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' PROPOSED ORDER**

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 Commissioner), 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 Senior) (collectively, Complainants) filed a formal Complaint in this Docket against Old North State Water Company, Inc. (Respondent). The Complaint alleges that Respondent charged Complainants connection fees that were not in effect at the time of sale and that Respondent calculated the applicable residential equivalent units (REU) inconsistent with the Commission's tariff orders.

On May 31, 2023, the Commission issued an Order serving the Complaint upon the Defendant. On June 12, 2023, the Defendant filed a Motion to Dismiss the Complaint and answering the allegations. On July 10, 2023, the Commission issued an Order Serving the Answer and Motion to Dismiss. On July 21, 2023, the Complainants filed the Response to Defendant's Answer and a Motion for Judgment on the Pleadings.

On September 6, 2023, the Commission issued an Order Scheduling Briefs and Oral Argument. On September 13, 2023, the parties filed Briefs in this proceeding. On September 27, 2023, Complainants filed a Response Brief in Opposition to Respondent's Motion to Dismiss.

On October 4, 2023, the Commission heard oral arguments of the parties.

On November 9, 2023, Respondent submitted a late-filed exhibit in response to questions from the Commissioners.

Based on the foregoing and the entire record, the Commission makes the following:

FINDINGS OF FACT

The Parties

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), an apartment complex located in Respondent’s Briar Chapel subdivision service territory.

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

3. Liberty Senior develops, owns, and manages senior living communities, with locations across North Carolina. Liberty Senior controls and manages Inspire at Briar Chapel, LP, which in turn owns Inspire Briar Chapel (Inspire), an apartment complex located in Respondent’s Briar Chapel subdivision service territory.

4. Inspire is a 150-unit, 4-story apartment complex for adults 55 and older that is being constructed. Inspire has one 6-inch water meter.

5. Respondent provides water and sewer service to customers in North Carolina. Respondent is a public utility under the laws of the State of North Carolina and is subject to the Commission’s jurisdiction with respect to its operations in this State.

Tariff Orders for the Briar Chapel Subdivision Service Area

6. In Docket No. W-1230, Sub 0, the Commission approved Briar Chapel Utilities' acquisition of the sewer system from the original developer of the Briar Chapel subdivision. As part of its application, Briar Chapel Utilities (BCU) submitted a copy of its acquisition agreement with the developer (the BCU Agreement).

7. Section 5.3 of the BCU Agreement states that Briar Chapel Utility "shall request from the Commission a wastewater connection fee of $1,500 for each Connection and shall use its best efforts to gain the Commission's approval of such fee." The BCU Agreement defined "Connection" to be "a single-family residential connection or RUE connection."

8. Section 1.32 of the BCU Agreement defines RUE as follows:

> "Residential Unit Equivalent" or "RUE" shall mean a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Projects (250 GPD). For purposes of this Agreement, the number of RUEs 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	RUE
less than 1"	1
1"	2.5
1.5"	5.0
2"	8.0
3"	15.0
4"	25.0
6"	50.0

9. Pursuant to its contractual obligations, Briar Chapel Utilities requested the connection fee of "$1,500 per REU" in Docket No. W-1230, Sub 0.

10. On December 8, 2009, the Commission approved a connection fee of $1,500 per REU in Docket No. W-1230, Sub 0 (the Sub 0 Order).

11. In Docket No. W-1300, Sub 9, the Commission approved Respondent's acquisition of the sewer system from Briar Chapel Utilities. As part of its application,

Respondent submitted a copy of its asset purchase agreement with Briar Chapel Utilities (the APA).

12. Section 3.2 of the APA states that the purchase price paid by Respondent for the sewer system is comprised of the following: "One Thousand Five Hundred Dollars ($1,500) per REU for each new residential and non-residential connection made to the Wastewater Utility System. [Respondent] will continue to collect the $1,500 per REU Connection Fee approved in the franchise proceeding for [Briar Chapel Utilities] in Docket No. W-1230, Sub 0, for each new connection made to the Wastewater Utility System and pay such fees to [the original developer]." The APA obligates Respondent to remit the connection fees to the original developer on a quarterly basis.

13. Section 1.27 of the APA defines REU as follows:

> "Residential Equivalent Unit" or "REU" shall mean a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Development (250 GPD). For purposes of this Agreement, the number of REUs 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

14. In approving Respondent's acquisition of the sewer system in Docket No. W-1300, Sub 9, the Commission's order expressly recognized that Respondent has "requested approval of the Commission approved $1,500 per REU connection fee." The order also states that ""[t]he purchase price for the Briar Chapel wastewater utility system under the APA is $1,500 per residential equivalent unit (REU) for each new connection and the future expansion of the existing 250,000 gallons per day (GPD) waste water treatment plant (WWPT). [Respondent] will pay the collected connection fees to BCU [sic] on a quarterly basis."

15. On April 20, 2015, the Commission approved a connection fee of "$1,500 per REU" in Docket No. W-1300, Sub 9 (the Sub 9 Order).

16. On March 8, 2021, Respondent filed an application in Docket No. W-1300, Sub 71 to revise its tariffs for the Briar Chapel subdivision service area. Specifically, Respondent requested to increase its connection fees to $4,000 per REU.

17. On April 19, 2021, the Commission approved a connection fee of "$4,000 per REU" in Docket No. W-1300, Sub 71 (the Sub 71 Order).

Respondent Created a Contract with Blue Heron

18. On March 19, 2021, Respondent sent a letter to the Chatham County Director of Permits and Inspections, informing Chatham County that Respondent was "now allowing commercial connections to the Briar Chapel system."

19. On March 23, 2021, Blue Heron signed and submitted a Water/Waste-Water Service Application (the "Application") to Respondent for the provision of sewer connection services to Knoll.

20. The Application submitted by Blue Heron was a standardized form created by Respondent. The Application states in red, bold, underlined, and capitalized letters at the top of the page: "*****THIS APPLICATION WILL BECOME A BINDING CONTRACT UPON ACCEPTANCE BY THE UTILITY*****."

21. In addition to the application form created by Respondent, Respondent provides instructions to builders to "[c]omplete the Builder Application for Connection" and "[e]nclose a check for the Tap, CIAC tax and Application Fees." The instructions then state that the builder should "[p]lease MAIL the completed application and check for fees to" Respondent.

22. The same day it received Blue Heron's application (March 23, 2021), Respondent emailed Blue Heron and said that it would provide an invoice for the connection service "at a later date." On the same day, Respondent submitted to Chatham County a form titled Intention to Provide Sewer Service. The form advised Chatham County that Respondent intended to provide sewer service to Blue Heron.

23. On March 23, 2021, Respondent accepted the Application of Blue Heron and, in doing so, created a contract for the provision of connection services. The creation of a contract constituted a "sale of sewer service" under NCUC Rule R10-20.

24. On April 19, 2021—the day on which the Commission approved Respondent's increased connection fee of $4,000 per REU—Respondent provided Blue Heron an invoice for the connection fee, citing the newly established rate of $4,000 per REU.

25. On November 29, 2021, Respondent issued a revised invoice removing an erroneously included tax charge. Respondent calculated the connection fee for Blue Heron to be $1,082,320.00.

26. On August 4, 2022, Respondent completed construction of the force main and pump station used to connect Blue Heron to the Briar Chapel sewer system.

27. On August 31, 2022, Blue Heron paid a connection fee of $1,082,320 to Respondent.

Respondent Prevented Liberty Senior from Creating a Contract

28. On April 1, 2021, Liberty Senior began communicating with Respondent regarding waste-water management services.

29. On April 5, 2021, Liberty Senior emailed Respondent and asked, "What do we need to do to pay the $1,500/unit connection fees associated with [Inspire]?"

30. Respondent did not respond to Liberty Senior's inquiry for two weeks.

31. On April 19, 2021—the day Respondent's connection fee increased—Respondent informed Liberty Senior that it would calculate the invoice at the "current tap fee" of $4,000 per REU. Respondent then provided Liberty Senior with an application form and an invoice. Respondent calculated the connection fee for Liberty Senior to be $807,400.

32. Respondent intentionally waited until the new tariff was in effect before it responded to Liberty Senior's email.

33. Respondent's conduct, by intentionally not responding to Liberty Senior until after the new tariff order was issued, prevented Liberty Senior from entering into a contract before the Respondent's rates had been increased.

Definition of REU

34. Respondent claims 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." On September 30, 2013, the Division of Water Resources for the North Carolina Department of Environmental and Natural Resources issued a letter to Briar Chapel Utilities adjusting the daily flow rate approval for single family residences to 56 GPD per bedroom.

35. Based on the September 30, 2013 letter, Respondent calculates REUs by dividing the design flow for Complainants' respective apartment complexes by 189 GPD. The letter upon which Respondent relies for its calculation of REUs says that the

adjustment "is applicable to residential single family dwellings only." The letter makes no reference to 189 GPD per single-family dwellings.

36. For the Knoll apartments owned by Blue Heron, Respondent divided the projected 51,140 GPD for Blue Heron's development by 189 GPD, and then claimed that the development has 270.6 REUs. If REUs were calculated based on meters as set forth in the APA, then Knoll would have 46 REUs based on its two 2-inch meters and two 3-inch meters. If REUs were calculated based on a flow rate of 250 GPD, then Knoll would have 204.6 REUs.

37. For Liberty Senior's Inspire, Respondent divided the projected 38,150 GPD for Liberty Senior's development by 189 GPD, and then claimed that the development has 201.85 REUs. If REUs were calculated based on meters as set forth in the APA, then Inspire would have 50 REUs based on its one 6-inch meter. If REUs were calculated based on a flow rate of 250 GPD, then Inspire would have 152.6 REUs.

38. On or about January 13, 2023, Respondent issued an invoice to Blue Heron for the first four months of sewer service. The total amount invoiced for the four months was $45,782.12, which reflects $11,445.53 per month. This reflects a previous balance of 34,336.59 for three months of sewer service (at $11,445.53 per month), plus $11,445.53 for December 15, 2022 to January 13, 2023. This monthly total is based on 270.6 REUs.

STANDARD OF REVIEW

This matter comes before the Commission on cross motions: Respondent's motion to dismiss and Complainants' motion for judgment on the pleadings.

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

The Commission evaluates a motion for judgment on the pleadings under the same standard as a court interpreting North Carolina Rule of Civil Procedure 12(c). *See, e.g.*, Order, *Treglia v. Carolina Power & Light Co.*, Docket No. E-2, Sub 679 (July 12, 1995) (applying Rule 12(c)). Similar to a motion to dismiss, under Rule 12(c), the court

takes the admitted factual allegations of the complaint as true. *See Affordable Care, Inc. v. N.C. State Bd. of Dental Examiners*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). "The standard of review for a Rule 12(c) motion is whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment." *Id.*

Because Respondent's Answer admits the material factual allegations in the Complaint, there are no factual disputes for the Commission to resolve. The Commission's resolution of the parties' dispute involves only questions of law.

EVIDENCE AND CONCLUSIONS FOR FACT NOS. 1 TO 17

The evidence supporting these findings of fact is contained in the Complaint, the Answer, and the Commission's prior orders in Docket Nos. W-1230, Sub 0 and W-1300, Subs 9 and 71.

EVIDENCE AND CONCLUSIONS FOR FACT NOS. 18 TO 27

The evidence supporting these findings of fact is contained in the Complaint and the Answer.

Section 62-139(a) of the General Statutes prohibits a utility from charging, demanding, collecting, or receiving "greater . . . compensation for any service rendered or to be rendered . . . than that prescribed by the Commission." N.C.G.S. § 62-139(a). In furtherance of this statute, the Commission's regulations prohibit a sewer utility from charging, demanding, collecting, or receiving "any greater . . . compensation for sale of sewer service . . . than those rates and charges approved by the Commission and in effect at that time." N.C.U.C. Rule R10-20. Thus, Rule R10-20 requires that a sewer utility charge the rate "in effect at that time" of sale.

In addition, the Commission has long recognized that connections fees are a type of contribution in aid of construction (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"); *accord* Testimony of Laura D. Bradley, *Petition for Transfer of Certificate from Briar Chapel Utilities, LLC to Old North State Water Company, LLC*, Docket No. W-1230, Sub 1 (Mar. 25, 2015), at 4 (The APA requires "Old North State to continue to collect the $1,500 connection fee, which will be paid back to Briar Chapel on a quarterly basis as new connections are made. Each $1,500 connection fee paid is CIAC[.]"). A CIAC is the result of a contract formed 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).

The Commission has held that the date of the connection-service agreement 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 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. In so ruling, the Commission held that a utility's tax liability is determined at the time the contract is created and not when the service is performed or the fees are paid. Similarly, the applicable tariff for a connection fee is determined at the time the contract is created and not at when the service is performed.

Despite these rules and precedents, Respondent claims "[t]he date of interconnection establishes the time the rate for connection fees is charged." Respondent does not provide any authority for this assertion. This assertion is also inconsistent with Respondent's practice of charging customers the fee in effect at the time of accepting an application, which is memorialized in its instruction for builders seeking sewer services, which requires a builder to submit "application fees" along with the application itself.

The sale of sewer service to Blue Heron occurred on March 23, 2021, when a contract was formed. "The plain meaning of 'sale' is 'a contract transferring the absolute or general ownership of property from one person or corporate body to another for a price (as a sum of money or any other consideration).'" *State v. Carr*, 145 N.C. App. 335, 343, 549 S.E.2d 897, 902 (2001) (quoting Webster's Third New International Dictionary 2003 (1966)). "Sale" is also defined as "any barter or other exchange" of a good or service for consideration. *See id.* at 344, 549 S.E.2d at 903 (citing N.C.G.S. § 18B–101(13)). Thus, North Carolina courts have defined "sale" as the creation of a *contract* to exchange goods or services for a price.

A contract was formed on March 23, 2021, by an offer and an acceptance. *See, e.g.*, *Yeager v. Dobbins*, 252 N.C. 824, 828, 114 S.E.2d 820, 823 (1960) (a binding contract is formed upon the acceptance of an offer). Blue Heron made an offer to acquire Respondent's connection service by tendering the Application, and Respondent then accepted Blue Heron's offer. The language in Old North State's own Water/Waste-Water Service Application states that the application will become a binding contract upon acceptance by Respondent.

Respondent has admitted both in its briefing and at oral argument that Respondent accepted the Application and agreed to provide connection service to Blue Heron. Respondent's acceptance is also established by its subsequent conduct. *See Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 822, 561 S.E.2d 578, 582 (2002) ("An

acceptance by conduct is a valid acceptance."). On the date it received the application, Respondent submitted the Intention to Provide Service form to Chatham County, which advised the county that Respondent was going to provide connection service to Blue Heron.

Respondent contends that Blue Heron's tender of the Application could not be an offer because the Application did not state the applicable connection fee, and an offer missing a material term is not a valid offer. In the same vein, Respondent contends that there was no meeting of the minds because the parties disagreed on the applicable tariff. The rates for connection service are prescribed as a matter of law by the Commission. *See* N.C.G.S. § 62-139(a). Indeed, counsel for the parties agreed that only the Commission could set the rate for Respondent's connection service. Moreover, North Carolina courts have made clear that "laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it, as if they were expressly referred to or incorporated in its terms.'" *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 789, 786 S.E.2d 255, 264 (2016) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429–30 (1934)). Here, the Commission sets the applicable rates for connection services and those rates are incorporated as a matter of law into a parties' contract for connection services. Therefore, Blue Heron's Application did not need to state the prescribed rates; the parties agreed that Respondent would provide connection services to Blue Heron at the rate prescribed by the Commission. A valid contract was formed.

Finally, Respondent argues that Blue Heron waived its right to seek a refund under Section 62-139(a) because it tendered the amount demanded by Respondent. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 10, 558 S.E.2d 199, 206 (2001) (internal quotation omitted). "A waiver is implied when a person dispenses with a right by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right." *Id.* at 12, 558 S.E.2d at 206–07 (internal quotation omitted). A customer's payment of excessive fees cannot constitute an abandonment of the customer's right to a refund under Section 62-139(a) because the statutory right to a refund is not triggered until the customer makes the payment. The act that triggers a statutory right cannot also be an act that waives that very right. Moreover, here, Respondent had long known of Blue Heron's objection to Respondent's calculation of the connection fee. Finally, Blue Heron was compelled to pay an incorrect fee because it needed sewer service so that tenants could move into its apartment complex; a utility cannot extract an excessive payment from a customer under duress and then argue that the customer's payment was a waiver of the statutory right to seek a refund. Thus, Blue Heron's tendering of payment *under protest and duress* did not lead Old North State to "naturally and justly" believe Blue Heron had waived its right to a refund. *See Medearis*, 148 N.C. App. at 12, 558 S.E.2d at 206–07.

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

EVIDENCE AND CONCLUSIONS FOR FACT NO. 28 TO 33

The evidence supporting these findings of fact is contained in the Complaint and the Answer.

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

On April 5, 2021, Liberty Senior emailed Respondent asking "[w]hat do we need to do to pay the $1,500/unit connection fees associated with [its apartment development]"? Liberty Senior made this inquiry with the expectation that Respondent would reply and provide the materials needed to enter into a contract. Respondent did not reply and concealed its intention to not reply until after the Commission had approved its pending rate increase. In its briefing, Respondent even admitted that it withheld materials from Liberty Senior "anticipating that the NCUC would rule upon and hopefully approve the pending request to set the connection fee at $4,000 per REU[.]" In doing so, Respondent intentionally prevented Liberty Senior from forming a connection service contact before the Sub 71 Order was issued. Respondent is estopped from now relying on the Sub 71 Order to collect the higher rate of $1,500 per REU from Liberty Senior.

EVIDENCE AND CONCLUSIONS FOR FACT NO. 34 TO 38

The evidence supporting these findings of fact is contained in the Complaint and the Answer.

The Sub 9 Order and Sub 71 Order do not include an express definition for the calculation of REU. Despite the absence of an express definition, these two orders implicitly incorporate the definition of REU as set forth in the APA.

In 2009, when the Commission initially approved Briar Chapel Utilities' acquisition of the sewer system in the Sub 0 Order, the Commission approved Briar Chapel Utilities' request for a connection fee of $1,500 per REU. Importantly, the BCU Agreement imposed two relevant contractual obligations: Briar Chapel Utilities was required to (a) request the Commission's approval of a connection fee of $1,500 per REU and (b) calculate REU as set forth in the BCU Agreement. Thus, when Briar Chapel Utilities requested the Commission's approval of a "$1,500 per REU" connection fee, Briar Chapel Utilities requested approval of both (1) the $1,500 amount and (2) the calculation of REU as set forth in the BCU Agreement. Consequently, when the Commission approved Briar

Chapel Utilities' requested fee, the Commission approved both the $1,500 amount and the BCU Agreement's calculation of REU.

In 2015, when the Commission approved Respondent's acquisition of the sewer system in the Sub 9 Order, the Commission approved Respondent's request for a connection fee of $1,500 per REU. As with the BCU Agreement, the APA contractually obligated Respondent to collect $1,500 per REU and it provided an express calculation of REU. In addition, the APA explicitly bound Respondent to "continue to collect the $1,500 per REU Connection Fee approved in the franchise proceeding for [Briar Chapel Utilities] in Docket No. W-1230, Sub 0." Thus, when Respondent requested the Commission's approval of a "$1,500 per REU" connection fee, Respondent requested approval of both (1) the $1,500 amount and (2) the calculation of REU as set forth in the APA (and the BCU Agreement). Consequently, when the Commission approved Respondent's requested fee, the Commission approved both the $1,500 amount and the APA's calculation of REU.

The conclusion that the Sub 9 Order incorporated the APA's calculation of REU is supported by two additional grounds. First, the BCU Agreement and the APA included identical definitions for the calculation of REU. The repetition of this definition in both agreements is evidence of the universally understood and accepted method of calculating REUs for ratepayers in the Briar Chapel subdivision. Second, the Sub 9 Order acknowledges that the APA obligated Respondent to remit the $1,500 per REU connection fee to the developer as part of the purchase price for the sewer system. In so acknowledging, the Commission understood that the fee it was approving to be collected from ratepayers was the same fee that Respondent was contractually obligated to remit to the developer. Because the fee remitted to the developer was to be calculated according to the REU definition in the APA, the fee the Commission was approving to be collected from ratepayers was also to be calculated according to the same definition. To hold otherwise would create an incongruity in which Respondent was remitting connection fees to the developer based on the definition of REU in the APA, yet Respondent was free to collect those same connection fees from ratepayers based on a different and unspecified definition of REU. Such a holding would result in Respondent essentially having discretion to set connection fees collected from ratepayers without seeking the Commission's approval for such fees.

In opposition to such an interpretation of the Commission's orders, Respondent asserts 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 does not cite any authority to support this assertion. Furthermore, the system extension permit to which Respondent points does not support Respondent's alternative calculation of REU. The system extension permit upon which Respondent relies "is applicable to residential single family dwellings only." The permit itself makes clear that it is not applicable to Complainants' multi-family developments. Furthermore, the extension permit makes no mention of 189 GPD; the permit only mentions 56 GPD per bedroom. The record is devoid of any evidence

explaining how Respondent determined that REU would be 189 GPD. The extension permit cannot be the basis of calculating REUs for Complainants' developments.

Respondent also objects to the incorporation of the REU definition from the APA because it contends that Complainants are attempting to take advantage of a negotiated tariff—to which Complainants were not a party—that would require special approval from the Commission. However, although the $1,500 per REU fee originated as the result of a negotiation between Respondent and Briar Chapel Utilities as part of the acquisition of the sewer system, Respondent then asked for the Commission's approval to charge the $1,500 per REU fee as the uniform tariff for all connection fees. The Commission approved this uniform fee in the Sub 9 Order. Complainants are merely asserting that they should be charged the $1,500 per REU fee that the Commission approved in the Sub 9 Order, rather than the higher fee in the subsequent Sub 71 Order.

Looking to the definition of REU in Section 1.27 of the APA, REU is defined as "a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit." For connections that were not single-family dwellings, the REUs for such "non-residential" facilities would be determined by (1), if there was a meter, then the REU conversion chart set forth in the APA or (2), if there was no meter, then the design flow of the facility divided by 250 GPD. Here, Complainants have meters for their facilities. Blue Heron's development, Knoll, has four separate facilities with a total of two 2-inch meters and two 3-inch meters. According to the conversion chart in both the APA, the Knoll development has 46 REUs. Liberty Senior's development, Inspire, has a single building with a single 6-inch meter. According to the conversion chart in the APA, the Inspire development has 50 REUs.

[ALTERNATIVE: Looking to the definition of REU in Section 1.27 of the APA, REU is defined as "a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit." For connections for "non-residential users," REUs would be determined by (1), if there was a meter, then the REU conversion chart set forth in the APA and (b), if there was no meter, then the design flow of the facility divided by 250 GPD. Complainants contend that they are non-residential users and are entitled to have their REUs calculated based on their meter sizes. However, because Complainants are developers of multi-family residential units, Complainants do not qualify as "non-residential users" under the APA. The APA's default definition of an REU is "a unit of wastewater treatment capacity equal to the presumed average daily wastewater flow of a single-family unit in the Development (250 GPD)." Based on this definition, Blue Heron's design flow of 51,140 GPD would result in 204.6 REUs, and Liberty Senior's design flow of 38,150 GPD would result in 152.6 REUs.]

Finally, the Sub 71 Order does not set forth an express definition for calculating REUs. Rather, the order acknowledges that, at the time, Respondent's "current wastewater connection fee [was] $1,500 per residential equivalent unit (REU)" and Respondent's "proposed wastewater connection fee is $4,000 per REU." In addition, footnote 1 of the order recognizes that the Commission, in the Sub 9 Order, "continued

the $1,500 per REU wastewater connection fee established for Briar Chapel Utilities, LLC, in Docket No. W-1230, Sub 0." Thus, the order recognizes the continuity of the definition of REU in the Briar Chapel subdivision service area. Because the Sub 71 Order does not suggest that the Commission approved a new way of calculating REU for the Briar Chapel subdivision, the Commission interprets the Sub 71 Order to continue the practice of incorporating the definition of REU as set forth in the APA.

IT IS, THEREFORE, ORDERED as follows:

1. Respondent's Motion to Dismiss is DENIED and Complainants' Motion for Judgment on the Pleadings is GRANTED;

2. Because Respondent should have charged Blue Heron a connection fee of $1,500 for 46 REUs, Blue Heron is entitled to a refund of $1,013,328. **[ALTERNATIVE: Because Respondent should have charged Blue Heron a connection fee of $1,500 for 204.6 REUs, Blue Heron is entitled to a refund of $775,488.]**

3. Because Respondent should have charged Liberty Senior a connection fee of $1,500 for 50 REUs, Liberty Senior should have been charged a connection fee of $75,000. **[ALTERNATIVE: Because Respondent should have charged Liberty Senior a connection fee of $1,500 for 152.6 REUs, Liberty Senior should have been charged a connection fee of $228,900.]**

4. Because Respondents should have charged Blue Heron for monthly sewer service based on 46 REUs, and not 270.6 REUs, Blue Heron is entitled to a refund of the difference. **[ALTERNATIVE: Because Respondent should have charged Blue Heron for monthly sewer service based on 204.6 REUs, and not 270.6 REUs, Blue Heron is entitled to a refund of the difference.]**

5. Unless and until Respondent petitions for, and receives approval of, a revised calculation of REUs for the Briar Chapel subdivision service area, REUs are to be calculated based on the definition set forth in the APA.

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 29th day of November, 2023.

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