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STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. A-41, Sub 22

In the Matter of	
Joint Application of Bald Head Island	)
Transportation, Inc., and Bald Head	)
Island Ferry Transportation, LLC, for	)
Approval of Transfer of Common Carrier	)
Certificate to Bald Head Island Ferry	)
Transportation, LLC, and Permission to	)
Pledge Assets	)

VILLAGE OF BALD HEAD ISLAND'S POST-HEARING BRIEF

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INTRODUCTION

The transaction proposed by the Applicants does not offer any net benefits to the public that uses the services offered by the current owners of the Bald Head Island ferry, parking, and barge operations. To the contrary, the proposed transaction creates a likelihood of harm to users of the regulated transportation system and, accordingly, to the Island itself, which is wholly dependent on that system. Given these facts, the transaction is, regrettably, opposed by the Village, the municipal government charged with representing the best interests of Bald Head Island. It is also opposed by the overwhelming majority of citizens and property owners on the Island. For these reasons, the application fails to meet the Commission's well-established test for transfers of this nature, and it should be rejected.

The principal purported benefit proffered by Applicants is the existence of a motivated seller and willing buyer who proposes to maintain the "status quo"—a "benefit" which is not cognizable by the statutory public interest standard. The only parties supporting this transaction are the developer—the Texas estate of one of the wealthiest individuals in the nation, which stands to reap significant profit from the sale—and the buyer, a private equity firm that wishes to leverage the unique monopoly assets for the benefit of its investors. The Applicants' bare desire to consummate this transaction, and that the utility assets be leveraged for their financial gain, is not a sufficient basis to support grant of the transfer.

Moreover, the proposed transaction entails substantial risk to ratepayers and the public. In summary:

- The proposed buyer has no demonstrated experience or competence in owning and operating any public utility, much less regulated ferry, parking, and barge operations; it has no apparent interest in operating a utility; and

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its admitted paramount loyalty will be to its investors rather than the public.

- The buyer has apparently premised its willingness to buy upon the hope that the Commission will permit it to burden ratepayers with an acquisition premium—a result which would be unprecedented in transactions of this nature.

- **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

- Notwithstanding the Commission's Order in Docket No. A-41, Sub 21 ("Sub 21 Order"), the buyer proposes to bifurcate ownership of the parking and barge assets (the operation and assets of which are currently owned by a single entity (Limited))—an outcome which serves no discernable public interest, will almost certainly foment future disputes over lease values to be recovered from ratepayers, and will enhance the likelihood that essential utility assets will be disposed of by the buyer to maximize profit.

- The buyer proposes to pledge, and therefore leverage, regulated assets in support of its unregulated development activities.

- The buyer has refused to accept the Commission's determination in its Sub 21 Order regarding the regulatory status of the parking and barge operations, a determination which is fundamental to the future operation and stability of the transportation system

The Settlement Agreement and Stipulation with Regulatory Conditions entered into between the Public Staff and the Applicants does not cure the Application's defects. Distilled to its essence, the Settlement Stipulation provides for a one-year "standstill" before commencement of general rate case and six-year protection from parking and barge rate increases above inflation if the Sub 21 Order is reversed.[1] In exchange, the stipulation

[1] **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** Similarly, SharpVue is already prohibited by the Sub 21 Order from increasing parking and barge rates without Commission approval. So, neither "commitment" is of value to ratepayers.

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preserves SharpVue's ability to extract existing excess revenues from the system—while permitting additional parking and barge rate increases on top of current rates (despite the Sub 21 Order); it preserves SharpVue's ability to seek recovery of acquisition premiums from ratepayers (albeit through parking and barge rates); it fails to resolve the significant disputed issues about rate base valuation; and it fails to protect ratepayers from the risks of system dismemberment in the event that the Sub 21 Order is reversed. As crafted, the stipulation lacks any tangible benefit for ratepayers while preserving all the risks associated with acquisition by a private equity firm that are and have been at the root of the intervenors' concerns.

Further, the transaction is not capable of consummation as it currently stands. SharpVue has failed to put forward sufficient record evidence concerning its proposed corporate organization and management upon which the Commission could predicate findings necessary to protect ratepayers. Additionally, the Village holds a right-of-first-refusal to match any offer to purchase the transportation assets, a right which Limited has failed to honor in the present transaction and which is currently in litigation in Brunswick County Superior Court.

The Village did not wish to oppose this transaction, especially in view of the Commission's resolution of the Village's petition in the Sub 21 docket seeking clarification of the regulatory status of the parking and barge operations as components of the unified transportation system. Ultimately, the Village shares the seller's stated goal of seeking an orderly transaction of utility ownership, but the Village is unable to support the transaction before it given the significant—potentially irreversible—risks to the lifeline assets presented by the transaction.

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There is no benefit to Bald Head Island from the proposed transaction; only risks. The transfer thus does not satisfy G.S. § 62-111(a) and should be denied, or, alternatively, this proceeding should be held in abeyance pending resolution of the litigation which is a condition precedent for the transaction.

In the event that the Commission approves the transaction, notwithstanding the concerns summarized above, it should do so subject to guardrails, substantially more robust regulatory conditions than those set forth in the Settlement Stipulation, as necessary to protect ratepayers from future disputes and potential harm resulting from this transaction. As proposed, the transaction is likely to generate serious future disputes over proposed intra-corporate lease agreements which, on their face, appear to have no public benefit (i.e., a lease to utilize real estate which is already owned free and clear by the utility); over the recovery of extensive acquisition premium and the establishment of rate base in a future rate case; over the potential transfer of essential utility assets to third parties; and over the potential adverse impact on the transportation system from Applicants' pending appeal from the Commission's Sub 21 Order.

BACKGROUND

A. The Parties to the Transaction and Their Affiliates

The parties to the Amended Application are: (1) Bald Head Island Limited, LLC ("Limited"), the "developer" of Bald Head Island which also owns the parking and barge operations among other assets and business operations on the Island and the mainland, (2) Bald Head Island Transportation, Inc. ("BHIT"), a wholly-owned subsidiary of Limited, which holds the common carrier certificate permitting the operation of the transportation

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system;[2] and (3) Bald Head Island Ferry Transportation, LLC ("BHIFT"), a wholly-owned subsidiary of Pelican Legacy Holdings, LLC ("Holdings"), and an "affiliate" of SharpVue Capital, LLC ("SharpVue").[3] SharpVue is a North Carolina-based private equity firm with experience in real estate and infrastructure investment but no experience in operating regulated public utilities.[4]

Stated another way, from the buyer sider of the transaction, BHIFT is the only "party" to the Amended Application as the entity that proposes to hold the common carrier certificate, but multiple other SharpVue affiliates would be involved in providing managerial services, debt and equity financing, exercising managerial and decision-making control, and holding public utility assets. SharpVue plans to structure the acquisition in the fashion of a private equity deal, where assets are structurally separated through multiple subsidiary entities to maximize the ability to leverage the assets for the financial benefit of itself and its investors. This structure—which is atypical for public utilities who typically hold assets used and useful in the utility enterprise in a regulated entity—increases the complexity of regulating the operation and protecting ratepayers. In some cases, as discussed *infra*, Section IV, SharpVue's exact plans as regards ownership and management of the regulated assets are not perfectly clear or have not been finalized, which impairs the

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[2] In the Sub 21 Order, the Commission, citing G.S. § 62-116, permitted the parking and barge operations, pending further order, under color of the existing common carrier certificate held by BHIT, notwithstanding that the assets are owned by Limited. *See* Order Ruling on Complaint and Request for Determination of Public Utility Status, Docket No. A-41, Sub 21 (Dec. 30, 2022) (the "Sub 21 Order"), at 28 ("the Parking and Barge Operations are granted temporary authority to operate in the interim pending any future proceeding.").

[3] SharpVue refers to Holdings as an "affiliate," (*see* Tr. Vol. 3, p. 12 (Roberts Amended Dir.)) presumably due to the common control of both entities by Lee Roberts and Doug Vaughn.

[4] Tr. Vol. 3, p. 13:4-6 (Roberts Amended Dir.) (acknowledging that "this type of transportation service is new to our team").

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Commission's ability to exercise its oversight function.

Under the transaction proposed in the Amended Application, BHIFT will own the regulated utility assets, including (1) the ferry assets, (2) the tram assets, (3) the parking operation, and (4) the barge assets. BHIFT is wholly owned and controlled by Holdings. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Pelican Real Property, LLC will own real estate and other supplemental assets, including (1) the Deep Point parking facilities, (2) the Deep Point ferry terminal, and (3) the Island ferry terminal. Pelican Real Property, LLC is wholly owned and controlled by Holdings.[6]

Pelican IP, LLC will own unspecified "intellectual property."[7]

[BEGIN AEO CONFIDENTIAL] [redacted]

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[5] *See* Tr. Vol. 3, pp. 34–35 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[6] *See* Tr. Vol. 9, pp. 44–45 (Roberts/Paul Joint Reb.); Amended Transfer Application, Docket No. A-41, Sub 22 (Jan. 24, 2023), Exhibit B (Proposed Organizational Structure).

[7] Tr. Vol. 9, p. 61 (Roberts/Paul Joint Reb., Addendum II – Regulatory Conditions).

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[redacted] **[END AEO CONFIDENTIAL]**

The anticipated organization and managerial control of the utility operations is depicted in the chart introduced into evidence as Village Roberts Direct Cross Exhibit 2 (Confidential) (Tr. Vol. 4, Exhibits). This chart depicts the complex web of relationships between the various SharpVue affiliates. As SharpVue witness Mr. Roberts explained:

> The SharpVue management team of Lee Roberts and Doug Vaughn will own and/or directly control over 50% of the investments in Pelican Legacy Holdings, LLC, will be Managers for all affiliated entities (along with Chad Paul for Pelican Legacy Holdings, LLC and thus BHIFT), and be the decision makers, along with Chad Paul, for all assets and operations owned and controlled by Pelican Legacy Holdings, LLC, including the regulated assets owned and operated by BHIFT.[10]

However, none of the organizational documents explaining the rights and responsibilities

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[8] Tr. Vol. 3, p. 132 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[9] *See* Wright Testimony at Exhibit JAW-9, SharpVue Responses to Village Data Requests No. 3, at Nos. 3, 4, 5, 6, and 7.

[10] Tr. Vol. 3, p. 24 (Roberts Amended Dir.).

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of the parties in the chain of management and control ultimately vested in Mr. Roberts and Mr. Vaughn were entered into evidence.[11]

B. Limited's Intention to Exit the Utility Business

The principal justification for the proposed transaction, and the main asserted benefit thereof, is Limited's stated desire to exit the utility business as part of its ongoing efforts to divest itself of its investments and operations on the Island.[12] Further, the Applicants contend that Limited's ultimate owner, the Estate of George Mitchell, no longer wants to operate the transportation system and that the lingering ownership of the assets is an impediment to closing the Estate.[13]

George Mitchell, recognized as the "father of fracking" due to his role in commercializing hydraulic fracturing technology,[14] was the original developer of the Island and the chief architect of Island's approach to development and its focus on environmental conversation and preservation. Mr. Mitchell's oil and gas firm was purchased in 2002 for $3.1 billion, and as of 2004 he was listed in *Forbes* magazine as among the 500 richest people worldwide.[15]

Limited, through Mr. Chad Paul, has stated its desire to exit from its operations on

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[11] The Village sought to introduce corporate governance documents of SharpVue and its affiliates at the hearing, however the Presiding Commissioner declined to admit the documents into the record at that time due to concerns stated by SharpVue and the Public Staff that the documents were not yet finalized, instead "leav[ing] the record open for the submission of those documents" "at the appropriate time when they're finalized." Tr. Vol. 5, pp. 9–13.

[12] Tr. Vol. 2, pp. 21–22 (opening statement from BHIT/Limited's counsel) (stating that the transfer from one owner to another is the "overriding benefit" of the transfer).

[13] *See, e.g.*, Tr. Vol. 3 (Roberts Amended Dir.).

[14] *See* Tr. Vol. 2 (Exhibits) at Village Paul Direct Cross Exhibit 1.

[15] *Id.*

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the Island. However, there is no evidence supporting such in the record from the Mitchell family or any representative of the Estate.[16] Certainly no evidence was presented that Limited's owner is under financial distress in any fashion or otherwise not capable of supporting the operations of the utility. The only testimony about the Mitchell Family is from Mr. Paul,[17] but Mr. Paul made clear that he was not authorized to speak for the Mitchells, and he is only authorized to speak for Limited.[18] Any inferences or argument regarding the intentions of the Estate have no basis in the evidentiary record.

C. SharpVue's Proposed Financing

[BEING AEO CONFIDENTIAL] [redacted]

[16] Tr. Vol. 2, p. 55 (Paul Dir.).
[17] Tr. Vol. 2, p. 4 (Paul Dir.).
[18] Tr. Vol. 2, p. 55 (Paul Dir.).
[19] *See* Tr. Vol. 5, p. 123 (Lloyd Dir.).
[20] *Id.* at pp. 123, 125.
[21] *Id.* at pp. 167-68.
[22] *Id.* at p. 159. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** *See also* Tr. Vol. 4 (Exhibits), at Confidential Village Roberts Dir. Cross Exhibit 11, p. 204.

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[redacted] **[END AEO CONFIDENTIAL]**

D. The Existing Consolidated Transportation System Is Substantially Overearning

There is no factual dispute that Limited is collecting excessive revenues from the transportation system and earning an excessive return on the combined utility assets. The Village, through the testimony of witness Julie Perry (adopting the direct testimony of witness O'Donnell), established that Limited is earning a return on its rate base far above what a regulated utility is allowed to earn. Applicants did not provide a single piece of

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[23] Tr. Vol. 5, p. 121 (Lloyd Dir.).
[24] *Id.* at pp. 121-22.
[25] **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**
[26] Tr. Vol. 5, p. 178 (Lloyd Dir.).
[27] *See id.* at p. 127 **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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evidence contradicting the calculations of Ms. Perry. Quite the opposite, Applicants' expert John Taylor offered revenue calculations that *confirm* Limited is collecting excessive revenues.

Using the audited financial information provided by Limited in discovery, the Village's expert witnesses were able to calculate the return on Limited's rate base for 2021.[28] First, the Village calculated a total rate base of $9.25 million for the consolidated transportation system's assets.[29] Second, the Village calculated the net operating income of $2.45 million from these same assets.[30] The result is a return on investment of 26.5%.[31] As stated by Ms. Perry, Limited is earning a profit "significantly above that which would typically be permitted in a rate proceeding . . . ."[32]

In Exhibit KWO-3 to Ms. Perry's testimony, she provides the details of her calculation, which reveal that the revenues from the parking and barge operations are driving the excessive returns for the transportation system. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Importantly, the Applicants did not provide any evidence that contradicted the

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[28] Tr. Vol. 4, p. 183 (O'Donnell Dir., as adopted by Perry).
[29] Tr. Vol. 4, p. 168 (Perry Cross).
[30] Tr. Vol. 4, p. 183 (O'Donnell Dir., as adopted by Perry).
[31] Tr. Vol. 4, p. 190 (Perry Dir.).
[32] *Id.*
[33] Tr. Vol. 4 (Exhibits), KWO-3.

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Village's calculations of Limited's rate base, net operating income, or the return on investment using 2021 data. In fact, Applicants did not provide *any evidence whatsoever* on Limited's rate base, net operating income, or the return on investment.[34] Thus, the record contains only the Village's calculation of Limited's returns—which are supported by Limited's financial records and workpapers that are attached to Ms. Perry's testimony—that shows Limited has been earning excessive returns on its utility assets. Given the express testimony by a competent expert backed by detailed analysis and support from the record, this analysis must be accepted as true.[35]

In fact, the Applicants' expert witness John Taylor presented [**BEGIN AEO CONFIDENTIAL**] [redacted]

[34] The Public Staff did not opine on the calculations because the expedited procedural timeline demanded by Applicants precluded the Public Staff from having sufficient time to audit BHIL's financials. *See* Tr. Vol. 6, p. 233 (Public Staff Joint Cross) ("And we would think through those when we perform an audit, which we've stated that we're not doing at this point in time because of the time restraints associated with all of it.").

[35] *See, e.g., Complaint of DPI Teleconnect, LLC, Against BellSouth Telecomm., Inc.,* Docket No. P-55, Sub 1577, 2008 WL 747721, at *1 (Mar. 7, 2008) ("[F]act was uncontested by [Complainant] at the hearing and unrebutted in its post hearing brief. The Commission assumes that, if [Complainant] had any contradictory evidence, it would have brought that evidence to our attention. This fact is dispositive.").

[36] *See* Tr. Vol. 8 (Exhibits), Confidential Taylor Rebuttal Cross Exhibit 1; Tr. Vol. 8, p. 15:16–16:4; 20:20–21:14 (Taylor Confidential Cross).

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[redacted] **[END AEO CONFIDENTIAL]**

E. The Applicants Seek to Leverage the Existing Overearnings to Recover Asset Valuations from Ratepayers, Which Are Not Justifiable for Regulated Assets.

The root of the regulatory issue at play in this proceeding is the Applicants' plan to leverage the existing overearnings to force increases in future rates to be paid by ratepayers.

The Applicants claim that SharpVue is proposing to buy the transportation system assets for the sum of **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** There are serious and substantial questions concerning the bona fides of purported valuation, however, and the

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[37] Tr. Vol. 8 (Exhibits), Confidential Taylor Rebuttal Cross Exhibit 1, at line 38.

[38] Tr. Vol. 8, pp. 15–16; 20–21 (Taylor Confidential Cross). **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** *See id.* 20–21.

[39] Tr. Vol. 8 (Exhibits), Confidential Village Taylor Rebuttal Cross Exhibit 1, at line 37.

[40] *See also* Tr. Vol. 8, p. 22 (Taylor Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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circumstances of the transaction—in which SharpVue is buying a bundle of assets including the transportation system assets as well as other unrelated assets which it will seek to commercially develop—raises risk of "gamesmanship" whereby parties to the transaction allocate a disproportionate amount of the overall transaction price to the regulated assets in hopes that the investment can be recovered from ratepayers rather than put at risk through private risk capital. The Applicants have not justified their purchase price. Thus, SharpVue has focused on the parking, which it claims is worth **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** There is no evidence to justify this valuation, however.

The record evidence shows:

- SharpVue's purchase price is nearly ten million more than Bald Head Island Transportation Authority's proposed purchase price—a price the Local Government Commission rejected for being too high.[42]

- The ferry operation, standing alone, is losing money. BHIT's year-end 2022 annual financial report shows a net operating income yearly loss of ($1,331,608) and its most recent quarterly report for Q1 2023 shows a quarterly loss of ($745,486), including interest.[43]

- SharpVue never secured an independent appraisal of the assets, instead

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[41] Tr. Vol 4 (Exhibits), KWO-6.

[42] Tr. Vol. 4, p. 77–78 (Gardner Dir.) (describing Local Government Commission's concerns and also noting that the purchase price exceeds the tax valuation of the assets). *See also* Tr. Vol. 3, p. 122:13–15 (Roberts Confidential Cross).

[43] BHIT Annual Report, Docket No. M-2, Sub 2023A (Apr. 28, 2023); BHIT Quarterly Financial Report, Docket No. A-41, Sub 7A (May 4, 2023). *See also* Tr. Vol. 6, p. 202 (Public Staff Joint Cross) ("The transportation system has been losing money for years . . . . Q. So Mr. Hinton, when you say the transportation systems, you mean all three components? A. The ferry system. No, just the ferry system.").

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relying on appraisals Limited procured and paid for.[44]

- The purported valuation of the assets greatly exceeds tax values.[45]

- Earlier appraisals valued the entire 52.6 acre Deep Point parcel at $10.5 million.[46] The 36 acre parking lot component of that larger parcel is thus presumably worth $7.14 million. A later appraisal valued the parking at $4 million.[47]

[BEGIN AEO CONFIDENTIAL] [redacted] **[END AEO CONFIDENTIAL]** But this appraisal valued the parking and barge operations as unregulated enterprises and, therefore, any appraisal based on the amount of revenue SharpVue could earn if these were unregulated is no longer correct—as the appraisal itself repeatedly emphasizes that it analysis assumes that the assets are not subject to regulation. In this regard, the Applicants' emphasis on this appraisal as definitely supporting the parking valuation is highly misleading.[49]

SharpVue has strong incentives to allocate the bulk of the purchase price to the parking facilities. As discussed, SharpVue hopes to recover its purchase price by having

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[44] Tr. Vol 4 (Exhibits), at Scott Gardner Exhibit 1, SharpVue Responses to the Village's Second Set of Data Requests, DR 2-29.

[45] Tr. Vol. 6, p. 29 (Wright Dir.) (citing Exhibits JAW-2, JAW-3, JAW-4, JAW-5, and JAW-6); Tr. Vol. 4, p. 77 (Gardner Dir., at 4). *See also* Tr. Vol. 9, p. 24 (Roberts/Paul Joint Reb.), at note 2 ("Dr. Wright is correct that . . . these appraised values were higher than the Brunswick County assessed property tax value . . . .").

[46] Tr. Vol. 9 (Exhibits), at LHR/CAP Rebuttal Exhibit 1.

[47] Tr. Vol. 9 (Exhibits), at LHR/CAP Rebuttal Exhibit 4.

[48] Tr. Vol. 9 (Exhibits), at Confidential LHR/CAP Rebuttal Exhibit 6.

[49] *See* Tr. Vol. 9, p. 26 (Roberts/Paul Joint Reb.) ("[W]e believe this is the most accurate valuation of the transportation system assets at issue in this docket").

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it included in rate base. And if the parking operation is not regulated, SharpVue can recover its purchase by extracting the value from consumers, who must pay whatever parking rates SharpVue demands in order to be able to ride the ferry to access their homes or jobs.

F. SharpVue's Plans for the Transportation System

Publicly, SharpVue has offered very few details about its plans for operating the transportation system should its purchase be approved. SharpVue refuses to commit to any improvements to the system until the sale has closed.[50] SharpVue has not offered any quantifiable benefits to customers.[51] **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

SharpVue has no plans or commitments to implement service or capital improvements—instead, it simply says that it will maintain the current operational status quo by retaining existing management and employees.[54] Indeed, as Mr. Paul testified, "our

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[50] Tr. Vol. 3, p. 16:10–13 (Roberts Amended Dir.).

[51] *See discussion infra* Section II.B.

[52] *See, e.g.,* Tr. Vol. 7 Exhibits (Village Public Staff Cross Exhibit 1) (SharpVue stating in data response that "we cannot commit to a particular hold period as we have fiduciary duties to our investors." (Tr. Vol. 3, pp. 79:5–80:23 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[53] *Id.* at p. 63:5–8.

[54] Tr. Vol. 2, p. 22:8–23:19 (opening statement from BHIT/Limited's counsel) (citing as benefits maintaining the same number of parking spots and providing funds to maintain the system).

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passengers will not notice any difference in the parking, ferry, tram, or barge services" once SharpVue owns the system.[55]

Setting aside, for the moment, whether the perpetuation of operations on a stauts quo basis is accretive to the public interest, SharpVue's repeated, clear and consistent communications with its investors tell a markedly different story about SharpVue's plans for the system.[56] **[BEGIN AEO CONFIDENTIAL]** [redacted]

[55] Tr. Vol. 2, p. 44:11–18 (Paul Dir.).

[56] SharpVue has shielded much of this process from public view by broadly designating documents as "ATTORNEYS EYES ONLY – CONFIDENTIAL." Thus, members of the public, including the Village's elected representatives and employees, have been unable to review and comment on SharpVue's plans.

[57] Tr. Vol 5, p. 122:5–11 (Lloyd Dir.); Tr. Vol. 3 (Exhibits), at Village Roberts Direct Cross Exhibit 4 Confidential through Village Roberts Direct Cross Exhibit 11 Confidential.

[58] *See* Tr. Vol. 3 (Exhibits), at Confidential Village Roberts Dir. Cross Exhibit 4, pg. 4.

[59] *Id.*

[60] *Id.*

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[61] Tr. Vol. 3, p. 50 (Roberts Cross).
[62] Tr. Vol 5, p. 122:16–21 (Lloyd Dir.).
[63] *See* Tr. Vol. 3 (Exhibits), at Village Roberts Direct Cross Confidential Exhibit 5, pg. 4.
[64] Tr. Vol. 3, p. 29:12–16 (Roberts Cross); *See* Tr. Vol. 3 (Exhibits), at Village Roberts Direct Cross Confidential Exhibit 1.
[65] Tr. Vol. 3 (Exhibits), at Village Roberts Direct Cross Confidential Exhibit 5, pg. 4.
[66] *Id.*

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[67] *Id.*
[68] Tr. Vol. 3, pp. 84–85 (Roberts Confidential Cross).
[69] Tr. Vol. 2, pp. 77–78 (Paul Confidential Cross).
[70] Tr. Vol. 3, pp. 84–85 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**
[71] Tr. Vol. 2, p.76 (Paul Confidential Cross).

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[72] Tr. Vol. 2 (Exhibits), Confidential Village Paul Direct Cross Exhibit 4, at SHARPVUE-0577.

[73] Tr. Vol. 3, p. 69 (Roberts Confidential Cross).

[74] Tr. Vol. 3, pp. 50, 61, 84 (Roberts Confidential Cross).

[75] Tr. Vol. 2, p. 88 (Paul Confidential Cross).

[76] Tr. Vol. 7, p. 15 (Hinton Confidential Cross).

[77] Tr. Vol. 7, p. 16 (Hinton Confidential Cross).

[78] *See* Tr. Vol. 2, p. 88 (Paul Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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[END AEO CONFIDENTIAL]

G. SharpVue Is Highly Incented By Its Compensation Structure to Pursue a Short-Term Strategy

[BEGIN AEO CONFIDENTIAL]

[79] *See generally* Tr. Vol. 5, pp. 120–121 (Lloyd Confidential Dir.).

[80] *Id. See also* Tr. Vol. 5 (Exhibits), Exhibit JLL-3 (SharpVue March 2022 Investment Opportunity Presentation), at 7.

[81] Tr. Vol. 5, pp. 120–121 (Lloyd Confidential Dir.).

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[redacted] **[END AEO CONFIDENTIAL]**

H. The Applicants Have Refused to Accept the Commission's Assertion of Regulatory Jurisdiction over the Consolidated Transportation Operations.

In this proceeding, Applicants have asked the Commission to approve the transfer of the ferry system, including the parking and barge. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** At the same time, however, Limited and SharpVue have made clear that they do not acquiesce to the Commission's authority and they continue to actively dispute and litigate the Commission's authority.[84]

The Applicants' ongoing litigation against the Commission's Sub 21 Order creates additional risk for ratepayers and undermines the value of certain "commitments" suggested by those parties in support of the transaction. **[BEGIN AEO CONFIDENTIAL]** [redacted]

[82] Tr. Vol. 9 (Exhibits), at Confidential Village Roberts-Paul Rebuttal Cross Exhibit 1.

[83] Tr. Vol 2, pp. at 87–88 (Paul Confidential Cross); Tr. Vol. 3, pp. 80, 124–125 (Roberts Confidential Cross); Tr. Vol. 4, p. 33 (Roberts Confidential Commissioners' Questions).

[84] *See* Tr. Vol. 9 at 123–124 (Roberts/Paul Joint Reb.).

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[redacted] **[END AEO CONFIDENTIAL]** Similarly, SharpVue has agreed not to seek a rate change for the ferry and tram services for a year (notably omitting any commitment not to seek a rate change for the parking and barge).[87] But SharpVue has expressly "reserved its right" to seek a rate change if the Sub 21 Order is affirmed.[88]

If Applicants are allowed to acquire the currently regulated assets and operations, parking could be sold out from under ratepayers to the "highest bidder"; parking and barge rates could be increased to recover acquisition premium; the barge service could be sold to an entity outside the Commission's regulatory authority; parking could be moved to an offsite location, significantly impacting the public's experience and making access to the Island more burdensome and expensive. These are not idle concerns—these are precisely the sort of actions that would be taken by a private equity firm, bound by its obligations to its investors, freed from regulatory constraints.

I. Lack of Public Support

The Island is close-knit, relatively small community. The public is keenly interested in the Island's affairs and have multiple direct sources of information relevant to these affairs, including from the Village, the Bald Head Association ("BHA"), the Club, and

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[85] Tr. Vol. 3, p. 64:10–65:7 (Roberts Confidential Cross).
[86] *Id.*
[87] Tr. Vol. 3, p. 16:15–20 (Roberts Amended Dir.).
[88] *See id.* ("If the Commission's Order in Docket No. A-41, Sub 21 is affirmed, SharpVue reserves the right to advocate for appropriate rate changes as the circumstances may warrant.").

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from Limited itself. In such a community, public support is very important to the success of every public project.

For example, on July 27, 2022, BHA sponsored a public forum to discuss the proposed transaction, where Mr. Roberts and Mr. Paul were able to speak directly to the public about their plans for operating the utility.[89] However, in a survey conducted by the BHA *after that public meeting* of its over 1,500 property owner members only 23% of the respondents supported the transfer of the certificate to SharpVue, while 56% opposed the transfer and another 22% did not have sufficient information to form an opinion.[90]

Similarly, at the public hearing in Bolivia, NC on November 1, 2022, there was strong public sentiment against the transaction. Mr. Pope spoke from the perspective of a business owner and larger user of the transportation system, stating:

> I have not seen evidence yet that SharpVue is a capable operator and one that would be customer focused. Indeed, SharpVue Capital is really not an operator at all. They are quite simply an investment organization.[91]

Ms. Scagnelli testified against the transaction from the perspective of citizens with modest means (being a retired social worker) and their ability to continue to access the Island under private equity ownership.[92]

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[89] Tr. Vol. 4 (Exhibits), at Scott Gardner Exhibit 1, SharpVue Responses to the Village's Second Set of Data Requests, Request 2-28; Tr. Vol. 3, p. 36 (Roberts/Paul Joint Reb.) ("Mr. Paul and I answered questions for more than two hours at an island forum sponsored by the Bald Head Island Association, at which the mayor attended.").

[90] Tr. Vol. 4, p. 77 (Gardner Dir.) (noting that "the survey results are generally consistent with my communications with Islanders – there is significant concern with, and unanswered questions about, this transaction and the public does not perceive the proposal, as currently framed, as serving the Island's long-term best interests"); Tr. Vol. 4, pp. 107–08 (Gardner Supp. Dir.).

[91] Tr. Vol. 1, p. 44.

[92] Tr. Vol. 1, pp. 82–92.

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Mr. Belch testified as regards the primary concern of private equity firms to "maximize income, potentially limit services, and minimize needed reserves."[93]

Mr. Rausch testified of his love of the Island community, described the consolidated system as a "three-legged stool" as the core of the Island, and his concern that acquisition by an entity whose primary concern is for investors could harm the Island community.[94]

Mr. Hagland testified from the perspective of a full-time resident and 20-year visitor.[95] He emphasized the need for a "financial stability" of the transportation operation, access to needed capital, and the affordability of the services, testifying:

> I know a decent amount about private equity and the private equity need for premium returns to their investors, and I'm concerned that the main interest in the Island is getting people and commerce back and forth and not necessarily in fulfilling private equity's premium returns.[96]

Mr. Brawner testified[97] concerning the critical importance to access to the ferry, barge and parking services as part of the interconnection suite of transportation services "support[ing] life totally . . . on Bald Head Island." He expressed his concerns and support for the continued regulation of all aspects of the transportation system should SharpVue be the buyer and whether SharpVue had plans and the means to make necessary improvements to service.

Although it is true that three citizens did support the transaction at the public

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[93] Tr. Vol. 1, pp. 76–81.
[94] Tr. Vol. 1, pp. 70–75.
[95] Tr. Vol. 1, pp. 34–41.
[96] Tr. Vol. 1, p. 38.
[97] Tr. Vol. 1, pp. 26–34.

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hearing, none of the witnesses disputed the service issues described by other witnesses, Mr. Fisher and Mr. Cowdry spoke from their perspectives as members of the Transportation Authority and their dissatisfaction with its efforts to acquire the system assets,[98] and Ms. Stephen spoke from the perspective of a 30-year family friend of Mr. Roberts.[99]

Additionally, the evidence shows that SharpVue has not made efforts to reach out to the larger users of the transportation system to solicit their views about the needs and concerns of the system's operation.[100] For example, Mr. Gardner testified:

> There has been no communication that I am aware of where SharpVue has solicited the Village's input concerning current operations of the transportation assets, its concerns regarding the proposed transaction, and measures that might be implemented to address these concerns. This is surprising given the obvious need for the parties to work together should the transaction be consummated and the fact that the Village would be one of SharpVue's largest customers.

This testimony was not challenged on cross-examination or in rebuttal testimony. Similarly, Claude Pope, owner of the Maritime Market on the Island, testified as to his concerns that SharpVue had not reached out to assess the needs and concerns of its largest customers.[101] And Mr. Paul made no effort to reach out to Mr. Belch as regards his dredging concerns, despite the Presiding Commissioner's direct request that Limited do so and Limited's promises to comply.[102]

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[98] Tr. Vol. 1, p. 19 (Fisher) and p. 93-95 (Cowdry).
[99] Tr. Vol. 1, p. 23.
[100] *See* Tr. Vol. 4, p. 80 (Gardner Dir.).
[101] Tr. Vol. 1, p. 46.
[102] Tr. Vol. 1, pp. 105-106; Tr. Vol. 2, pp. 50–52 (Paul Cross).

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J. The Village's Concerns Are Articulated in the Record of this Proceeding

The Village has consistently expressed its concerns regarding this transaction, concerns which have effectively been ignored by the Applicants.[103]

Bald Head Island is uniquely dependent on the ferry system.[104] Because the Island is inaccessible by car, the ferry and the barge are the only way to access the Island, and its economy, residents, visitors, and workers depend on the ferry system.[105] There is no alternative to the ferry system—everyone who visits the Island must arrive by ferry or boat. Thus, every visitor to, resident of, and worker whose job is on the Island is at the mercy of the ferry system's owner.

Accordingly, this transfer is a watershed event for the Island, with enormous consequences for its future. No party has identified, and the Village is not aware of, any similar transfer in the Commission's history involving monopoly assets which are the lifeblood of all aspects of a geographic area and where the assets are not replicable given barriers to entry such as access to suitable alternative harbors and navigable waters.[106] In

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[103] *See, e.g.*, Tr. Vol. 4, p. 106 (Gardner Supp. Dir.) ("SharpVue has made no effort to work with the Village to address its concerns. There has been no communication that I am aware of where SharpVue has solicited the Village's input concerning current operations of the transportation assets, its concerns regarding the proposed transaction, and measures that might be implemented to address these concerns.").

[104] Tr. Vol. 6, p. 19:21–20:5 (Wright Dir.); Tr. Vol. 2, p. 21 (opening statement of counsel for BHIT and Limited, explaining that "there are many, many factors in this case that make it unique. . . . [I]t is so unique in many different ways when you have a significant asset with multiple competing bidders that would like to purchase it."); Sub 21 Order, at ¶¶ 8-9.

[105] Sub 21 Order, at ¶ 36.

[106] Tr. Vol. 2, p. 25:10–16 (opening statement of counsel for BHIT/Limited) (stating that transfer is "unique" and "unprecedented").

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addition to the unique nature of the ferry system, the transfer is complicated by the fact that the buyer is a private equity firm—rather than a utility—and the regulatory status of the parking facilities and operations and the barge assets and operations is in flux due to Applicants' appeal.[107]

As a protector of the Island, the Village is concerned:[108]

- That SharpVue will be more concerned with the interests of investors than those of the public.
- That SharpVue will not make sufficient investments in the system to address known service issues and otherwise make necessary service improvements.
- That SharpVue will manipulate its ownership structure to the detriment of ratepayers by extracting an acquisition premium from the captive public.
- That SharpVue will seek to leverage the utility assets for short-term financial gains for itself and its investors, by, for example, seeking to sell or lease pieces of the consolidated transportation system.

Again, these are not idle concerns. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Given the potential consequences to the Island, as well as the overwhelming public sentiment against the transfer,[109] the Village intervened in an effort to ensure the continued operation of the transportation system, without disruption and at reasonable and fair rates.

As discussed herein, the evidence does not support a conclusion that SharpVue

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[107] *See* Tr. Vol. 4, pp. 76–77 (Gardner Dir.) (summarizing concerns with transaction).

[108] Tr. Vol. 4, pp. 100–02, 104–06 (Gardner Supp. Dir.); Tr. Vol. 4, pp. 90–97 (Gardner Dir.).

[109] Tr. Vol. 4, p. 77 (Gardner Dir.) (summarizing results of survey regarding transfer, in which only 23% of residents supported the transfer).

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intends to—or, as the deal is presently constructed, be able to—run the ferry system in the best interests of the Island or the ferry riding, Deep Point parking and barge using public; therefore, the transfer application should be denied. In the alternative, and at a minimum, if the Commission were to approve the transfer, certain concerns such as the acquisition premium, rate base, and risks and lack of benefits to customers must be addressed at this stage.

ARGUMENT

I. THE COMMISSION'S GENERAL "MERGER" STANDARD UNDER SECTION 62-111(a) APPLIES TO THIS TRANSACTION.[110]

A. All Parties Agree that the Public Convenience and Necessity Standard of G.S. § 62-111(a) Applies to the Proposed Transfer.

All parties have cited G.S. § 62-111(a) as the appropriate legal standard to be applied by the Commission in this proceeding.

The Applicants' initial Application filed July 14, 2022, and Amended Application filed January 24, 2023, each cited G.S. § 62-111(a) as the "applicable legal standard."[111] The testimony of the Public Staff[112] and the Village[113] each agreed that G.S. § 62-111(a) is the appropriate standard to be applied by the Commission in this proceeding.

Under Section 62-111(a):

> No franchise now existing or hereafter issued under the provisions of this Chapter other than a franchise for motor carriers of passengers shall be sold, assigned, pledged or

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[110] This section responds to the request of the Presiding Commissioner at the hearing for briefing on the legal standard that should be applied by the Commission to the Amended Application. *See* Tr. Vol. 6, pp. 270-71.

[111] *See* Amended Application, at 8.

[112] *See* Tr. Vol. 6, pp. 133-34 (Public Staff Joint Dir.) (citing G.S. § 62-111(a) as the appropriate standard).

[113] *See* Tr. Vol. 6, p. 22 (Wright Dir.).

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> transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition of control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity.

(emphasis added). The term "franchise" is broadly defined under Chapter 62 to include any "grant of authority by the Commission to any person to engage in business as a public utility" including "certificates, and all other forms of licenses or orders and decisions granting such authority." N.C.G.S. § 62-3(11). Accordingly, by the express language of the statute, the common carrier certificate held by BHIT authorizing the operation of the Bald Head Island transportation system as a public utility[114] constitutes a "franchise" under Section 62-111(a) which cannot be "sold, assigned, pledged or transferred" without the Commission's prior approval.

B. The Commission's Three-Part Test Used to Determine Whether a Proposed Business Combination Is Justified by the Public Convenience and Necessity Applies Here.

In the context of utility mergers,[115] the Commission has articulated and applied a three-part test for determining whether a proposed utility merger is justified by the public

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[114] *See Order Granting Common Carrier Authority*, Docket No. A-41, Sub 0 (Jan. 6, 1995). As previously noted, in the Sub 21 Order the Commission permitted temporary operation of parking and barge under color of the Common Carrier Certificate. Sub 21 Order, at 28 ("[T]he Parking and Barge Operations are granted temporary authority to operate in the interim pending any future proceeding.").

[115] *See Order Approving Merger Subject to Regulatory Conditions & Code of Conduct*, Docket Nos. E-2, Sub 1095, E-7, Sub 1100, and G-9, Sub 682 (Sept. 29, 2016) (Duke Energy Corporation/Piedmont Natural Gas); and *Order Approving Merger Subject to Regulatory Conditions & Code of Conduct*, Docket Nos. E-22, Sub 551 and G-5, Sub 585 (Nov. 19, 2018) (Dominion Energy/SCANA).

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convenience and necessity under Section 62-111(a). This test includes consideration of:

> (1) Whether the merger would have an adverse impact on the rates and services provided by the merging utilities;
>
> (2) Whether ratepayers would be protected as much as possible from potential costs and risks of the merger; and
>
> (3) Whether the merger would result in sufficient benefits to offset potential costs and risks.[116]

Although this test was first articulated in the context of a merger proceeding, the test represents the Commission's accepted interpretation of the statutory standard, and it has been applied to a range of transfers under G.S. § 62-111(a), including transfers of control through stock purchases and sales[117] and other transfers of control.[118]

All parties agree that this three-factor test applies to the transfer of the Bald Head Island transportation system. For example, SharpVue and BHIT's Application and Amended Application both cite the three-part test as the relevant test in this transaction:

> In applying [the] statutory merger approval standard [of G.S. § 62-111(a)], the Commission has concluded that a proposed business combination is justified by the public convenience and necessity where: (i) the transaction will have no adverse impact on North Carolina retail ratepayers; (ii) the utility's customers are protected as much as possible from potential costs and risks resulting from the transaction; and (iii) there are sufficient benefits from the proposed transaction to offset

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[116] *Id.* at 68.

[117] *See Order Approving Merger Subject to Regulatory Conditions Order*, Docket No. G-40, Sub 160 (Nov. 22, 2021) (applying three-factor test to sale of Frontier Natural Gas to Ullico Infrastructure Hearthstone Holdco, LLC); *Order Approving Merger Subject to Regulatory Conditions,* Docket No. G-40, Sub 136 (Aug. 1, 2017), at 18-19 (applying three-factor test to sale of Frontier Natural Gas to Blackrock).

[118] *See Order Approving Transfer Subject to Conditions,* Docket No. E-22, Sub 418 (Apr. 19, 2005), at 11-12 (applying the three-factor test to the proposed transfer of control over Dominion's transmission and generating assets to PJM).

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the potential costs and risks.[119]

Similarly, the Public Staff's witnesses testified that "[t]he Public Staff believes the Commission's three-part test for determining whether a proposed merger is justified is also appropriate in determining the appropriateness of the Proposed Transfer."[120] The Village agrees.[121]

C. The Test Enunciated in G.S. § 62-111(e) for Transfers of "Highly Specialized" and "Highly Competitive" Motor Carriers does not apply to the Bald Head Island Transportation System.

In contrast to the general public convenience and necessity standard under G.S. § 62-111(a), Section 62-111(e) provides a narrow carve-out for transfers of motor carriers. Specifically, Section 62-111(e) applies a looser standard that favors transfer "without undue restraint" due to the "highly specialized" and "highly competitive" nature of the motor carrier industry.[122]

Whereas Section 62-111(a) is applicable to any franchise "other than a franchise for motor carriers of passengers," Section 62-111(e) only applies to "applications for transfer of motor carrier franchises . . . ." In *Village of Pinehurst,* the Court of Appeals

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[119] *Application for Transfer of Common Carrier Certificate*, Docket No. A-41, Sub 22, at 7 (July 14, 2022); *Amended Application for Transfer of Common Carrier Certificate*, Docket No. A-41, Sub 22, at 8–9 (Jan. 24, 2023).

[120] Tr. Vol. 6, p. 133–34 (Public Staff Joint Panel Dir.).

[121] *See* Tr. Vol. 6, p. 22 (Wright Dir.) ("Given that the Applicants cited this standard in their application, it is not disputed that this is the applicable standard.").

[122] *State ex rel. Utils. Comm'n v. Vill. of Pinehurst*, 99 N.C. App. 224, 228, 393 S.E.2d 111, 114 (1990), *aff'd per curiam*, 331 N.C. 278, 415 S.E.2d 199 (1992) (citing *Utils. Comm. v. Express Lines*, 33 N.C. App. 99, 234 S.E.2d 628 (1977). *See also* G.S. § 62-111(e) (the Commission "shall approve" proposed motor carrier transfers so long as (1) the transfer "will not adversely affect the service to the public," (2) the transfer "will not unlawfully affect the service to the public by other public utilities," (3) the proposed transferee "is fit, willing and able to perform such service" and (4) service "has been continuously offered to the public up to the time of filing said application.").

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explicitly reiterated that "the plain language of G.S. § 62–111(e) unambiguously indicates the intent of the Legislature for that section to operate as a separate and distinct test, applying only to transfers of motor carrier franchises."[123]

Chapter 62 defines "motor carrier" as "a common carrier by motor vehicle."[124] A "motor vehicle" is "any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and used upon the highways within the State."[125] In turn, a "highway" is "any road or street in this State used by the public or dedicated or appropriated to public use."[126] Ferries—which transport passengers and property via *boats* over *water*, not "road[s] or street[s]"—clearly do not satisfy the statutory definition of "motor carriers." Accordingly, the narrow motor carrier carve-out of 62-111(e) is not applicable to the proposed transfer of the Bald Head Island transportation system.

Additionally, unlike seasonally-operated tour boats, the policy concerns animating Section 62-111(e) are directly at odds with the Bald Head Island transportation system's status as a *de facto* monopoly and an essential utility service.[127] In *Village of Pinehurst*, the Court of Appeals explained that Section 62-111(e) is a "narrow standard" designed to "favor[] transfers of actively operated motor carrier franchises without undue restraint,"

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[123] *State ex rel. Utils. Comm'n v. Vill. of Pinehurst,* 99 N.C. App. 224 at 230, 393 S.E.2d 111, at 115 (1990), *aff'd per curiam*, 331 N.C. 278, 415 S.E.2d 199 (1992).

[124] N.C.G.S. § 62-3(17).

[125] *Id.* § 62-3(18) (emphasis added).

[126] *Id.* § 62-3(12) (emphasis added).

[127] *See* Sub 21 Order, at 25 ("Based on a consideration of all of the evidence, the Commission finds that the Ferry, Parking, and Barge Operations function as interdependent components of a single transportation system upon which the community of Bald Head Island wholly depends.")

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due to the "*highly specialized*" and "*highly competitive* nature of the motor carrier industry."[128] In holding that Section 62-111(e) was not applicable to the transfer of a water or sewer franchise, the Court of Appeals further stated that:

> If anything, the subsequent amendment of G.S. § 62–111 to add subpart (e) more clearly reflects the Legislature's intent to create a separate test, applicable only to transfers of franchises within the highly specialized class of utilities made up of motor carriers. . . . Consequently, we cannot agree . . . that the "adverse effect" inquiry is properly applied as the ultimate standard to proposed transfers of water or sewer franchises. Were it otherwise, a bad operator, providing poor service at questionable rates to a captive public, could transfer his franchise—and perhaps profit from his own misdeeds—simply upon a showing that the proposed transfer would not make bad matters worse. We cannot believe that the General Assembly intended that the public be thus held hostage.[129]

Notwithstanding the clear limitation in Section 62-111(e), the Commission has, in a few instances, approved transfers of seasonally-operated, recreationally-focused tour boats with minimal scrutiny under Section 62-111(e). The Commission has done so despite seasonally-operated tour boats failing to meet multiple statutory requirements of section 62-111(e), including (1) not being motor carriers and (2) not being operated continuously prior to transfer. However, this is in keeping with the reduced need for regulatory oversight of tour boats that do not provide essential services and operate in a highly competitive industry, similarly to motor carriers.

For example, in Docket Nos. A-52, Sub 7 and A-74, Sub 0, the Commission

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[128] *Pinehurst*, 99 N.C. App at 228–29, 393 S.E.2d at 114 (emphasis added) (citing *Utils. Comm. v. Express Lines*, 33 N.C. App. 99, 234 S.E.2d 628 (1977)).

[129] *Id.* at 229, 393 S.E.2d at 114–15 (emphasis added).

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approved the transfer of a seasonally-operated tour boat franchise from Beach Bum, Inc. to Ferry Excursions, LLC under Section 62-111(e).[130] Far from operating as a traditional ferry service, the franchise was a "Seasonal Summer Business" with a total sale price of $131,000.[131] According to its website:

> We begin at 9 a.m., weather permitting, seven days a week, depending on the season. . . . Tours start with a minimum of 45 minutes up to 3 hour tours depending upon how much fun you want to have. . . .[132]

Despite (1) not being a motor carrier as required by Section 62-111(e), and (2) not being operating continuously prior to the transfer[133] as required by Section 62-111(e),[134] the Commission approved the transfer less than six weeks after the application was filed, with no hearing.[135]

The same tour boat franchise was sold approximately six months later to another operator.[136] Despite the new operator having purchased the franchise on October 31, 2013 (and ceasing operations as of the same date), a transfer application under Section 62-111(e)

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[130] *See Amended Transfer Application*, Docket Nos. A-52, Sub 7 and A-74, Sub 0 (April 29, 2013); *Order Approving Transfer*, Docket Nos. A-52, Sub 7 and A-74, Sub 0 (June 6, 2013).

[131] *Amended Transfer Application*, Docket Nos. A-52, Sub 7 and A-74, Sub 0 (April 29, 2013), at pp. 1–2.

[132] Island Ferry Adventures, About (https://islandferryadventures.com/about/) (last accessed on May 22, 2023).

[133] *See Amended Transfer Application*, Docket Nos. A-52, Sub 7 and A-74, Sub 0 (April 29, 2013), at p. 1.

[134] *See* G.S. § 62-111(e), (requiring, *inter alia*, "that service under said franchise has been continuously offered to the public up to the time of filing said application . . . .").

[135] *See Order Approving Transfer*, Docket Nos. A-52, Sub 7 and A-74, Sub 0 (June 6, 2013).

[136] *See Transfer Application*, Docket Nos. A-74, Sub 1 and A-40, Sub 2 (March 28, 2014), at p. 1 ("Ceased operations on October 31 upon sale of business + equipment to Outer Banks Ferry Service").

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was not filed until March 28, 2014.[137] On June 4, 2014, the transferee filed a handwritten letter requesting a name change in the same docket.[138] On August 7, 2014, without a hearing, the Commission issued an order approving (1) the sale (that had occurred on October 31, 2013), (2) the transfer (despite the fact that the franchise had not been operated for nine months), and (3) the name change.[139]

In contrast to the seasonally-operated tour boat transfers discussed above, the Bald Head Island transportation system is both essential to residents and businesses on Bald Head Island, as well as a *de facto* monopoly. Accordingly, none of the policy goals animating Section 62-111(e) apply to the transfer of the Bald Head Island transportation system, and Section 62-111(a) must be used in assessing whether or not to approve the transfer.

First, unlike seasonally-operated tour boats—which are by their nature recreational, and not essential—the Bald Head Island transportation system is the "lifeblood" of an island community, relied upon by property owners, vacationers, small business employees, contractors, tradespersons, and others.[140] In its Sub 21 Order, the Commission noted that "[w]hile a few BHI residents and visitors may travel to the Island by private boat, the only

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[137] *Id.*

[138] *See* Letter filed in Docket Nos. A-74, Sub 1 and A-40, Sub 2 on June 4, 2014 (Attachment 1 hereto).

[139] *See Order Approving Sale and Transfer and Name Change*, Docket Nos. A-40, Sub 2 and A-74, Sub 1.

[140] *See Order Ruling on Complaint & Request for Determination of Public Utility Status*, Docket No. A-41, Sub 21 (Dec. 30, 2022), at 8 ("The Barge Operations are the 'lifeblood' to construction on the Island, and the Barge schedule dictates construction, inspection, and real property closing schedules on the Island. . . . During major emergencies, such as tropical storms or hurricanes, the Ferry and Barge Operations often coordinate to evacuate persons and property.").

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means of public access to and from the Island is via the Ferry and Barge Operations."

Second, the Commission has determined that the Bald Head Island transportation system is a *de facto* monopoly. In the Sub 21 Order, the Commission found that "at present, both the Parking and Barge Operations are operating as de facto monopolies and that Island residents, visitors, and other Ferry customers are captive to the same. . . ."[141]

Accordingly, the policy goal of G.S. § 62-111(e)—relaxing public convenience standards in order to not impede the transfer of "highly competitive" motor carrier franchises—is directly at odds with reality of Bald Head Island and its transportation system, and the standards of section 62-111(a) should properly apply.

II. THE COMMISSION SHOULD DENY THE APPLICATION BECAUSE NO PRONG OF THE TRANSFER STANDARD IS MET.

As shown above, the Applicants must demonstrate that (1) the transaction will not have an adverse impact on rates and services, (2) ratepayers will be protected "as much as possible" from potential costs and risks, and (3) the transaction will result in sufficient benefits to offset costs and risk. Despite conceding that the three-prong test applies, SharpVue has not made an appropriate evidentiary showing to support a finding that it has satisfied any of the three elements of the test. This Section addresses the Commission's application of this test, based on precedent, to the transaction as proposed by Applicants in their testimony. Section III *infra* discusses the application of this test specifically to the Settlement Stipulation between the Public Staff and the Applicants.

[141] *Id.* at 27.

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A. Commission Precedent Requires the Applicant to Demonstrate Tangible, Measurable Benefits to Ratepayers.

In prior merger and transfer proceedings, the Commission has required the applicants to demonstrate tangible and quantifiable ratepayer benefits to satisfy the statutory transfer standard.[142] For example, when Ullico Infrastructure Hearthstone Holdco, LLC ("Ullico"), a private infrastructure investment fund, sought to purchase Frontier Natural Gas Company ("Frontier"), the Commission required proof of quantifiable benefits supporting the transaction.[143] In assessing potential benefits under prong three, the Commission credited the merger with giving Frontier continued access to capital at the same or lower rates than would otherwise be available, including being supported by Ullico's $3 billion infrastructure fund, but nonetheless required Ullico to provide a direct, quantifiable financial benefit to ratepayers in the form of a $200,000 bill credit to Frontier's North Carolina customers.[144] And not all Commissioners agreed that the $200,000 credit to ratepayers was a sufficient benefit, with two commissioners contending that ratepayers were owed *more* "[g]iven the relative financial scale of this acquisition and the relative size

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[142] *See* Order Approving Merger Subject to Regulatory Conditions Order, *In re Joint Application of Frontier Nat. Gas Co. & Ullico Infrastructure Hearthstone Holdco, LLC, for Approval of the Sale & Transfer of Stock*, Docket No. G-40, Sub 160, 2021 WL 5531367, at *9 (Nov. 22, 2021) (finding prong three satisfied where a proposed sale would "result in a significant number of known and potential benefits, both quantifiable and non-quantifiable" including a $200,000 credit to ratepayers); Order Approving Merger Subject to Regulatory Conditions, Docket No. G-40, Sub 136 (Aug. 1, 2017) (finding prong three satisfied where a proposed sale would "result in a significant number of known and potential benefits, both quantifiable and non-quantifiable" including a $100,000 credit to ratepayers).

[143] *In re Joint Application of Frontier Nat. Gas Co. & Ullico Infrastructure Hearthstone Holdco, LLC, for Approval of the Sale & Transfer of Stock,* Docket No. G-40, Sub 160, 2021 WL 5531367, at *4 (Nov. 22, 2021).

[144] *Id.* at *13.

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of the utility's revenues."[145]

Similarly, in the prior Frontier Natural Gas transaction involving the private equity firm Blackrock, the Commission held that the benefits of a proposed merger outweighed potential risks where the utility was required to provide a one-time bill credit totaling $100,000 to all North Carolina customers in addition to the imposition of a moratorium on rate increases, annual cost savings, retention of current employees, enhanced access to capital, preservation of existing rates, and demonstrable savings resulting from transition from a public company to a private company.[146]

Consistent with these cases, the Commission has frequently pointed to bill credits,[147] charitable contributions,[148] agreements to withdraw applications or forfeit arguments,[149] decrements in rates,[150] or cost-savings due to shared resources[151] as

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[145] *Id.* at *15 (Commissioners Hughes and McKissick, concurring). In addition, the Commission imposed regulatory conditions, requiring (1) reporting requirements to ensure appropriate accounting and allocation of costs; (2) assurances of continuing levels of service quality; (3) a requirement that Merger-related direct and indirect expenses and any acquisition premium be excluded from recovery through customer rates; and (4) the elimination of any possible future proposed adjustment to Frontier's rate base to recapture any past negative acquisition adjustments or asset impairment write downs from prior Frontier mergers. *Id.* at *13.

[146] *See* Order Approving Merger Subject to Regulatory Conditions, Docket No. G-40, Sub 136, at p. 20 (Aug. 1, 2017) (finding prong three satisfied where a proposed sale would "result in a significant number of known and potential benefits, both quantifiable and non-quantifiable" including a $100,000 credit to ratepayers).

[147] *In re Application of Duke Energy Corp. & Piedmont Nat. Gas, Inc., to Engage in A Bus. Combination Transaction & Address Regul. Conditions & Code of Conduct*, No. E-2, Sub 1095, 2016 WL 5776232, at *9 (Sept. 29, 2016) (noting Piedmont would provide customers with $10 million bill credit).

[148] *Id.*

[149] *Id.*

[150] *In Re Duke Energy Corp.*, No. E-7, Sub 795, 2006 WL 1559336 (Mar. 24, 2006).

[151] *In re Application of Duke Energy Corp. & Progress Energy, Inc., to Engage in A Bus. Combination Transaction & to Address Regul. Conditions & Codes of Conduct*, 298 P.U.R.4th 363 (June 29, 2012).

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supporting a finding of tangible and quantifiable benefit to ratepayers. The Village is not aware of any case in which a transfer has been approved without any benefit to ratepayers such as is proposed here.

B. The Asserted "Benefits" Cited by Applicants Are Not Cognizable Under the Law.

SharpVue's illusory proffered "benefits" do not come close to those the Commission has required in other cases. SharpVue has not offered any rate decrease, credit or other tangible and quantifiable benefit to customers.[152] Nor has SharpVue offered customers any demonstrable non-quantifiable benefits.

In their Amended Application, Applicants cite three purported public benefits of the transaction, specifically that SharpVue will: "(1) ensure that the Ferry Operations and Tram Operations continue without immediate or significant change despite the pending dissolution of BHIT; (2) provide financial stability to accommodate long-term viability of the transportation services; and (3) provide other tangible and intangible benefits to those needing Bald Head Island transportation services."[153] Additionally, SharpVue asserts that the proposed transaction will be "seamless" to BHIT's customers and "will not adversely affect BHIT's customers in any way, as they will continue to receive the same high-quality service to which they are accustomed" and that "the transaction itself will in no way affect the rates charged for the ferry and tram service."[154]

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[152] In discovery, SharpVue admitted that it had not "undertaken an anlysis" of any purported quantifiable benefits accruing from the transaction. *See* Exhibit JAW-8 (SharpVue Response to Village Data Request 2, No. 12) (Tr. Vol. 6, Exhibits).

[153] Amended Application, ¶ 39.

[154] *Id.*

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None of these purported "benefits" offer any tangible value to ratepayers, as explained below. Some are not cognizable under the law, some are illusory, and some are empty promises that should be given no weight. Further, given the significant risks and adverse impacts discussed above, and given that the transportation system is currently "very profitable,"[155] self-sustaining,[156] and well-maintained,[157] SharpVue's unwillingness to commit to any tangible system improvement—coupled with its vow to maintain the status quo—does not provide *any* "benefit" to ratepayers, let alone a "*sufficient* benefit" to outweigh the risks of the transaction.

1. The mere fact that seller wishes to sell and buyer wishes to buy is not sufficient evidence of benefit to ratepayers.

The Commission has rejected the argument that a mere change in ownership is a benefit to customers, and a contrary conclusion here would set a dangerous precedent as the Commission would be effectively surrendering its regulatory power to oversee utility transactions.

In an order in a proceeding involving Utilities, Inc.'s petition to acquire the CPCN to operate the sewage treatment facilities of North Topsail Water and Sewer, Inc., the Commission analyzed purported benefits accruing from the proposed acquisition of a financially troubled but operationally viable water utility by a large, professionally-operated utility (Utilities Inc., or "UI").[158] There the Commission held that:

> A decision refusing to approve the transfer in the manner

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[155] Tr. Vol. 6, p. 202 (Public Staff Joint Dir.). *See also* Tr. Vol. 4, p. 167 (Perry Dir.).
[156] *See* Tr. Vol. 6, p. 204 (Public Staff Joint Dir.); *id.* at 206.
[157] *See* Tr. Vol. 8, pp. 123–24 (Stewart Dir.); Tr. Vol 9, p. 43 (Roberts/Paul Joint Reb.).
[158] Order Approving Transfer and Denying Acquisition Adjustment, Docket No. W-1000, Sub 5 (Jan. 6, 2000) ("W-1000 Sub 5 Order").

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> requested by UI is consistent with the Commission's prior acquisition adjustment decisions and with considerations of sound regulatory policy. On the other hand, approval of UI's proposal would, in effect, amount to a decision that an acquisition adjustment would be included in rate base any time that a large, professionally-operated utility acquires a smaller system, an approach which is inconsistent with this Commission's precedent and considerations of sound regulatory policy.[159]

While the Commission's decision in the Utilities, Inc. case was directed at denying including of an acquisition premium in rate base, the same principle applies to a proposed sale—it is inherent in any sale that the buyer wants to own the utility more than the seller wants to keep owning it. Otherwise, there would be no sales agreement. Accordingly, SharpVue's theory—that a transaction provides public benefit whenever a buyer wants to own a utility more than the seller does—would effectively eliminate the public benefit requirement from all future merger/transfer proceedings.

2. The evidence shows that the transportation system is operationally and financially viable under Limited's ownership.

The Applicants claim that the transfer of ownership from "a dead man's estate" benefits ratepayers because the estate "cannot and will not make major capital investments in these operations."[160] However, the Applicants fail to offer competent evidence supporting these statements and, to the contrary, the evidence adduced at hearing shows the opposite: that Limited is a solvent, viable company and that both the Estate and Limited continue to provide adequate resources to support the utility operations.

The record is devoid of evidence that Limited has any intention of abandoning the transportation system, that it is failing to maintain the operational integrity of the system,

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[159] *Id.* at pp. 32–33.
[160] Tr. Vol. 2, pp. 21-22 (opening statement from BHIT/Limited's counsel).

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that it cannot or will not make necessary capital investments, or that the system is a distressed utility. As regards the ultimate owner of the utility, the Estate, no member of the Mitchell family or representative of the Estate has provided evidence supporting any finding whatsoever concerning the Mitchells' intentions, resources, or plans. Likewise, the executor of the Mitchell Estate has been silent throughout this process, not having provided any evidence supporting Limited's claims that the transfer is somehow "holding up" the closing of the Estate. In fact, contrary to this assertion, Limited continues to pursue commercial development opportunities in Southport at Indigo Plantation, the site of the prior mainland ferry landing.[161]

All evidence suggests that Limited and/or the Mitchell Estate has the ability and is willing to continue operations—or that the operations could be continued outside the Estate. SharpVue has stated that BHIT and Limited are "extremely well-run companies."[162] The transportation system as a whole is "very profitable."[163] It is also financially self-sustaining—in SharpVue's estimation, the transportation system generates sufficient income to fund its own capital expenditures.[164] Shirley Mayfield and Chad Paul

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[161] Tr. Vol. 2, p. 66 (Paul Cross).

[162] Tr. Vol. 3, p. 16 (Roberts Amended Dir.).

[163] Although the ferry itself "has been losing money for years," the combined system has been "very profitable." Tr. Vol. 6, p. 202 (Public Staff Joint Dir.). *See also* Tr. Vol. 4, p. 167 (Perry Dir.) (discussing that the ferry system is generating a 26.5 percent rate of return).

[164] Tr. Vol. 6, p. 204 (Public Staff Joint Dir.) ("Q. Does the transportation system generate enough funds that it could fund its own capital expenditures going forward? A. That is the position of Mr. Roberts, and it seems reasonable to myself, especially in view of their alternatives to lease a new vessel if a new vessel is needed."); *id.* at 206 ("Q. But in other words, it's very possible that any new investment required for the system could be funded by the system's own profitability? A. Through certain lease arrangements, it could be done so. That is, again, the position of Mr. Roberts as he filed.").

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likewise testified that the system is solvent and profitable.[165] The Public Staff's review of Limited operations did not identify any financial deficiencies due to lack of capital.[166]

Further, Limited has never threatened and is not threatening to discontinue utility operations.[167] **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** Similarly, Limited is an ongoing solvent and viable commercial concern conducting business on the Island and the mainland.[169]

Notwithstanding service quality issues, particularly in summer peak months, the ferry remains operationally viable. BHIT's Vice President and Chief Operating Officer, Captain Stewart, testified that the ferry system vessels have been meticulously maintained and he "has never been told no" when he has requested a safety or operational need.[170] There has been no decrease in safety, efficiency, or maintenance regardless of the Mitchell

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[165] *See, e.g.,* Tr. Vol. 2, p. 59 (Paul Cross) ("Q. Okay. So there's two layers of corporations before you get to the estate? A. Correct. Q. Okay. And Limited, itself, is an independent going concern, correct? A. Correct. Q. You're actively doing business? A. Yes. Q. The company is solvent? A. Yes. Q. It's profitable? A. Yes.").

[166] *See* Tr. Vol. 6, p. 202 (Public Staff Joint Dir.) ("there wasn't any deficiencies due to capital or lack of capital that we can determine.").

[167] *See* Tr. Vol. 2, p. 67 (Paul Dir.) ("[Q:] you responded in your data response: 'No. BHIL has no plans to discontinue the utility services. Has never threatened to do so. BHIT has operated the regulated Utility since 1993. Has an exemplary record with the Commission dating back 30 years in its operation as a regulated utility.' Is this still your position? A. Yes, it is.").

[168] Tr. Vol. 9, pp. 107–108 (Roberts/Paul Confidential Joint Reb.).

[169] *See* Tr. Vol. 2, pp. 59, 65 (Paul Cross).

[170] Tr. Vol. 8, pp. 123–24 (Stewart Dir.) ("There is no question that the best maintained, safest operated vessels historically and, by my experience and by my inspectors' experience, was with the Bald Head Island ferry system. . . . In fact, I have a vessel out of the water right now going through dry dock. And everything we've done on that boat, I get very positive comments about how well we run our maintenance systems, how well we operate our systems from the inspectors . . . .").

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Estate's alleged disinterest in continued ownership.[171] And SharpVue agrees: "every well-informed and knowledgeable evaluator of the system has concluded that the ferries and trams have been well maintained. That is our own assessment as well."[172]

In sum, the transportation system is not a distressed utility; it is profitable, financially self-sustaining, and operationally sound. Accordingly, merely transferring the ferry system to a new owner because the seller wishes to sell provides no quantifiable or non-quantifiable benefit to ratepayers. If the Commission were to conclude otherwise under the facts here, it would be unable to reach a different conclusion in any future transaction presenting a willing buyer and motivated seller.

3. The Applicants' claim of "financial stability to accommodate the long-term viability of the system" is not supported by the evidence.

Applicants' assertion that ratepayers will benefit from "financial stability to accommodate the long-term viability of the system" as a result of the transaction is not supported by the evidence.

First, as shown above, there is no showing that the current ownership is not financially stable. To the contrary, Limited is operationally viable and solvent. The Mitchell Estate holds the assets of a person who, at one time, was one of the world's wealthiest individuals.[173] One may fairly infer that the reason that no representative of the Estate offered evidence in this proceeding is that the evidence would show that the Estate

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[171] Tr. Vol. 8, pp. 109–10 (Stewart Dir.) ("I've never been told no to something that I articulated as a safety requirement or an operational need. It has been supported, and we have done some really, really great things over the last 16 months since I've been on board. My feeling is that [the Mitchell estate's position is] not affecting current operations. We can continue operations with what the Mitchells have to this point.")

[172] Tr. Vol 9, p. 43 (Roberts/Paul Joint Reb.).

[173] *See* Tr. Vol. 2, pp. 56-57 (Paul Cross); and Tr. Vol 2 (Exhibits), Village Paul Direct Cross Exhibit 1.

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has vast resources capable of supporting the operation of the utility—resources that very likely far surpass those of SharpVue. Having chosen to acquire and operate assets as a public utility, an owner should not be permitted to "create its own crisis" by disclaiming further responsibility to leverage a sale on terms which are disadvantageous to ratepayers.

Regardless, SharpVue's principal business plan is to fund operations using the considerable excess revenues that are currently flowing from operation of the consolidated transportation system. Given that SharpVue's plan is to perpetuate the current operation, even discounting the likelihood that Limited and the Estate have access to substantially more resources than SharpVue, SharpVue has made no showing that it will have greater access to resources than current ownership.

To the contrary, although the record shows that SharpVue has the resources to close the transaction, there are serious and substantial concerns about SharpVue's ability to fund needed future capital improvements. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Finally, the notion that SharpVue intends to be a long-term owner of the assets is highly disputed. As discussed more fully *supra* in Background Section F (SharpVue's Plans for the Transportation System), **[BEGIN AEO CONFIDENTIAL]** [redacted]

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[174] Tr. Vol. 5, pp. 121-22, 127 (Lloyd Dir.).

[175] *See* Tr. Vol. 5, p. 125 (Lloyd Confidential Dir.) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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[redacted] **[END AEO CONFIDENTIAL]** On cross-examination, the Applicants were unable to identify any facts that call into question Mr. Lloyd's testimony.[178]

C. Prong 1: The Transfer, as Proposed, Will Have an Adverse Impact on Rates and, Potentially, Services.

As discussed in Section III *infra* in the context of the Settlement Stipulation, the transfer as proposed will have an adverse impact on rates and, potentially, services.

As regards rates, SharpVue requests the ability to raise rates on parking and barge at the rate of inflation. In other words, SharpVue's stated plan is to "adversely" impact

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[176] *See generally* Tr. Vol. 5, pp. 116–29 (Lloyd Dir.). Mr. Lloyd has 35 years of experience in investment banking, corporate law, and finance and currently operates his own M&A/corporate finance advisory firm in Greensboro, North Carolina. *See id.* pp. 116–17.

[177] *See* Tr. Vol. 5, pp. 127–29 (Lloyd Confidential Dir.).

[178] *See, e.g.*, Tr. Vol. 5, pp. 153–55 (Lloyd Confidential Cross).

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rates—by increasing them.

SharpVue's plan to increase parking and barge rates is especially harmful given the uncontradicted evidence that those rates are currently set at levels that generate super-compensatory profits. *See* Background Section D, *supra.* The continuation of rates that have been shown to be too high is harmful to ratepayers, particularly when SharpVue has no plans to utilize those excess revenues for the benefit of ratepayers. The ability to automatically increase those rates on an annual basis not only adds insult to injury as to ratepayers but is inconsistent with the Sub 21 Order which does not allow any change in transportation system rates.

Additionally, SharpVue's stated plan is to perpetuate the existing practice of charging rates above the level justified by standard rate setting practices and then to further exacerbate that problem by either allowing it to collect an acquisition premium or setting its rate base at its chosen purchase price for the transportation system, rather than at undepreciated original cost, as required by law. SharpVue explains that if it is not allowed to recover its full acquisition premium from customers, then SharpVue could not buy the system because SharpVue "would not be interested in pursuing a transaction in which it could not *earn a return on $25 million of its investment at the onset*."[179] As a result, Applicants ask the Commission to allow SharpVue to recover its entire purchase price either by (1) allowing SharpVue to collect the acquisition premium from rate payers; or (2) by setting rate base at purchase price.[180] As discussed in Section VII.A *infra* that request is inconsistent with established regulatory principles and should be denied.

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[179] Tr. Vol. 7, p. 101 (Taylor Reb.) (emphasis added)).
[180] *See infra* Section VI.

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Either of SharpVue's proposed approaches would set an artificially high rate base resulting in ratepayers paying more for the consolidated transportation services than they should.[181]

As regards service, SharpVue claims that service will not be disrupted by the transfer, pointing to its intention to retain existing management. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

For these reasons, the first prong of the transfer analysis weighs against approving the transaction.

D. Prong 2: The Transfer, as Proposed, Will Not Protect Ratepayers "As Much As Possible" From Potential Costs and Risks of the Transfer.

SharpVue has challenged the Sub 21 Order and the Commission's exercise of regulatory authority over the de facto monopoly parking and barge operations.[183] If SharpVue's appeal is successful, the parking and barge operations would no longer be

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[181] *See infra* Section VI.

[182] Tr. Vol. 3, p. 63:5–8 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[183] *See generally* Notice of Appeal and Exceptions, Docket No. A-41, Sub 21 (Jan. 27, 2023).

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regulated and SharpVue would be free to sell the parking and barge operations at any time without Commission approval.[184] There is no guarantee that any SharpVue commitment regarding parking or barge availability or rates would be binding on any successor.

Additionally, SharpVue has stated its intention to seek recovery of acquisition premium from ratepayers, either through a rate case or through intracompany lease arrangements. Either way, SharpVue's stated intention will lead to additional litigation before the Commission—perhaps in multiple proceedings. This regulatory strategy is costly and burdensome for intervenors. SharpVue's proposals in this proceeding do nothing to protect ratepayers from this risk—to the contrary, SharpVue's proposals virtually guarantee that these additional proceedings will occur in the very near future.

Similarly, SharpVue has expressly declined to commit that it will hold the utility assets for any particular time and it has declined to agree, regardless of the outcome of the Sub 21 Order appeal, that it will not seek to cannibalize the assets by selling them in piece parts. As the Public Staff has conceded, the Commission has experience with private equity firms claiming that they will hold utility assets for the long term but then failing to fulfill that promise. Again, SharpVue's proposals in this proceeding do nothing to protect ratepayers from these risks—risks inherent to ownership of utility assets by a private equity firm.

Additionally, SharpVue's proposed organizational structure would have an unregulated affiliate, Pelican Real Property, LLC, own the ferry terminal buildings and the associated real estate, the parking facility real estate, and other real estate and buildings

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[184] *See* Sub 21 Order.

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referred to as "supplemental assets."[185] **[BEGIN AEO CONFIDENTIAL]** [redacted]

[END AEO CONFIDENTIAL]

Given these concerns, and others flowing from the risks associated with ownership of a public utility by a private equity firm, the second prong of the transfer analysis weighs against approving the transfer.

E. Prong 3: The Transfer Would Not Result In Any Net Benefit to Ratepayers.

As discussed above, the "benefits" claimed by SharpVue are illusory or otherwise not cognizable under the law. SharpVue has not offered evidence of *any* tangible public benefit from the transaction, let alone a "*sufficient* benefit" that would outweigh the substantial risks created by the transaction.

To this point, SharpVue's stated goal is to simply maintain the status quo, without committing to a single improvement or tangible benefit.[186] Because the BHI transportation system as a whole is profitable, financially self-sustaining, and not financially distressed in any way, simply stepping into the shoes of the previous owner does not benefit ratepayers.

SharpVue will not even commit to the straightforward capital improvements the

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[185] Tr. Vol. 6, pp. 32–38 (Wright Dir.) (discussing structure of assets and affiliates).

[186] *See, e.g.,* Tr. Vol. 2, p. 48 (Paul Dir.) ("We anticipate that the day after the transaction closes, it will be business as usual and our passengers will not notice any difference in parking, ferry, tram, or barge services.").

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Village has identified.[187] SharpVue admits that these improvements would be easy to make, but refuses to commit to making even these easy, relatively inexpensive improvements, or any tangible improvement to current operations, for that matter.[188] At most, SharpVue states that it will make changes it sees as necessary once it has "had an opportunity to review the system."[189] SharpVue's commitment to "look at it after closing" is no commitment at all, and cannot be said to be an actual benefit to customers justifying approval of the transfer.

SharpVue points to certain potential improvements, but these examples have either been implemented or planned to be implemented by Limited or BHIT. For example, SharpVue points to a planned electronic ticketing and reservation system, but that program began and is in the process of being implemented by Limited—not SharpVue.[190] Similarly, the Public Staff confirmed that "the baggaging improvements, the policy changes that were approved, and the e-ticketing system were both things that BHIL implemented."[191]

In sum, SharpVue has failed to establish a single tangible benefit of the proposed transfer. The record is clear that (1) the transportation system is currently "very profitable," self-sustaining, and well-maintained, (2) the public receives no financial benefit from

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[187] *See, e.g.,* Tr. Vol. 4, p. 131–34 (Gardner Dir.).

[188] *See* Tr. Vol. 3, p. 16 (Roberts Amended Dir.) ("Q: Does Sharp Vue plan to make any significant changes to the operation? A: No. we have no such plans at this time. . . . it is our intention to continue [BHIT's] track record of success. We intend to spend the first year after the purchase communicating with stakeholders and evaluating the current operations in more detail and, of course, looking for opportunities to improve service and make any needed investments over time."); Tr. Vol. 6, p. 218 (Public Staff Joint Dir.) ("Q. SharpVue has not made any commitment to address [the issues raised by Gardner] issues, has it? 6 A. No. Those have not be addressed by SharpVue.").

[189] Tr. Vol. 6, p. 220 (Public Staff Joint Dir.). *See also* Tr. Vol. 3, p. 16 (Roberts Amended Dir.) ("We intend to spend the first year after the purchase communicating with stakeholders and evaluating the current operations in more detail . . . .").

[190] *See* Tr. Vol. 9, p. 18 (Roberts/Paul Joint Reb.) ("Current management has been working on implementing an electronic ticketing and reservation system for the past 24-months.").

[191] Tr. Vol. 6, pp. 219–20 (Public Staff Joint Cross).

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SharpVue's pledge to maintain (and increase) unreasonably high parking and barge rates, and (3) SharpVue is unwilling to commit to any system improvements.

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All of the factors weigh against approving the transfer. The transfer should therefore be denied.

III. THE NON-UNANIMOUS SETTLEMENT BETWEEN THE PUBLIC STAFF AND THE APPLICANTS DOES NOT MAKE THE APPLICATION "GRANTABLE."

On May 10, 2023, the Applicants and the Public Staff filed a Settlement Agreement and Stipulation with Regulatory Conditions ("Settlement Stipulation") setting forth agreed upon stipulations that they jointly recommend for adoption by the Commission. For the reasons set forth below, this agreement—which does not include the Village, the Club, or the BHA—is insufficient to protect the interests of the Island stakeholders, including utility ratepayers, and does not cure the evidentiary deficiencies in the record such that the Application could be granted.

A. The Non-Unanimous Stipulation Does Not Substitute for Record Evidence Nor Cure Evidentiary Deficiencies.

The evidentiary standard applicable to Commission decisions under G.S. § 62-65 requires that decisions be based on competent, material and substantial evidence "irrespective of whether the case is settled or fully litigated."[192] As regards non-unanimous settlement agreements, the Supreme Court has noted that such agreements are "subversive

[192] Order Declining to Adopt Proposed Settlement Rules, Docket No. M-100, Sub 145 (Mar. 1, 2017), at 10 (citing N.C.G.S. § 62-65)

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of due process and the legislative authority delegated to the Commission" and raise due process concerns given the "danger that when presented with a ready-made solution, the Commission might unconsciously require that the opponents refute the agreement, rather than require the utility to [carry its burden of proof.]"[193]

Accordingly,

> a stipulation entered into by less than all of the parties as to any facts or issues in a contested case proceeding under Chapter 62 should be accorded full consideration and weighed by the Commission with all other evidence presented by any of the parties in the proceeding.[194]

Here, however, contrary to the typical procedure involving settlement stipulations of less than all the parties, none of the parties to the Settlement Stipulation have submitted testimony supporting their agreement.[195] As a result, the settlement is not, by itself, "evidence" supporting any particular fact or conclusion. At most, the settlement constitutes the stipulating parties' views on acceptable regulatory conditions. It does not transform an otherwise ungrantable application into one that may be granted.

B. The Non-Unanimous Stipulation Does Not Reflect the Views of the Island Stakeholders.

The Settlement Stipulation sets forth a series of regulatory conditions agreed upon by the Applicants and the Public Staff. However, the Settlement Stipulation does not

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[193] *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n, Inc*., 348 N.C. 452, 463-464, 500 S.E.2d 693, 702-703 (1998) (quoting *Cities of Abilene v. Public Util. Comm'n*, 854 S.W.2d 932, 938–39 (Tex. Ct. App. 1993), *rev'd in part on other grounds*, 909 S.W.2d 493 (Tex. 1995)).

[194] *Id.* at 466 (emphasis added).

[195] *Order Declining to Adopt Proposed Settlement Rules*, Docket No. M-100, Sub 145 (Mar. 1, 2017), at 14 (declining to adopt a rule to require such testimony and exhibits but noting that, "[i]n practice, the settling parties typically file testimony and exhibits in support of their settlement agreement.").

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reflect agreement by the intervenors representing the views of the Island—specifically, the Village, the Club, and BHA. In a transaction where the basic legal test involves a consideration of the public interest, the absence of support from the public is, at the least, highly relevant, if not determinative.

This omission is glaring in the context of this particular proceeding, which involves localized needs and concerns and where there is, as previously noted, an absence of public support for the transaction.[196] The needs of the Island as regards the transportation system are unique, as the Commission has previously recognized in its Sub 21 Order.[197] And its citizenry is directly impacted in myriad ways by the proper functioning of the transportation system. In other words, citizen concerns go much deeper than whether ferry ticket prices are $23 or $24—their concerns are about the economic vitality of the Island which is wholly dependent on a properly functioning, unified system include ferry/tram, parking, and barge operations.

While representing the interests of the using and consuming public, especially as regards rates and service, are within the Public Staff's statutory authority, the Public Staff is not imbued with any specific statutory mandate as regards transportation matters nor is

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[196] *See* Tr. Vol. 4, pp. 107–08 (Gardner Dir.) (noting that in a survey sent by the Bald Head Association to over 1,500 property owners, "[o]nly 23% of the respondents supported the transfer of the certificate in this proceeding, while 56% opposed the transfer . . . ."). *See also* Tr. Vol. 1, pp. 34–41 (Haglund Testimony), p. 44 (Pope Testimony), pp. 70–75 (Rausch Testimony), pp. 76–81 (Belch Testimony), pp. 82–92 (Scagnelli Testimony).

[197] *See* Sub 21 Order, p. 19 ("As a starting point, it is apparent that BHI presents a unique scenario . . . ."); *id.* at p. 24 ("When BHIL was first in discussions with SharpVue and other private equity buyers to sell these assets, it highlighted that 'everything necessary to sustain human endeavor on Bald Head Island' and 'the majority of—whether it be humans or material'—'arrive[s] by some sort of vessel crossing the river . . . ,' with BHIL being 'the single service provider for [that service] . . . .").

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it directed to advocate for the long-term interests of a particular community wholly dependent monopoly utility service. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** In other words, the Public Staff's evaluation of the transaction included deference to the interests of the Applicants in the consummation of the transaction irrespective of other considerations—a principle which is difficult to reconcile with the statutory directives set forth in G.S. § 62-15(c).

While Island intervenors have no desire to **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** facilitating the flow of money from buyer to seller is not their concern. Their concern is that the utility operation—and the Island—be protected and preserved into the future. Unfortunately, the proposed stipulations fall short in this regard.

C. The Non-Unanimous Stipulation Does Not Sufficiently Protect Island Stakeholders, Including Ratepayers, from Adverse Effects of the Proposed Transaction.

While the Settlement Stipulation reflects a negotiated compromise between the Public Staff and the Applicants regarding proposed regulatory conditions, the compromise of these parties does not cure Applicants' various evidentiary deficiencies. Most notably, the proposed settlement conditions will not result in any net benefits for ratepayers nor do they provide sufficient protection against harm to ratepayers, and the public, from the proposed transaction.

1. Ratepayers are not sufficiently protected from adverse rate impacts.

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[198] *See* Tr. Vol. 7, p. 16 (Hinton Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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As discussed above in Background Section D, the Village presented testimony by its expert financial consultant showing that Limited is earning a 26.5% return on investment on its consolidated transportation operations, a return significantly above what would typically be permitted in a rate proceeding and 218% more than the Commission's existing authorized rate of return of 8.33% from BHIT's most recent rate case.[199] This testimony was not rebutted or contested by the Applicants.

Although the Village understands that this is not a general rate case proceeding, the Settlement Stipulation does nothing to address the adverse impact to ratepayers from the current overearning. Rather it compounds the problem by (a) allowing SharpVue to siphon off 100% of this overearning for the benefit of itself and its investors, (b) allowing SharpVue to increase parking (and barge) rates based on an annual CPI inflator, and (c) not addressing the potential recovery of acquisition premiums from ratepayers through parking and barge or monopoly lease rates. Each of these issues is, standing alone, sufficient reason to deny the Application.

a. Distribution of 100% of net income

Proposed Regulatory Condition 8 permits SharpVue to distribute 100% of BHIFT's net income (calculated on a two-year rolling basis) to its affiliates and managers. This condition reflects a compromise from the Public Staff's prior position that BHIFT net distributions should not exceed 80%.[200] If adopted, the effect of the Public Staff's

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[199] *See* Tr. Vol. 4, p 190 (Perry Dir.); *Notice of Amendment to Testimony*, Docket No. A-41, Sub 22 (March 6, 2023); *Order Granting Partial Rate Increase*, Docket No. A-41, Sub 7 (Dec. 17, 2010), at 5. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[200] *See* Tr. Vol. 6, p. 172 (Public Staff Joint Amended and Supplemental Dir.) (discussing proposed Regulatory Condition No. 6).

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concession is that SharpVue will be permitted to siphon off virtually all of the excess earnings from parking and barge for the benefit of itself (through management fees) and distributions to investors without any benefit to ratepayers. It would be one thing if SharpVue was required to, or agreed to, hold excess earnings for use on capital projects benefiting ratepayers, but to simply pocket that money without any benefit to ratepayers is not in the public interest. This condition cannot be reconciled with SharpVue's stated plan to finance unspecified future system investments through the use of revenues generated from transportation system operations.

This adverse impact is facilitated by the manner in which SharpVue is proposing to organize its corporate affairs and hold ownership of its regulated assets. As stated above, SharpVue apparently plans to hold the real estate to be acquired (including the ferry terminals and Deep Point parking lot) in a separate, unregulated real estate subsidiary while holding the "business operations" in the regulated entity. This means that *all* the operational revenues will be flowing through BHIFT, while the assets representing most of the system value[201] will be held in a separate subsidiary. If this was not the case—i.e., if BHIFT, like most utilities, owned all of the utility assets in a single entity—net income for purpose of Regulatory Condition 8 would be net of depreciation and interest associated with the utility assets. But here, where the loan will be held at the Holdings level and where the appreciated assets will be held in a separate subsidiary, the deductions associated with normal utility operations will not offset the gross income, and there will be very little to deduct from the operational revenues. This means that nearly all of the excess revenues

[201] *See* Tr. Vol. 7, p. 95 (Taylor Reb.) at Table 2 (listing "Purchase Price Allocation[s]" of $22.9 million for Parking, $8.3 million for Barge, and $3.3 million for Ferry).

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resulting from the combined transportation system operations may be freely siphoned out of BHIFT without benefit to the system or to ratepayers given that the proposed regulatory conditions contain no controls on spending and distributions at the Holdings level.[202]

This result is exactly the sort of "shell game" that private equity firms in the unregulated arena employ to the economic advantage of their investors. But, if left unsupervised in the regulatory arena, it will result in active harm to utility ratepayers here. It is unclear why the Public Staff would agree to such a provision, especially when its own testimony, which has not been withdrawn, supports an 80% limitation.[203]

b. Parking and barge rate increases

Proposed Regulatory Condition 4 would permit SharpVue to increase "aggregate" parking and barge rates by CPI-U every year for a six-year period. As stated, the unrebutted evidence in the record shows that parking and barge are currently substantially overearning— **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** The Public Staff's stipulation would permit SharpVue to increase rates which are already substantially overearning. For several reasons, this is contrary to the law and public interest.

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[202] The Regulatory Condition could be revised by defining the calculation of BHIFT "Net Income" to include appropriate interest expense incurred at the Holdings level, but addressing the allocation issue is more difficult, if not impossible, given that SharpVue has refused to offer a definitive plan for its asset holdings nor its proposed allocation of the purchase price among the assets being acquired. *See* Sec III below. Once again, this Regulatory Condition demonstrates the difficulty of exercising an appropriate level of regulatory scrutiny over a private equity firm.

[203] Intervenors do not concede that an 80% limitation would solve the excess earnings problem.

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First, the proposed condition conflicts with the Commission's Sub 21 Order, which requires parking and barge rates to be maintained at "status quo" levels.[204] The parties cannot agree among themselves to revise the Commission's clear directive in the Sub 21 Order, nor should the Commission reconsider this determination.[205]

Second, the proposed stipulation constitutes impermissible single-issue ratemaking "contrary to the well-established, general ratemaking principle that all items of revenue and costs germane to the ratemaking and cost-recovery process should be examined in their totality in determining the appropriateness of the utility's existing rates and charges."[206] A non-unanimous stipulation regarding a single financial aspect in the context of a transfer proceeding is not the appropriate context for allowing future automatic rate increases.

Additionally, the stipulation would permit rate increases that are unwarranted and harmful. The CPI-U was 7.0% in 2021 and 6.5% in 2022,[207] meaning that if inflation continues at its present pace SharpVue will be permitted to increase its already excessive rates by 13.5% over the next two years—without any justification or review. While the

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[204] Sub 21 Order, at 28 ("Without more and absent any requested change, the Commission permits the status quo — and the current rates and services of the Parking and Barge Operations — to continue.") and decretal paragraph 4 ("That it is in the public interest for the Parking and Barge Operations to continue to operate, consistent with their existing operation, rates, and services, and therefore are, hereby, granted temporary authority to do so pending further Order by the Commission.").

[205] No party has sought reconsideration of the Sub 21 Order. Regardless, as the matter is currently under appeal, the Commission currently has no jurisdiction to reconsider the Sub 21 Order. *In re Approval & Closing of Bus. Combination of Duke Energy Corp. & Progress Energy, Inc.*, 234 N.C. App. 20, 25, 760 S.E.2d 740, 743 (2014) ("The general rule is that an appeal takes the case out of the jurisdiction of the trial court. Thereafter, pending the appeal, the trial judge is *functus officio*.").

[206] Order Approving Deferral Accounting with Conditions, *Petition of Duke Energy Carolinas, LLC, for an Accounting Order*, Docket No. No. E-7, Sub 874 (Mar. 31, 2009), at 24.

[207] Source: U.S. Department of Labor Bureau of Labor Statistics.

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current rate of inflation is above that historically experienced since 2000, the simple average of CPI-U for the last ten years is 2.63%. Even if the economy reverts to this historic average over the next six years, SharpVue would be permitted to increase parking and barge rates by 15.8% over this period outside Commission supervision. This, as shown below, represents a nearly $900,000 increase in revenues.[208]

Projected Parking/Barge Revenue Increase

Parking Total Revenues	$3,976,447
Barge Total Revenues	$1,535,195
Total	$5,511,642
15.8%	$870,839

All evidence shows that the consolidated system is currently substantially overearning. It is baffling why the Public Staff would not only agree to allow this overearning to continue without any benefit to ratepayers but double down on this by authorizing additional increases outside of a rate case. This transfer is not the appropriate proceeding to authorize a $900,000 increase in revenues generated from the consolidated regulated operations.

c. The proposed conditions do not protect ratepayers from the recovery of acquisition premium from parking and barge operations

Proposed Regulatory Condition 3 states that SharpVue will neither "pursue nor recover an acquisition adjustment in any future rate case for ferry or tram services that have been historically regulated." This condition, although apparently intended to prohibit the recovery of acquisition premium from ratepayers, is insufficient to accomplish this goal.

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[208] *See* Tr. Vol. 9 (Exhibits), Village Roberts-Paul Rebuttal Cross Stipulation Exhibit 1 (at BHIL/IT 000354) and Exhibit 2 (at BHIL/IT 000388).

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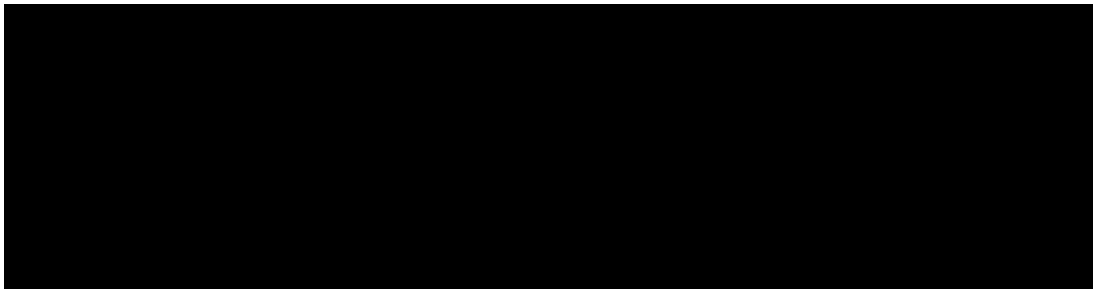
On its face, the condition only addresses the recovery of an "acquisition adjustment" as regards ferry/tram rates, which renders the condition toothless as SharpVue is capable of assigning nearly all of the purchase price in this transaction to the parking and barge operations and the conditions provide no protections against this allocation risk.

In fact, the evidence in this case shows that, under SharpVue's draft allocations, no premium is being assigned to the ferry operation.[209] Ms. Perry's analysis shows that SharpVue is proposing to recovery the following acquisition premium:

[BEGIN AEO CONFIDENTIAL]



[END AEO CONFIDENTIAL]

Because the proposed purchase price allocation as to the ferry assets is less than current net book value (i.e., rate base), this condition offers no protection for ratepayers, and SharpVue's promise not to seek a *negative* premium is not a "win" for ratepayers.

At most, Regulatory Condition 3 might offer some protection against ferry rates being influenced by the parking and barge premium, but it offers no protection for parking and barge ratepayers being forced to fund SharpVue's recovery of acquisition premium. This situation, especially as regards ferry ratepayers is especially unfair, as virtually all ferry riders also park at the Deep Point ferry terminal facility. In light of the fact that the Sub 21 Order has subjected parking and barge operations and assets to the Commission's

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[209] *See* Tr. Vol. 4 (exhibit) (Perry Affidavit).

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regulatory authority, the parking and barge ratepayers are entitled to the same regulatory protections as the ferry ratepayers. SharpVue should not be permitted to evade the Commission's regulations by recovering acquisition premium from the parking and barge instead of the ferry.

Given that SharpVue has yet to establish final allocations, ratepayers are completely exposed to the risk that SharpVue has already forecast in its filings—that it will seek to recover from ratepayers the premium it has agreed to pay seller.[210]

Furthermore, it is worth noting that SharpVue's legal contention in this proceeding, which it does not appear to have abandoned in the stipulation, is that the concept of "acquisition premium" is inapplicable to *any* part of this transaction. SharpVue contends that "[i]n this case, the valuation of rate base should be set at SharpVue's purchase price of those assets (i.e., SharpVue's original cost, not the undepreciated original cost of the prior non-utility owner)."[211] This argument is echoed in SharpVue witness Taylor's Table 2, purporting to "update the Perry Affidavit analysis with the appropriate data":[212]

Table 2 – The Non-Existence of an Acquisition Premium

	Parking	**Barge**	**Ferry**	**Total**
Purchase Price Allocation	$22,901,938	$8,358,150	$3,320,810	$34,580,901
Rate Base	$22,901,938	$8,358,150	$3,320,810	$34,580,901
Acquisition Premium	**$0.00**	**$0.00**	**$0.00**	**$0.00**

As explained in detail in Section VI.B, SharpVue's position is completely unsupported by G.S. § 62-133 and long-standing Commission rate-making principles

[210] *See, e.g.,* Tr. Vol. 7, pp. 95–96 (Taylor Reb.).
[211] Tr. Vol. 7, p. 96 (Taylor Reb.).
[212] Tr. Vol. 7, p. 95 (Taylor Reb.).

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regarding the establishment of rate base, given the facts that (1) the parking and barge operations are currently regulated pursuant to the Sub 21 Order, (2) parking operations have been included in rate base since 2010 through imputation of parking revenues, and (3) Limited has more than recovered its original purchase price for the parking facilities through parking rates.

Finally, SharpVue's claim that agreeing to not seek acquisition premiums provides any benefit to ratepayers is directly at odds with its arguments that there are no acquisition premiums to begin with, and that the entire purchase price should be included in SharpVue's rate base. Once again, SharpVue's purported commitment is illusory.

d. By not addressing rate base, the proposed stipulation merely defers litigation of major disputed items and keeps ratepayers at risk of being harmed from the transaction

A major disputed issue in this case is the appropriate treatment of the barge and parking assets for ratebase purposes. The Village contends that the parking and barge assets must be added to rate base, if at all, based on historic costs or net book value. SharpVue contends that these assets should be added to rate base at the arbitrary value it chooses to assign to these assets, out of the bundle of mixed regulated and unrelated assets it is acquiring—an amount which it still has not finalized.[213] The Settlement Stipulation seeks to sidestep an adverse ruling on rate base by agreeing that "a rate base determination is not necessary at this time." (Regulatory Condition 3)

The failure to resolve this threshold issue leaves ratepayers at risk of being saddled with the premium paid by SharpVue to acquire the transportation assets. Further, failing to resolve the issue now will require ratepayers to expend time, effort and resources

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[213] *See, e.g.,* Tr. Vol. 7, pp. 94–95 (Taylor Reb.).

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litigating this issue in one or more future proceedings. All of this represents risks and harms to ratepayers which could, and should, be avoided in this proceeding. Simply put, kicking this particular can down the road is flatly inconsistent with protecting ratepayers "as much as possible" from potential costs and risks.

2. Ratepayers are not sufficiently protected against risks of dismantlement of the consolidated transportation system.

The Commission, in the Sub 21 Order, has made legal determinations affirming the critical importance of the parking and barge operations to the consolidate transportation system and the Island more generally. The Applicants, however, have refused to accept the Commission's determination in the Sub 21 Order and have appealed that order.[214]

The ongoing appeal of issues which are central to the integrity of the transportation operations at the same time that SharpVue seeks permission to acquire those very assets puts ratepayers in jeopardy of significant harm. Should the Sub 21 Order be overturned, there is a likelihood that SharpVue would seek to dispose of transportation assets in piece parts, a risk affirmed by Dr. Wright in his expert testimony.[215] Indeed, on cross-examination, the Public Staff acknowledged that in prior instances where private equity firms have acquired utility assets "[t]hey would come to us and say we're going to hold these kind of assets for long-term, and they would not."[216]

The proposed Regulatory Conditions provide no comfort in this regard. They do not provide any assurances that the unified system assets would continue to be jointly held

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[214] *See Limited, BHIT, and SharpVue Notice of Appeal and Exceptions*, Docket No. A-41, Sub 21, filed Jan. 30, 2023 (appeal docketed in N.C. Court of Appeals, Case No. COA23-424, May 9, 2023).

[215] *See* Tr. Vol. 6, pp. 20–21 (Wright Dir.).

[216] Tr. Vol. 7, p. 16 (Hinton Cross).

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in the event the Sub 21 Order is overturned. Nor do they contain any commitment that SharpVue would seek the Commission's prior approval of any transfer of such assets.

Although the conditions do contain limitations on rate increases (Regulatory Condition 4) and parking availability (Regulatory Condition 5), the conditions are time limited so are of little utility to Islanders who have made lifelong investments in the Island expecting that reasonable access to the Island will be maintained in perpetuity. Moreover, the viability of these conditions may be challenged by the owner of the assets as the express language of the proposed conditions state that SharpVue's acceptance of the conditions regarding the Sub 21 Order is only "to the extent [the order] is upheld on appeal." *See* Settlement Stipulations, at Attachment A, p. 2.

Given the time-limited nature of the proposed conditions, coupled with the fact that they do not apply to asset transfers and that they contain express language limiting their application "to the extent [the order] is upheld on appeal," the regulatory conditions offer little practical protection for ratepayers as to the costs and risks associated with the protection of continued access to the unified transportation system "as much as possible."

3. Other risks to ratepayers from the proposed conditions

There are multiple other risks not addressed by the Settlement Stipulation, including:

[1] New lease agreement (Settlement Agreement, ¶ II.C.).

The Settlement Agreement states, "The Stipulating Parties agree that it is appropriate and reasonable for BHIFT to enter into long-term leases to operate its parking and barge services. Any such leases will be subject to advance approval by the Commission pursuant to N.C.G.S. § 62-153, which will occur prior to closing of the transfer and before any rents are paid." This approach is highly problematic—as it

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contemplates a likely controversial filing, implicating ratepayer interests, after the transfer is approved and the record in this matter is closed, but before closing of the transaction. In other words, the parties have created an "extra" step in the approval process in which the public will be informed about critical aspects of SharpVue's plans only after approval has been granted. This horse-before-the-cart situation is prejudicial to ratepayer interests.

This provision alludes to the possibility that the real estate essential to utility operations (as definitively established by Commission order) will be divorced from these operations, subject to an affiliate agreement securing access to the real estate. In the case of parking, this arrangement will be the first time that ownership of the parking real estate would be separated from parking operations—and whether such separation presents any benefit to ratepayers is highly questionable and will undoubtedly be contested by the parties.[217] If the transaction is approved, the parking assets will be owned free and clear by SharpVue, reflecting the reality that the real estate has been already paid for through a *de facto* regulatory regime recognized and applied by the Commission in its 2010 rate order and established definitively in the Sub 21 Order. The establishment of a new mechanism by which ratepayers are forced to pay again for something they have already paid for is contrary to the public interest.[218] *See generally* Section VII.B. *infra.*

Moreover, it is highly likely that SharpVue will seek to value the proposed lease

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[217] Relatedly, this proposed corporate structure may weaken the Commission's authority over the regulated assets. In Limited's case, it was subject to the jurisdiction of the Commission as the parent entity under Section 62-3(23)c. In SharpVue's case, the entity owning the real property will be a "sister"-entity of the regulated entity.

[218] *See, e.g., In re Carolina Water Service, Inc., of N.C.*, Docket Nos. W-354, Subs 74, 79, 81, Eightieth Report of the North Carolina Utilities Commission: Orders and Decisions 342, 394 (1990) ("[P]ublic utility ratepayers normally should only be responsible for reimbursing an investor once for the cost of public utility property.").

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based on the portion of the purchase price it arbitrarily allocates (in the future) to the real estate. As previously discussed, this allocation is susceptible to manipulation by SharpVue and there are no ratepayer protections addressed in the stipulations to protect ratepayers from such gamesmanship.

Given the gravity of the issues and their relation to core issues in dispute between the parties, any new lease sought to be entered into by SharpVue respecting the real property should be fully disclosed and resolved prior to any approval in this proceeding.

[2] Existing lease agreements (Regulatory Condition 23).

The proposed settlement stipulations seek to "preapprove" the continuation of certain lease agreements previously approved by the Commission in Docket Nos. A-41, Sub 4 and Sub 7. The stipulation permits SharpVue to maintain the existing facilities leases and to increase the lease fee by 3% per year—a modification not contemplated in the original agreements nor approved by the Commission.

It is not at all clear that the original justification for these lease agreement remains satisfactory under the proposed acquisition, where SharpVue proposes a different management and ownership structure. Moreover, there is no provision in Chapter 62 for entering into affiliate transactions other than as prescribed by Section 62-153. If SharpVue desires to bifurcate ownership of the assets upon closing and to enter into a new lease arrangement for those facilities, those affiliate leases must be submitted for approval under Section 62-153. There is no legal authority for the Commission to approve an affiliate transaction, the terms of which are unknown and the justification for which has not been provided, in the absence of complying with the requirements set forth in Chapter 62. The protection of ratepayers requires that any affiliate lease agreement be submitted for approval by the Commission.

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[3] Harm associated with disposition of supplemental assets.

A substantial risk from the proposed transaction is the mixture of regulated and unregulated assets, which are components of the transaction before the Commission. Proposed Regulatory Condition 24 does not prohibit adverse impact on utility ratepayers from the sale, assignment or other disposition of the supplemental assets. By its express terms, the regulatory conditions permit adverse impacts, so long as such impacts are not "material," a term which is not defined.

4. The Settlement Stipulation Provides No Net Benefits to Ratepayers That Would Provide a Basis for Approval of the Transaction.

In summary, the Settlement Stipulation is devoid of tangible benefits to ratepayers. Specifically:

- There are no rate decreases or service credits (to the contrary, as discussed above, the stipulation would allow for automatic rate increases, even though the transportation system is currently overearning!).
- The commitment to retain the existing imputation of revenues from the 2010 rate case (Regulatory Condition 7) is not a cognizable benefit because it is already required by the 2010 rate order and, in any event, the unrebutted record evidence shows that the imputation amount, which was set 13 years ago, should be much higher to reflect revenue growth that has occurred over the years. In fact, the provision allowing annual CPI adjustments will further exacerbate the extent to which an imputation based on 2009 test year parking revenues is undersized.
- There is no commitment to make service improvements.
- There is no commitment to make specific capital improvements.
- There is no requirement that excess profits be used for the benefit of ratepayers.

Against this lack of benefits, the Settlement Stipulation fails to protect against myriad risks to ratepayers from the transaction.

- There is no commitment that SharpVue will own the system for any particular period of time. In fact, the Public Staff conceded on cross-

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examination that previously private equity firms "would come to us and say we're going to hold these kind of assets for long-term, and they would not."[219]

- There is no protection as regards the potential sale of parking and barge assets as stand-alone assets if the Sub 21 Order is not affirmed on appeal.

- There is no protection against SharpVue seeking rate increases, other than a one-year commitment (Regulatory Condition 28), **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** The six-year commitment for barge and parking is illusory, because SharpVue has the right to initiate a rate case after one year.

- There is no protection against SharpVue's claims for recovery of acquisition premiums through parking and barge rates. (SharpVue's "acquisition adjustment" commitment in Regulatory Condition 3 only applies to ferry rates.)

- There is no protection against SharpVue's claims for preferential rate base treatment as regards the allocated value of parking and barge assets in future rate cases.

- There is no protection against SharpVue's leveraging utility assets (e.g., Deep Point parking) for the benefit of its unregulated development efforts.

- There is no protection against SharpVue "gaming" the regulatory process by making a disproportionate and unreasonable allocation of its purchase price to regulated assets as opposed to unregulated assets.

- There is no protection against SharpVue siphoning off excess earnings from the transportation operations for the benefit of itself and its investors (as opposed to the benefit of ratepayers).

- There is no resolution of the valuation issues relating to the parking assets. As a result, there is no protection to ratepayers against SharpVue's plan to sell the parking operation and extract monopoly rents for the parking real estate, an arrangement not justifiable by any regulatory construct from ratepayers for use of the property (which has already been paid for by

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[219] Tr. Vol. 7, p. 16 (Hinton Cross).

[220] *See* Confidential Exhibit E to Amended Application, at sec. 5.3 **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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ratepayers).

- Ratepayers are not fully protected from adverse impacts from the disposition of the "supplemental assets."

Sidestepping all of these issues—as the stipulation proposes—will lead to numerous future disputes, requiring the expenditure of time, effort and resources by ratepayers in protecting their interests. There is no discernable public interest in "kicking the can down the road" on these issues which have been clearly joined by the pleadings in this proceeding and which threaten to have material and substantial adverse impacts on ratepayers in the future. Given these concerns, there is no plausible argument that the benefits of this transaction, of which there are none as a practical matter, either outweigh the risks presented by the transaction, or that ratepayers are protected from such risks "as much as possible" under the proposed regulatory conditions.

IV. INDEPENDENTLY, THE APPLICATION IS NOT GRANTABLE BECAUSE SHARPVUE HAS FAILED TO PROVIDE SUFFICIENT RECORD EVIDENCE UPON WHICH THE COMMISSION MAY PREDICATE FINDINGS NECESSARY TO PROTECT RATEPAYERS.

Put simply, the Commission cannot approve a proposed utility transfer when documents governing key aspects of the transfer—including the structure, management, finances, and control of the acquiring entities—have been withheld by the applicant from the evidentiary record.

It is inherent under Section 62-111(a)[221] that the Commission cannot approve the

[221] "No franchise . . . shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition of control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity." (emphasis added).

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transfer of control of a utility if there is no evidentiary basis for determining precisely to *who* control would be transferred and how that control will be exerted. The Commission must be sufficiently informed of not only the identity and nature of the ultimate owner and controlling entity, but also of the proposed internal corporate structure and any mechanisms by which other entities—including affiliated entities—may exert oversight, management, control, or financial leverage over regulated utility operations and/or assets.[222]

Here, however, the Commission did not receive into evidence the underlying corporate governance documents supporting findings as to corporate organization and control, as Applicants stated that the agreements were not "finalized."[223] Instead, the Commission held open the record to receive the final documents into evidence.[224] Applicants have failed to provide such documents—either finalized or in draft form. Accordingly, there is no evidentiary basis upon which the Commission can make findings as to who will control the various SharpVue entities. This information is a critical aspect

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[222] The Commission has long viewed Section 62-111(a) as requiring investigation into—and oversight of—internal corporate structure and management arrangements beyond simply the entity with ultimate ownership and control. *See, e.g., In Re ATX Licensing, Inc.*, Docket No. P-972, Sub 2, 2002 WL 1943589 (May 28, 2002) (approving application under § 62-111(a) for "corporate restructuring" even though "no new party obtained a controlling interest . . . as a result of the reorganization. In addition, there are no planned changes in the board of directors or management of any of these three entities. Further, ATX will continue to operate under the same name and Certificate and provide services under the same rates, terms and conditions."); *In Re KMC Telecom v, Inc.*, Docket No. P-989, Sub 1, 2002 WL 1902121 (Mar. 20, 2002) (approving application under § 62-111(a) for "internal corporate restructuring" even though the reorganization would "not affect the ultimate ownership and control . . . ."); *In Re CTC Long Distance Servs., Inc.*, Docket No. P-295, Sub 12, 2001 WL 1142781 (Aug. 15, 2001) (same); *In Re Xo Commc'ns Servs., Inc.*, No. P-1325, 2006 WL 1342802 (Jan. 18, 2006) (same); *In Re Elantic Telecom, Inc.*, Docket No. P-1136, Sub 4, 2006 WL 1519249 (Mar. 7, 2006) (same); *In Re Working Assets Funding Serv., Inc.*, Docket No. P-299, Sub 4, 2001 WL 522110 (Apr. 19, 2001) (same).

[223] Tr. Vol. 5, p. 13 (Presiding Commissioner: "So we'll receive these documents into the record at the appropriate time once they're finalized.").

[224] *Id.* ("[W]e'll leave the record open for the submission of those documents.").

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of the Commission's inquiry into whether or not the proposed transaction is justified by public convenience and necessity. Without them, and without being able to review them, the Commission cannot make the requisite findings and the Application cannot be granted.

V. SHARPVUE PROPOSES TO PLEDGE, AND THEREFORE LEVERAGE, REGULATED ASSETS IN SUPPORT OF ITS UNREGULATED DEVELOPMENT.

SharpVue's Application seeks approval for SharpVue and/or one of its affiliates to borrow/issue debt secured by pledging regulated transportation assets as may be necessary to finance the proposed transaction, under G.S. §§ 62-160 and -161.[225] The Commission should not grant SharpVue's request for at least two reasons.

First, SharpVue has not specifically identified the assets that it is proposing to encumber to secure the proposed financing.[226] Given the mix of regulated and unregulated assets that are the subject of the Applicants' purchase agreement and SharpVue's proposed affiliate structure—under which regulated and unregulated assets are held in separate entities—the Commission must be apprised of exactly what regulated assets are proposed to be pledged to secure what debt in order to assess the potential impact on ratepayers.[227] Because SharpVue has withheld any such information, any Commission authorization to pledge regulated assets is premature.

Second, to the extent that SharpVue proposes to pledge, and therefore leverage, regulated assets in support of its unregulated development activities, such leverage is contrary to G.S. § 62-161(b), and prior Commission decisions. Section 62-161(b) requires

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[225] Amended Application, pp. 1–2.
[226] Tr. Vol. 6, p. 49 (Wright Dir.).
[227] *See id.*

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that the Commission only approve a pledge of utility assets if the pledge:

> (i) for some lawful object within the corporate purposes of the public utility, (ii) is compatible with the public interest, (iii) is necessary or appropriate for or consistent with the proper performance by such utility of its service to the public and will not impair its ability to perform that service, and (iv) is reasonably necessary and appropriate for such purpose.

The Commission has held that, under Section 62-161(b), pledging utility assets for the benefit of non-regulated affiliates is not permissible where it puts the utility at substantial risk. In a 2020 order considering a request for approval to pledge assets, a regulated water utility service sought approval to pledge regulated assets to secure a loan for the benefit of nonregulated affiliates.[228] Despite the Public Staff's recommendation of approval, the Commission refused to allow the pledge, holding that:

> The assets used by YES AF Utilities cannot be pledged to secure a loan for the benefit of nonregulated affiliates, including [roadwork and a new pier in] Autumn Forest [the community that the utility served,] and other affiliates operating in numerous states. Should default on the credit facility or Loan occur, both of which are far greater in amount than the assets or future needs of YES AF Utilities, the ability of the utility to operate could be placed in jeopardy. The Commission also notes that proceeds from the Loan are to be used by both YES AF Utilities and Autumn Forest, and no specific amounts or timetable were provided for any proceeds to be used only by YES AF Utilities.[229]

Here, as in *Yes AF Utilities*, SharpVue apparently seeks to use regulated assets to support unregulated affiliate activities.[230] Moreover, unregulated assets that SharpVue

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[228] *In re Application by YES AF Utilities EXP, LLC, for Approval of a Fin. & Pledging of Assets*, Docket No. W-1302, Sub 4, 2020 WL 7426751 (Dec. 15, 2020).

[229] *Id.* at *3.

[230] Tr. Vol. 6, p. 49 (Wright Dir.).

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would acquire—such as real property intended for development—"likely have a significant value and they reflect a significant part of the purchase price."[231] Furthermore, if Applicant's appeal of the Sub 21 Order is successful, the parking and barge operations will no longer be subject to Commission regulation. Thus, if the Commission approves SharpVue's request to pledge assets at this time, and if Applicant's Sub 21 appeal is successful, the end result could be that the regulated ferry is used as collateral to secure debt related to the then-unregulated parking operation and barge.[232] Thus, here, as in *Yes AF Utilities*,

> [T]he requested pledge of assets by [a] North Carolina regulated utility, . . . , to be held jointly and severally liable for the credit facility and the Loan comingled with nonregulated affiliates of [the utility] . . . in amounts far greater than the capital needed by [the utility], is not permitted under N.C.G.S. §§ 62-160 and-160(a)-(c).[233]

Accordingly, the Commission should not grant SharpVue permission to pledge regulated assets. To do so in the absence of concrete information regarding the pledged assets and how the related funds would be used from SharpVue, while Applicants' appeal of the Sub 21 Order is still pending, would be at best premature, and at worst would subject regulated assets to unnecessary risk, contrary to G.S. § 62-161.

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[231] *Id.*

[232] *See* Tr.Vol. 7, p. 95 (Taylor Reb.) (listing SharpVue's purchase price allocations to various business segments).

[233] *In re Application by YES AF Utilities EXP, LLC, for Approval of a Fin. & Pledging of Assets*, Docket No. W-1302, Sub 4, 2020 WL 7426751, at *4 (Dec. 15, 2020).

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VI. IN THE ALTERNATIVE, THE COMMISSION MAY WISH TO HOLD THIS PROCEEDING IN ABEYANCE PENDING COMPLETION OF THE ROFR AND SUB 21 ORDER LITIGATION.

As explained in the Village's Motion to Hold Proceeding in Abeyance and Request for Expedited Ruling on the Motion,[234] Applicants have initiated two ongoing proceedings outside this Docket related to the assets they seek authority to transfer—(1) their appeal of the Sub 21 Order (in which Applicants challenge the Commission's regulatory authority over the parking and barge operations) and (2) Limited's Complaint for Declaratory Judgment filed on January 19, 2023 in Superior Court (contesting the Village's Right of First Refusal, or ROFR, to purchase certain ferry and infrastructure assets). Although the Commission denied the Village's motion to hold the proceeding in abeyance,[235] "[t]he Commission may at any time upon notice to the public utility and to the other parties of record affected. . . rescind, alter or amend any order or decision made by it."[236] In light of additional factual development during the hearing, the Commission may wish to reconsider its earlier order and hold this proceeding in abeyance for several reasons.

First, if the Commission approves the transfer on a finding that the transfer standard is met under the current regulatory regime, there is the difficulty, if not impossibility, of unwinding the transaction should an appellate court grant relief to the Applicants. Specifically, the Commission will have approved the transfer under the incorrect assumption that the Commission has direct regulatory authority over the consolidated BHI transportation system and will lose the ability to determine whether the transfer of

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[234] Docket No. A-41, Sub 22 (Feb. 03, 2023).

[235] *See* Order on Motion to Hold Proceeding in Abeyance, Docket No. A-41, Sub 22 (Feb. 13, 2023).

[236] N.C.G.S. § 62-80.

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disaggregated regulated components of the system is in the public interest.

Second, the Commission is faced with the difficult proposition of assessing whether the merger will result in sufficient benefits to offset potential costs and risks under G.S. § 62-111, while not knowing whether those assets will still be subject to its regulatory authority post-appeal. If the Commission has no regulatory authority over parking, for example, the public will be exposed to "market forces"[237] imposed by a *de facto* monopoly[238] without Commission intervention, and the attendant ability to ensure, through direct regulation, that acquisition premiums are not passed through to ratepayers will likewise be compromised. These matters bear directly on the public interest in the transaction, as well as the ability of the Commission to ensure that "ratepayers are protected as much as possible from the costs of the merger."

Third, if the Commission makes a decision based on the assumption that all assets comprising the unified transportation system serving Bald Head Island are subject to its regulatory authority and it is subsequently determined that only certain of those assets are subject to its regulatory authority, that determination would likely materially impact the Commission's assessment of risks to ratepayers from the proposed transfer, and whether proffered commitments and/or proposed regulatory conditions will sufficiently serve to protect ratepayers "as much as possible from potential costs and risks of the merger" or even be enforceable.

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[237] *See* Tr. Vol. 3, p. 128 (Roberts Confidential Cross) **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[238] *See* discussion *supra*, The Applicable Legal Standard, Section C.

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Fourth, as discussed immediately above in Section V, should the appeal of the Sub 21 Order result in the deregulation of parking and barge, and the Commission approves the requested pledge of assets in this proceeding, the Commission will have approved the pledge of regulated assets in support of unregulated assets and operations—something which is contrary to the public interest and G.S. § 62-161(b).

Finally, in their January 19, 2023 declaratory judgment complaint brought in Brunswick County Superior Court, Limited and BHIT assert that the ROFR status *must* be resolved before any closing of the transportation system assets could occur.[239] Specifically, it is alleged that SharpVue's lender is unwilling to finance the transaction without title insurance, which SharpVue is unable to obtain because of the Village's ROFR to acquire the transportation assets.[240] Given that the ROFR litigation is just now entering into the discovery phase,[241] the resolution of that litigation is not imminent.

Accordingly, in light of the additional evidence adduced at hearing, the Commission may wish to reconsider its earlier order and hold this proceeding in abeyance.

VII. THE COMMISSION SHOULD DISALLOW RECOVERY OF ACQUISITION PREMIUM AS REGARDS ALL OF THE TRANSPORTATION SYSTEM OPERATIONS—WHETHER THROUGH RATES OR LEASES.

For years, Limited has operated its parking and barge assets as indispensable components of its transportation system, "used and useful" in connection with its utility

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[239] *See Bald Head Island Limited, LLC & Bald Head Island Transp., Inc. v. Village of Bald Head Island*, Complaint, Brunswick County Superior Court No. 22 CVS 98 (filed Jan. 19, 2023) (attached as Exhibit B to Village's Motion to Hold Proceeding in Abeyance, Docket No. A-41, Sub 22 (Feb. 3, 2023)).

[240] *See id.*, ¶ 53.

[241] By order dated May 11, 2023, the trial court denied Plaintiffs' Motion for Judgment on the Pleadings. *See* Attachment 2 hereto.

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operation, but without seeking a formal determination of the regulatory status of those assets and operations. By not pursuing such a determination, and not initiating general rate case proceedings, Limited has been able, in large part, to operate these assets outside of formal regulatory scrutiny, while using excess revenues from these operations to support the regulated ferry operation. This approach has allowed it to collect extensive and excessive revenues from these assets and, now, to seek to leverage those unregulated returns into inflated asset valuations. Indeed, it is undisputed that, based on its 2021 financial records, Limited has been overearning on its parking and barge operations by pocketing revenues in excess of $2 million above what it should be collecting from regulated public utility operations. *See supra* "Background" Section D.

The purchase price that Limited has demanded for the collection of assets including the transportation system assets was based, at least in part, on these inflated valuations. And SharpVue's business plan, therefore, is predicated on the continuation of Limited's approach—an expectation which was never reasonable given the nature and use of the assets, but certainly is no longer reasonable given the Commission's determination in the Sub 21 Order. Nonetheless, to effectuate its plan, SharpVue seeks a determination allowing it to continue to collect these excessive revenues by being allowed to collect acquisition premium from ratepayers through including the purchase price in rate base.[242]

North Carolina law, however, protects ratepayers and precludes SharpVue from

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[242] Alternatively, the Village anticipates based on **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** This is simply an alternative mechanism for extracting the same monies from ratepayers.

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recouping its acquisition premium. First, the Commission has long adhered to a general prohibition against allowing a purchaser to recoup an acquisition premium, and Applicants have not made a case for why this transaction should be excluded from this prohibition. Second, Section 62-133 dictates that rate base be set at the "original cost . . . of the public utility's property . . . less that portion of the cost that has been consumed by previous use recovered by depreciation expense," and because SharpVue is buying existing utility property, Limited's original cost—and not SharpVue's purchase price—must be the base for the transportation system's rates.

Ultimately, Applicants ask that the Commission take Limited's past practice of overearning on its utility assets and make that a permanent fixture of the transportation system—which would hand Applicants a windfall at the expense of ratepayers who depend on the transportation system. The Commission should reject Applicants' request.

A. The Commission Should Disallow SharpVue's Attempt to Collect an Acquisition Premium.

SharpVue is not allowed to collect an acquisition premium.[243] Years ago, the Commission declared a general prohibition against allowing a purchaser to recoup an acquisition premium, absent "special circumstances."[244] Applicants have not demonstrated that special circumstances exist here.

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[243] The definition of an acquisition premium refers pays for an asset above the asset's net book value. The definition is illustrated by the National Association of Regulatory Utility Commissioners (NARUC) Uniform System of Accounts states that Utility Plant Acquisition Adjustments (Account 114) shall include the difference between (1) the cost to the utility of plant acquired as an operating unit or system by purchase, merger, or otherwise, and (2) the net of amounts distributed to the plant accounts, the accumulated depreciation account and other appropriate accounts, also referred to as net book value. *See* Tr. Vol. 4 (Exhibits), KWO-2, at ¶ 3.

[244] *See* Order, Docket No. W-1000, Sub 5, at 27 (Jan. 6, 2000).

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[BEGIN AEO CONFIDENTIAL] [redacted] **[END AEO CONFIDENTIAL]**

[245] For the sake of simplicity, we have focused on the revenue requirements for the parking operations. The same is true for the barge operations. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** *See* Tr. Vol. 8 (Exhibits), Confidential Village Taylor Rebuttal Cross Exhibit 2. This is echoed in the undisputed evidence provided by Ms. Perry. *See* Tr. Vol. 4, p. 190 (Perry Dir.); Tr. Vol. 4 (Exhibits), KWO-3.

[246] Tr. Vol. 8 (Exhibits), Confidential Village Taylor Rebuttal Cross Exhibit 1, at line 36; Tr. Vol. 8, p. 23:1–12 (Taylor Confidential Cross).

[247] Tr. Vol. 8, p. 23:8–12 (Taylor Confidential Cross).

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1. There is a longstanding general prohibition against allowing acquisition premiums.

Over two decades ago, the Commission articulated the test for determining whether a purchaser would be allowed to recoup an acquisition premium paid for a utility asset.[248] In doing so, the Commission first emphasized that

> A majority of regulatory agencies in the United States have decided that, all other things being equal, acquisition adjustments should not be afforded rate base treatment. According to [the] Bonbright [treatise], "most commissions are skeptical of transfers between utilities at excess costs, so rate base adjustments are generally not made unless the utility can demonstrate actual, distinct and substantial benefits to all affected ratepayers." The adoption of such a general rule is clearly appropriate, for the routine inclusion of acquisition adjustments in rate base would tend to create an incentive for purchasers to pay a high price to acquire utility assets, confident in the knowledge that such payments would be recouped from ratepayers.[249]

To guard against creating an incentive for purchaser to overpay for a utility asset, the Commission "adopt[ed] a general rule prohibiting the inclusion of acquisition adjustments in rate base[.]"[250]

As discussed below, the concern that animated the adoption of this prohibition—that permitting the inclusion of acquisition premium would create an incentive for purchasers to pay a high price confident that the overpayment would be recovered from ratepayers—is *precisely* the concern at play here. Not satisfied with the Local Government Commission's rejection of the prior sale to the Transportation Authority because the purchase price was unsubstantiated, Limited has repackaged the deal at a *higher* price while

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[248] *See* Order, Docket No. W-1000, Sub 5, at 27 (Jan. 6, 2000).
[249] *Id.* at 26.
[250] *Id.* at 27.

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advancing the legal arguments that (a) the Commission must approve the assignment because of a "crisis" of its own creation, and that (b) the Commission must allow full recovery of the purchase price from ratepayers.

However, Applicants' arguments do not satisfy the "special circumstances" which the Commission has recognized could "justify[] a contrary decision" that would warrant the inclusion of an acquisition premium in rate base.[251] Such special circumstances exist only when the purchaser establishes that (a) the purchase price was "prudent" and (b) "both the existing customers of the acquiring utility and the customers of the acquired utility would be better off (or at least no worse off) with the proposed transfer, including rate base treatment of any acquisition adjustment, than would otherwise be the case."[252]

As for the second factor, the Commission noted that it should consider "the extent to which the selling utility is financially or operationally 'troubled;' the extent to which the purchase will facilitate system improvements; the size of the acquisition adjustment; the impact of including the acquisition adjustment in rate base on the rates paid by customers of the acquired and acquiring utilities; the desirability of transferring small systems to professional operators; and a wide range of other factors, none of which have been deemed universally dispositive."[253] On appeal, the Court of Appeals affirmed the Commission's ruling in Docket No. W-1000, Sub 5, holding that "the Commission did not create a 'new standard,' but rather properly considered all factors and rendered a decision consistent with prior acquisition adjustment cases."[254]

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[251] *Id.*
[252] *Id.* at 27. *See also id.* at 22.
[253] *Id.* at 27.
[254] *In re Utilities, Inc.*, 147 N.C. App. 182, 193–94, 555 S.E.2d 333, 341 (2001).

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2. The Commission has consistently adhered to the general prohibition against acquisition premiums.

Consistent with its ruling in Docket No. W-1000, Sub 5, the Commission has rarely allowed a purchaser to recoup an acquisition premium on the purchase of utility assets. In short, "special circumstances" that warrant an award of an acquisition premium are few and far in between.

Witness Perry, a 32-year veteran of the Public Staff, testified based on her extensive experience that the Commission "has consistently disallowed recovery of the acquisition premiums from ratepayers in merger proceedings over the last 25 years." In support of her testimony, Ms. Perry identified twelve major transfer proceedings since 1997 in which the purchaser was not awarded the recovery of acquisition premium.[255]

The only known outliers in which the Commission allowed a purchaser to recoup its acquisition premium are found in a handful of water-transfer proceedings. Nearly all of

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[255] Tr. Vol. 4 (Exhibits), KWO-3, at Exhibit A (Duke Power Company and PanEnergy Corp -Docket Nos. E-7, Sub 596 (1997); Dominion Resources, Inc., and Consolidated Natural Gas Company, Docket No. E-22, Sub 380 (1999); Carolina Power & Light Company and North Carolina Natural Gas Corporation, Docket Nos. E-2, Sub 740 and G-21, Sub 377 (1999); Carolina Power and Light Company and Florida Progress Corporation, Docket No. E-2, Sub 760 (2000); Piedmont Natural Gas Company & NUI North Carolina Gas Service -Docket Nos. G-9, Sub 466/G-3, Sub 251 (2002); Piedmont and North Carolina Natural Gas Corporation and Eastern NCNG Merger - G-9, Sub 470, G-21 Sub 439, and E-2, Sub 825 (2003); Duke Energy Corporation - Cinergy in Docket No. E-7 Sub 795 (2005); Duke and Progress Energy, Inc. Merger in Docket Nos. E-2, Sub 998 and E-7, Sub 986 (2012); Duke Energy Corporation (Duke) and Piedmont Merger in Docket Nos. E-2, Sub 1095, E-7, Sub 1100, and G-9, Sub 682 (2016); Public Service Dominion Energy, Inc. (Dominion Energy) and SCANA Corporation (SCANA) - Docket Nos. E-22, Sub 551 and G-5, Sub 585 (2018); Ullico Infrastructure Hearthstone Holdco, LLC Acquisition of GEP Bison Holdings Inc., Including Frontier Natural Gas Company - Docket No G-40, Sub 160 (2021); Frontier Natural Gas Company and FR Bison Holdings, Inc., for Approval of Acquisition of Stock of Gas Natural, Inc. - Docket No G-40, Sub 136 (2017)).

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those water-transfer proceedings involved a purchaser acquiring a system that was no longer financially and/or operationally viable.[256] The one known exception to this rule was a water-transfer proceeding in 1997 in which there were no operational deficiencies in the system but, nevertheless, the Commission allowed the acquisition premium because of wanting to encourage transfers of water systems "from developers and small owners to reputable water utilities."[257] Not only is this 1997 water-transfer proceeding an anomaly, the stated rational for allowing the acquisition premium—i.e., to incentivize professional utility operator purchasers to acquire systems—stands in tension with the Commission's later justification for its general prohibition against allowing acquisition premiums—i.e., to avoid incentivizing purchasers to overpay for systems.[258] Indeed, when the Commission

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[256] *See* Recommended Order, Docket No. W-354, Sub 361 (July 29, 2019) (citing the 1997 and 2000 orders and recommending approval of acquisition adjustment in rate base where "the undisputed evidence [showed] that there are deficiencies affecting Pace Utilities' water system which negatively affect the quality of water utility service currently being provided to the Silverton Subdivision customers."); Recommended Order, Docket No. W-218, Sub 420 (July 18, 2016) (citing the 1997 order and recommending approval of acquisition adjustment in rate base since Aqua would make necessary system improvements, and due to the public policy of encouraging transfer of water systems from developers and small owners to reputable water utilities); Recommended Order, Docket No. W-218, Sub 335 (August 6, 2012) (recommending approval of acquisition adjustment in rate base where "the Public Staff does not consider Fox Run to be viable financially, managerially, and operationally."). *See also* Recommended Order Approving Rate Increase, Merger of CWS Systems, Inc., and Transfer of Beatties Ford, Docket No. W-354, Sub 39 (Jan. 10, 1986) (approved transfer of three systems; acquisition premium was allowed for one system in disrepair, not allowed for two systems with no evidence of troubles).

[257] Order Approving Transfer, Acquisition Adjustment, and Maintaining Current Rates, Docket No. W-274, Sub 122 (Apr. 30, 1997).

[258] *Compare* Order, Docket No. W-274, Sub 122 at 11 (Apr. 30, 1997) ("The Commission concludes that the acquisition is in the best interests of the customers and that Heater should be allowed to make the requested debit acquisition adjustment to rate base after the transfer has been completed. The Commission has articulated a position of encouraging the orderly transfer of water systems from developers and small owners to reputable water utilities like Heater and from reputable water utilities to municipalities and other governmental owners."), *with* Order, Docket No. W-1000 Sub 5 at 26 ("The adoption of such a general rule is clearly appropriate, for the routine inclusion of acquisition adjustments in rate base would tend to create an incentive for purchasers

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otherwise reviewed the purchase of water systems that were not operationally deficient, the Commission denied the purchaser's request for recovery of an acquisition premium.[259]

3. Applicants have not demonstrated special circumstances that overcome the prohibition against recovery of acquisition premiums.

Applicants rely on the acquisition-premium test from Docket No. W-1000, Sub 5 and argue that they satisfy the standard because they claim SharpVue's purchase price is prudent and that the benefits of SharpVue's ownership outweigh the costs of higher rate base.[260] They are wrong on both fronts.

First, the purchase price that SharpVue is paying for the regulated transportation system is not prudent. As explained above, Limited is seeking to collect an inflated purchase price for the BHI transportation system—exactly as the Commission recognized would be the case in the absence of rule prohibiting the recovery of acquisition premium. Because Limited's parking and barge operations were only recently formally declared as subject to regulation, Limited has been collecting excessive revenues for the operations. The Applicants' agreed-upon purchase price is based on the hope that SharpVue will be able to continue to collect these excessive revenues from ratepayers despite any doubt about the regulatory status of the operations now being clarified. Moreover, all of the

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to pay a high price to acquire utility assets, confident in the knowledge that such payments would be recouped from ratepayers.").

[259] *See* Order, Docket No. W-1000, Sub 5 at 21 (Jan. 6, 2000) (denying acquisition premium because system was "in satisfactory condition" and "currently sufficient to provide" service); Recommended Order, Docket No. W-1300, Sub 10 (February 4, 2016) (denying acquisition adjustment in rate base where the system was well run and the current operator would continue to operate the plant after transfer of ownership); *see also* Docket No. W-354, Sub 39 (Jan. 10, 1986) (approving transfer of three systems; acquisition premium was allowed for one system in disrepair, not allowed for two systems with no evidence of troubles).

[260] Tr. Vol. 9, p. 34 (Roberts/Paul Joint Reb.).

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appraisals to which Applicants point as evidence of the prudency of their purchase price are appraisals based on the assumption that the owner of the transportation system will continue to collect revenues from an unregulated transportation system.[261]

A purchase price based on a new owner's expectation of recouping its investment by collecting excessive revenues from ratepayers is not a prudent purchase price; to the contrary, it is exactly the type of inflated purchase price that the Commission targeted in declaring a general prohibition against acquisition premiums. The Commission should not countenance Applicants' attempt to bootstrap a claimed entitlement to acquisition premium based on the very concerns that led to the prohibition in the first place.[262]

Second, Applicants' own evidence shows that there are no special circumstances

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[261] *See* Tr. Vol. 9 (Exhibits), LHR/CAP Rebuttal Exhibits 1 and 2 (Appraisals as of Apr. 24, 2019—prior to the Sub 21 Order—with "no Hypothetical Conditions."); *id.*, LHR/CAP Rebuttal Exhibits 4 and 5 (Appraisals as of Jul. 17, 2021—prior to the Sub 21 Order—with no hypothetical conditions); *id.*, LHR/CAP Confidential Rebuttal Exhibit 6 **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

[262] The Village recognizes that the purchase price, standing alone, is not the Commission's concern. How that purchase price impacts the operation of the utility system (e.g., debt service) and how that purchase price is recovered, if at all, from ratepayers is absolutely relevant to the Commission's concern. The rebuttal testimony of Mr. Paul and Mr. Roberts subtly threaten to abandon the transfer if SharpVue is not able to recoup its current purchase price. Tr. Vol. 9, p. 35:9–11 (Roberts/Paul Joint Reb.) ("Without including the purchase price in rate base, there is considerable jeopardy to the benefit of transferring the regulated operations serving Bald Head Island to a willing and capable owner (SharpVue)[.]"). **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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that overcome the prohibition against acquisition premiums. As discussed above, Limited is not threatening to discontinue operations nor is there any evidence that operations imperiled in any way.[263] Thus, there is no imminent threat to utility service.

The system is not operationally troubled. As the Public Staff admitted, SharpVue stated in response to a data request that SharpVue believed the transportation system is currently "well run."[264] Aside from the need to improve on-time performance, the Public Staff found no deficiencies in the system's current management and operations.[265] In fact, SharpVue believes that the system is so well run that SharpVue intends to retain the existing management and staff.[266] Moreover, SharpVue has no experience in operating a transportation service, so must rely on current management to continue operating the system.[267] Thus, if there were operational problems, no solutions would result due to SharpVue's ownership.

The system is also not financially troubled. The Mitchell Estate is able to make investments and has continued to do so, including a recent investment in an e-ticketing system for the ferry.[268] The Public Staff admitted that the recent acquisition of the

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[263] Tr. Vol. 6, p. 202 (Public Staff Joint Cross).

[264] Tr. Vol. 6, p. 217 (Public Staff Joint Cross).

[265] Tr. Vol 6, pp. 201–202 (Public Staff Joint Cross).

[266] Tr. Vol. 3, p. 13:5–6 (Roberts Amended Dir.) ("SharpVue will keep the operations' current management in their current roles and duties[.]"); *id.* at p. 13:13–12 ("SharpVue has committed to hire almost all of the current employees involved in ferry, tram, parking, and barge operations.")

[267] *See* Tr. Vol. 3, p. 13:4–6 (Roberts Amended Dir.) (acknowledging that "this type of transportation service is new to our team"); Tr. Vol. 6, p. 217: 20–23 (Public Staff Joint Cross) ("Q. Okay. SharpVue, itself, has no experience in operating the transportation service, correct? A. That's been said in the record ad nauseam.").

[268] Tr. Vol. 9, pp. 18:3–14 (Roberts/Paul Joint Reb.).

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e-ticketing system suggests that the Mitchell Estate was still willing to make investments to improve the system.[269] Even if the Mitchell Estate was unable to fund the system, it is irrelevant: According to the Public Staff, the consolidated transportation system has been "very profitable."[270] The Public Staff testified that the transportation system is financially self-sustaining, and noted that Mr. Roberts has said so himself.[271]

To this point, SharpVue simply intends to maintain the status quo; it has disclosed no concrete plans for operational changes or improvements in the short-term.[272] Regarding long-term plans, when the Public Staff asked SharpVue for its investments plans, SharpVue similarly stated that it did not have any plans for any new investments.[273] **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** the Public Staff had no recollection of this.[275]) For example, when asked to "[s]pecify the capital improvements that SharpVue commits to undertake as owner of the transportation facilities, including (a) the projected date of completion of the improvement, and (b) the project cost of the improvement," SharpVue refused to identify any particular new investment that it would make in the system to improve it.[276] Instead, SharpVue's response—in full—merely recited that: "After closing the transaction, SharpVue intends

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[269] Tr. Vol. 6, p. 213:1–6 (Public Staff Joint Cross).
[270] Tr. Vol. 6, p. 202:13–15 (Public Staff Joint Cross).
[271] Tr. Vol. 6, pp. 206:6–207:4 (Public Staff Joint Cross).
[272] Tr. Vol. 6, p. 220:6–18 (Public Staff Joint Cross).
[273] Tr. Vol. 9, pp. 220-23 (Public Staff Joint Cross).
[274] Tr. Vol. 3, p. 114 (Roberts Confidential Cross).
[275] Tr. Vol. 6, pp. 221:12–22:20 (Public Staff Joint Cross).
[276] Tr. Vol 4 (Exhibits), at Scott Gardner Exhibit 1, SharpVue Responses to the Village's Second Set of Data Requests, DR 2-8.

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to continue the ferry and tram operations without significant or immediate change. SharpVue plans to analyze the business more fully while operating it and make strategic decisions, including related to capital improvements, in due course."[277]

In short, SharpVue's acquisition presents no "special circumstance" warranting rate base treatment of the acquisition premium it agreed to pay Limited. The only circumstance here is the continuation of the status quo. SharpVue is buying a financially self-sustaining utility operation and its only plan is to do nothing new. In exchange for simply maintaining the status quo, SharpVue, through SVC Pelican Partners, LLC, will collect [**BEGIN AEO CONFIDENTIAL**] [redacted] [**END AEO CONFIDENTIAL**] fees for its management of the system—money taken from ratepayers that, rather than being reinvested in the system, will go to pay a private equity group for merely maintaining the status quo.[278]

For these reasons, SharpVue's acquisition offers no benefit to the public, much less a benefit that outweighs the cost of including an acquisition premium in rate base. There are no special circumstances that warrant a departure from the prohibition against recovery of acquisition premiums.

B. Contrary to Applicants' Unsupported Arguments, the Commission Should Set Rate Base at Undepreciated Original Cost or Net Book Value.

The Village simply asks the Commission to apply statutory law and Commission precedent to the settled facts and set the transportation system's rate base at undepreciated

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[277] *Id.*

[278] Tr. Vol. 3, p. 13 (Roberts Amended Dir.) ("SharpVue will keep the operations' current management in their current roles and duties . . . . SharpVue has committed to hire almost all of the current employees involved in ferry, tram, parking, and barge operations.").

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original cost or net book value. In contrast, seeking to avoid clear, settled authority prohibiting recovery of acquisition premium, the Applicants employ slight-of-hand to argue that the issue is not really one of acquisition premium but one of the interpretation of "original cost". Their creative arguments are not supported by authority and must be rejected.

1. The law requires rate base to be set at net original cost.

Section 62-131 of the General Statutes requires that rates for utility operations be "just and reasonable."[279] Section 62-133 of the General Statutes establishes how "just and reasonable" rates are to be fixed.[280] The statute requires the Commission to "[f]ix such rate of return on the cost of the property . . . as will enable the public utility by sound management to produce a fair return for its shareholders."[281]

Importantly, step one of the statutory process of fixing the rate of return is to "[a]scertain the reasonable *original cost* . . . of the public utility's property . . . less that portion of the cost that has been consumed by previous use recovered by depreciation expense[.]"[282] Again, the statute later says that the residual "*original cost* of the public utility's property" will be determined at the end of the test period used to calculate the revenue requirement.[283] Thus, the General Assembly explicitly requires that rate base be set at net original cost. Indeed, the Supreme Court has interpreted Section 62-133 to define

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[279] N.C.G.S. § 62-131.
[280] N.C.G.S. § 62-133.
[281] N.C.G.S. § 62-133(b)(4).
[282] N.C.G.S. § 62-133(b)(1) (emphasis added) (the statute allowed for the consideration of fair market value only under Section 62-133.1A, which concerns purchases of water system).
[283] N.C.G.S. § 62-133(c) (emphasis added).

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a utility's rate base as "the undepreciated original cost of the utility's property which is used and useful in providing service to the public."[284]

In sum, North Carolina law requires rates to be just and reasonable, and it says that rates are just and reasonable when they allow a fair return on the *net original cost* of property used and useful for the utility service. Here, there is no debate that the barge and Deep Point parking operation have been used and useful to the service of ratepayers. The barge and parking operations were constructed as ancillary components of the integrated transportation service and have been operated as such for the entirety of their existence. As regards parking in particular, the Deep Point facilities were specifically constructed to serve the ferry terminal and have been used since construction for that purpose. There is no evidence in the record suggesting that the parking facilities have been used for anything other than to serve the ferry or that the facilities were intended for any other purpose. Indeed, the nature of the ferry service (offloading passengers and their luggage and personal effects), coupled with isolated nature of the Deep Point terminal, compel the existence of terminal parking facilities. Revenues from the parking (and barge) operation have been used to defray ferry expenses. And the same consumers who use the parking facilities also use the ferry. The Commission confirmed these facts in the Sub 21 Order. There, the Commission ruled that the parking lot was "an integral component of the

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[284] *State ex rel. Utils. Comm'n v. Pub. Staff-N.C.U.C.*, 323 N.C. 481, 487 n.7, 374 S.E.2d 361, 364 n.7 (1988); *see State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n. Inc.*, 323 N.C. 238, 244, 372 S.E.2d 692, 696 (1988) ("The 'rate base' is the cost of the utility's property which is used and useful in providing service to the public.").

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regulated ferry service", [285] the barge was an ancillary service,[286] and that collectively the ferry, parking, and barge operate as "a single, holistic transportation system."[287]

2. Applicants have not justified deviating from settled law on establishing rate base to disallow recovery of acquisition premium.

Notwithstanding North Carolina law, Applicants contend that the rate base for the transportation system set at the value that SharpVue is paying for the assets—in essence arguing that the "original cost" refers to the cost SharpVue paid for the assets.[288] Applicants offer no authority for this assertion—and for good reason. There is none. If SharpVue records the assets being acquired above original cost, then it, by definition, will be recovering acquisition premium. The acquisition premium rules exist to address this specific situation—where a buyer is acquiring utility property. The Applicants cannot sidestep these rules by asserting that the acquisition of the utility assets should be treated akin to the purchase of an item of equipment that is then put into rate base.

Rather than to provide authority for their novel claim to circumvent the acquisition premium prohibition, Applicants provide four reasons, why they contend the purchase price should be the rate base for the parking (and barge) assets: (1) parking and barge operations have not been included in rate base; (2) Limited has not recovered investment in or earned return on parking and barge assets; (3) parking and barge operations have

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[285] Sub 21 Order, at 7 (¶ 22).
[286] Sub 21 Order, at 8 (¶ 34).
[287] Sub 21 Order, at 17.
[288] Applicants ask the Commission to "set rate base at the lesser of purchase price or fair market value for the parking and barge assets." Tr. Vol. 7, p. 94:12–13 (Taylor Reb.). Notably, if the rate base of those assets was the purchase price (which is also the fair market value, according to Applicants), then there would be no acquisition premium.

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never been owned by utility; and (4) if the rate base is less than the purchase price, then the revenue requirement would be too low and SharpVue would have overpaid for the assets. As explained below, none of these reasons are valid.

First, the Applicants contend that the purchase price should be the rate base value because "the operations have never been included in any rate base calculations in the past."[289] However, this assertion is irrelevant. The assets being acquired have been declared to be utility property by the Commission. As such, SharpVue would be acquiring utility property and the rules applicable to the acquisition of utility property—i.e., the acquisition premium prohibition—apply. It matters not to SharpVue whether the property in question has previously been included in the seller's rate base. Moreover, as discussed above, the property in question has always been used and useful in connection with the utility operation, and the Sub 21 Order merely confirmed this fact. The Order did not create a utility, it recognized an existing utility. As the Commission ruled, "[t]here is no doubt that these Ferry and Parking Operations not only evolved together *but were planned from the outset as necessary components of a single, holistic transportation service as early as 1998*."[290] Additionally, in the 2010 rate case, the Commission entered an order in which parking revenue was attributed to the ferry operation.[291] To determine the amount of that attribution, the Public Staff calculated the amount of parking revenue by determining the

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[289] Tr. Vol. 7, p. 93:12–13 (Taylor Reb.).

[290] Sub 21 Order, at 17 (emphasis added); *see also id*. at 20 ("here is no doubt these Parking Facilities were provided—in this case by BHIL—in part to alleviate specific Ferry customer concerns.").

[291] Sub 21 Order at 12–13.

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rate base for the parking assets.[292] As a result, the Commission ordered that $523,000 of revenue from the parking operations be imputed to the ferry operations annually.[293] BHIT agreed to this attribution in the 2010 rate case.[294] SharpVue has agreed to continue this revenue attribution, to some extent, as part of its proposed regulatory conditions.[295]

Second, Applicants contend that, because the assets have never been in rate base, "[t]he Commission has never established rates for these services."[296] Applicants elaborate that, "[t]herefore, the depreciation of those assets has never been included and recovered as a cost of a regulated service; nor has there ever been a return built into Commission-approved rates."[297] But just because the Commission has not previously established rates for parking and barge, that does not mean that Limited has not fully recovered its cost or earned a return on those assets. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

In fact, the record evidence tends to show that Limited has more than recovered its

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[292] Tr. Vol. 5 (Exhibits), Bald Head Perry Cross Exhibit 2, at 17–18.
[293] Sub 21 Order at 12–13.
[294] *Id.*
[295] Tr. Vol. 9, p. 48:5–10 (Roberts/Paul Joint Reb.).
[296] Tr. Vol. 7, p. 93:13–14 (Taylor Reb.)
[297] *Id.* at p. 93:14-16; *see also id.* at 97:7–9 ("The regulated ferry rate payers have not paid for these assets through utility rates and BHIL never received a regulated return or cost recovery through depreciation expense through regulated rates for the services they provide."); and 97:18-21 ("equates to retroactively regulating the parking and barge operations by pointing to the fees that it has charged as a competitive venture, subject to market conditions, without designated service territory, or entitlement to a rate of return, and conflates those fees with the rates paid by utility ratepayers to arrive at the conclusion . . . .").
[298] *Id.* at p. 34:21–24.
[299] Tr. Vol. 8, pp. 33:22–34:1 (Taylor Confidential Cross)

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investment. By way of illustration, between 2014 and 2021 (the period for which Limited has provided financial records), Limited generated $12 million in net revenues in excess of direct expenses from parking alone. Applying the average receipts over this period ($1,501,437) to years 2010-2013 and 2022, one may extrapolate that Limited has generated, minimally, over $19 million during the period subsequent to the 2010 rate case in profit from parking. *See* Attachment 3 hereto. By comparison, Limited paid $325,126 for the land on which the parking lot sits,[300] and the entire rate base for the parking operation as a whole (including improvements) is only **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Allowing the rate base to be set at the purchase price, as Applicants' urge, would merely result in ratepayers paying again for assets they have already paid for. The Commission has previously recognized that it is contrary to the public interest to require ratepayers to pay for assets thay have already paid for.[302]

On cross-examination, Mr. Taylor conceded that Applicants were not asserting that Limited had never earned a return on those assets.[303] Limited has not been prejudiced by

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[300] Tr. Vol. 2 (Exhibits) (Village Mayfield Cross Exhibit 1).

[301] *See* Perry Dir. (adopting O'Donnell Dir.), at Exhibits KWO-2 (calculation) KWO-3 (workpapers) (Tr. Vol. 4 Exhibits). *See also* Perry Dir. (adopting O'Donnell Dir.), at 6–9 (Tr. Vol. 4, pp. 179-182) (discussing double payment problem).

[302] *See, e.g., In re Carolina Water Service, Inc., of N.C.*, Docket Nos. W-354, Subs 74, 79, 81, Eightieth Report of the North Carolina Utilities Commission: Orders and Decisions 342, 394 (1990) ("[P]ublic utility ratepayers normally should only be responsible for reimbursing an investor once for the cost of public utility property."); and id. at 399 ("The Commission agrees with this adjustment [reducing acquiring utility's rate base from purchase price to net original cost to developer] because ratepayers should not have to pay more than once for the same net original cost of utility property used to provide them with service.").

[303] *Id.* at p. 36:9–16.

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the lack of regulated rates for parking and barge operations. In fact, and to the contrary, Limited has profited by running its parking operations outside of regulatory scrutiny. Applicants should not be allowed to continue to collect excessive revenues simply because Limited avoided a formal determination on regulation until December 30, 2022.

Third, curiously, Applicants contend the purchase price should be used to establish rate base because "[p]rior to acquisition by SharpVue or at least prior to the Sub 21 Order, the parking and barge assets have not been owned by a utility and have not been regulated assets."[304] SharpVue, though, has not yet acquired the parking and barge assets. The parking and barge assets are currently owned by Limited, and they are currently regulated utility operations, as made clear by the Commission in the Sub 21 Order.[305] Mr. Taylor himself testified that "these assets are now deemed to be part of a regulated utility pursuant to the Sub 21 Order."[306] Therefore, at the time SharpVue acquires the assets, SharpVue will be acquiring previously regulated utility assets. Limited is not exempt from the statutory requirement to set rate base at original cost simply because, until recently, it had evaded regulation. Awarding Limited special rate-base treatment here would create a strong financial incentive for utility operators to evade the Commission's supervision as long as possible, knowing that longer they avoid regulation, the greater their rate base might eventually be.

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[304] Tr. Vol. 7, p. 94 (Taylor Reb).

[305] *See* Sub 21 Order, at Finding of Fact ¶¶ 22–23, 34 (ancillary and parent); *id.* at 28 ("declaration of utility status" and "may continue to operate . . . as an ancillary service covered under BHIT's certificate of public convenience and necessity")

[306] Tr. Vol. 7, p. 93:16–17 (Taylor Reb.).

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Finally, Applicants contend that "[t]he use of the original owner's costs would result in parking rates that are far below the current level, a current level of rates which all parties have deemed as fair and reasonable."[307] In other words, in circular fashion Applicants argue that the Commission must set rate base at SharpVue's purchase price so that SharpVue can continue to collect the revenues that Limited has historically collected as an unregulated operation. Applicants attempt to justify this request—to continue to collect historical revenues—by mislabeling Limited's past revenues as just and reasonable.[308] However, Limited's rates are not been determined as such. Section 62-133 establishes how "just and reasonable" rates are to be fixed, and it requires the Commission to "[f]ix such rate of return on the cost of the property . . . as will enable the public utility by sound management to produce a fair return for its shareholders."[309] Thus, North Carolina law does not define just and reasonable rates in reference to how a utility's rates might compare to non-regulated operations. Moreover, the Commission has never determined that Limited's current parking rates are just and reasonable. In the Sub 21 Order, the Commission noted that the proceeding was not a general rate case and stated that "no party has sought to present evidence on the panoply of matters appropriate for full review or determination in a general rate case."[310] The reasonableness of the parking rates is deferred to the next general rate case.

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[307] Tr. Vol. 7, p. 100 (Taylor Reb.).

[308] Mr. Taylor presented a table of rates of other commercial parking lots, and he argued that the parking rates charged by Limited are reasonable when compared to these other parking operations.[308] The parking lots in his list, though, are not utility operations. They are free to charge whatever rate they wish. Limited's regulated parking operation is different.

[309] N.C.G.S. § 62-133(b)(4).

[310] Sub 21 Order, at 28.

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Moreover, SharpVue's chosen purchase price (which is based on the transportation system's expected revenues) does not dictate rate base in the assets to be acquired. Simply put, rate base is used to establish a utility's revenue requirement—expected revenues are not used to set rate base. Applicants' concern is that if rate base was the net original cost of the parking assets, or even the original cost—and parking rates will later be reduced because of the lower rate base—then SharpVue will not earn its projected return on its investment.[311] In other words, Applicants argue that the Commission should allow SharpVue to recoup all of its purchase price through rate base treatment of the acquisition premium it agreed to pay because, otherwise, SharpVue will have overpaid for the transportation system.[312] Using purchase price to set rate base, though, creates an incentive for utility buyers to pay higher prices, knowing that they will be able to recoup their investment. As the Commission recognized in the W-1000, Sub 5 Order, "the routine inclusion of acquisition adjustments in rate base would tend to create an incentive for

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[311] Applicants explain that, if parking rates will be reduced in the future, then SharpVue not buy the system because SharpVue "would not be interested in pursuing a transaction in which it could not *earn a return on $25 million of its investment at the onset*." (Taylor 26 (emphasis added)).

[312] *See* Tr. Vol. 7, p. 105 (Taylor Reb.) (emphasis added) ("Said conversely, *reducing the rate base by $25 million as proposed by the Village would result in parking rates that would be completely inconsistent and uneconomical for the facilities' owner* when compared with similar parking services provided around the state. I am not a lawyer, but, in layman's terms, such a result would have the practical result of a taking from BHIL or Sharp Vue in the amount of $25 million of value."); 26:13–18 ("No investor would (or should be expected to) accept the risks associated with maritime transportation operations (e.g. operational complexity, weather, economic cycles, etc.) while earning no return on $25 million of its investment. This economic reality is the basis for the regulatory principle discussed previously that *returns should be sufficient to attract necessary capital* to fund operational and capital needs of the utility. A decision that would, in essence, write-off $25 million of an investment would violate that principle.")

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purchasers to pay a high price to acquire utility assets, confident in the knowledge that such payments would be recouped from ratepayers."[313]

SharpVue contends that because it intends to allocate $56 million of the purchase price to the transportation assets, it should be able to recoup that chosen price.[314] This simply is not the way ratemaking works. For example, if SharpVue had chosen to pay twice as much—$108 million—for the transportation system, then ratepayers should not be forced to pay twice as much to ride the ferry. The price a purchaser chooses to pay for existing utility property is part of the equation for setting future rates when the purchaser pays net book value for those assets, otherwise absent "special circumstances" that do not exist here, the purchase price is not the means of determining how much the purchaser should be able to collect from ratepayers through future rates.

* * *

For the reasons set forth above, the Commission should confirm its well-established rules prohibiting recovery of acquisition premium and clarify that assets acquired by SharpVue would come into rate base at the lower of depreciated original cost or net book value.[315] Applicants previously asked the Commission to determine the proper method to calculate the transportation system's rate base.[316] Clarifying the proper method for

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[313] Order Approving Transfer and Denying Acquisition Adjustment, Docket No. W-1000, Sub 5 (Jan. 6, 2000), at 15.

[314] *See* Tr. Vol. 7, p. 94 (Taylor Reb.) (emphasis added) ("In this case*, the net original cost and the purchase price for the parking and barge assets are the same*, the apportionment of the $56 million that Sharp Vue has agreed to pay for those parking and barge assets.").

[315] The Village agrees with Commissioner Clodfelter's suggestion that the Commission could determine the proper *method* of calculating rate base for the transportation system without having to undertake the additional exercise of calculation the actual rate base amount (which would require an audit by the Public Staff).

[316] Tr. Vol. 7, p. 92 (Taylor Reb.) ("Unlike the Sub 21 proceeding, the Applicants in Sub 22 are requesting a determination of the rate base value for the parking and barge assets.").

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establishing rate base is necessary for the Commission to determine whether the costs of the transfer, such as its impact on a future revenue requirement, are outweighed by the transfer's claimed benefits. Answering the rate-base question would also be fair to SharpVue and its investors, who need to know evaluate their ability to earn their expected return on the current purchase price. Finally, the question of rate base treatment of the acquisition premium will inevitably have to be answered, and resolving the matter now would provide clarity to stakeholders and avoid future disputes about this critically important issue.

CONCLUSION AND REQUEST FOR RELIEF

Applicants have met no part of three-prong test here, so the transfer must be denied. Further, the Application cannot be granted as presently framed as SharpVue has failed to provide sufficient record evidence upon which the Commission could predicate findings necessary to protect ratepayers. The pendency of the Applicants' Sub 21 Order appeal makes it impracticable for the Commission to fashion appropriate safeguards to ensure that ratepayers are protected "as much as possible," including with regard to SharpVue's request for authority to pledge utility assets as security for debt it proposes to use to finance the transaction. In the alternative, if the Commission were to approve the transfer, to curtail future disputes and litigation, it must make clear that SharpVue cannot recover acquisition premium or its purchase price through rate base.

Based on the foregoing, the Village respectfully requests that the Commission issue an order providing the following relief.

1. Denying the transfer from Limited/BHIT to SharpVue;

2. In the alternative, holding the proceeding in abeyance pending the

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resolution of the Sub 21 Appeal and ROFR litigation;

3. In the further alternative, should the Commission approve the transfer, that the transfer include conditions that (i) SharpVue agree to and accept regulatory conditions consistent with the arguments and authorities set forth above sufficient to reasonably protect ratepayer interests, stronger than those proposed in the non-unanimous settlement agreement, (ii) SharpVue shall not recover an acquisition premium and that rate base be set at the lower of undepreciated original cost or net book value for the utility assets being acquired; and (iii) that SharpVue accept and acquiesce to the Commission's jurisdiction over parking and barge consistent with the Sub 21 Order; and

4. Such other and further relief as the Commission deems appropriate.

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May 22 2023

This 22nd day of May, 2023.

By: 

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CERTIFICATE OF SERVICE

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

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Attorney for Village

This the 22nd day of May, 2023.

By: /s/ Marcus W. Trathen

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ATTACHMENT 1

Letter filed in Docket Nos. A-74, Sub 1 and A-40, Sub 2 on June 4, 2014

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BARRIER ISLAND, INC.

Outer Banks Ferry Service
Houseboat Rentals of the Crystal Coast

Beaufort Gas Dock
Beaufort Visitors Center

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Jun 04 2014

FILED
JUN 04 2014
Clerk's Office
N.C. Utilities Commission

May 22 2023

6/2/14

A-74, SUB 1
A-40, SUB 9

Mr. Finley

Sorry this got buryed on my desk. I have purchased Island Ferry Adventures at the end of 2013. I sent in the package to combined the 2 businesses. They are both under my chapter S corporation. They both Outer Banks Ferry Services and Island Ferry Adventures have the same routes and Prices and have lost the right to go to the Cape Lookout National Seashore - Shackleford Banks and Cape Lookout. I look forward to combining the two business under 1; prefer to operate under Island Ferry Adventures, since this is the direction of my Marketing.

Thanks
Perry Barrow (252) 241-5214
(office # ~~252~~ 252-728-4129)

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JUN 04 2014
FINANCE AND BUDGET GROUP
FISCAL MANAGEMENT DIVISION
N.C. UTILITIES COMMISSION

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May 22 2023

ATTACHMENT 2

Order Denying Plaintiffs' Motion for Judgment on the Pleadings

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May 22 2023

NORTH CAROLINA

BRUNSWICK COUNTY

FILED
2023 MAY 11 A 10:52
BRUNSWICK CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
23 CVS 98

BALD HEAD ISLAND LIMITED, LLC, and BALD HEAD ISLAND TRANSPORTATION, INC.,

Plaintiffs,

v.

VILLAGE OF BALD HEAD ISLAND,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

This cause was heard before the undersigned Senior Resident Superior Court Judge at the May 8, 2023 civil session of Brunswick County Superior Court on Plaintiffs' motion, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c), for judgment on the pleadings. After reviewing the pleadings, the parties' briefs and hearing the parties' arguments, the Court is of the opinion that Plaintiffs' motion should be denied.

It is, therefore, ORDERED that Plaintiffs' motion for judgment on the pleadings is DENIED.

This the 11th day of May, 2023.

Jason C. Disbrow
Senior Resident Superior Court Judge

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May 22 2023

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant certifies that on this day the foregoing Order was served upon the attorneys of record for the Plaintiffs in this action by email sent by 5:00 p.m. Eastern Time on a regular business day to:

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Email: mmurchison@murchisontaylor.com

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This the _____ day of May, 2023.

Gary S. Parsons

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ATTACHMENT 3

Calculation of Parking Net Revenues

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Attachment 3

	Parking - Net Revenues in Excess of Direct Expenses ($)							
	2014	2015	2016	2017	2018	2019	2020	2021
a	1,122,255	1,177,658	1,193,512	1,288,456	1,316,341	1,473,240	1,954,082	2,485,954
Source	[1]	[1]	[1]	[2]	[2]	[3]	[3]	[4]

TOTAL $ 12,011,498

[1] BHIL - Parking Department, Audited Financial Report, Dec. 31, 2016, at 2 (Tr. Vol. 9 (Exhibits), at BHIL/IT 000336)

[2] BHIL - Parking Department, Audited Financial Report, Dec. 31, 2018, at 2 (Tr. Vol. 9 (Exhibits), at BHIL/IT 000336)

[3] BHIL - Parking Department, Audited Financial Report, Dec. 31, 2020, at 2 (Tr. Vol. 9 (Exhibits), at BHIL/IT 000347)

[4] BHIL - Parking Department, Audited Financial Report, Dec. 31, 2021, at 2 (Tr. Vol. 9 (Exhibits), at BHIL/IT 000354)

b	$ 1,501,437	Average of row a
c	$ 7,507,186	b times 5 years
d	$ 19,518,684	c plus total for years 2014-2021