

Edward S. Finley, Jr., PLLC
2024 White Oak Rd.
Raleigh, NC 27608
919-418-4516
edfinley98@aol.com
(N.C. Bar No. 6149)

September 13, 2023

Ms. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
Mail Service Center 4325
Raleigh NC 27699 -4300

RE: Docket No. W-1300, Sub 92 - Complaint by Blue Heron and Liberty Senior

Dear Ms. Dunston:

In accordance with the Commission's procedural order in this docket we submit herewith for filing the brief on behalf Respondent, Old North State Water Company, Inc..

Thank you for your attention to this matter.

Sincerely,

/s/ Edward S. Finley, Jr.

Edward S. Finley, Jr.
Counsel for Old North State
Water Company, Inc.

cc. Parties of Record

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

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FACTUAL BACKGROUND AND CONTEXT

1. Complainants' Claims for a Refund of Connection Fees.

Complainants, Blue Heron Asset Management, LLC ("Blue Heron") and Liberty Senior Living LLC ("Liberty Senior"), claim that Old North State Water Company, Inc. ("Old North State") has assessed charges for connection fees in excess of those approved by the North Carolina Utilities Commission. Comp. pp. 1-2. In summary, on April 19, 2021 Old North State provided an invoice to Blue Heron to pay connection fees with respect to the Perch Apartment Building project¹ pursuant to the connection fees approved by the Commission in Docket No. W-1300, Sub 71 earlier on April 19, 2021. Resp. p. 6. The invoice was submitted immediately after the order from the Commission was issued. Resp. pp. 6-7. As of April 19, 2021 no interconnection to the Perch project had been made. Blue Heron paid the fees as invoiced by wire transfer on August 31, 2022. Resp. p. 7.

a. History of Connection Fees – Briar Chapel Subdivision.

The developer of the Briar Chapel wastewater system is NNP-Briar Chapel ("NNP"). NNP created a public utility subsidiary, Briar Chapel Utilities, into which it transferred the wastewater system. NNP and Briar Chapel Utilities filed for a CPCN to allow Briar Chapel Utilities to charge consumers in Docket No. W-1230, Sub 0. The Commission approved the application on December 8, 2009. The Commission approved connection fees of \$1,500 per REU. Finding of Fact 6. of the Dec. 8, 2009 Order provided that "The developer, NNP-Briar

¹ Blue Heron first asserted it should not be charged connection fees pursuant to the Sub 71 order by letter dated May 13, 2021 in which it referred to the project as the "Perch Apartments." Blue Heron now refers to the project as the "Knoll." Old North State replied to the May 13 letter on May 20, 2021 explaining that Blue Heron would be required to comply with the Sub 71 order, making Blue Heron aware at that time as it has consistently thereafter that its excuses for objecting to do so are without merit. To this day Blue Heron persists in repeating its claims while ignoring Old North State's reasons why Blue Heron's claims are invalid. Blue Heron remains unable to address much less refute most of Old North State's arguments. Resp. p.6, fn. 1.

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

In 2014 in Docket No. 1300, Sub 9 Respondent, Old North State, applied to receive the transfer of the CPCN for Briar Chapel from Briar Chapel Utilities. The Commission approved the transfer by order dated April 20, 2015. The rate base at the time of closing was \$0.00. Order, Finding of Fact 5. Old North State sought no change in rates, tariffs or fees from those that had been approved for Briar Chapel Utilities. The only justification for the \$1,500 connection fees and the REUs upon which the connection fees were based was the terms of the negotiated Asset Purchase Agreement dated October 31, 2014 between NNP-Briar Chapel, Briar Chapel Utilities and Old North State. The Commission's order stated "The purchase price for the Briar Chapel wastewater utility system under the APA is \$1,500 per residential equivalent unit (REU) for each new connection and the future expansion of the existing 250,000 gallon per day (GPD) wastewater treatment plant (WWTP)." Order, Finding of Fact 8.

Under the Asset Purchase Agreement Old North State was to collect connection fees at a rate of \$1,500 per connection and based on residential equivalent units (REUs) as set forth in the Asset Purchase Agreement. Under the Asset Purchase Agreement Old North State was to remit the connection fees of \$1,500 so collected back to BCU/NNP. *Id.* Therefore, the Commission was not called upon to assess the reasonableness of the connection fees or the REUs that Old North State would be permitted to charge other than to approve the transfer with the knowledge of the terms of the Asset Purchase Agreement. The Commission's order in Sub 9 made no reference whatsoever to a method for calculating residential equivalent units or

any other method for calculating billing determinants through which to establish the total fee per interconnection for non-single family residences or commercial buildings.

As recited in the Company's 2021 application in Docket No. W-1300, Sub 71, the justification for the increase in the connection fee to \$4,000 per REU is to provide funds from those like Blue Heron and Liberty Senior seeking to interconnect to the Briar Chapel sewer system for expansion of the sewage treatment plant and other investments in order to meet the demand anticipated from interconnection with those consumers. "The primary reason for the increased wastewater connection fee is to aid in recovery of cost of the facility expansion and provide service for new development." April 19, 2021 Order, p.1

Connection fees such as those approved in Sub 71 constitute contributions in aid of construction. The Sub 71 connection fees differ from those approved in Sub 9 in that the Sub 9 \$1,500 connection fees were remitted to NNP, and therefore did not constitute contributions in aid of construction. See discussion, pp. 24-31, *infra*. Contributions in aid of construction not passed through to a seller constitute reductions to rate base and therefore reduce the rates end users in the Briar Chapel development will pay for sewage services they receive. *Id.* Contributions in aid of construction, by reducing the rate base, reduce the return Old North State is entitled to receive. *Id.* Therefore, it is not to the financial advantage of Old North State to increase the connection fees.

b. Theories Blue Heron Relies upon in Support of its Claims.

Blue Heron based an initial claim in a February 28, 2023 letter that Old North State bound itself to provide connection to the Perch Project at \$1,500 per REU on the following recitation:

On March 23, 2021, Blue Heron signed and submitted an application to ONSWC for the provision of sewage connection services in the Briar Chapel area. On this same date, ONSWC submitted an associated Intention to Provide Service to Chatham County. Despite receiving a completed application form and tendering the Intention to Provide Service, ONSWC told Blue Heron that it would provide an invoice for the contracted-for connection fee "at a later date." At 3:21 pm on April 19, 2021, ONSWC provided Blue Heron an invoice for the connection fee, which used the newly established rate of \$4,000 per REU.

Resp. p. 7.

Blue Heron's claim of a binding, express contract between Old North State and Blue Heron to allow interconnection at \$1,500 per REU is based on the submittal of an application to Old North State. This application makes no reference to the fee per connection or the method for calculating the billing determinants for non-single family residences, (Comp.¶ 17, Ex. B.) which Respondent assumes Blue Heron alleges to be a firm offer.² The Blue Heron application was submitted on March 23, 2021, 15 days after Old North State filed its application with the Utilities Commission in Sub 71 to increase the connection fees. *Id.*

Next, Blue Heron referred to the "tendering" by Old North State to Chatham County of an "Intention" to Provide Service. Resp. p. 7. By this Respondent assumes Blue Heron asserts that this is the acceptance of the offer of Blue Heron to accept or receive interconnection at the rate of \$1,500 per REU, even though neither the rate calculated by reference to a chart set forth in the 2014 Asset Purchase agreement nor the method for calculating REUs is set forth in the "offer" nor referred to in the Intention. Comp.¶ 17, Ex. B. No connection fee was submitted to Old North State with the Application. Fees for interconnection would be those for "services" based on "fees" or "other charges now or in the future" as called for in the application. No dealings between Old North State and Chatham County would have addressed the rate or fee Blue Heron would pay Old North State for the provision of utility service. Old North State would provide no sewerage service to Chatham County. Resp. pp. 7-8.

Next Blue Heron cited selected provisions of N.C. Gen. Stat. § 62-139(a) in support of the assertion that Old North State has failed to charge fees for services as authorized by the North Carolina Utilities Commission. Resp. pp. 7-8. The complete subsection is set forth below:

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

² The introductory paragraph of the Application, Customer # 7186 BC states: Consumer agrees to promptly pay the application fee, service fees, deposits, late fees, after-hour fees, processing fees and all other charges and fees of Utility ("Charges") at Utility's standard rates as set by Utility now or at any future time, and to comply with Utility's rules, regulations and policies, as modified from time to time by Utility ("Rules"). Utility's obligation to provide water/wastewater service is subject to (i) Utility's acceptance of this application and (ii) the provision of any water or sewer license, franchise, easement, right-of-way or other agreements that may be between Utility and any governmental authority or other person. Utility shall have exclusive right to furnish the service(s) to the service area. Consumer will read and comply with the water and wastewater policy manual available at www.integrawater.com or upon request from Utility at the address shown. The signed application and applicable charges must be submitted to Utility at the address set forth and Consumer further agrees that:
Comp. ¶ 17, Ex. B.

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. Resp. p. 8.

The “service rendered” here is interconnection. It is interconnection through facilities that enable sewage to be discharged from the building(s) constructed by Blue Heron to be transmitted through a sewerage collection system to sewage treatment facilities owned and operated by Old North State. No such interconnection facilities were in place on the date Blue Heron submitted what Blue Heron designates as an offer, March 23, 2021, or the unidentified date of the receipt of the Intention to Chatham County. Resp. p. 8. In fact, Blue Heron was aware it could not interconnect its project to the Briar Chapel sewer system on that date. Mr. Kevin Wade with Blue Heron stated in an email dated March 2, 2022, “We'd like to get the connection fee settled, but need confirmation the sewer is available prior to making any payment.” Resp. p. 8. In addition, Blue Heron knew the permit authorizing it to connect required that the SD East lift station and force main be completed prior to Blue Heron being able to connect. The Flow Tracking for Sewer Extensions (FTSE) permit was issued by DEQ July 13, 2020 and stated explicitly that the force main and pump station had to be complete. Resp. pp. 7-8. Blue Heron knew the lift station was not completed in March, and, due to construction delays, the lift station was not completed until July of 2022. Blue Heron also acknowledged it had construction defects and debris in its gravity sewer line that had to be corrected prior to making the connection. Resp. p. 9. This is acknowledged in an email dated May 18, 2022 and as late as August 6, 2022 by Blue Heron’s contractor (Evolve). Resp. p. 9.

Next, Blue Heron maintained that a “sale” of sewer services took place between Old North State and Blue Heron on March 23, 2021. This appears to be an alternative theory from the argument that an express, binding contract to provide interconnection at \$1,500 per 46 REU occurred on or about March 23, 2021 based in part on actions by Chatham County. Again, it would have been impossible to make an interconnection on those dates because facilities were not in place to enable an interconnection to be made. Substantial delays occurred. In order to make the interconnection Blue Heron had to clean and inspect the line. The line had numerous construction defects and debris in it.

As stated, under this second theory Blue Heron argues that service was provided when Old North State accepted the Blue Heron application. This is not a case where Old North State is refusing to make the interconnection with Blue Heron or to provide the other sewer services for which the application was submitted. The interconnection has been made on August 31, 2022, and sewerage has been discharged, accepted and processed. The dispute between the parties addresses the fee to be paid in exchange for the contemplated interconnection due on or before the interconnection was made and charges for the collection and treatment services addressed in the application were provided. Resp. pp. 9-10.

Complainants earlier had contested the requirement by Old North State that they pay the invoiced connection charge. Therefore, Complainants had contested the assessed fees in advance of its payment of the fee. Complainants had plenty of time to take their complaints to the Utilities Commission prior to making the payment or to make the payment under protest. They did neither. Resp. p. 10.

Complainants attribute to Old North State clandestine and underhanded motives by waiting to invoice Blue Heron 27 days after receipt of the Blue Heron application until receipt of the Commission's Sub 71 order. Comp. pp.1-2,7; Resp. p. 11. Complainants allege the Old North State is engaged in a "scheme," "deceptive trade practices," "bait and switch," "violation of statutes requiring a utility to charge only the Commission approved fees and charges," "violation of contracts," "equitable estoppel." Of course, if Complainants claims of an express, binding contract or a consummated sale on March 23, 2021 were valid, the timing of the Old North State invoice would be immaterial. Significantly, however, the request for the \$4,000 per REU was pending before the Commission well before Blue Heron submitted its application and before Liberty Senior made any inquiry to Old North State as to a rate for interconnection and before the issuance of the order of approval of the new rates.

The date on which the Commission issued its approval was out of Old North State's control. The application had been reviewed by the Public Staff and approved by and submitted by that agency to the Commission for the Commission's approval. Resp. p. 11. The requested increase was to finance system improvements, an expansion of the Briar Chapel WWTP by 250,000 gpd and to construct a force main and lift station that would be needed to serve Blue

Heron, Liberty Senior and other consumers. All of this was through public submissions and was widely known in the Briar Chapel subdivision. Resp. p. 11. Even a cursory due diligence effort would have revealed these facts. Customers in the Briar Chapel area were aware of the submission and on March 19, 2021 communicated with the Commission in support, stating that “the new development which is driving these upgrades should help offset the capital costs for this upgrade with an increase in the connection fees from \$1,500 to \$4,000 per REU.” Resp. p. 11; Sub 71 Order pp. 1-2. These were not sophisticated business customers and are unlike Complainants with the substantial connection fees Complainants would be required to pay. Blue Heron and Liberty Senior failed to make an appropriate due diligence investigation and inquiry into the requirements for interconnection within Briar Chapel in advance of their potential need for the interconnection service. Resp. p. 3.

Blue Heron alleges that it has a binding, express contract with unambiguous terms with Old North State to pay \$1,500 per connection at 46 REUs of \$69,000 based on the Commission order in Sub 9. Comp. ¶ 21, p. 6. However, Blue Heron admits that that order is ambiguous and must be interpreted to produce the \$69,000 bill Blue Heron asserts to be the correct fee. Blue Heron argues that according to a chart in the Asset Purchase Agreement with NNP, REUs for the Blue Heron project are 46, producing a fee of \$69,000. However, Blue Heron argues, “Alternatively, should REU be computed based on design flow, the 51,1450 GPD for Blue Heron’s development would be divided by 250 GPD-- per the APA and the BCU agreement-- resulting in 204.6 REUs. This would result in a fee of only \$306,840 (204.6 REUs x \$1,500).” February 28, 2023 letter page 5, fn. 2. Resp. p. 11. The Sub 9 tariff makes no reference to the Asset Purchase Agreement. Even if it did, the terms of the Asset Purchase Agreement need interpretation to address the Blue Heron request and therefore cannot serve as the basis for a binding, express contract.

2. Claims That REUs Should Be Calculated Differently.

Complainants take issue with the formula Old North State has used to calculate the REUs upon which it has based its invoiced connection fees to Blue Heron and Liberty Senior. As

explained as early as in Old North State's letter of May 20, 2021, addressing this same complaint in the May 13, 2021 letter on behalf of Blue Heron, Old North State explained the basis for the calculation. This explanation is repeated here:

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 waste water into Old North State's existing Briar Chapel sewage collection system. This construction permit controls the amount of wastewater Old North State is responsible to process and forms the correct gpd on which to calculate the connection fees.

Briar Chapel has received from DEQ a flow reduction so that its capacity to treat wastewater is now calculated based on a 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 equals $270.58 \times \$4,000 = \$1,082,328.04$. Were REUs calculated in the manner you suggest, wastewater at some point would exceed the capacity of the sewage treatment plant as permitted and violations would likely occur. Were other potential entities seeking connection to calculate REUs in the way you suggest, the capacity would be exceeded in short fashion.

Resp. pp. 12-13.

3. Claims by Liberty Senior that Old North State Has Bound Itself to Provide Interconnection at \$1,500 Per Connection.

Liberty Senior submitted no application to Old North State prior to the Commission's order in Sub 71. Liberty Senior made inquiries as to what actions should be taken for it to take advantage of the \$1,500 connection fees for its project. Old North State has never taken any action suggesting to Liberty Senior that a \$1,500 connection fee would be available for the project Liberty Senior was constructing. Resp. pp. 16-17.

4. Claims by Complainants That They are Entitled to Wastewater Usage Fees Based On Any Tariffs Other Than Those Approved By the Commission in Sub 71.

Any services provided by Old North State to either Blue Heron or Liberty Senior for receiving, treating and discharging sewerage from the projects of the developers were provided

well after the Commission issued its order in Sub 71. Neither Blue Heron or Liberty Senior can claim that they have an express contract authorizing calculation of a charge for monthly usage services based upon the Asset Purchase Agreement entered into between NNP, Briar Chapel Utilities and Old North State in 2014.

ARGUMENT

1. Blue Heron Has No Binding, Express Contract With Old North State to Obtain Interconnection at \$1,500 Per Connection Based on 46 REUs.

The submission by Blue Heron of an application for service and the acceptance of the application by Old North State contain no reference to a connection fee of \$1,500 or any other rate. The application does not address REUs. Blue Heron admits it had no meeting of the mind in March-April 2021: “We’d like to get the connection fee settled and need confirmation the sewer is available prior to making payment.” Letter, March 2, 2022. Resp. p. 8. Without these essential terms upon which Blue Heron bases its entire claim, there is no contract permitting Blue Heron to interconnect that \$1,500 per connection based on 46 REUs. No connection fee was submitted to Old North State with the application. Any dealings between the Old North State and Chatham County would not have addressed the rate or fee Blue Heron would pay Old North State for the provision of utility service. Old North State would provide no sewage service to Chatham County. Blue Heron fails to explain how an “intention” would constitute an acceptance even if it were to Blue Heron, the party Blue Heron apparently maintains to have made the offer and even though the intention does not mention \$1,500 per REU.

2. Any Contract Blue Heron Would Have Entered Into on March 23, 2021 Allowing Blue Heron to Interconnect at \$1,500 at 46 REUs for \$69,000 Was Not Permissible Under Any Old North State Tariff and Was Not Enforceable Because It Was Not Approved by the Commission.

Blue Heron does not seek to enforce a tariff. Blue Heron seeks to enforce what it alleges to be an express, binding contract. Blue Heron relies as its primary authority N.C. Gen. Stat. § 62-139. That statute is encaptioned **Rate varying from schedule prohibited; refunding**

overcharge; penalty and prevents providing or receiving a service other than one “prescribed” by the Commission. Blue Heron relies upon a contract never approved by the Commission as a rate schedule or a tariff. On March 23, 2021 no tariff on behalf of Old North State existed that approved the terms of the express contract Blue Heron claims was entered into on that date. The terms of the tariff (a) would have required allowing multi-residential apartment buildings constructed by builders on property other than that developed by NNP to interconnect at an identified fee and calculated REU, (b) would have applied to builders that had contributed no infrastructure to obtain interconnection at a connection fee of \$1,500 per residential equivalent unit, and (c) would have calculated REUs pursuant to the 2014 Asset Purchase Agreement, between NNP, Briar Chapel Utilities and Old North State. The tariff approved in Sub 9 defined REU as one residential equivalent unit. The reference in the tariff to the billing determinant made no reference to the Asset Purchase Agreement. Blue Heron was not a party to the Asset Purchase Agreement. Blue Heron was not a successor in interest to the APA. Blue Heron’s complaint is not that the Commission find Old North State to have violated the tariff approved in Sub 9 but to have failed to comply with an express, binding contract based on an agreement allegedly entered into on March 23, 2021.

Even though no contract was entered into containing a rate, Blue Heron claims that it obtained an express, binding contract with Old North State on March 23, 2021 authorizing Blue Heron to interconnect its apartment buildings at \$1,500 per REU of 46 at a rate of \$69,000. As this alleged contract was based on missing terms that did not comport with the outstanding Old North State tariff in effect at the time approved in Sub 9 or the tariff requested in the pending application in Sub 71, this alleged contract would have required approval by the Commission as a special service contract after entered into for it to be enforceable even if there had been no disagreement as to some of its terms. No request was made to the Commission on March 23, 2021 or at any time thereafter for approval of this alleged contract that was based on terms not set forth in any Old North State tariff. Blue Heron is correct that to the extent that a contract omits an essential term such as the rate and the billing determinant the only way to rectify this omission is through resort to the outstanding law existing at the time of execution of the contract. Reply, p. 10. Unfortunately for Blue Heron, Blue Heron failed to go to

the Commission and obtain an order that would have rectified this omission. No contract between Old North State and Blue Heron existed on March 23, 2021 allowing Blue Heron to interconnect at \$1500 per REU of 46 for a rate of \$69,000. If such a contract had existed it would not have been enforceable because it would not have been approved by the Commission.

The Commission on occasion approves special service contracts for the state's local gas distribution companies such as Piedmont Natural Gas. The Commission addressed the generic topic of special service contracts in its order dated March 25, 2019 in Docket Nos. M-100, Sub 148, G-9, Sub 731 and G-9, Sub 737. In this case the issue was the extent to which Piedmont should be required to flow through the reduction in the federal corporate income tax rate to customers with whom Piedmont had entered into special service contracts in addition to its more traditional customers whose rates have been set through tariffs in Piedmont's general rate case dockets. The applicant must seek approval and meet a test showing that the non-tariffed offering is justified.

The test to be employed in determining the rates for special service contracts in the contest of natural gas service are stated in Docket No. G-9, Sub 722 (Order dated Jan. 6, 2022):

Special contracts may be structured with (a) a demand charge that recovers the plant investment required to serve the customer, (b) margin and fixed gas components, (c) other negotiated volumetric components that provide system contributions, or (d) other contributions that result in a benefit to the system. Moreover, according to the Public Staff, the volumetric rate component should be comparable with the type of volumetric contribution paid by interruptible and firm tariffed transportation customers on the LDC's system.

Id. at 59. Emphasis added.

In addition, had Blue Heron sought Commission approval, Old North State would have resisted such a request. Among other objections, the contract would have undercharged for the services rendered and would have violated N.C., Gen. Stat. § 62-140. Not only would the contract have omitted the required contribution, It would have given Blue Heron a rate that was not compensatory and that would have been discriminatory and prejudicial to other similarly situated Old North State customers such as Liberty Senior that would not have been entitled to this non-compensatory rate.

3. There Was No Sale of Sewerage Services to Blue Heron on March 23, 2021.

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

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

4. Old North State Took No Action and Engaged In No Inaction That Led Blue Heron to Fail to Obtain a \$1,500 Connection Fee.

- a. Blue Heron's Inconsistent, Invalid Claims that Old North State's Actions Impeded Blue Heron from Receiving Interconnection For a Fee of \$1,500 at 46 GPD Are Baseless.**

After Old North State had applied to the Commission for an increase in the connection fees to charge builders such as Blue Heron but before the Commission had issued its order approving the request, Blue Heron submitted an application for interconnection. In order for Blue Heron to proceed with its facility in order for ultimate interconnection, it was necessary for Old North State to inform Chatham County that Old North State had received its application and approved the request for interconnection. Resp. p. 3. Old North State took no action to entice or to bait Blue Heron into submitting the application when it did. *Id.* By accepting the application at least to the extent Old Northern State committed to interconnect (but not as to the connection fee to be paid) in order to allow Blue Heron to proceed without complications from Chatham County, Old North State expressly stated that it would send an invoice for the connection fees at a later time. Old North State had agreed to allow interconnection.

Old North Sate had not agreed to interconnect at any particular fee. Old North State had no ulterior motive in proceeding in this fashion. Old North State had justified its request to increase the connection fees to \$4,000 based on the REUs it has relied upon to offset the cost of the 250,000 gpd expansion and the construction of the lift station and force main and other facilities that it would need to serve Blue Heron, among other builders. Had Old North State wished to enhance its profits, it would not have requested an increase in connection fees but would have left unreimbursed its investment in the 250,000 GPD expansion, the force main and the lift station and increased its rate base. These facts refute the claim that Old North State's motives were as Blue Heron asserts. If Blue Heron had a binding, express contract or a consummated sale on March 23, 2021, Old North State's alleged nefarious actions or inactions would have been immaterial. Of course, to the extent that Blue Heron fails to reimburse Old North State for the costs incurred to extend service, Old North State will be forced to recover these costs from the consumers in Briar Chapel.

Shortly after receiving the Blue Heron application the Commission approved the requested \$4,000 per interconnection. After investigation and obtaining information from the Division of Water Resources to determine the demand Blue Heron would place on its system, Old North State immediately thereafter invoiced Blue Heron as promised. Seventeen months later, after

substantial construction activities, including installing and clearing piping permitting Blue Heron's facilities to be interconnected with the collection system of Old North State, Blue Heron paid the invoiced connection fees and the interconnection was made.

The procedure Old North State followed was one of extending Blue Heron a favor to avoid delays from Chatham County and also to assess Commission approved connection fees to obtain appropriate contributions in aid of construction to minimize Old North State's investment, all to the benefit of Briar Chapel consumers. There was no scheme. There was no bait and switch. There was no deceptive trade practice. There was no failure to charge Commission approved rates for which penalties should be assessed. There was no contract with Blue Heron to charge a \$1,500 connection fee at 46 REUs to be violated. There were no Commission orders or tariffs not followed. There were no acts of estoppel. Had Old North State acted as Blue Heron argues it should have acted, Old North State would have undercharged Blue Heron and violated NC. Gen. Stat. § 62-319 by so doing. If any party is attempting to game the system, that party is Blue Heron. Blue Heron seeks to avoid reimbursement to Old North State its appropriate pro rata share of the cost of the sewage facilities needed to serve Blue Heron's buildings and instead to foist those costs onto Briar Chapel end users on the theory that several weeks passed after Old North State accepted an application and sent an invoice.

b. Liberty Senior Has No Valid Claim, Estoppel or Otherwise.

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

to establish a right on behalf of a consumer of public utility service where there is no Commission approved tariff or schedule available.

Complainants argue that Old North State's March-April 2021 "tactics" of not submitting an invoice 27 days before the Commission issued its order in Sub 71 impeded their ability to take advantage of the 2014 Asset Purchase Agreement calculated rates of \$1,500 at 46 REUs (for Blue Heron) set forth in the table in the Asset Purchase Agreement presented in Sub 9. Reply, pp.12-13. Complainants argue that Old North State "deliberately prevented" Complainants from paying the rates that were in effect at the time of sale. Reply, p. 8. Complainants argue that the fact that Old North State had been waiting for an anticipated rate increase does not excuse its conduct of "intentionally foiling" Complainants attempt to pay the rates in effect at the time. Reply, p. 14, n. 5. This is an unintended admission that no express, binding contract or consummated sale occurred on March 23, 2021.

Complainants argue forcefully that the connection fee rate at the time Blue Heron submitted its application was \$1,500 per REU. Complainants argue forcefully that the table set forth in the 2014 Asset Purchase Agreement determines the REUs based on the meters in their projects. Old North State did nothing preventing Complainants from paying the rates they claim were dictated by the Asset Purchase Agreement at any time they wished. Indeed, Old North State's application form requires applicants to enclose a check for the Tap fees with the application. Comp. ¶20, Ex. D. Blue Heron failed to comply. A wait of 27 days to submit an invoice to comply with Commission policy to reduce rates to end use customers is not a "tactic" or an act of "deliberate prevention" or an effort to "intentionally foil" anyone from paying what should have been paid. Moreover, had Complainants paid only what they maintain they owed, they would have been required to pay the remainder at the time of the interconnection, the time of the provision of service.

Complainants argue that Blue Heron had a binding, express contract on March 23, 2021 to receive interconnection at \$1,500 per 46 RUE for a fee of \$69,000. Blue Heron argues that the billing determinants should have been calculated through reference to the 2014 Asset Purchase Agreement chart that establishes REUs on the basis of meter size. Blue Heron knew the size of the meters it planned to install. Complainants argue alternatively that Blue Heron completed a

sale (purchase) on March 23, 2021 entitling Blue Heron to interconnection at \$1,500 for 46 RUE for a fee of \$69,000. As addressed above, these theories are incorrect. If they were correct, however, nothing Old North State did by waiting 27 days to send an invoice deprived Blue Heron of its alleged contract and purchase rights. Blue Heron could have paid the \$69,000 whenever it wished. If a consumer at the grocery store picks up a box of cereal with a price identified as \$5, the consumer can pay at the checkout counter without a statement from the checkout clerk stating that the price is \$5.

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

Connection Fee	\$1,500 per REU.
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The tariff set forth the monthly flat rate sewer service fee at \$42.30 per REU. This tariff item is footnoted. The footnote states "REU is one Residential Equivalent Unit."

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

Even if Blue Heron's invalid theory were correct that the 2015 order had addressed billing determinants by reference to the 2014 Asset Purchase Agreement, the Asset Purchase Agreement provision addressing REUs for various customer demands does so by reference to a single meter per interconnection, not multi-meter, multi-residential structures like the Blue

Heron project.³ Comp. pp. 9-0, ¶ 40. Consequently, application of the chart in the APA would have been subject to different interpretations.

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

5. Blue Heron Claims Erroneously That Old North State Has Violated Commission Rules.

Blue Heron makes much of Commission Rule R10-20:

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

³ Section 1.27. of the APA addresses Residential Equivalent Unit for non-single family units:

- (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

If it were permissible to calculate the billing determinants by this section of the APA, the first issue to resolve would be whether the Blue Heron buildings are residential or non-residential. The second issue to be resolved would be whether the Blue Heron buildings had any meters at all and if so the sizes. The third issue to resolve would be whether facilities with multiple meters rather than "a" "water and/or wastewater meter" are addressed under this subsection. None of the information necessary to resolve these issues was provided in the Blue Heron application. Even if it were permissible to rely on this subsection, Blue Heron had no right to expect an invoice immediately upon submitting the application.

This rule only recites the requirements of N.C. Gen. Stat. § 62-139. While the rule uses the word “sale”, this is simply a rough paraphrase of the identical concept in the statute. The language in the statute controls. The utility offering of interconnection at issue is “service.” The words of the rule are “sale for sewer service, or for service connected therewith.” Emphasis added. To the extent there was a “sale,” it was the sale of sewerages collection, treatment and disposal services. The interconnection service was a “service connected with” the sale of the other services. The interconnection by Old North State with Blue Heron is a service, not a sale of a service. Interconnection alone provides nothing to consume. It provides a pathway through which a commodity can be accepted, treated and disposed.

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

Information as to service and rules .- A utility shall, when accepting application for sewer service, give full information as to the applicant concerning type of service to be rendered and rates which will be applicable.

The type of service (not the type of sale) at issue was interconnection. Old North State notified Blue Heron of the rate Blue Heron would be assessed (the Commission approved rate) 27 days after Blue Heron submitted its application. Like the statute, this rule addresses “service,” not “sale.” Old North State was awaiting the imminent ruling from the Commission determining the rate for the interconnection service that would be in effect at any time Blue Heron would be in a position to receive that service. The Commission's ruling came 27 days after the submission of the Blue Heron application, and Old North State then informed Blue Heron what the rate would be. Old North State's actions were in compliance with this rule to the maximum extent possible under the facts in existence at the time. Old North State could have done nothing more to provide “full information.”

The intent of this rule is not entirely clear. Ostensibly, the intent of the rule is to provide potential consumers with an opportunity to construct facilities elsewhere, without the service territory of the utility to whom the application is submitted or perhaps to avoid being surprised when later billed for service. The Blue Heron building(s) was well underway when it submitted its application to Old North State. Blue Heron was 17 months away from needing

interconnection to receive sewerage service, so the 27 day delay resulted in no injury from that perspective. Irrespective of any connection fees Old North State would have quoted at the time of the application, Blue Heron was beyond the point of constructing its facilities elsewhere.

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

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

Old North State was in compliance with the Commission's rules. Cases cited by Blue Heron requiring Old North State to comply with Blue Heron's interpretation of the Commission's rules are inapposite. While the Utilities Commission is an administrative agency of the state government, and general tenets of administrative law are applicable to its activities unless modified by statute, the Commission is not bound by the Administrative Procedures Act that controls the activities of many other state agencies. *State ex rel. Utilities Commission v. Nantahala Power and Light Co.*, 326 N.C. 190, 388 S.E.2d 118 (1990).

The Attorney General's failure to appeal the Utilities Commission order promulgating Rule R1-17(h), which established certain procedures for participation by natural gas utilities in exploration and drilling programs and for making applications for rate adjustments to recover costs and account for revenues associated with such programs, did not foreclose review of the

lawfulness of the procedure approved in that order, since the Commission's action was legislative, not judicial, in nature. *State ex rel. Utilities Commission v. Edmisten*, 294 N.C. 598, 242 S.E.2d 862 (1978). The ratemaking activities of the Utilities Commission are a legislative function, and rulemaking is likewise an exercise of the delegated legislative authority of the Commission to supervise and control the public utilities of the state and to make reasonable rules and regulations to accomplish that end. *Id.*

Old North State's virtual compliance with the rule constitutes acceptable compliance based on the facts at issue. Many of the Commission's procedural rules are outdated. Many are not followed. Many are waived. The Commission's filing requirements call for many copies of documents. These rules were passed before filings by electronic submission. The Clerk's Office does not require compliance with all of these rules. The Commission rule requires motions to strike testimony to be filed five days before start of the hearing. NCUC Rule R1-24(f)(4). This rule is seldom enforced.

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

(1986) for the same proposition. The court said both cases involve only an agency's failure to follow its own procedural rules.

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

Ironically, the Commission's Rule R1-5(d) requires pleadings such as Blue Heron's complaint to be verified. Blue Heron violated this rule by failing to verify its complaint when filed on May 26, 2023. Instead, Blue Heron delayed until July 24, 2023 to file its verification, far more than 27 days. Under Blue Heron's theory of strict compliance with Commission's rules, its complaint should be dismissed for failure to verify when filed but delaying for 68 days.

6. Old North State Has Not Violated the Instructions in Its Application Form Addressing the Submission of Application Fees.

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

The practice was memorialized in its own instructions to builders seeking sewer services, which require a builder to submit "application fees" along with the application itself. See Compl. ¶ 20 ; Id, Ex. D. The only way a builder could submit the connection fee along with the application is if the fee was determined at the time of the application. If the fee was determined at the time of the connection - as Old North State now insists, Resp. at 4- then a builder could not calculate the fees to include with the application because they would be dictated by the later-to-be-revealed date of service. Old North State's instructions to builders - which calculates fees at the time of the application- is consistent with Rule R-10-20's requirement that the sewer utilities charge rates in effect at the time of sale.

The all too obvious fallacy in this argument is that Blue Heron is conflating "application fees" with "connection fees." The instructions on the application form distinguished between an "application fee" and a "service fee" and "all other charges." Application fees are to reimburse Old North State for the administrative expense of processing a builder's application. The application fee is due with the application and is not refundable. Connection fees are to

reimburse Old North State for investment in utility infrastructure. See Docket No. W-1300, Sub 71. If no interconnection, the fees probably are refundable if paid in advance.

Even if Blue Heron had not conflated application fees with connection fees, this argument makes no sense. The application form requires tap fees as well as application fees to be submitted with the application. As addressed in substantial detail in this brief Blue Heron maintains that it had an express, binding contract to pay as a connection fee \$69,000. Nothing prevented Blue Heron from submitting that connection fee with the application. It should be noted that the language in the application form indicates that the application fees or tap fees are non-refundable. The application form of Old North State has not been reviewed by or approved by the Utilities Commission. The terms in the application form have not been required as part of any regulatory conditions or code of conduct required by the Utilities Commission. As such, whether or not connection fees paid in advance of interconnection where interconnection does not take place are refundable would be subject to a ruling by the Commission irrespective of language in the Old North State application form.

7. The Authorities Complainants Cite Addressing Disputes Not Involving Public Utilities or Not Involving Appeals from Utilities Commission Orders Are Inapposite.

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

All contracts Old North State enters into, be they agreeing to interconnection, contracts addressing the rate of interconnection and contracts for accepting and processing wastewater are regulated by this Commission. Blue Heron filed this complaint in the Commission, not the

Superior Court. The dispute is one to be resolved by reference to N.C. Gen. Stat. § 62-139. Had Old North State agreed in 2022 to interconnect Blue Heron at \$1,500 per connection at the REU referred to in the APA between NNP, Briar Chapel Utilities and Old North State when Blue Heron was able to interconnect, Old North State would have violated the statute by charging less than the approved tariffed rate in place at the time of service. The service rendered in 2022 and to be rendered in March-April 2021 was interconnection. No service was provided in March-April 2021. Blue Heron maintains that a sale occurred in March or April of 2021.

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

Blue Heron argues that the rate for interconnection of \$1,500 was established on March 23, 2021 through reference to laws which subsisted at that time even though that rate is not mentioned in the alleged contract between Old North State and Blue Heron. At the same time Blue Heron argues inconsistently that Old North State violated provisions of the Commission's rules requiring the utility to inform consumers of the rates to be assessed for the services contracted for at the time of application. If Blue Heron obtained through its own actions a binding, express contract or was the recipient of a consummated sale on March 23, 2021, any failure by Old North State to inform would have been of no consequence. Blue Heron cannot have it both ways. Blue Heron cannot rely upon what it maintains to be the law in effect at the time of its application to supply terms missing from the parties' written documentation to bind Old North State to the outdated rate and claim that it was injured by failure of Old North State to inform Blue Heron of the terms of the missing but superimposed binding terms. Moreover

the laws subsisting at the time of the alleged contract, March 23, 2021, was that found in Chapter 62 overseen by this Commission. Any outstanding Commission order would not supply a rate of \$1,500 per 46 RUE at \$69,000.

8. Commission Precedent Addressing Connection Fees Established in Asset Purchase Agreements as Part of the Compensation to the Seller of a Wastewater System and Connection Fees Based on Traditional Cost of Service Principles Demonstrates that Complainants' Allegations Must Be Dismissed.

In a number of dockets involving the connection fees charged by Carolina Water Service the issue arose as to whether the Company was required to charge its tariffed uniform connection fees or was authorized to charge a different level of connection fees upon certain acquisitions and whether connection fees the Company collected and then passed through to developers that sold systems to the Company should be reflected as contributions in aid of construction and thereby reduce the rate base.

The Commission was required to address situations such as those addressed in this docket in which the level of connection fees was established in Asset Purchase Agreements negotiated between the developer of systems that had incurred the initial expense in installing the systems and the utility acquirer of the systems. The Commission was required to address situations in which the level of connection fees assessed by the utility that factored into the purchase price and that was not based on traditional cost of service principles was lawful and appropriate. The Commission carefully examined this issue and determined that the Company had acted prudently, appropriately and with the best interest of its customers in mind in negotiating contracts calling for connection fees forming an essential component of the purchase price and not based upon traditional cost of service principles. The Commission likewise endorsed the process through which the utility, subsequent to acquisition, assessed connection fees from new builders and passed the fees through to the developer/seller. The Commission found the practice prudent, appropriate and in the best interest of customers. In opposition to Public Staff and Attorney General recommendations to the contrary, the Commission determined that connection fees so collected and passed through to the developer did not constitute

contributions in aid of construction that should be subtracted from rate base. By contrast, connection fees assessed under tariffs based on cost of service principles and approved in advance by the Commission that are retained by the utility to finance system improvements constitute contributions in aid construction and reduce rate base.

a. Connection Fees Established As Part of the Purchase Price Between a Developer and the Public Utility Are Based On Competitive Market Considerations and Receive Treatment by the Commission Different from Connection Fees Established in More Traditional Contexts.

This issue was addressed extensively by the Commission in its orders dated March 22, 1994 and February 27, 1998 in Docket No. W-354, Sub 118 , *In the Matter of Carolina Water Service Inc of North Carolina - Investigation of Tap and Plant Modification Fees*.

The evidence in this case indicates that CWS has utilized two primary methods over its 22-year history in North Carolina to acquire new systems and expand into new areas. One method has been the purchase of existing utility systems. The other method has been to contract with developers of areas contiguous to an already certificated CWS system for the authority to provide water and or sewer utility service. The systems generally are constructed by others in order to facilitate the construction of residential subdivisions. In obtaining systems during the time it has operated in North Carolina, CWS has followed a consistent pattern. CWS has entered into contracts with the sellers of systems through which the Company has sought to minimize development risk for CWS and its ratepayers. CWS's objective has been to maximize contributions in aid of construction (CIAC) collected from developers of new areas and to obtain existing systems at a reasonable cost per connection. CWS asserts that it has sought to obtain systems where there was an opportunity to expand in the future and take advantage of economies of scale.

Each contract CWS enters into when it acquires systems contains provisions addressing the mechanism through which CWS accomplishes its investment objectives. The consideration exchanged by CWS and the developer or builder is established through contractual provisions identifying facilities the seller conveys and setting forth the compensation, if any, CWS pays for such facilities.

This pattern of compensation and facility transfer differs with each CWS system acquisition. Each service area is unique; each seller, developer or builder has different needs and objectives. The varying competitive market forces dictate what compensation the seller requires for the facilities conveyed in an arms-length transaction to CWS and

the price CWS is willing to pay for those facilities. The sales price for the systems are not regulated per se, for there is no tariff or Commission rule controlling the price of utilities CWS acquires. However, regulation does exist in the form of oversight in certificate of public convenience and necessity proceedings or subsequent general rate cases.

Issues such as the level of connection fees, whether connection fees are waived or collected, the timing of collection of such fees, and whether the fees are retained by CWS or remitted to a third party, are necessarily tied to the agreed upon compensation paid for the facilities conveyed. For the reasons outlined above, CWS has negotiated contracts that call for many different approaches to the timing, mechanics, and the level of compensation, reflecting the different risks and the circumstances of each situation. This has caused different mechanisms and levels of connection fees to be charged to builders. CWS asserts that the delicate balance between the purchase price paid for utility facilities and CIAC collected has resulted in a reasonable and appropriate investment per connection and that the reasonableness of the Company's investment is evidenced by the approvals granted in general rate case and certificate of public convenience and necessity orders issued over a long period of time. According to CWS, accomplishment of its investment goal has resulted in a reasonable rate base and the payment of a reasonable amount as return on the rate base through rates paid by customers. CWS takes the position that the evidence of this conclusion is found not only in the record of this proceeding but in the orders entered by the Commission during the Company's 22-year history.

An examination of CWS's investment practices over its history in North Carolina reveals that the Company's practices have been consistent and that the mechanism of connection fees has been used to obtain funds from or convey funds to sellers of systems. Where CWS has a contract establishing connection fees, the Company has relied upon those contractual terms as dictating and subsequent activities regarding the connection fees.

...

As explained above, in the excerpts from the Docket No. W-354, Sub 118 order, the contract defined connection fees are based upon an arms-length transaction between CWS and the seller. Each transaction is based upon its own unique circumstances and, therefore, such details as connection fees may be unique and vary from transaction to transaction. Connection fees defined in a contract approved by and on file with the Commission, for a given subdivision shall be the governing connection fees in that subdivision. Otherwise the approved uniform connection fees shall apply in the absence of a contract.

Based upon the foregoing, the Commission finds that the Public Staff request that CWS should be required to provide justification where it has varied in its uniform connection

fee should be denied. The presence of a contract approved by the Commission and on file with the Commission, provides CWS the justification it needs to charge a connection fee that varies from its uniform connection fee. As noted above, in the case where the different connection fees are specified in an approved contract, the contract governs. In the absence of the approved contract, the uniform connection fees govern.

Emphasis added.

The practices the Commission addressed with respect to the Carolina Water Service acquisitions from developers is the same practice followed by the Briar Chapel Utilities and Old North State that acquired the systems at issue in this docket from the developer, NNP. The connection fees of \$1,500 and the REUs representing the billing determinants used to calculate the multiples of the \$1,500 for individual connections were negotiated between the developer that built, financed, and installed the sewage treatment facilities that it sold to Briar Chapel Utilities and Old North State and that NNP agreed to install through an Asset Purchase Agreement. As part of the transaction set forth in the Asset Purchase Agreement, Briar Chapel Utilities/Old North State would assess the connection fees at the \$1,500 level and remit them to the developer. In this fashion, the connection fees served as a delayed method of compensation to the developer that had conveyed the facilities to Old North State at a 0 cost. This was all in accord with typical financial arrangements occurring scores of times where developer owned systems are acquired by public utilities in North Carolina.

Blue Heron and Senior Liberty are not privy to nor a successor in interest to previous Asset Purchase Agreements between NNP and Old North State. While there has been a transfer of facilities providing wastewater services in the Briar Chapel service area, that transfer was based upon an Asset Purchase Agreement in which the rate base to the acquirer, the connection fees to be charged and the REUs serving as billing determinants for calculating the connection fees for each connection were interdependent. Each of those variables was negotiated between the seller and the acquirer and determined the rate base in the hands of the acquirer. The seller knew the acquirer would bear responsibility to finance in some measure through connection fees. The acquirer agreed to collect and pass through the connection fees to the seller. The NCUC approved the transfer and did not question the usage rate requested, the rate base established in the transfer of the collection fees or REUs in the Asset Purchase Agreement.

With respect to Briar Chapel the situation changed in 2021. The developer had received or was receiving appropriate remuneration through the connection fees passed through at the \$1,500 level. Old North State, having acquired the systems from Briar Chapel Utilities, faced the responsibility of expanding the sewage treatment plant by 250,000 gpd and installing a force main and lift station to serve structures such as those being built by Blue Heron. The cost of this expansion was not one borne by NNP, the developer, but would be borne initially by Old North State. The \$4,000 connection fee and the REUs were based on traditional cost of service principles and were calculated to reimburse Old North State over time for the cost of facilities such as the 250,000 gpd expansion, the construction of the force main and the lift station.

In the Sub 71 docket Old North State supported its request for an increase in the connection fees to \$4,000 per connection on an exhibit setting forth in detail the estimated cost of the 250,000 gpd expansion needed to serve builders such as Blue Heron. The \$4,000 supported by this evidence and approved by the Commission supplanted the \$1,500 per connection and the REU calculations set forth in the Asset Purchase Agreement with NNP. The REU relied upon by Old North State enabled Old North State to collect from builders like Blue Heron an appropriate level of funds at \$4,000 per connection to pay at least in part for the facilities such as the expansion, the force main and the lift station. Should the Commission agree with Blue Heron that the builder, Blue Heron, should be assessed a connection fee less than the \$4,000 and based on an REU lower than that relied upon by Old North State, the investment such as that Old North State represented to the Commission it would offset by the connection fees will not be offset, rate base will not be offset by the contributions in aid of construction, and end use customers will bear the cost of the expansion in contradiction to the Commission's intent in approving the request in Sub 71.

With reference to the Carolina Water Service example, the \$4,000 connection fee is equivalent to the uniform connection fee.

b. 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 Cost of Service Principles.

This situation within Brier Chapel was likewise addressed by the Commission in its 1994 and 1998 orders in Docket No. W-354, Sub 118.:

Although CWS relies primarily upon its contracts with the seller to determine the connection fees charged within a service area, occasions arise where the connections are made that are not covered by any contract. For example, the developer may complete the sales of homes within the subdivision and leave a number of lots without new homes. Subsequently someone else will buy the lots and construct homes in situations not covered under the contract with the original developer. In other situations, a portion of the subdivision will be sold by the original developer to a third party before homes are constructed. CWS may have no contract with the subsequent developer of the new section.

Without a provision in the Company's tariff authorizing it to assess connection fees in those situations, CWS would have difficulty collecting any connection fees at all. Consequently, in 1981, CWS requested uniform system-wide rates in the Sub 16 docket and at that time sought a tariffed set of connection fees. In its filing, CWS clearly indicated that the tariffed tap fees established by the Commission were to apply only where no contract existed for a different fee.

Emphasis added

This situation addressed in the Carolina Water Service orders is comparable to the one in Briar Chapel at issue here. The buildings Blue Heron seeks to connect are not those built by NNP, with whom the Asset Purchase Agreement addressed in Sub 9 was negotiated. Without the order in Sub 71 it would be inappropriate and contrary to the public interest to charge a connection fee not based on the cost to construct the facilities such as the 250,000 GPD expansion, the lift station and the force main and remit the fees to the developer that will not finance these expenditures. The fees addressed in Sub 9 were not intended to apply to the property Blue Heron bought from NNP and not covered by any Asset Purchase Agreement between the original developer and the utility. If Blue Heron's theory is correct and the terms of the Asset Purchase Agreement and the Commission's orders in Subs 0 and 9 control, for any connection assessed at the time of the Blue Heron application was accepted, Old North State must remit these collections to NNP. NNP would conclude that it had won the lottery without even purchasing a ticket.

Old North State applied to the Commission to increase its tariffed connection fees to \$4,000 per REU. The expansion of the facilities such as the sewage treatment plant, the lift station and the force main were necessary to serve builders such as Blue Heron and Liberty Senior. The connection fees established at \$4,000 per REU from Blue Heron were not to be remitted to the developer, NNP, because the developer bore no responsibility to pay for that expansion and the construction of these facilities. Had the situation been otherwise the Commission would never have approved the request. The \$4,000 per REU collected from builders such as Blue Heron would not be remitted to the developer but would be retained by Old North State. These connection fees would constitute contributions in aid of construction and would reduce rate base and thereby benefit the end use customers in the Briar Chapel service territory.

c. Connection Fees Approved By The Commission For Builders Not Addressed in Asset Purchase Agreements and Not Remitted To The Developer Constitute Contributions In Aid Of Construction.

The Commission in its orders in Docket No. W-354, Sub 118 confronted arguments by the Public Staff and the Attorney General that where Carolina Water Service entered into contracts calling for the Company to remit to the developer connection fees, the Commission should attribute to the Company the connection fees so remitted as reductions to rate base. The Commission rejected those arguments.

The penalty the Public Staff urges the Commission to employ is to reduce rate base by \$3 million, or by approximately 20%. The theory of this penalty is that CWS should have charged its uniform, tariffed connection fees, and had it done so, cash CIAC would have increased by \$3 million. Notwithstanding the many harsh admonitions and reprimands the Commission has delivered over the years to CWS regarding its connection fee practices and procedures, there is no reasonable basis, legal or equitable, upon which to adopt the ratemaking adjustment through the imputation of connection fees proposed in this case by the Public Staff and Attorney General.

Sub 118 Order, NCUC Orders & Decisions, 1994, p. 653.

When Old North State remits to NNP connection fees obtained upon interconnection by structures constructed by NNP covered by the Asset Purchase Agreement between NNP, Briar Chapel Utilities and Old North State and addressed in Subs 0 and 9, the connection fees so remitted do not reduce rate base. NNP had contributed to the utility the facilities to serve structures from which those connection fees were collected. Blue Heron has contributed nothing. Blue Heron is a builder that acquired property from NNP. Old North State must expand the sewage treatment plant and construct other facilities initially at its own expense. Old North State is charging Blue Heron that builder's pro rata share of the cost to be reimbursed to make these improvements. Old North State will not remit to NNP any of the connection fees assessed to Blue Heron. The full amount of the fees collected from Blue Heron will constitute contributions in aid of construction, will reduce rate base, and will inure to the ultimate benefit of the end use consumers in the Briar Chapel subdivision.

9. Liberty Senior Cites No Facts That Would Entitle That Builder To Receive Interconnection at a Fee of \$1,500 Per Connection.

Blue Heron goes to great lengths to argue that Old North State expressly contracted to provide the interconnection service to Blue Heron in March or April 2021. Blue Heron bases these arguments on the application Blue Heron submitted and actions Old North State took through communications to Chatham County. When it comes to the complaint by Liberty Senior, made well after the initial claims by Blue Heron, the allegation is, "On April 5, 2021, Liberty Senior emailed ONSWC President John McDonald explicitly asking '[w]hat do we need to do to pay the \$1,500/unit connection fees associated [its apartment development]'? Mr. McDonald ignored the inquiry for two weeks. Then, on April 19, 2021- after the new tariff was established - Old North State issued within an hour invoices to Blue Heron and Liberty Senior that used the new connection fee of \$4,000 per REU." Comp .p. 8. There was no express contract with Liberty Senior prior to the Sub 71 order. An "inquiry" that is "ignored" does not a contract make. This is where Complainants drop back into yet another theory, estoppel. The alleged action or inaction constituting estoppel is the alleged "scheme" of waiting to send an invoice until the Commission issued its Sub 71 order. This argument fails to pass any test of

reasonableness. The scheme is that undertaken by the Complainants to avoid paying their fair share of the sewerage plant expansion and other costs to enable their building projects. As addressed *supra*, a utility cannot by acts or omissions of estoppel commit to provide service not set forth in a Commission approved schedule or tariff.

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

The timeline with respect to Old North State's correspondence with Liberty Senior is as follows:

On March 19, 2021 Old North State received an e-mail from Tanya Matzen with NNP-Briar Chapel that Liberty Senior Living was trying to secure permits but was not sure when construction would commence. Old North State did not receive any correspondence or contact with Liberty Senior Living. On March 19, 2021 Old North State received a signed FTSE for Liberty Senior Apartments. On March 31, 2021 Old North State received a phone call from Thad Moore of Liberty Senior wanting to know if Liberty Senior could purchase capacity with the current FTSE. Moore was advised that FTSE for the project was permitted at 38,150 gpd. On April 9, 2021 Old North State received plans for the Briar Chapel Active Adult. On April 19, 2021 Old North State informed Thad Moore with Liberty Senior Living that Old North State would calculate an invoice connection fee. Old North State asked for a clarification on Moore's mailing address. On April 19, 2021 Old North State provided Thad Moore on behalf of Liberty Senior Living with a builder application and tap fee invoice. Old North State also provided the April 19, 2021 NCUC order in Sub 71. On April 20, 2021 Thad Moore stated that Liberty Senior had prepared a financial model for the project for only \$1,500 per unit for 150 units. On April 20, 2021 Old North State advised Thad Moore that the tap fee increase had been applied for several months earlier. Old North State advised that the plant expansion to be recovered through the increased connection fees was driven by the commercial demands, and the Utilities

Commission agreed to increase the fees accordingly. Only 17 months later, on February 11, 2022, did Old North State receive construction documents from Liberty Common Skilled Nursing. Resp. pp. 16-17.

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

10. Complainants Are Not Entitled to Billing Determinants Set Forth In The Asset Purchase Agreement Between NNP, Briar Chapel Utilities and Old North State in 2014.

The REU billing determinant Old North State used to bill Blue Heron and Liberty Senior is 189 per GPD. Old North State, based on historic demand upon its sewage treatment and disposal facilities, obtained from the Division of Environmental Quality a flow reduction from a higher number per GDP. Old North State's application to the Commission justified the \$4,000 per connection to finance the cost of the expansion of the sewage treatment plant from 250,000 gallons per day to 500,000 gallons per day and other costs to serve builders such as Blue Heron and Liberty Senior. Old North State had to construct a force main and lift station to serve the Blue Heron and Liberty Senior properties. Part of the cost justification before the Commission was an engineering analysis and detailed, item-by-item estimated cost justification for the sewer plant expansion. With respect to Blue Heron, Old North State reviewed the DEQ documentation submitted with respect to its apartment complex. Based on this information Blue Heron has obtained permission through its permit to serve 183 one and two-bedroom apartments, 17 three bedrooms apartments and a clubhouse as part of the project. Therefore, there is a discharge demand on Old North State's facilities of 51,140 gallons per day. The expansion is engineered to meet this demand among other demand anticipated in the service area. Old North State divided the 51,140 gallons per day by 189 gallons per day. This produced a gallons per day of 269.58. The 269.58 was multiplied by \$4,000. The product was \$1,078,328. This amount represents only a limited portion of the estimated cost of the sewage treatment plant expansion and construction of the other facilities. For Liberty Senior the same process was employed. For Liberty Senior the REUs were 201.85, resulting in a fee of \$807,400.

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

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

In response to Old North State's arguments that the \$1,500 per REU connection fee is inadequate to finance the anticipated system expansion, Complainants as expected cite back yet again to the 2014 Asset Purchase Agreement and the even earlier agreement with Briar Chapel Utilities addressing system expansion. Complainants argue, "Notably, both the BCU Agreement and the APA call for future expansion and set the connection at \$1,500 per REU. If

the fee somehow became inadequate for planned expansion, then it was Old North State's burden to prudently manage the expansion and timely request any needed rate changes." Reply, p. 16. In response to that argument the answer is that that train has already left the station. Old North State requested the increase to the connection fee in 2021. In approving the \$4,000 connection fee in its order in Docket No. W-1300, Sub 71 the Commission states, "The primary reason for the increased wastewater connection fee is to aid in recovery of the cost of facility expansion and to provide service for new development." The time to have complained over the way the demand on the wastewater system developed after 2014 was in the Sub 71 docket. That order is now in the books, and Complainants must live with it. Complainants new residential Briar Chapel neighbors made their views known in the Sub 71 case. Complainants, the sophisticated businesses, were asleep at the switch.

11. Blue Heron Provides No Basis To Support Its Claim that Ongoing Sewage Usage Fees Should Be Based On Billing Determinants Prescribed In The Asset Purchase Agreement Between NNP, Briar Chapel Utilities and Old North State.

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

The tariff calls for a flat rate sewerage usage rate. Unless the usage rate is based on a billing determinant reflecting the demand the Blue Heron and Liberty Senior structures place on the Old North State system, other customers will bear an inordinately large cost of the operating and maintaining the system. Homeowners will be subsidizing the operational costs of the commercial users.

12. By Paying the Connection Fees Assessed by Old North State Without Making Payment Under Protest Blue Heron Has Waived its Right to Obtain Relief Under Its Complaint.

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

⁴ Complainants alleged in their complaint that they paid under protest. Old North State alleges that it received no payment under protest. This is a contested issue, so resolution is premature at the motions stage. The Commission can resolve this dispute without reaching the waiver issue. Should the complaint proceed, Complainants must offer proof supporting their allegation of payment made under protest.

Conclusion

Despite Complainants' huffing and puffing and threatening to blow Old North State's house down and irrespective of their many conflicting and contradictory claims, the pertinent issue in this case is relatively simple. Is Old North State seeking to violate N. C. Gen. Stat. § 62-139 by charging Complainants a connection fee of \$4,000 per RUE in accordance with the Commission's 2021 order in Docket No W-1300, Sub 71 for interconnection thereafter to help defray the costs Complainants caused, or are Complainants seeking to violate the statute by maintaining that they are entitled to interconnection at a rate of \$1,500 per REU on the basis of the Commission's order of 2015 in Docket No. W-1300 , Sub 9 and an Asset Purchase Agreement to which they are not a party? Complainants are the parties seeking to violate the statute. The Commission should dismiss their claims.

Respectfully submitted this 13th day of September, 2023.

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

CERTIFICATE OF SERVICE

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

This 13th day of September, 2023

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

COUNSEL FOR RESPONDENT