, there could have been no contract. Respondent's Br. at 7. But an ambiguity in the Commission's order would not preclude a contract in this situation because the Commission's approved tariff order, whether unambiguous or not, dictated the applicable connection fee (*see* N.C. Gen. Stat. § 62-139(a))—there was nothing for the parties to negotiate about the connection fees.

Second, Old North State contends that there could be no agreement on March 23, 2021, because Blue Heron did not tender payment on that date. *See* Respondent's Br. at 4. ("No connection fee was submitted to Old North State with the Application."). As a threshold matter, Old North State brushes aside that it deliberately prevented Blue Heron from tendering payment on March 23, 2021, by withholding the invoice that showed what Blue Heron owed; and, as explained already, such misconduct by Old North State estops it from denying the existence of a contract for failure to make payment. *See* Complainants' Br. at 12–13. But even setting aside the doctrine of estoppel, payment was not required to create a contract. The only elements need to create a contract were an offer and acceptance—and both existed on March 23, 2021. *See id.* at 9–11.

Third, Old North State misstates Complainants' position regarding the relevancy of Old North State 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." Respondent's Br. at 9. Rather, because 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 its acceptance* of Blue Heron's offer. *See* Complainants' Br. at 10–11. However, this point is likely irrelevant now, given that Old North State has repeatedly admitted that it accepted Blue Heron's offer on March 23, 2021. *See* Respondent's Br. at 13 ("By accepting the application at least to the extent Old Northern State committed to interconnect (but not as to the connection fee to be paid)".);

id at 13 ("Old North State had agreed to allow interconnection."); *id.* at 19 ("Old North State accepted the application well before Blue Heron would need to interconnect[.]").[1]

Fourth, Old North State characterizes Complainants' position as "argu[ing] that service was provided when Old North State accepted the Blue Heron application." Respondent's Br. at 6. Old North State is mistaken. Complainants have never asserted that service occurred on March 23, 2021. Complainants assert that a contract was formed on March 23, 2021, in which Old North State promised to provide service in the future (and the date of the contract, not the eventual date of the service, determines the applicable connection fee). *See* Compl. ¶ 62.

II. Blue Heron's contract with Old North State did not require special Commission approval.

Old North State argues that Complainants are not seeking to enforce a uniform tariff, but rather a negotiated tariff that would require special approval from the Commission. *See* Respondent's Br. at 9 ("Blue Heron does not seek to enforce a tariff. Blue Heron seeks to enforce what it alleges to be an express, binding contract."); *id.* at 10 ("[T]his alleged contract would have required approval by the Commission as a special service contract[.]"). Old North State's argument is mistaken on two grounds.

First, Complainants are seeking to enforce the uniform tariff that was applicable

[1] Old North State contends that it agreed to provide connection services to Blue Heron but that it "had not agreed to interconnect at any particular fee." Respondent's Br. at 13. Old North State suggests a nuance to their acceptance that is immaterial to this dispute. The connection fee was non-negotiable—the fee was set by the Commission and incorporated as a matter of law. *See* Complainants' Br. at 9–10. There was no agreement to be reached on "any particular fee" because both parties are required by law to accept the Commission's approved connection fee. *See id.* All that matters is that, by accepting Blue Heron's offer, Old North State had promised on March 23, 2021, to provide connection to Blue Heron.

to the connection services that Old North State promised to provide. Complainants contend that the governing tariff was the connection fee in the Sub 9 Order, which was the applicable tariff at the time Blue Heron and Old North State entered into a connection-service agreement. *See* Complainants' Br. at 8–11. Thus, the parties' connection-service contract is relevant to determining what uniform tariff should be applied.

Second, Old North State is incorrect that its connection-service agreement with Blue Heron requires special approval by the Commission. Specifically, Old North State argues that "Blue Heron relies upon a contract never approved by the Commission as a rate schedule or a tariff." Respondent's Br. at 10. However, as a matter of law, Blue Heron's agreement with Old North State incorporated the Commission-approved rates that were applicable at the time the agreement was formed. *See* Complainants' Br. 9–10. Because the Commission had already approved the rates that were incorporated into the agreement, no additional approval of the agreement would be needed. Thus, the agreement between Blue Heron and Old North State is not akin to the "special service contracts" to which Old North State points in its brief. *See* Respondent's Br. at 11. Those contracts were "*negotiated rate* special contract[s]" in which "rates are negotiated." *See* Order Approving Proposal and Application and Requiring Filing of Revised Tariffs, *In the Matter of Piedmont Natural Gas Filings to Reflect the Federal Tax Cuts and Jobs Act*, Docket No. G-9, Sub 731 (Mar. 25, 2019), at 2 (emphasis added). In contrast, the connection-service agreement here incorporated tariffed rates—there were no negotiated rates.

III. The contract formed on March 23, 2021 was a "sale" under Rule R10-20.

Old North State contends that its agreement with Blue Heron to provide connection service is not a "sale" under Rule R10-20 because "sale" only "refers to the provision of a

commodity[.]" Respondent's Br. at 12. Old North State provides no authority for this argument. As explained in Complainants' Brief, North Carolina courts have defined "sale" to be a contract to provide a good or service in return for money. *See* Complainants' Br. at 9. Therefore, the connection-service agreement between Old North State and Blue Heron—in which Old North State agreed to provide connection service in return for Blue Heron's payment of the connection fee—was the "sale" of connection service to Blue Heron. The fact that connection service is a "one-time event as opposed to recurring acceptance and treatment of wastewater," Respondent's Br. at 12, does not change the fact that a connection-service agreement is the sale of a ("one-time") service.

Indeed, the Commission has recognized that connection fees are contributions in aid of construction ("CIAC"), and a CIAC is the result of a sales contract. The Commission has previously held that connection fees are CIAC. *See, e.g.*, Order of Clarification, *In the Matter of Carolina Water Service, Inc. of North Carolina – Investigation of Tap and Plant Modification Fees*, Docket No. W-354, Sub 118 (Feb. 27, 1998), at 8 ("[W]hen a utility contracts with a developer to collect the *connection charges* . . . from the developer in several payments, a liability to pay taxes *on CIAC* is incurred upon the execution of the contract[.]" (emphasis added)); Order Granting Franchise and Approving Rates, *In the Matter of Application by Aqua North Carolina, Inc., . . .*, Docket No. W-218, Sub 396 (Feb. 2, 2015), at 2 (finding that Aqua's requested "CIAC fee" is "also known as a connection fee").[2] As the Supreme Court has observed, a CIAC is the result of a *contract* formed

[2] In addition, in 2019 the Commission worked through issues caused by the 2017 Federal Tax Cuts and Jobs Act, which "made CIAC taxable again for water and wastewater public utilities." Order Addressing Federal Income Taxes on Contributions in Aid of Construction, *In the Matter of Impact of The Federal Tax Cuts and Jobs Act on Contributions in Aid of Construction for Water and Wastewater Companies*, Docket No. W-100, Sub 57 (Aug. 26, 2019), at 1. In doing so, the

between the utility and the customer: When a customer "is located so far from the [utility's] existing main or line that the [utility] is unwilling to bear the expense of constructing the necessary extension of its facilities," the utility "*agrees to render service* if the person or persons desiring it *will pay all or part of such cost* of construction" of the necessary facilities. *State ex rel. Utilities Commission v. Heater Utilities*, Inc., 288 N.C. 457, 461 (1975) (emphasis added).

Here, Old North State's connections fees are a type of CIAC. Old North State admits it is collecting the connection fee is exchange for "interconnect[ing] [Complainants] to the Briar Chapel sewer system" and the "expansion of the sewage treatment plant and other investments in order to meet [their] demand[.]" Respondent's Br. at 3; *accord Heater Utilities*, 288 N.C. at 461. In addition, Old North State is collecting its connection fees pursuant to a connection-service contract: Old North State promised to provide future connection service in exchange for Blue Heron's payment for the cost of such service. Thus, Old North State's connection-service agreement is a "sale of sewer service."

Consistent with there being a sale at the time of the agreement, the Commission has held that the date of the connection-service agreement (as opposed to a subsequent date of service) determines a utility's tax liability for a connection fee. "[W]hen a utility *contracts with a developer to collect the connection charges* . . . from the developer in several payments, a liability to pay taxes on CIAC is incurred *upon the execution of the contract* if

---

Commission addressed the Public Staff's proposal that, in light of CIAC being taxable again, utilities should "collect the full gross-up on all contributions in aid of construction, *including connection fees and tap fees*." *Id.* at 24 (emphasis added). The Commission ultimately decided that utilities would have some discretion in the manner of collecting taxes on CIAC, *see id.*, but the Commission nonetheless ordered that tariffs—which included connection and tap fees—would need to be adjusted to account for the collection of taxes. *Id.* at 26. In ordering connection and tap fees to be adjusted for taxes, the Commission appeared to acknowledge that connection and taps fees were CIAC.

entered on or before June 12, 1996." Order of Clarification, *In the Matter of Carolina Water Service, Inc. of North Carolina – Investigation of Tap and Plant Modification Fees*, Docket No. W-354, Sub 118 (Feb. 27, 1998), at 8–9 (emphasis added). Notably, in so ruling, the Commission held that a utility's tax liability is determined at the time the contract is created (i.e., at the time of the sale) and not when the service is performed or the fees are paid. Likewise, the applicable tariff for a connection fee is determined at the time the contract is created (i.e., at the time of sale) and not at when the service is performed.

IV. Equitable estoppel applies due to Old North State's conduct.

The doctrine of equitable estoppel "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." Complainants' Br. at 13 (internal quotation marks omitted). Here, Old North State prevented Blue Heron from paying the rates in effect at the time the agreement was formed. Compl. ¶¶ 22–26. Old North State went even further with Liberty Senior: it prevented Liberty Senior from *even entering a contract* by withholding the application form (and invoice) from Liberty Senior. Compl. ¶¶ 31–35 & Ex. H. Old North State did not provide what Complainants requested until after Old North State's desired rates were in effect. And Old North State has admitted that it intentionally withheld the materials. *See* Respondent's Br. at 16 ("Old North State *had no intention* of providing Blue Heron with an invoice for a connection fee calculated at a rate of $1,500 per REU." (emphasis added)). The elements of equitable estoppel are satisfied here. *See* Complainants' Br. at 13–14.

Old North State contends that it is "inconsistent[]" for Complainants to argue simultaneously that (a) the tariff rate in the Sub 9 Order dictates the fee that Old North

State can charge Complainants and (b) equitable estoppel applies here. Respondent's Br. at 23–24. These positions are consistent with each other. Complainants have already explained that (1) a contract was formed on March 23, 2021, (2) the contract, as a matter of law, incorporated the applicable tariff, and (3) the applicable tariff was the tariff in the Sub 9 Order at the time of the contract. *See* Complainants' Br. at 8–11. This reality does not preclude Complainants from also asserting that, based on equitable estoppel, Old North State is not allowed to charge a later (and higher) tariff when Old North State's conduct prevented Complainants from securing the original (and lower) tariff. *See id.* at 13–14.

Complainants acknowledge that equitable estoppel might not be particularly material to Blue Heron's claim against Old North State because Blue Heron had already entered into an agreement with Old North State by the time Old North State withheld the invoice (and, therefore, an agreement already existed). However, equitable estoppel is material to Liberty Senior's claim, because Old North State prevented Liberty Senior from forming a contract before the new rates were adopted. On April 5, 2019, Liberty Senior asked "[w]hat do we need to do to pay the $1,500/unit connection fees associated with [its apartment development]"? Compl. ¶ 32. This inquiry makes clear that Liberty Senior was taking the necessary steps to enter into an agreement. In response, Old North State did nothing for two weeks. Then, the day the new tariff was adopted, Old North State sent Liberty Senior the application form (as well as an invoice) that Liberty Senior needed (and had requested two weeks earlier) in order to form an agreement. *Id.*, Ex. H. Old North State is equitably estopped from taking the position that Liberty Senior did not form an agreement in time because Liberty Senior's delay was due to Old North State's conduct.

V. Old North State violated Rules R10-20 and R10-17.

Old North State argues that it did not violate Rule R10-20 because Old North State's "offering of interconnection at issue is 'service'" and, therefore, Old North State's connection was just a "service, not a sale of a service." Respondent's Br. at 18. Old North State's argument seems to be that it simply performed a service, and there was no agreement associated with the service. But this argument is inconsistent with the facts and the law. First, Old North State has admitted that it promised to perform the service in the future. *See* Respondent's Br. at 5 (explaining how the parties knew "the force main and pump station" still had to be completed); *id.* at 13 ("Old North State had agreed to allow interconnection."); *id.* at 19 ("Old North State accepted the application well before Blue Heron would need to interconnect[.]"). Second, Old North State's application form states that, upon acceptance, the application "become[s] a binding contract." Compl. ¶ 18. Thus, Old North State's own materials establish that it enters into agreements to provide connection service. Third, as explained above, connections fees are CIAC and CIAC is the result of an *agreement* between the utility and the developer. *See supra* pp. 6–7. Because there was an agreement to provide service, there was "sale" of sewer service.

Old North State next asks the Commission to deem it to be in "virtual compliance" with the rule because "[m]any of the Commission's procedural rules are outdated . . . [and] not followed." Respondent's Br. at 19. Old North States goes on to contend that the Commission can set aside Rules R10-20 and R10-17 because (1) the Commission is not bound by the Administrative Procedure Act, (2) the Commission was acting in a legislative capacity, and not judicial capacity, when in enacting these rules, and (3) these rules are merely procedural. None of these arguments support Old North State's request that the

Commission abandon Rules R10-20 and R10-17.

First, Old North State did not "virtual[ly]" comply with the Rules. As explained in Complainants' Brief, Rule R10-20 requires Old North State to charge the connection fee applicable at the time its connection-service agreement was formed—which Old North State did not do. *See* Complainant's Br. at 8–11. In addition, Rule R10-17 requires Old North State to inform a customer, at the time of "accepting application for sewer service," the "rates which will be applicable"—which Old North State failed to do. *Id.* at 8–9.

Second, while the Commission is exempt from the Administrative Procedure Act, Old North State has not explained how this exemption would excuse the Commission from the obligation placed upon all state agencies to "strictly follow[] and enforce[]" the rules promulgate pursuant to statutory authority. *N.C. Dep't of Just. v. Eaker*, 90 N.C. App. 30, 38, 367 S.E.2d 392, 398 (1988), *overruled on other grounds by Batten v. N.C. Dep't of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990); *see* Complainants' Br. at 9.

Third, while the Commission's enactment of Rules R10-20 and R10-17 was an exercise of the Commission's legislative function, those rules, once enacted, have the effect of law. *See Eaker*, 90 N.C. App. at 38, 367 S.E.2d at 398. Notably, in this docket the Commissions is exercising its judicial, and not legislative, function in applying the rules to the facts at hand. *See* N.C. Gen. Stat. § 62-60; *see also State ex rel. Utilities Comm'n v. Edmisten*, 294 N.C. 598, 603, 242 S.E.2d 862, 865 (1978). Old North State does not provide any authority for the Commission, when exercising its judicial function, to abandon or rewrite a rule that the Commission has previously enacted in its legislative function.

Finally, while agencies are permitted some leeway in deviating from procedural

rules (so long as the deviation is not prejudicial), *see, e.g.*, *Farlow v. N.C. State Bd. of Chiropractic Examiners*, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985), Rules R10-20 and R10-17 are not procedural rules. These rules are policy rules—or, stated differently, "substantive" rules. In another context, federal courts have long explained that a substantive rule "creates rights or obligations" whereas a procedural rule "defines a form and mode of enforcing the substantive right or obligation." *In re Cnty. of Orange*, 784 F.3d 520, 527 (9th Cir. 2015) (quotation cleaned up) (citing *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958)). Rules R10-20 and R10-17 award rights to Complainants and impose corresponding obligations on Old North State. These are not procedural rules.

VI. Old North State's application instructions—which request the tendering of connection fees—corroborate that connection fees are determined at the time of the agreement.

Old North State's application instructions for builders ask builders to "[e]nclose a check for the Tap, CIAC tax and Application Fees" with the application form. Compl. ¶ 20, Ex. D. These instructions memorialize Old North State's own practice of charging customers the connection fee at the time the agreement is created, because the only way a builder could submit the "Tap" fee (i.e., connection fee) along with the application is if the fee was determined at the time of the application. Complainants' Br. at 11.[3]

VII. Complaints cited only relevant and binding authorities.

Old North State argues that the cases cited by Complainants regarding the definition of "sale" and the creation of a contract are not relevant to this dispute or binding on the

[3] In their prior briefing, Complainants mistakenly stated that the instructions required builders to tender "application fees" (rather than "Tap" fees). Complainants' Br. at 11. Complainants' mistake likely caused Old North State to believe that Complainants were "conflating 'application fees' with 'connection fees.'" Respondent's Br. at 21. As the instructions state, builders are asked to submit application fees *and connection fees* with their application form.

Commission because the cases did not concern utility companies. Respondent's Br. at 22–23. Complainants recognize the unique jurisdiction of the Commission over utility matters. *See* N.C. Gen. Stat. §§ 62-30, 62-31, 62-32. The Commission, though, when exercising its judicial function, "shall render its decisions upon questions of law and of fact in the same manner as a court of record." *See id.* § 62-60. Complainants understand this statute to require the Commission to apply North Carolina law (as the Commission regularly does). Therefore, while Complainants cite court decisions that were not utility cases, the principles of law established in those decisions are applicable to this utility dispute.

VIII. Regardless of whether a connection fee is negotiated or set by a uniform tariff, the connection fee is determined at the time the agreement is formed.

Old North State elaborates on the differences in connection fees that are collected as part of an asset purchase agreement and connection fees that are collected as part of a uniform tariff. Old North State argues that these differences establish that, in this case, Old North State is allowed to charge a connection fee other than the one that was applicable at the time of the agreement. Complainants acknowledge that differences exist between negotiated connection fees and tariff connection fees, but these differences are immaterial here. Regardless of whether the connection fee is negotiated or in a tariff, the applicable fee is determined at the time the agreement is formed.

A. The accounting treatment of a connection fee does not change the fact that the fee is determined at the time the agreement is formed.

Old North State emphasizes that the connection fees established in the Sub 0 Order and Sub 9 Order were remitted to the developer and, therefore, did not constitute CIAC that would reduce Old North State's rate base. Respondent's Br. at 24–25. Old North State points out that, in contrast, the higher connection fee established in the Sub 71 Order was

set by the Commission's ratemaking authority and will reduce Old North State rate base. *See* Respondent's Br. at 24–25, 27–28. Old North State argues that this difference in accounting treatment allows it to charge Complainants the higher connection fee.

Regardless of how a connection fee is treated for purposes of determining a utility's rate base, the applicable connection fee is determined at the time of the agreement. What a utility does with a connection fee after it is collected—i.e., whether it remits the fee to a third party or retains the fee to reduce rate base—does not change the fact that the connection fee is determined at the time of the agreement.

B. A connection fee set by a negotiated contract and a connection fee set by a uniform tariff are both determined at the time of the agreement.

Old North State takes the position that because Complainants do not have a negotiated connection fee, Complainants must pay the $4,000 connection fee most recently established by the Commission. Respondent's Br. at 29. Old North State justifies this position by relying on the Commission's order in Docket No. W-354, Sub 118, in which the Commission dealt with Carolina Water Service ("CWS") having both negotiated connection fees and tariff connection fees. Old North State points to the Commission's Order of Clarification in Docket No. W-354, Sub 118 that required CWS to charge the connection fees set by the Commission absent a negotiated connection fee. Respondent's Br. at 29. Based on the Order of Clarification, Old North State argues that because Complainants do not have a negotiated connection fee, Complainants must pay the most recent tariff set in the Sub 71 Order. Old North State's argument is unpersuasive for two reasons.

First, the Commission's Order of Clarification is not relevant here. The order instructed CWS on how to set rates for two classes of customers: customers with negotiated

rates, and customers without negotiated rates. The Commission made clear that, unless there was a negotiated connection fee (as part of an approved contract), CWS must charge the tariff rate. Order of Clarification, *In the Matter of Carolina Water Service, Inc. of North Carolina – Investigation of Tap and Plant Modification Fees*, Docket No. W-354, Sub 118 (Feb. 27, 1998), at 10 ("[I]f connection fees are specified in a Commission approved contract, the contract governs. In the absence of an approved contract, the uniform connection fees govern."). Complainants have never alleged that they are entitled to a negotiated rate. To the contrary, Complainants only ask that they pay the uniform tariff of $1,500/REU that the Commission established in the Sub 9 Order. Old North State seems to believe that, because the uniform tariff in the Sub 9 Order was the product of an asset purchase agreement, the uniform tariff is somehow a "negotiated rate" to which Complainants are not entitled. That is incorrect. Although the $1,500/REU amount originated in an asset purchase agreement, the amount became a uniform tariff when it was approved in both the Sub 0 and Sub 9 Orders. Complainants are entitled to that tariff, as it was the governing tariff at the time of the connection-service agreement.

Second, regardless of whether a connection fee is set by a negotiated agreement or by a uniform tariff, the applicable connection fee is determined at the time of the agreement. Old North State seems to argue that the connection fee is determined at the time of the agreement *only if* there is a negotiated connection fee—otherwise, the connection fee is determined at the time of connection service. This argument ignores Rule R10-20, which requires that a sewer utility charge the tariff applicable at the time of the sale. Because a connection-service agreement is a sale of sewer service, customers are entitled to the uniform tariff that is applicable at the time the agreement is created.

C. Regardless of the financial impact of a connection fee, the applicable fee is determined at the time the connection-service agreement is made.

Old North State argues that because the $1,500/REU fee is remitted to the developer (and does not reduce rate base), Complainants will have "contributed nothing" to the costs of constructing the new facilities if they pay the applicable tariff rather than the subsequent and higher tariff. Respondent's Br. at 31. In contrast, according to Old North State, the higher $4,000/REU fee would be retained by the utility (and reduce rate base) and was requested in anticipation of developers such as Complainants.[4] *Id.* at 28. In essence, Old North State objects that its adherence to Rule R10-20—and honoring the tariff applicable at the time of the connection-service agreement—would have unwanted financial implications.

Old North State's financial objection cannot overcome Rule R10-20. The rule is clear and binding: Old North State must charge the rate in effect at the time the connection-service agreement is created (i.e., when the "sale of sewer service" occurs). *See* Complainants' Br. at 8–9. Old North State has long been aware of its obligation to charge the connection fee applicable at the time the connection-service contract is created: it has been Old North State's practice to collect connection fees upon acceptance of the application (as shown by its instructions to builders to submit the connection fee with the application). *See id.* at 11.

[4] Complainant's read Old North State's APA to obligate Old North State to remit to Briar Chapel Utilities the $1,500/REU per connection even if Old North State raises the connection fees it charges. *See* Compl., Ex. I, § 3.2 ("Buyer will continue to collect the $1,500 per REU Connection Fee approved in the franchise proceeding for the Seller in Docket No. W-1230, Sub 0, for each new connection made to the Wastewater Utility System and pay such fees to Developer."). Notably, the APA also permits Old North State to seek approval of a higher connection fee after a certain period of time. *See id.*, Ex. I, § 3.4. Thus, it appears that even with the $4,000/REU tariff, Old North State must continue to remit a portion of the connection fee to the developer.

Old North State has also long been aware of the need to expand the Briar Chapel sewer facilities. The obligation to fund the future expansion was spelt out in Old North State's agreement with Briar Chapel Utilities ("BCU"). *See id.* at 15–16. In fact, the $1,500/REU fee was negotiated and accepted by Old North State with the knowledge that the expense of a future expansion was forthcoming. *See id.* at 15–16. If there is a negative financial impact from charging Complainants the correct connection fee of $1,500/REU, it is of Old North State's making—not Complainants'.

IX. Old North State is estopped from denying Liberty Senior the $1,500/REU fee.

As explained above and in Complainants' Brief, estoppel prevents a party from asserting rights when the party's conduct makes the assertion of those rights unfair. Complainants' Br. at 13; *see supra* pp. 8–9. By withholding the application and invoice, Old North State prevented Liberty Senior from entering into a connection-service contract before the higher tariff was approved. *See supra* p. 8–9. Old North State is therefore estopped from insisting that Liberty Senior now pay the higher rate.

X. The asset purchase agreements define the billing determinants used in the Commission's orders.

Old North State seeks to disavow the terms of its asset purchase agreement ("APA") with BCU, which defined how to calculate REUs and required Old North State to collect connection fees as set forth in the agreement. Specifically, Old North State argues that "[t]he Commission's order in Sub 9 made no reference whatsoever to a method for calculating residential equivalent units or any other method for calculating billing determinants[.]" Respondent's Br. ar 1–2; *see id.* at 33–34.

Complainants admit that the Sub 9 Order does not explicitly define how to calculate REU. But the Sub 9 Order does not exist in a vacuum. As explained in Complainant's

Brief,

> [t]he original BCU Agreement expressly defined "REU" and *obligated Briar Chapel Utility to seek the Commission's approval of a $1,500 "per REU"* as defined in the agreement. *Briar Chapel Utility sought and received such approval in Docket No. W-1230, Sub 0.* Then, in the APA by which Old North State acquired the system from Briar Chapel Utility, *Old North State had promised to continue to collect the same $1,500-per-REU connection fee that Briar Chapel Utility had asked the Commission to approve in W-1230, Sub 0 docket.* In the Sub 9 Order, the Commission approved Old North State's continued collection of the $1,500-per-REU connection fee as was first established and defined by the BCU Agreement and again defined verbatim in Old North State's own APA.

Complainants' Br. at 19 (emphasis added) (footnote omitted). Thus, both the BCU Agreement and Old North State's APA obligated those utilities to seek the Commission's approval of the $1,500/REU connection fee that was set forth in the respective agreements. Both of the utilities fulfilled their duty to collect the connection fees set forth in the agreements: BCU first requested and received approval of the $1,500/REU connection fee in the Sub 0 Order; then Old North State requested and received approval of the same $1,500/REU connection fee in the Sub 9 Order. There was no need for the Sub 9 order to explicitly define how to calculate REUs because the Sub 9 Order was the culmination of a prior Commission order and two asset purchase agreements that set forth the calculation.

Instead of honoring the calculation delineated in the asset purchase agreements, Old North State contends that "[t]he appropriate way to calculate residential equivalent units is through reference to the wastewater collection system extension permit authorized by the Division of Water Resources of the State." Respondent's Br. at 8; *see id.* at 33–34. Old North State provides no authority for this alternative calculation of REU, and it fails to explain how a permit that is limited to single-family dwellings would apply to the

Complainants' two multi-family developments. *See* Complainants' Br. at 19–20.

XI. The Sub 71 order did not change the billing requirements.

The Sub 71 Order is silent on how to calculate REU. Old North State points to this silence as justification for it changing the way it calculates REU for "ongoing sewage usage fees." Respondent's Br. at 35. In other words, Old North State asserts that, even if it is forced to honor the calculation of REU for tariffs in the Sub 9 Order, the Sub 71 Order nevertheless reset the way to calculate REU and allows Old North State to calculate them as Old North State desires. As with the Sub 9 and Sub 0 Orders, the Sub 71 Order does not explicitly define how to calculate REU. But, more importantly, the Sub 71 Order does not articulate a different method for calculating REU than what was used in prior orders. Old North State offers no grounds for its assertion that the Sub 71 Order's silence was the Commission's tacit adoption of a new (and unspecified) method of calculating REU.

Other utilities have requested and received connection fees that include explicit calculations of REU. *See, e.g.*, Order Recognizing Contiguous Extension and Approving Rates, *In the Matter of Notification by Pluris, LLC, . . .* , Docket No. W-1282, Sub 7 (Sept. 12, 2011), at Appendix B ("The number of REU's shall be determined by taking the design flow capacity for each nonresidential customer, as set forth in Administrative Code 15A NCAC 02T .0114, and dividing that design flow capacity by 360."). Old North State, in contrast, has not requested an explicit calculation of REU as part of a rate change. Complainants acknowledge that Old North State has the option of requesting a different, explicit calculation of REU. But until Old North State requests such a change—and the change is approved by the Commission—Old North State must continue to calculate REU as it was set forth in the Sub 0 and Sub 9 Orders.

XII. Old North State has admitted that Blue Heron paid under protest.

Old North State's section heading asserts that Blue Heron did not pay the excessive connection fees under protest. Yet, Old North State repeatedly admits in its brief that Complainants protested the higher fees before tendering payment. *See* Respondent's Br. at 6. ("Therefore, Complainants had contested the assessed fees in advance of its payment of the fee."); *id.* at 10 ("Complainant earlier had contested the requirement by Old North State that they pay the invoiced connection charge."); *id.* at 36 ("Therefore, Complainants had contested the assessed fees in advance of its payment of the fee."). Moreover, as explained in Complainants' Brief, the decision in *City of High Point v. Duke Power Co.*, 120 F.2d 866 (4th Cir. 1941), has no application here. *See* Complainants' Br. at 15 n.7. Moreover, Complainants' payment of the fees could not have waived their right to a refund under Section 62-139(a) when Complainants' payment is needed to trigger this statutory right to a refund. *See id.* at 14.

CONCLUSION

For the reasons stated above, Complainants respectfully ask the Commission to deny Old North State's Motion to Dismiss and grant Complainant's Motion for Judgement on the Pleadings.

Respectfully submitted, this 27th day of September, 2023.

By: /s/ Craig D. Schauer

Craig D. Schauer
N.C. State Bar No. 41571
DOWLING PLLC
3801 Lake Boone Tr., Suite 260
Raleigh, North Carolina 27607
Telephone: (919) 529-3351
cschauer@dowlingfirm.com

Attorney for Complainants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 27th day of September, 2023.

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