

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Village of Bald Head Island, c/o Village	)	
Manager, 106 Lighthouse Wynd, Bald	)	
Head Island, North Carolina 28461,	)	
Complainant	)	
	)	
v.	)	ORDER SERVING ANSWER AND
	)	MOTION TO DISMISS
	)	
Bald Head Transportation, Inc., and Bald	)	
Head Island Limited, LLC,	)	
Respondent	)	

BY THE COMMISSION: Notice is hereby given that on March 30, 2022, the attached Answer of Respondent has been filed with the Commission, setting forth the admissions or denials of the complaint or an offer or other statement of Respondent relating to satisfaction of the complaint.

Rule R1-9 of the Commission's Rules provides that if this Answer of Respondent is satisfactory to you as Complainant, then no further proceedings will be held in this docket.

You are, therefore, requested to review the attached Answer of Respondent and advise the Commission whether the Answer is acceptable to you and, if not, whether you desire a public hearing to present evidence of your complaint. You may advise the Commission of your position by filing a separate Reply to the Answer or, if you so desire, you may check the appropriate box on the attached form, sign the form, and return it to the Commission.

This Order will be served on Complainant by United States certified mail, return receipt requested. If Complainant does not file a reply or request a hearing by

April 14, 2022, the Commission will assume the complaint is satisfied and this docket will be closed.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 4th day of April, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in dark ink, appearing to read "Joann R. Snyder". The signature is fluid and cursive, with the first name "Joann" being more prominent.

Joann R. Snyder, Deputy Clerk

**DOCKET NO. A-41, Sub 21**

Village of Bald Head Island

v.

Bald Head Island Transportation, Inc., and Bald Head Island Limited, LLC

- ( ) The relief offered in the Answer filed by the Respondent is acceptable to me as Complainant, and I do not desire a public hearing in this proceeding.
- ( ) The Answer filed by the Respondent is not satisfactory to me as Complainant, and I hereby request a public hearing at which time I will present evidence in support of the complaint.
- ( ) Although the Answer filed by the Respondent is not completely satisfactory to me as Complainant, I do not request a hearing at this time. I do request that the Commission keep this docket open for at least six months so that the matters complained of can be monitored by the Complainant, the Commission, and the Public Staff.
- ( ) The Answer filed by the Respondent is not satisfactory to me as Complainant and I request the following additional information subject to Commission review as to the reasonableness of my request. (Detail)

---

Signature of Complainant

**THIS REPLY SHOULD BE RETURNED TO:**

Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4325



Fox Rothschild LLP  
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E-mail: [gstyers@foxrothschild.com](mailto:gstyers@foxrothschild.com)

March 30, 2022

Ms. A. Shonta Dunston  
Chief Clerk  
N.C. Utilities Commission  
430 N. Salisbury Street  
Room 5063  
Raleigh, NC 27603-5919

**Re: In the Matter of  
The Village of Bald Head Island v. Bald Head Island Transportation, Inc.  
and Bald Head Island Limited, LLC  
NCUC Docket No. A-41, Sub 21  
*Response, Motion to Dismiss, and Answer***

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc. ("BHIT") and Bald Head Island Limited, LLC ("BHIL"), we submit herewith for filing in the above-referenced docket their Response, Motion to Dismiss, and Answer.

If you should have any questions concerning this submittal, please do not hesitate to contact me.

Thank you for your assistance.

Sincerely,

*/s/ M. Gray Styers, Jr.*

M. Gray Styers, Jr.

pbb

Attachment

OFFICIAL COPY

Mar 30 2022



Fox Rothschild <sup>LLP</sup>  
ATTORNEYS AT LAW

Ms. A. Shonta Dunston

March 30, 2022

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Copy to: Counsel of Record  
Christopher Ayers, Esq.  
Dianna Downey, Esq.  
W. Zeke Creech, Esq.

OFFICIAL COPY

Mar 30 2022

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

VILLAGE OF BALD HEAD ISLAND,	)	
	)	
Complainant,	)	
v.	)	
	)	
BALD HEAD ISLAND	)	
TRANSPORTATION, INC. and	)	
BALD HEAD ISLAND LIMITED,	)	
LLC,	)	
	)	
Respondents.	)	
		RESPONSE, MOTION TO DISMISS, AND ANSWER

Respondents Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL” and collectively, “Respondents”), by and through undersigned counsel, and pursuant to Rule 1-9 of North Carolina Utilities Commission (“Commission”) Rules, respond to the claims asserted by complainant Village of Bald Head Island (“the Village or VBHI”) by moving to dismiss the Complaint, and answering the enumerated allegations therein as follows:

**INTRODUCTION**

On its face, the Village’s Complaint is asking the Commission to interject itself into BHIL’s potential, third-party market sale of regulated and unregulated assets in an attempt to steer the sale of those assets to the Village instead:

“BHIL has expressed its intention to divest itself of the ferry and related transportation assets, including the Deep Point Marina terminal, ferries, Barge, on-island tram and mainland Parking facilities. Various potential purchasers of the assets have emerged, including VBHI itself . . . . A dispute has arisen between and among VBHI, BHIT and BHIL regarding the potential sale . . . .”

(Complaint and Request for Determination of Public Utility Status, ¶¶ 43, 46).

There is no statutory authority or precedent to support such an extraordinary intervention into a private company’s control and sale of its own assets, and the Commission should dismiss the Complaint, including its request for declaratory relief.

### **FACTUAL BACKGROUND AND CONTEXT**

#### **A. INITIAL CERTIFICATE AND SCOPE OF UTILITY SERVICES**

George Mitchell purchased the undeveloped portions of Bald Head Island (the “Island”) - which was most of it at that time - in the 1980s and started creating the corporate structure for the development of, and services to, the Island. BHIL has provided parking facilities, first at the Indigo Plantation ferry terminal and then at its current Deep Point Terminal, since at least 1991 (“Parking Facilities”). Records and available information indicate that barge service has been provided to and from the Island since 1983 (together with the associated tugboat, “Barge”). Once regular ferry service was established, BHIT filed an Application for Authority to Operate Ferry Service in Docket A-41, Sub 0. The Commission granted temporary authority by order dated April 27, 1993, requiring BHIT to file with the Public Staff “a schedule of rates and charges” at that time. BHIT then filed its first tariffs and rate schedule, “NCUC No. 1”, which was effective July 1, 1993. The

Commission issued its order on January 6, 1995 setting forth the parameters of BHIT's utility operations:

"Transportation of passengers and their personal effects, via water in ferry operations, from Southport to Bald Head Island and return."

Order Granting Common Carrier Authority, Ex. B, Docket No. A-41, Sub 0, Jan. 6, 1995. Since 1995, the base ticket prices remained unchanged until BHIT filed its first (and only) general rate case on May 5, 2010 in Docket No. A-41, Sub 7.

**B. 2010 RATE CASE**

The Village, the Bald Head Island Club, and the Bald Head Association intervened in the 2010 rate case, and all parties (including the Public Staff) entered into a Revised Agreement and Stipulation of Settlement on October 21, 2010 ("Settlement Agreement") prior to the start of the evidentiary hearing. Revised Agreement and Stipulation of Settlement, Docket No. A-41, Sub 7, Oct. 21, 2010. The Settlement Agreement was supported by Late-Filed Exhibits by Public Staff witness James G. Hoard establishing the rate base of \$3,943,335, a number repeated by the parties in their Settlement Agreement and joint Proposed Order and approved by the Commission in its Order Granting Partial Rate Increase and Requiring Notice ("Rate Case Order"). Order Granting Partial Rate Increase and Requiring Notice, Findings of Fact and Conclusions 7 and Schedule II, Docket No. A-41, Sub 7, Dec. 17, 2010. This approved rate base did not include any Plant in service or other assets associated with parking or barge functions. They were not considered to be part of the regulated utility. In order to reach an agreement on the revenue



requirement, the parties agreed to impute \$523,097 of revenue from the Parking Facilities to BHIT for purposes of the rate case. The Settlement Agreement included a letter commitment by BHIL that limited increases of parking rates through 2014. *Id.*, Ex. C.

Finding of Fact 17 of the Rate Case Order required BHIT to file quarterly financial reports with extensive financial data, including month-end balances of plant, accumulated depreciation expense by plant category, and other relevant data. BHIT has filed over 50 quarterly reports since that time. Those reports include only data from the regulated operations – ferry and on-island tram – in a format prescribed by the Public Staff.

Although there have been two adjustments to the baggage tariff provisions, the base passenger ticket prices established in Docket No. A-41, Sub 7 remain in place, and there is no allegation in the Complaint that any BHIT action has countermanded those rate allowances. There has been no subsequent rate case.

#### **C. DEATH OF GEORGE MITCHELL**

George Mitchell died on July 26, 2013, and his heirs have been liquidating the assets owned by the Mitchell family's business interests in order to provide additional funds to The Cynthia & George Mitchell Foundation. [The Mitchell Foundation \(cgmf.org\)](http://The Mitchell Foundation (cgmf.org))

#### **D. CREATION OF BALD HEAD ISLAND TRANSPORTATION AUTHORITY TO PURCHASE THE BHIL AND BHIT ASSETS**

In 2017, the General Assembly passed the Ferry Transportation Authority Act under which a multi-jurisdictional public authority can be created to purchase

and operate a ferry system – like the one that connects Southport and the Island. See Senate Bill 391, codified at N.C.G.S. § 160A-680, *et seq.* Both the Senate and the House chambers of the General Assembly passed the bipartisan legislation unanimously, which was signed by the Governor shortly thereafter on July 18, 2017.

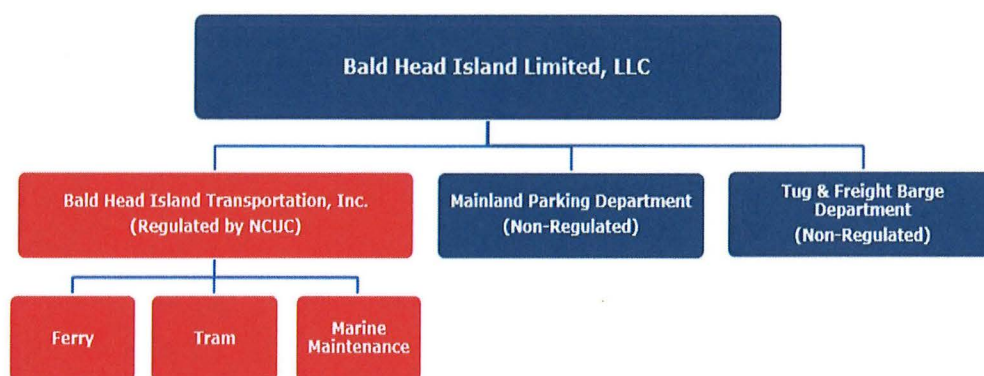
Promptly upon the enactment of the legislation, the Village, the City of Southport, and Brunswick County each passed concurrent resolutions creating the Bald Head Island Transit Authority (“BHITA” or “the Authority”). Specifically, the Village passed its resolution on August 7, the Articles of Incorporation was signed by it on August 8, and attorneys for the Village and for BHIL together filed the Articles with the Secretary of State, who issued the Certificate of Incorporation of BHITA on August 23, 2017.

According to the Village’s resolution, in creating the Authority the Village joined its co-creating jurisdictions in stating that BHITA’s multi-jurisdictional governance model would benefit the entire region by:

“engaging to coordinate and plan for the Authority that will operate a reliable and safe ferry and barge transportation system to transport passengers and freight between Southport and the Village, to provide parking facilities for those passengers on the mainland, and to provide tram service on the island; *to enhance the quality of life, mobility, and circumstances of residents of the Village, Southport, and Brunswick County; and to promote economic development and tourism throughout the Cape Fear region, while protecting and preserving the environment*”

(emphasis added) (Concurrent Resolution of Village, Exhibit A attached hereto).

Under its regional governance model, the Authority would acquire the BHIL and BHIT assets that comprise the transportation and logistics services that operate between the Island and the mainland. The assets underlie four key functions: (i) transport of passengers to and from Southport and the Island via ferry; (ii) on-island transportation of passengers via tram; (iii) a vehicle parking facility at the ferry terminal in Southport; and (iv) a tug and freight barge operation that transports supplies and equipment to and from the Island. The ferry and tram operations and assets are owned by BHIT and are regulated by the Commission. The parking and tug and barge operations and assets are owned by BHIL and are not regulated by the Commission. The asset and ownership structure is reflected, below, in Figure A:



**Figure A**

Since its creation, BHITA, chaired by former Commissioner Susan Rabon, has (i) undertaken due diligence on the purchase of the BHIT and BHIL assets, (ii) reached agreement with BHIL on the purchase price, and (iii) submitted a revenue bond application to the North Carolina Local Government Commission ("LGC") to finance the purchase. Compl., ¶ 43. During this time, BHITA's eleven directors

included the Mayor and Mayor pro Tempore of the Village and a third Island representative appointed by the Village Council. N.C.G.S. § 160A-684 (a), (b). BHIL has cooperated with and supported the purchase of the regulated and non-regulated assets by BHITA as a continuing public steward of these long-held and developed assets.

**E. THE VILLAGE'S DESIRE TO PURCHASE THE REGULATED AND UNREGULATED ASSETS OF BHIT AND BHIL**

On December 8, 2021, the Village withdrew its support for BHITA's purchase after it decided that it wanted to purchase the BHIL and BHIT assets itself. The Village then filed an application at the LGC for a General Obligation bond to purchase the system. Compl., ¶ 43. The Complaint is understandably silent on any agreed purchase price, the existence of purchase documents, or any agreement whatsoever between BHIL/BHIT and the Village to sell and purchase the assets -- because they do not exist: BHIL/BHIT have never agreed to sell their assets to the Village.

Neither BHITA's nor the Village's bond applications have been placed on the LGC agenda. *Id.* The Chairman of the LGC has publicly stated that he does not currently intend to schedule either application on the agenda for approval. *Id.* Therefore, BHIL has no choice but to look for another buyer and has announced its intentions to do so consistent with the disposition of assets in the Estate of Cynthia and George Mitchell. *Id.*, ¶ 44.

### **MOTION TO DISMISS**

The Respondents move to dismiss this Complaint in its entirety for lack of jurisdiction and for failure to state a cause of action, pursuant to Commission Rules 1-7 and 1-9.<sup>1</sup> For reasons explained in more detail below, the Village's Complaint (a) does not assert a claim within the Commission's Complaint jurisdiction, (b) improperly seeks an advisory, declaratory ruling that raises no justiciable issue; (c) requests the Commission to assert jurisdiction over parking and barge operations beyond its statutory authority and jurisdiction; (d) tries to re-open a twelve-year-old general rate case in which current rates were established without the inclusion of parking or barge assets in rate base; (e) raises issues prematurely that are not ripe and should be addressed only in future Commission proceedings; and (f) mistakenly characterizes the barge as a common carrier. For any or all of these reasons, the Complaint should be dismissed.

### **ARGUMENT**

The Complaint is part of a multi-pronged approach by the Village to acquire BHIL and BHIT regulated and unregulated assets for itself. When BHITA sought state approval to issue bonds to support its asset purchase, the Village responded by staging a bond referendum and then seeking state approval to issue its own bonds

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<sup>1</sup> Respondents are required to answer the individual allegations of the Complaint pursuant to Rule 1-9, "set forth any new matter relied upon as a defense," and to "fully advise the complainant and the Commission of the particular grounds of defense." Rule 1.9(e). They have done so herein, providing information in the Factual Background and Context section and in individual responses to enumerated allegations in the Complaint that may contain information which extends beyond the Complaint's four corners. The Motions to Dismiss is based on information contained, referenced or fairly enmeshed in the Complaint's many allegations, as well as on filings before this Commission of which notice can be taken.

in a self-proclaimed attempt to purchase the assets for itself. Now, as BHIL turns to consider private buyers after the Village undercut the public authority it helped create, the Village has responded with a “complaint” that seeks to prematurely invite the Commission to weigh in on issues regarding the sale of both a utility’s regulated assets as well as other assets owned by an unregulated entity.

Put simply, the Village hopes that commencement of this docket will frustrate or delay consideration by BHIL and BHIT of a private sale of their assets. Viewing itself as a “potential purchaser” – even though the seller (BHIL) does not – the Village asks for a Commission hand on the transaction scale that might leave it as “the last buyer standing.” The purported “complaints” and request for declaratory ruling in the Complaint must fail for multiple reasons.

**A. THE STYLIZED “COMPLAINT” DOES NOT FALL WITHIN THE COMMISSION’S COMPLAINT JURISDICTION.**

The Commission’s statutory authority to hear complaints against public utilities is found in N.C.G.S. § 62-73:

“Complaints may be made by the Commission on its own motion or by any person having an interest . . . by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable.”

(emphases added). A fatal defect is that the Complaint does not (and cannot) allege any wrongful act or omission by BHIT. Rule R1-9 requires “[a] clear, concise

statement of the actions or things done or omitted to be done by any public utility,” but there is no such statement in the Village’s pleading.

As numerous Commission orders and appellate case have noted, an interested party “may file a complaint with the Commission alleging that a utility rate is unjust or unreasonable.” *See e.g., State ex rel. Utilities Com’n v. CIGFUR*, 503 S.E.2d 697, 700 (N.C. Ct. App. 1998). But here, the Village makes no allegations that the currently applicable ferry rates and rate structure — approved in 2010 (with Village support) – are unjust or unreasonable. Moreover, there are no allegations of deficiencies in ferry service, or that BHIT has failed to follow any Commission rules, regulations, or orders regarding conduct of its regulated activities.

As explained more fully in the next section, prospective concerns about possible ramifications from a potential transfer of BHIT’s Certificate of Public Convenience and Necessity (“CPCN”) can provide no basis for Commission jurisdiction. *See e.g., State ex rel. Utilities Comm’n v. Cube Yadkin Generation LLC*, 865 S.E.2d 323, 327 (2021) (holding that Cube Yadkin’s “*Proposed Plan*” indicates a “lack of practical certainty that litigation will commence” and that it “failed to bring a justiciable controversy before this Court and the Commission.” (emphasis added) (internal citations and quotation marks omitted)); *see also Town of Pine Knoll Shores v. Carolina Water Serv., Inc. of N. Carolina*, 128 N.C. App. 321, 323, 494 S.E.2d 618, 619 (1998) (dismissing the complaint because the “alleged controversy between the parties was based solely on proposed actions.”)



**B. THE “COMPLAINT” ALLEGES NO JUSTICIABLE ISSUE THAT IS APPROPRIATE FOR A DECLARATORY RULING.**

The Village is seeking an advisory opinion from the Commission designed to influence the disposition of the BHIT and BHIL assets. Yet, there is no “adversarial relationship” sufficient to demonstrate a justiciable controversy that the Commission can entertain. *Cube Yadkin Generation*, 865 S.E.2d at 326.

Any supposed controversy for the Commission to decide is an illusory construct brought on solely by the Village’s decision to withdraw support for a public authority that was designed to own, operate, and manage in the public interest the very assets it now wishes to purchase and control for its own benefit as a purported “competitive buyer” Compl., ¶ 44, fn. 14.

As the Complaint notes, a multi-jurisdictional ferry transportation public authority was created pursuant to N.C.G.S. § 160A-680. BHITA exists for the purpose of acquiring and operating the BHIL and BHIT assets described in paragraph 43 of the Complaint. Its 11-member authority board has representation from all three of the local jurisdictions - the Village, the City of Southport, and Brunswick County - affected by the functioning of the BHIL’s and BHIT’s transportation and logistics assets which the Authority was designed to purchase. Indeed, among the three government entities, the Village has the dominant voting-member position on the board. N.C.G.S. § 160A-684(a), (b). The Authority provides a long-term solution to governance and management of the BHIL and BHIT regulated and unregulated assets, with a focus on regional input into their continued operation and service to the public.



In contrast, the Village declares in its Complaint that -- contrary to the multi-jurisdictional model of N.C.G.S. § 160A-680 that it previously endorsed -- it now wishes to own and manage the BHIL and BHIT assets itself. Compl. ¶ 43 (emphasis added). Thus, as the Complaint notes, in addition to the Authority seeking to issue revenue bonds to purchase the BHIL and BHIT regulated and unregulated assets, the Village has filed a competing application to issue general bonds to finance its own purchase of those assets. *Id.*

The Complaint references numerous sources that describe the status of requests to the LGC by the Authority and the Village to issue bonds to finance a purchase of the BHIL and BHIT assets. *Id.*, n. 12-14. Those media reports accurately describe that the LGC has declined to put either of those requests on a public meeting agenda of the LGC and that at least one member of the LGC questions the validity of appraisals that underlie the Authority's proposed purchase price for the BHIL and BHIT assets. It is important to note, however, that these LGC filings create no "dispute" or "controversy" between the Village and either BHIL or BHIT. LGC approval is required for either the Authority or the Village to issue bonds needed to purchase the BHIL and BHIT assets; however, even a decision by the LGC that *only* the Village may issue bonds does not connote that the Village has secured any right or opportunity to purchase the assets.

In the conduct of its public duties, the LGC may determine that the Village's request to issue bonds should be approved along with the Authority's, or that only the request of the Village should be granted. But neither action will result in BHIT

bringing before this Commission a request that its CPCN be cancelled and its assets transferred to the Village. BHIL regrets the apparent unavailability of the consensus, public ownership model envisioned by the General Assembly and BHITA but plans to move forward with securing private buyer(s) consistent with duties imposed by the Mitchell Estate. BHIT would then ask the Commission to approve transfer of its CPCN for the regulated ferry and tram services to private purchaser(s), and this body will determine whether such a sale meets the requirements of N.C.G.S. § 62-110(a).

The Village seeks the Commission's input on a CPCN transfer docket not yet before it and hopes that Commission regulation of the Barge and Parking Facilities will deter, or slow down, a private sale of those assets that would foreclose "the Village itself" from acquiring and solely controlling them. Compl. ¶¶ 43-45. The Village notes that its concern "takes on particular importance now" because of a potential private sale, possibly in parts, of the BHIL and BHIT assets. Compl., p. 2. It intones that "the regulatory status of the Parking and Barge operations has been a long-standing source of concern" and that it has "never been directly addressed by the Commission." *Id.*, ¶ 31. Yet, the Complaint also notes that these "pressing concerns" that the Village believes the Commission should take up were last brought to public attention in a 1998 Commission docket regarding the ferry's operating schedule and the 2010 rate case regarding BHIT's regulated assets – the ferry and tram services. *Id.*, ¶ 33, fn. 8, 9)

It is well-settled that North Carolina courts do not countenance a role for the Declaratory Judgment Act that brings courts or agencies into play as adjunct transactional counsel, as the Village here proposes for the Commission. The Act “does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs.” *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583-584, 347 S.E.2d 25, 29 (1986). The Commission does not have the kind of Village-proposed role in influencing the disposition or acquisition of the assets of a regulated utility:

“Notwithstanding the authority of the Commission to regulate its services and rates, and other matters incidental thereto, the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in G.S. Chapter 62, the utility is free to manage its property and business as it sees fit and the Commission may not restrict, or control, the discretion of the board of directors in the acquisition of property, or in the price paid for it.”

*State ex rel. Utilities Comm'n v. Gen. Tel. Co. of S.E.*, 281 N.C. 318, 337, 189 S.E.2d 705, 717–18 (1972).

It certainly is true that the Village has taken an about-face from its earlier endorsement of multi-jurisdictional management by the Authority. As Village council member Scott Gardner explained about the effort by the Village to secure exclusive control of the BHIL and BHIT assets, “[w]e never understood why it was considered a regional ferry authority because there’s only one destination.” Compl.,

¶ 43, fn. 13. But there is nothing about the differences of opinions presented in the Complaint that makes BHIT's and BHIL's regulated and unregulated "disputed assets" that underlie "a dispute . . . between and among [the Village], BHIT and BHIL regarding the[ir] potential sale." Compl., ¶¶ 46, 49.

As articulated in *Cube Yadkin*:

[A] 'mere difference of opinion between the parties' does not constitute a controversy[.] "because "courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions.

*Cube Yadkin*, 856 S.E.2d at 329 (Jackson dissent, explaining black-letter law; citations omitted; emphasis added). That is exactly what the Village is seeking in this docket. BHIT and BHIL are not "in a realized adversarial position" to the Village simply because their considered judgment is that their transportation and logistics assets would be best operated in the public interest by a private owner if they are unable to place them in the legislatively-approved Authority construct. *Id.*, 856 S.E.2d at 326. Were that the case, the Commission would find itself entertaining the "disputes" manufactured by many a "potential purchaser" that felt it would be a better steward of assets than the marketplace directed to a different buyer.

**C. THERE IS NO STATUTORY AUTHORIZATION OR PRECEDENT TO SUPPORT THE ASSERTION OF THE COMMISSION'S REGULATION OF PARKING OR BARGE OPERATIONS.**

1. Absence of statutory authorization in Chapter 62

There is no statutory basis -- in the definition of a “Public utility” or elsewhere in Chapter 62 – or any precedent in Commission jurisprudence for it to regulate the functions of “parking” or “barge”.

The Commission has no jurisdiction other than what the General Assembly has granted in Chapter 62 of the General Statutes. Nowhere in the very detailed definition of “Public utility” are the functions of “parking” or “barge” (i.e., transporting motor vehicles across bodies of water) included. *See* N.C.G.S. § 62-3(23)(a).

2. History of regulation of BHIT

The Commission has regulated rates and services of BHIT for over 27 years and has never asserted jurisdiction over parking or barge operations conducted by BHIL. As noted in the Factual Background section above, BHIT’s operating certificate sets the parameters of its utility operations:

“Transportation of passengers and their personal effects,  
via water in ferry operations, from Southport to Bald Head  
Island and return”

See also Order Granting Temporary Authority, issued April 27, 1993 (“authority to transport passengers and their personal effects via water in ferry operations”). BHIL was operating parking facilities at the Indigo Plantation terminal, as well as barge service, in 1993 and 1995, and there is no indication that the Commission considered those to be part of the regulated ferry operations for which it granted BHIT authority to operate. For the almost-29 years since the Order Granting

Temporary Authority, representatives of the Public Staff have been to Bald Head Island on official business (e.g., for the 2010 rate case public witness hearing and multiple times for the 2012 baggage tariff amendment stakeholder process), and Commissioners have been to the Island (e.g., for the 2010 rate case public witness hearing). There have been no material changes to the operations of the Parking Facilities or the Barge since those visits.<sup>2</sup> At no time has the Public Staff suggested, or the Commissioners inquired *sua sponte*, that the parking or barge functions should or could be regulated under Chapter 62.

3. Absence of precedent in regulating other ferry operations

The Commission has regulated rates and services of dozens of ferry operations in the State of North Carolina over several decades, and upon information and belief, has never asserted jurisdiction over (or even inquired about) parking or other ancillary services of those other ferry operations. Currently, upon information and belief, the Commission regulates seven ferry operations other than BHIT:

Cape Lookout Cabins & Camps Ferry Service	A-66
Davis Shore Ferry Service, LLC	A-65
Island Express Ferry Service, LLC	A-75
Island Ferry Adventures	A-40
Morehead City Ferry Service	A-76
Morris Marina Kabin Kamps & Ferry Service, Inc.	A-26
Portsmouth Island Boat Tours	A-30

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<sup>2</sup> A site visit or local hearing, as suggested in the Complaint's Relief Requested ¶ 2 is unnecessary and would reveal nothing different from what Commissioners observed at the 2010 rate case public witness hearing. Moreover, because there are no "complaints" in the Complaint, there is no remaining, appropriate avenue for the public to comment on the declaratory relief requests that raise only legal issues.

In addition, Waterfront Ferry Service, Inc. was a petitioner in the fuel surcharge docket, Docket No. A-100, Sub 0, and Commission docket numbers reveal numerous other ferries that have been regulated in the past: e.g., Barrier Island Transportation Services, Inc. (A-37); Cape Lookout Ferry Service, Inc. (A-46). While none of them may have the size and scope of operations which BHIT has, upon information and belief, many of them provide ancillary services themselves, or through affiliated companies, to their ferry passengers. Upon information and belief, neither the Public Staff nor the Commission has ever inquired into their unregulated, ancillary services, and there is no reason to start that type of inquiry now as the Complaint requests.

4. Absence of regulation of parking or barge assets elsewhere

Likewise, there are numerous other barges and parking facilities located throughout the State of North Carolina – many of which are the only, or most convenient, means by which persons access specific locations. The Commission has never asserted jurisdiction over those facilities. Parking is generally not considered to be a natural monopoly: there are no significant barriers to entry, fixed costs are not extraordinarily high, and competition is commonplace. Even around other transportation facilities (e.g. airports), the presence of a large adjacent parking facility (e.g. operated by an airport owner) does not prohibit or prevent alternative parking facilities and shuttles by competitors.

Despite a multitude of conclusory allegations to the contrary in the Complaint, there is no reason why alternative, competitive parking could not be

offered for Bald Head Island ferry passengers. Access to and from the drop-of and pick-up points at the terminal is unrestricted, free, and open to the public. Passengers on other ferries around the country may park in satellite lots not adjacent to the terminal. There is vacant land near the Deep Point terminal. See Exhibit 1 attached to Complaint. If there is not currently alternative parking for passengers to Bald Head Island, one explanation may be the low cost of parking provided by BHIL.

5. Parking at Deep Point is also used by those not riding the ferry.

The parking facilities at Deep Point are used not only by ferry passengers, but also by those owning, visiting, or servicing boats in the Deep Point marina (with 84 boat slips, 3,643 linear feet for docking), and customers of the current and future retail establishments at the terminal and marina.<sup>3</sup> (The images attached as Exhibit 1 to the Complaint show the marina, and the second even includes a label for the “Deep Point Marina & Yacht Club.”) There are numerous other ferries around the country, especially in urban areas, departing from and returning to terminals that are part of marina, retail, and/or mixed-use developments with shared parking facilities serving all of those uses. Upon information and belief, none of those parking facilities are considered to be regulated utilities. Trying to draw a distinction between when parking should or should not be regulated (in the absence of statutory authorization or guidance) creates a very slippery slope.

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<sup>3</sup> Currently, parking is free for the first two hours at the Deep Point Parking Facilities to accommodate those visiting the Café Restaurant in the Terminal, the marina, and other retail establishments.



**D. IN THE LAST RATE CASE, THE COMMISSION SET RATES BASED UPON A RATE BASE THAT DID NOT INCLUDE PARKING OR BARGE ASSETS, BECAUSE PARKING AND BARGE ARE NOT PART OF THE UTILITY'S OPERATIONS. THERE IS NO NEED TO RE-OPEN OR RE-LITIGATE THAT DECISION**

The Complaint notes that Village residents made statements at public witness hearings about BHIL's parking and barge activities in 1998 and 2010 dockets, but it fails to acknowledge that, in the Commission's Order in that rate case, Docket No. A-41, Sub 7, the Commission issued its Order approving rates based upon the rate base for the utility (with the support and endorsement of the Village) that did not include any assets used in the parking or barge operations. Therefore, in essence, this issue has already been decided in that docket.

Although there was an adjustment to the revenue requirement by imputing revenue in order to lower the ticket prices to a level that all parties could agree to, the rate base calculations of the value of assets used and useful in the provision of BHIT's utility services did not include assets from the parking or barge operations of BHIL. In support of the settlement, the Public Staff submitted:

late-filed exhibits of James G. Hoard, Assistant Director, Accounting Division, revised to reflect the agreement of the parties in the Revised Agreement and Stipulation of Settlement and to make certain corrections to the exhibits. All parties have consented to the entry of these documents into the record of this proceeding.

Filed by Public Staff on October 21, 2010 (cover letter and Hoard Exhibit 1, Schedules 1 and 1A are attached hereto as Exh. B). These exhibits establish the Plant in service to be \$6,656,972, and the Original Cost Rate Base to be \$3,943,335.

*Id.* at Hoard Exh. 2, Schedule 1. The Commission expressly relied upon these exhibits in its Findings of Fact and Conclusions Nos. 7-8:

The Stipulating Parties agreed that these revenues are intended to provide BHIT, through sound management, the opportunity to earn an overall rate of return of 8.33% on a rate base of \$3,943,335 . . .

The Commission finds and concludes that this aspect of the Stipulation is just and reasonable.

Commission Order Granting Partial Rate Increase and Requiring Notice, in Docket No. A-41, Sub 7, filed on December 17, 2010, pp. 5 and 13-17, and Schedule II on p. 16 (attached as Exh. C). It is undisputed that this rate base did not include any assets used in the parking or barge operations.

Despite its support of this Order 11-plus year ago,<sup>4</sup> the Village is trying to re-open and re-litigate those findings now that it wants to buy the regulated and unregulated assets of BHIT and BHIL. The Complaint goes to great length to cite decade-old statements at public witness hearings and even quotes pre-filed testimony by one of the experts sponsored by the Intervenors in Docket No. A-41, Sub 7. But the Commission's findings in its Order (supported and endorsed by the Village) are very clear as to the rate base on which the rates were approved. That rate base considered only those assets used and useful by the regulated ferry and tram, and the parking and barge assets were not part of the utility for which rates were set and subject to the Commission jurisdiction.

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<sup>4</sup> The Village accepted and endorsed that rate base determination in (1) entering into the Revised Stipulation and Settlement Agreement in that docket and (2) submitting a Proposed Order based upon that rate base determination. As noted by the Commission in the Rate Case Order, "These findings and conclusions are not contested by any party. Rate Case Order at p. 14.

The Village contends that “[t]he ferry and the parking are inextricably related and in fact exist in tandem as one de facto regulated service” and that the Commission should take up these issues prematurely because of an anticipated future change in ownership. Following any transfer of the BHIT CPCN to a private party, the Commission retains jurisdiction in a future rate case to identify and appropriately consider the “used and useful” assets that it may or may not find are “integral” to ferry service and meriting regulation. Compl., ¶ 24.

Even if the Commission were inclined to revisit this issue in a future rate case, it should not change the proverbial rules in the middle of the game now, when:

1. The current rates established in Docket No. A-41, Sub 7 have been in place and effective for more than eleven years;
2. Those rates were not based upon the net operating cost of service or a rate of return on parking or barge assets; and, in fact,
3. There has never been a valuation or rate of return established for those assets in any ratemaking process pursuant to N.C.G.S. § 62-133(b)(1)-(4); and
4. Those parking and barge assets have depreciated over the past 11-plus years and that depreciation has not been part of the cost of service for the setting of any rates.

Hypothetically, if the Commission were to consider parking and barge operations to be part of the regulated ferry service (notwithstanding the arguments set forth in the preceding section), the appropriate time to revisit these issues is in

the next rate case, so that the cost of service of the operations and rate of return on all associated assets could be considered in setting reasonable rates.

**E. THE COMPLAINT PREMATURELY RAISES ISSUES REGARDING THE VITALITY AND SUSTAINABILITY OF FERRY SERVICE THAT ARE NOT RIPE AND SHOULD BE ADDRESSED ONLY IN FUTURE COMMISSION PROCEEDINGS.**

The Village declares a “direct and substantial interest in ensuring the ongoing and continued availability of transportation service to the Island . . . on reasonable terms and conditions.” Compl., ¶ 10. Respondents do not doubt that this is an earnest position and shares the goal that BHIT’s long-term stewardship of ferry service to the Island will transition to a new owner/operator that will carry forward in the same fashion. BHIL’s support for a public authority with broad political consensus in the region to own, operate, and regulate the BHIT and BHIL assets was designed for just that purpose.

The Village’s apparent premise is that a future sale of the assets to a currently unknown private purchaser would somehow imperil the availability of ferry service. Compl., ¶¶ 47-49. Those fears are not a “complaint” under NCUC jurisdiction. Moreover, the Commission will have the opportunity to evaluate and rule upon any petition seeking transfer of the CPCN of the regulated ferry service. In that future docket, the Commission would then consider whether a proposed transfer is justified by the “public convenience and necessity” and otherwise meets the requirements of N.C.G.S. § 62-111(a).

In addition, as noted immediately above in Section D, what assets are or are not used and useful in providing a regulated utility service is a determination made

in the context of a rate case – not in a completely separate proceeding, in the abstract, without the consequential determination of the cost of service provided by those assets, and the reasonable rate of return which the utility provider may earn on those assets.

Therefore, if there is any merit to the concerns raised by the Village, which the Respondents strongly deny, there are ample opportunities for the Commission to evaluate those arguments in future proceedings rather than in this attempt to thwart a potential sale, in an unidentified transaction, to an unknown third-party.

**F. THE BHIL BARGE TRANSPORTS ONLY THIRD-PARTY VEHICLES AND NOT HOUSEHOLD GOODS OR PASSENGERS FOR COMPENSATION, AND THEREFORE IS NOT A COMMON CARRIER.**

Finally, in trying to hammer a proverbial round peg into a square hole, the Complaint mischaracterizes the pricing and services provided by the Barge. Customers of the Barge purchase space for their vehicles to be conveyed across the Cape Fear River – nothing more. Those spaces are priced in six-foot increments, as needed by the vehicle: currently \$60 per six-foot length. The Barge operation itself does not own or operate a motor vehicle, and does not at any time take possession of any household goods (or other items) or transport those items. This practice has been consistently followed for over 20 years (after discussions with the Public Staff) to ensure that the Barge is not a “common carrier” as defined by statute.

North Carolina General Statute section 62-3(6) specifically defines “Common carrier” as a person “engage[d] in the transportation of persons or

household goods for compensation.” In addition, the definition of “Public Utility” includes a person “Transporting persons or household goods by street” or “by motor vehicles.” N.C.G.S. § 62-3(23)(a)(3)-(4). None of these definitions apply to BHIL, or to any other barge service conveying motor vehicles over water (which is why, upon information and belief, the Commission doesn’t regulate such barges). Customers/buyers on the Island may take possession of goods on the mainland and transport them in their own vehicles conveyed by the Barge,<sup>5</sup> or third-party sellers on the mainland may deliver goods to customers/buyers on the Island by their own vehicles conveyed by the Barge. But in neither instance does BHIL know, except as required to comply with U.S. Coast Guard regulations, about the types of materials and equipment transported by vehicles utilizing the barge service. Quite simply, the Barge does not transport household goods, as required to be considered a common carrier.

For these reasons, the Complaint’s allegations requesting that the Commission regulate the Barge as a Common carrier should be dismissed.

#### **ANSWER TO ENUMERATED ALLEGATIONS**

Although the Motions to Dismiss set forth herein are legally sufficient to dispose of this matter, Respondent also provides specific allegations to the enumerated allegations of the Complaint in compliance with Commission Rule R1-9, as follows:

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<sup>5</sup> The Bald Head Island Club transports household goods on the Barge on behalf of its members.

1. The allegations contained in paragraph 1 are admitted upon information and belief.

2. No response is required to the allegations contained in paragraph 2. To the extent that any response is required, the allegations contained in paragraph 2 are admitted.

3. The allegations contained in paragraph 3 are admitted.

4. The allegations contained in paragraph 4 are admitted.

5. It is admitted that BHIL's parent corporation is Mitchell Island Investments, Inc., which is owned by the Estate of Cynthia and George Mitchell. It is further admitted that BHIL has owned various properties and businesses on Bald Head Island, in the City of Southport, and in Brunswick County and has been engaged in development activity in those locations for over thirty (35) years. BHIL owns and operates parking lot facilities adjacent to the Deep Point Marina Terminal ("Parking Facilities") in the City of Southport, as well as a barge (together with its associated tugboat, "Barge") on which vehicles are transported to and from the Island. Except as herein admitted, the allegations contained in paragraph 5 are denied.

6. The allegations contained in paragraph 6 are admitted.

7. The allegations contained in paragraph 7 call for conclusions of law, to which no response is required. To the extent any response is required, respondents state that North Carolina General Statute § 62-73 speaks for itself and is its own best evidence.

8. The allegations contained in paragraph 8 call for conclusions of law, to which no response is required. To the extent any response is required, respondents state that North Carolina General Statute § 62-30 speaks for itself and is its own best evidence.

9. The allegations contained in paragraph 9 call for conclusions of law, to which no response is required. To the extent that any response is required, respondents state that North Carolina General Statute §1-253 and North Carolina General Statute § 62-60, as they were enacted by the North County General Assembly and interpreted by the North Carolina courts, speak for themselves and are the own best evidence.

10. It is admitted that the Village is a municipal corporation under the laws of the state of North Carolina pursuant to Chapter 160A of the North Carolina General Statutes. It is further admitted, upon information and belief, that the employees of the Village regularly use the ferry and Parking Facilities, and that Village vehicles are occasionally transported on the barge. It is admitted that elected officials of the Village have expressed their desire to acquire regulated and unregulated assets of BHIL, including those used for transportation services to the Island. Except as herein admitted, the allegations contained in paragraph 10 are denied.

11. The allegations contained in paragraph 11 are denied.

12. It is admitted that the Island is a barrier island located at the confluence of the Cape Fear River and Atlantic Ocean, approximately three



miles across the Cape Fear River from the City of Southport in Brunswick County. It is further admitted that it is a popular vacation destination for visitors, as well as for property owners, because of its natural beauty, including its picturesque beaches and 173-acre maritime forest preserve. It is admitted that the Village generally prohibits by municipal ordinance motor vehicles with internal combustion engines on the Island -- except for commercial uses, public works, and public safety purposes. It is admitted that instead of using motor vehicles, residents and visitors typically ride bicycles or drive golf carts to travel on the Island. Except as herein admitted, the allegations contained in paragraph 12 are denied.

13. The allegations contained in paragraph 13 are admitted upon information and belief.

14. It is admitted that the Village of Bald Head Island is a municipality governed by an elected Village Council and that the roles and responsibilities of the Village Council are set forth in applicable state statutes and municipal ordinances and enacted policies. It is admitted that the Village provides various services to residents and visitors. Except as herein admitted, Respondents lack sufficient information with which to form a belief as to the truth or falsity of the remaining allegations in paragraph 14, which are therefore denied.

15. The allegations contained in paragraph 15 are admitted.

16. It is admitted that the schedule for the ferries operated by BHIT are filed with the Commission, are their own best evidence, and speak for themselves. No further response to the allegations in paragraph 16 is required.

17. It is admitted that the Deep Point Ferry Terminal was constructed and fully placed in operation in 2009. Prior to the that time, BHIL's operations on the mainland were conducted from Indigo Plantation, a smaller facility located on the Intracoastal Waterway southwest of Southport, North Carolina. It is further admitted that one of the many factors for moving the ferry operations from Indigo Plantation and constructing the Deep Point Marina and Terminal was to better accommodate travelers to and from the Island and provide opportunities for expansion of additional non-regulated business activities around the Parking Facilities and the Deep Point terminal area in general. Except as herein admitted, any remaining allegations in paragraph 17 are denied.

18. It is admitted that property owners, visitors, and employees may leave their automobiles at the Parking Facilities adjacent to the Deep Point Terminal prior to boarding the ferry, and, upon information and belief, most do so. Except as herein admitted, the allegations contained in paragraph 18 are denied.

19. The allegations contained in paragraph 19 are admitted.

20. The allegations contained in paragraph 20 are admitted.

21. It is admitted that BHIL constructed, owns and operates the Deep Point Parking Facilities, that they are currently the closest parking facilities to the ferry terminal, and this proximity is illustrated by Exhibit 1, which is its own best evidence and speaks for itself. Except as herein admitted, the allegations contained in paragraph 21 are denied.

22. It is admitted that the Respondents know of no other regular bus service from another public parking lot to and from the Deep Point Terminal operating at this time. It is further admitted that a percentage of travelers to the Island are non-residents who temporarily rent island homes for vacations and who often bring a number of personal items for their vacation visits. The Commission may take judicial notice of the pleadings filed in Docket A-41, Sub 20, which are their own best evidence and speak for themselves. The remaining allegations in paragraph 22 are conclusory in nature and no further response is required. To the extent that a further response is required, these allegations are denied.

23. It is admitted that, in 2019 employee and contractor riders working on the island accounted for approximately 159,000 ferry rides, which constituted 44% of the ridership. It is further admitted, upon information and belief, that these employees and contractors include public safety officials, police, fire, EMTs, water plant operators, waste water plant operators, solid waste handlers, and other utility service providers, who are employed or contracted by the Village. It is further admitted, upon information and belief,

that most of the employees and contractors are residents of Brunswick or New Hanover counties. Except as herein admitted, the allegations contained in paragraph 23 are conclusory in nature and no further response is required. To the extent any further response is required, the allegations contained in paragraph 23 are denied.

24. The allegations contained in paragraph 24 are conclusory in nature, and call for conclusions of law, to which no response is required. To the extent a response is required, these allegations they are denied.

25. It is admitted that BHIL owns and operates a barge and tugboat that travels to and from the Island, according to published terms that are available on its website. It is further admitted that space can be reserved for vehicles on the Barge, in six-foot increments, pursuant to these published terms. The Respondents know of no other similar barge service currently operating between the mainland and the Island at this time. BHIL generally has no first-hand knowledge of the types of materials and equipment transported by vehicles utilizing the barge service, but admits that the barge does transport public safety and utility service vehicles to and from the Island. Except as herein admitted, the Respondents lack sufficient information with which to form a belief as to the truth or falsity of the remaining allegations in paragraph 25, and therefore denies each such allegations.

26. It is admitted that the Barge transports third-party vehicles to and from the Island.<sup>6</sup> BHIL generally has no first-hand knowledge of the types of materials, equipment, or items transported by vehicles utilizing the barge service. It is also admitted, upon information and belief, that tradespersons and service technicians utilize the barge to convey their vehicles to the Island. Except as herein admitted, the allegations contained in paragraph 26 are denied.

27. It is admitted that the Barge transports third-party vehicles to and from the Island. BHIL generally has no first-hand knowledge of the types of materials, equipment, or items transported by vehicles utilizing the barge service. It is specifically denied that the BHIL ever takes possession of any materials, equipment, or items that a third party places inside a vehicle for which space is reserved on the Barge, or that BHIL itself transports household goods on the Barge. Except as herein admitted, the allegations contained in paragraph 27 are denied.

28. It is admitted that a third party may transport smaller household goods in vehicles for which it reserves space on the Barge. Except as herein admitted, the allegations contained in paragraph 28 are denied.

29. It is admitted that the Barge has transported as many as 60 vehicles in a day, some of which, upon information and belief, may be utilized by service vendors or other entities delivering household goods to persons on

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<sup>6</sup> The BHIL Barge does not own any motor vehicles, so third parties must furnish their own vehicles that may also contain items they wish to transport to the Island.

the Island. The remaining allegations in paragraph 29 are conclusory in nature, and no further response is required. To the extent any further response is required, the allegations contained in paragraph 29 are denied.

30. It is admitted that, when necessary and as requested by the appropriate authorities, BHIL and BHIT utilize all available resources to assist and evacuate persons and property from the Island, in major emergencies, such as tropical storms and hurricanes, and are proud of their role in utilizing ferry and barge operations as part of emergency event management by the Village, the City of Southport, Brunswick County, the State of North Carolina, and the United States Coast Guard.

31. It is admitted that BHIL operates parking and barge operations as unregulated and independent activities that are separate and distinct from one another. Except as herein admitted, the allegations contained in paragraph 31 are denied.

32. It is admitted that BHIL operates parking and barge operations as unregulated and independent activities that are separate and distinct from one another. Respondents lack sufficient information to know the truth or falsity of the remaining allegations contained in paragraph 32, and they are therefore denied.

33. It is admitted that individuals speaking at public witness hearings in 1998 and 2010 testified regarding matters unrelated to BHIT's utility rates and service, including about parking and barge operations. The

statements of those individuals are found in the transcripts of those public witness hearings, which speak for themselves and are their own best evidence. Except as herein admitted, the allegations contained in paragraph 33 are denied.

34. It is admitted that BHIL has tried to listen and be responsive to the concerns of its customers and to resolve issues without unnecessary Commission involvement, but except as herein admitted, the allegations contained in paragraph 34 are denied.

35. It is admitted that BHIL agreed to limit increases for annual parking rates at the Parking Facilities to the rate of annual inflation between 2009 and 2014, and that, in general, the overall cost of parking at the Parking Facilities since 2009 has increased less than the rate of inflation. That revised agreement and stipulation in Docket No. A-41, Sub 7 speaks for itself and is its own best evidence.

36. It is admitted that in the context of settling the BHIT's 2010 general rate case, both BHIL and the Village were parties to a stipulation and agreement that allowed for a portion of revenue from parking operations to be imputed to BHIT's regulated ferry service for purposes of agreeing on a revenue requirement number used, in part, for the determination of passenger ticket prices for the ferry. It is also admitted that the stipulation and agreement document sets forth limitations on parking rate increases. That stipulation and agreement is its own best evidence and speaks for itself.

37. It is admitted that BHIT filed a general rate case on May 5, 2010 in which it requested approval for an increase in rates, fares and charges for ferry transportation services, and certain changes in the rate design underlying existing rates for BHIT. That application and the filings in that Docket A-41, Sub 7 are their own best evidence and speak for themselves. It is further admitted that intervenors filed joint testimony of Julius A. Wright, which is its own best evidence and speaks for itself. It is specifically alleged, based upon information and belief, that, in a subsequent deposition Dr. Wright acknowledged that he had very little knowledge of, and was generally unfamiliar with, the day-to-day operations of BHIT and BHIL. BHIT agreed not to cross-examine Dr. Wright at the hearing as part of the settlement of the rate case.

38. It is admitted that Commission accepted a stipulation of all parties – including that of BHIL – providing, among other things, that \$523,097 of revenues from the Deep Point Parking Facilities would be imputed to BHIL for purposes of the rate case and that parking rate increases would be constrained for a period of six years, as set forth in the Commission’s Order Granting Partial Rate Increase and Requiring Notice in Docket No. A-41 Sub 7 issued December 17, 2010 (“Rate Case Order”), which is its own best evidence and speaks for itself. It is further admitted, that, although the words of the rate case order do not expressly discuss the regulatory status of the parking facilities, the Commission’s order relies upon



the Public Staff's late-filed Exhibits of James G. Hoard, Assistant Director, Accounting Division, which determined that the net rate base amount was \$3,943,345 - which did not include any assets from Barge or Parking Facilities.

39. The Revised Stipulation and Agreement of Settlement and, as its provisions specifically pertain to BHIL's Parking Facilities, is its own best evidence and speaks for itself. As noted in footnote 10, the Revised Stipulation and Agreement was the result of compromise and does not bind any party in a future proceeding. It is admitted that the stipulations were accepted by the Commission in the Rate Case Order.

40. The Revised Stipulation and Agreement of Settlement, as its provisions specifically pertain to BHIL's adherence to codes of conduct, is its own best evidence and speaks for itself.

41. The allegations contained in paragraph 41 are denied.

42. The allegations contained in paragraph 42 are denied.

43. Respondents deny that the Village's description of itself as a "potential purchaser" of the transportation assets of BHIL and BHIT indicate that BHIL has had any discussions about such a transaction with the Village, or that BHIL would entertain selling such assets to the Village. The remaining allegations contained in paragraph 43 are admitted.

44. The allegations contained in paragraph 44 are admitted.

45. It is admitted that BHIL may sell its unregulated assets to a third party, and that in the hands of such a purchaser such assets would remain unregulated. Whether each asset sold individually would summon a higher total valuation is purely speculative, and therefore Respondents lack sufficient information upon which to form a belief as to the truth or falsity of such allegations. The remaining allegations contained in paragraph 45 are conclusory in nature, and therefore no response to them is required. To the extent that any further response is required, the remaining allegations contained in paragraph 45 are denied.

46. The allegations contained in paragraph 46 are denied.

47. The Respondents admit that they know of no other similar barge and tug boat service currently operating between the mainland and the Island at this time. To the extent the allegations in paragraph 47 call for conclusions of law, no response is required. To the extent any response is required to such allegations, they are denied. Any remaining allegations contained in paragraph 47 are denied.

48. The allegations contained in paragraph 48 are denied.

49. The allegations contained in paragraph 49 are denied.

50. Respondents reallege and incorporate by reference their responses to the allegations in each of the preceding paragraphs.

51. The allegations contained in paragraph 51 are denied.

52. It is admitted BHIL has made considerable new investments to expand and improve the Parking Facilities at Deep Point in recent years without any expectation that it would be entitled to recover a regulated rate of return on that (and previously made) investments. Although the price of one (of eight) parking categories -- nonseasonal daily parking (a rate that no longer exists) -- specifically referenced in paragraph 52 -- increased from \$8 to \$12 since 2010 (in large part because of the elimination of the seasonal and nonseasonal distinction in order to simplify pricing), it is also admitted and alleged that the overall increases in parking prices in general since 2009 have trailed the rate of inflation. Except as herein admitted, the remaining allegations contained in paragraph 52 are denied.

53. To the extent the allegations in paragraph 53 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 53 are denied.

54. The allegations contained in paragraph 54 are denied.

55. The allegations contained in paragraph 55 are denied.

56. To the extent the allegations in paragraph 56 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 56 are denied

57. It is admitted that BHIL is the corporate parent of BHIT, a public utility. Except as herein admitted, the allegations contained in paragraph 57 are denied.

58. The allegations contained in paragraph 58 are denied.

59. The allegations contained in paragraph 59 are denied.

60. Respondents reallege and incorporate by reference their responses to the allegations in each of the preceding paragraphs.

61. To the extent the allegations in paragraph 61 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 61 are denied.

62. To the extent the allegations in paragraph 62 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 62 are denied.

63. To the extent the allegations in paragraph 63 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 63 are denied.

64. There being no facts that the Barge transports persons or household goods for compensation, there is no question of fact to be determined by the Commission. If the motor vehicles conveyed by the Barge are not subject to regulation by the Commission, then certainly the Barge that conveys those motor vehicles is not regulated. To the extent the allegations in paragraph 64 call for conclusions of law, no response is required. To the extent any response is required, the remaining allegations contained in paragraph 64 are denied.

65. The allegations contained in paragraph 65 are denied.

66. The allegations contained in paragraph 66 are denied.

WHEREFORE, Respondents respectfully request that the Commission grant the following relief:

1. Enter an Order dismissing the Complaint, on the grounds that:
  - a. it does not assert a claim within the Commission's Complaint jurisdiction; and/or
  - b. it improperly seeks an advisory declaratory ruling and thus raises no justiciable issue; and/or
  - c. the Commission has no statutory authorization to assert jurisdiction over BHIL's parking or barge operations; and/or
  - d. the current ferry ticket rates were established without the inclusion of Parking or Barge assets in rate base, but without prejudice to the consideration of these issues in any future general rate case; and/or
  - e. these issues are not ripe for decision and should be addressed only in future Commission proceedings; and
  - f. the Barge is not a Common carrier as a matter of law.
2. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 30<sup>th</sup> day of March 2022.

FOX ROTHSCHILD LLP

A handwritten signature in blue ink that reads "M. Gray Styers, Jr.".

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*Attorneys for Bald Head Island  
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Limited, LLC*

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the attached Response, Motion to Dismiss and Answer in the above-captioned case, which was filed on March 30, 2022, by electronic mail to the parties of record or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

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*North Carolina Utilities Commission  
Public Staff*

This the 30<sup>th</sup> day of March, 2022.



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M. Gray Styers, Jr.







**A CONCURRENT RESOLUTION WHEREBY THE VILLAGE OF BALD HEAD  
ISLAND, THE CITY OF SOUTHPORT, AND THE COUNTY OF BRUNSWICK  
SIGNIFY THEIR DETERMINATION TO ORGANIZE  
THE BALD HEAD ISLAND TRANSPORTATION AUTHORITY**

**WHEREAS**, on July 18, 2017, the Governor of the State of North Carolina signed the Ferry Transportation Authority Act, as ratified by the North General Assembly, 2017 Session Law 120, codified at North Carolina General Statutes, Chapter 160A, Article 29 (the "Act");

**WHEREAS**, the Village of Bald Head Island (the "Village") is a municipal corporation that is only accessible by watercraft vessel;

**WHEREAS**, the Village is dependent upon a reliable, safe, and affordable ferry system (including passenger and barge transportation services, terminal facilities and vehicle parking) that operates on the Cape Fear River between Deep Point Marina in the City of Southport and Bald Head Island Marina in the Village;

**WHEREAS**, the City of Southport ("Southport") is a municipal corporation where the mainland ferry terminal, the mainland barge terminal, and vehicle parking for access to Bald Head Island are located;

**WHEREAS**, many Southport and other Brunswick County residents are employed on and/or regularly visit Bald Head Island and depend upon the ferry services and parking facilities, and many residents living on and visitors to Bald Head Island regularly transact business in Southport and Brunswick County ;

**WHEREAS**, the Village and Southport are both municipalities located in Brunswick County, North Carolina in which all of the ferry terminal and barge facilities and vehicle parking for access to Bald Head Island are located;

**WHEREAS**, the ferry system, barge system, on-island tram system, terminals, and parking facilities are presently owned and operated by a number of privately held corporations;

**WHEREAS**, the Act permits the purchase of those assets of those privately held corporations used in the operations of the ferry system, barge system, on-island tram system, terminals, and parking facilities, and the consolidation of those operations in, by a single ferry transportation authority as defined in G.S. 160A-681 and with the powers set forth in G.S. 160A-685 ("the Authority");

**WHEREAS**, pursuant to G.S. 160A-683, the Village Council of the Village of Bald Head Island, the Board of Alderman of the City of Southport, and the Board of Commissioners of the County of Brunswick are the proper entities to adopt a resolution to create the Authority pursuant to the Act;

**WHEREAS**, the Village, Southport, and Brunswick County are engaging to coordinate and plan for the Authority that will operate a reliable and safe ferry and barge transportation system to transport passengers and freight between Southport and the Village, to provide parking facilities for those passengers on the mainland, and to provide tram service on the island; to enhance the

quality of life, mobility, and circumstances of residents of the Village, Southport, and Brunswick County; and to promote economic development and tourism throughout the Cape Fear region, while protecting and preserving the environment;

WHEREAS, the Village, Southport, and Brunswick County have duly afforded the general public, and other interested parties, both public and private, the opportunity to participate in public hearings regarding the formation of the Authority, which public hearings were noticed as required by G.S. 160A-683 and properly conducted pursuant to all applicable laws:

WHEREAS, the creation of an Authority, pursuant to the Act, appears to be in the best long-term interest of the Village, Southport, and Brunswick County, and their residents and businesses;

WHEREAS, the Village Council of the Village of Bald Head Island desires by this Concurrent Resolution to signify its determination to organize an Authority under the applicable provisions of the Act; and

**NOW, THEREFORE, BE IT RESOLVED,** by the Village Council of the Village of Bald Head Island:

1. That the Village Council of the Village of Bald Head Island signifies its determination to organize an Authority under the Act.

2. That the articles of incorporation of such Authority are included herein by reference, and that, pursuant to G.S. 160A-683, these articles of incorporation set forth all of the following:

(a) that the "Bald Head Island Transportation Authority" is the official name of such Authority;

(b) that such Authority is organized under the Act; and

(c) that the names of the organizing entities for the Authority are the Village of Bald Head Island, the City of Southport, and Brunswick County

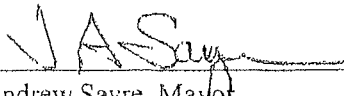
(d) that the registered agent for service of process shall be the Chairman of the Board of Trustees or such other agent as the Board of Trustees may designate and whose name and address is provided to the North Carolina Secretary of State.

3. That the purpose of the Authority shall be to operate a reliable and safe ferry and barge transportation system to transport passengers and freight between Southport and the Village, provide parking facilities for those passengers on the mainland, and to provide tram service on the island; to enhance the quality of life, mobility, and circumstances of residents of the Village, Southport, and Brunswick County; and to promote economic development and tourism throughout the Cape Fear region, while protecting and preserving the environment, in accordance with the provisions of, and with all such powers as provided in, the Act.

4. That pursuant to G.S. 160A-683, public hearings were duly conducted concerning the matter of organizing an Authority under the provisions of the Act prior to adoption of this Concurrent Resolution.

5. This resolution shall become effective if and when concurrent counterparts are adopted by the Board of Alderman of the City of Southport and the Board of Commissioners of the County of Brunswick.

ADOPTED by the Village Council of the Village of Bald Head Island, this the 18th day of August, 2017.

  
\_\_\_\_\_  
J. Andrew Sayre, Mayor

ATTEST:

  
\_\_\_\_\_  
Daralyn Spivey, Village Clerk





## Village of Bald Head Island PUBLIC HEARING

### NOTICE OF PUBLIC HEARING ON PRO- POSED CREATION OF A BALD HEAD IS- LAND TRANSPORTATION AUTHORITY

The public will take notice that the Village Council of the Village of Bald Head Island will conduct a public hearing at the Bald Head Association Center, 111 Lighthouse Wynd, Bald Head Island, NC 28461, at 2:30 p.m. on August 18, 2017, to consider whether it and the Board of Alderman of the City of Southport and the Board of Commissioners of Brunswick County should join in the organization of a Bald Head Island Transportation Authority ("Authority") to operate a reliable and safe ferry and barge transportation system to transport passengers and freight between the City of Southport and the Village of Bald Head Island, to provide parking facilities for those passengers on the mainland, and to provide tram service on the island; to enhance the quality of life, mobility, and circumstances of the residents of the Village of Bald Head Island; and to promote economic development and tourism throughout the Cape Fear region, while protecting and preserving the environment. The following are the proposed Articles of Incorporation for the Authority:

#### ARTICLES OF INCORPORATION OF BALD HEAD ISLAND TRANSPORTATION AUTHORITY

In compliance with the Ferry Transportation Authority Act, Article 29 of Chapter 160A of the North Carolina General Statutes, the Village Council of the Village of Bald Head Island, North Carolina, the Board of Alderman of the City of Southport, North Carolina, and the Board of Commissioners of Brunswick County, North Carolina, each pursuant to a resolution signifying its determination to organize an Authority pursuant to G.S. 160A-683, which Authority shall be a public body and body politic of the State of North Carolina, hereby certify that:

1. The name of the Authority is the "Bald Head Island Transportation Authority."
2. The Authority is organized under Article 29 of Chapter 160A of the North Carolina General Statutes.
3. The names of the organizing entities for the Authority are the Village of Bald Head Island, the City of Southport, and Brunswick County.
4. The Authority shall be governed by Board of Trustees consisting of eleven (11) members selected and serving in accordance with Article 29 of Chapter 160A of the North Carolina General Statutes.
5. The registered agent for service of process shall be the Chairman of the Board of Trustees or such other agent as the Board of Trustees may designate and whose name and address is provided to the North Carolina Secretary of State.







**NORTH CAROLINA  
PUBLIC STAFF  
UTILITIES COMMISSION**

October 21, 2010

Ms. Renné C. Vance, Chief Clerk  
North Carolina Utilities Commission  
4325 Mail Service Center  
Raleigh, North Carolina 27699-4325

Re: Docket No. A-41, Sub 7  
Bald Head Island Transportation, Inc.

Dear Ms. Vance:

In connection with the above-captioned docket, I transmit herewith for filing on behalf of the Public Staff, eighteen (18) copies of the following: late-filed exhibits of James G. Hoard, Assistant Director, Accounting Division, revised to reflect the agreement of the parties in the Revised Agreement and Stipulation of Settlement and to make certain corrections to the exhibits. All parties have consented to the entry of these documents into the record of this proceeding.

By copy of this letter, I am forwarding a copy to all parties of record.

Sincerely,

Dianna W. Downey  
Staff Attorney

[dianna.downey@psncuc.nc.gov](mailto:dianna.downey@psncuc.nc.gov)

cc: Parties of Record

Executive Director  
733-2435

Communications  
733-2810

Economic Research  
733-2902

Legal  
733-6110

Transportation  
733-7766

Accounting  
733-4279

Consumer Services  
733-9277

Electric  
733-2267

Natural Gas  
733-4326

Water  
733-5610

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**FILED**

OCT 21 2010

Clerk's Office  
N.C. Utilities Commission

msf  
AG  
Finley  
Beatty  
Allen  
Bennink  
Moover  
Sessions  
Kite  
Bruce R.

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Mar 30 2022

**Bald Head Island Transportation, Inc.**  
**Docket No. A-41, Sub 7**  
**For the Test Year Ended December 31, 2009**  
**Revenue Requirement Reconciliation**

<u>Line No.</u>	<u>Description</u>	<u>Amount</u>
1	Company proposed rate increase per Application	\$2,767,548
2	Change in capital structure	0
3	Change in debt cost	(34,286)
4	Change in return on equity	0
5	Update plant and related items	(10,446)
6	Include parking revenues	(523,725)
7	Amortize gain on transfer of Indigo Plantation	(73,772)
8	Include BHI terminal in rate base	(278,438)
9	Adjust Deep Point terminal lease	216,833
10	Adjust intercompany tram charges	(32,485)
11	Adjust payroll and related items	(105,628)
12	Adjust fuel expenses	(25,763)
13	Adjust amortization of fuel tracker account	1,528
14	Adjust management fees, including Patriot, LLC	(37,936)
15	Adjust rate case expense	6,850
16	Adjust customer growth	(4,219)
17	Other revenue adjustment	(144,133)
18	Rounding	0
19	Settlement revenue increase	<u>\$1,721,928</u>

EXHIBIT B  
TO BHIT MOTION TO DISMISS  
NCUC DOCKET A-41 SUB 21

Hoard Exhibit 1  
Schedule 1A  
Revised

Bald Head Island Transportation, Inc.  
Docket No. A-41, Sub 7  
For the Test Year Ended December 31, 2009  
Settlement Cost of Service

Line No.	Item	Settlement Adjustments										Settlement Amounts
		Company Amount	Rate of Return	Update Plant and Related Items	Include Parking Revenues	Include BHI Terminal in Rate Base	Amortize Gain on Transfer of Indigo PI	Adjust Interco Trans Charges	Adjust DP Terminal Lease	Other Adjustments	Amortize Fuel Tracker Acc	
		(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)
1	Plant	\$6,020,582		20,193 <sup>14</sup>		616,196 <sup>14</sup>						6,956,972
2	Accumulated Depreciation	(2,085,249)		(144,275) <sup>14</sup>		(173,122) <sup>14</sup>						(2,402,646)
3	Net Plant	3,935,344	0	(124,082)	0	443,064	0	0	0	0	0	4,254,326
4	Cash Working Capital	664,667		0		(45,696) <sup>14</sup>			26,667 <sup>14</sup>	(19,040) <sup>14</sup>		628,605
5	Average Tax Accruals	(37,429)		0					0	(6,615) <sup>14</sup>		(44,044)
6	Deferred Income Taxes	(660,584)		704 <sup>14</sup>		(33,872) <sup>14</sup>						(663,752)
7	Rate Base	\$3,702,198 <sup>v</sup>	60	(\$123,378)	\$0	\$363,503	\$0	\$0	\$26,667	(\$25,655)	\$0	\$3,943,335
8	Pre-Tax ROR %	12.26% <sup>2</sup>	11.33%	11.31% <sup>12</sup>	11.31%	11.38% <sup>12</sup>	11.38%	11.38%	11.39% <sup>12</sup>	11.38% <sup>12</sup>	11.38%	11.38%
9	Overall Rate of Return %	9.25% <sup>2</sup>	8.33% <sup>12</sup>	8.33% <sup>12</sup>	8.33%	8.33%	8.33%	8.33%	8.33%	8.33%	8.33%	8.33%
10	Pre-Tax ROR on Rate Base	453,798 <sup>v</sup>	(34,245) <sup>12</sup>	(14,965) <sup>12</sup>		44,090 <sup>12</sup>			3,235 <sup>12</sup>	(3,112) <sup>12</sup>	0	448,901
11	Revenue Credits	(100,664)			(523,097) <sup>14</sup>		(73,683) <sup>14</sup>	(32,446) <sup>14</sup>		(143,960) <sup>14</sup>	1,526 <sup>14</sup>	(872,344)
12	O&M Expenses	5,316,939 <sup>8</sup>				(365,512) <sup>14</sup>			213,338 <sup>14</sup>	(152,324) <sup>14</sup>		5,014,442
13	Depreciation	282,977 <sup>7</sup>		4,531 <sup>12</sup>		27,806 <sup>11</sup>						315,314
14	Property Taxes	25,702 <sup>8</sup>				15,512 <sup>14</sup>						41,214
15	Payroll Taxes	147,468 <sup>8</sup>								(8,846)		140,622
16	Regulatory Fee	7,365 <sup>10</sup>	(41)	(13)	(626)	(334)	(89)	(38)	280	(368)	2	8,115
17	Total Cost of Service <sup>14</sup>	\$6,135,565	(\$34,286)	(\$10,446)	(\$523,725)	(\$278,438)	(\$73,772)	(\$32,485)	\$216,633	(\$306,610)	\$1,528	\$5,094,164

## Footnotes:

<sup>v</sup> Mayfield Exhibit 1, Schedule 2.

<sup>2</sup> Line 10/Line 7.

<sup>3</sup> Mayfield Exhibit 1, Schedule 1, Column(d), Line 9.

<sup>4</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Sum of Lines 76, 77 and 78.

<sup>5</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Sum of Lines 2 through 5.

<sup>6</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Lines 71.

<sup>7</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Lines 72.

<sup>8</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Lines 73.

<sup>9</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Lines 74.

<sup>10</sup> Mayfield Exhibit 1, Schedule 3, Column (e), Lines 75.

<sup>11</sup> Sum of lines 10 through 16.

<sup>12</sup> Determined based on the following capital cost components:

Equity % of total capital 50.00%

Debt cost rate 6.65%

Return on equity 10.00%

<sup>14</sup> Hoard Exhibit 1, Schedule 1C.

<sup>12</sup> Hoard Exhibit 1, Schedule 1C.

<sup>13</sup> Hoard Exhibit 1, Schedule 2.

<sup>14</sup> Hoard Exhibit 1, Schedule 2-1.

<sup>15</sup> Hoard Exhibit 1, Schedule 3.

<sup>16</sup> Hoard Exhibit 1, Schedule 2-2.

<sup>17</sup> Hoard Exhibit 1, Schedule 4.

<sup>18</sup> Hoard Exhibit 1, Schedule 5.

<sup>20</sup> Revised Hoard Exhibit 1, Schedule 3.





SCHEDULE II  
BALD HEAD ISLAND TRANSPORTATION, INC.  
North Carolina Operations  
Docket No. A-41, Sub 7  
STATEMENT OF RATE BASE AND RATE OF RETURN  
Twelve Months Ended December 31, 2009  
(000s Omitted)

Item	Amount
Plant in service	\$6,656,972
Accumulated depreciation	<u>(2,402,645)</u>
Net plant in service	4,254,326~
Cash working capital	626,805
Average tax accruals	(44,044)
Deferred income taxes	<u>(893,752)</u>
Original Cost Rate Base	<u><u>\$3,943,335</u></u>
Overall Rate of Return on Rate Base:	
Present rates	(32.23%)
Approved rates	8.33%

Note: ~ Denotes rounding per Stipulation.

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Mar 30 2022