STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. A-41, Sub 22

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Amended 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 PROPOSED ORDER DENYING TRANSFER OF COMMON CARRIER CERTIFICATE

HEARD: Tuesday, November 1, 2022, at 7:00 p.m., in the Brunswick County Courthouse, Bolivia, North Carolina

Tuesday, March 7, 2023, at 2:00 p.m., in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner Kimberly W. Duffley, Presiding, Chair Charlotte A. Mitchell, and Commissioners ToNola D. Brown-Bland, Daniel G. Clodfelter, Jeffrey A. Hughes, Floyd B. McKissick, Jr., and Karen M. Kemerait

APPEARANCES:

For Village of Bald Head Island:

Marcus W. Trathen, Craig D. Schauer, and Amanda S. Hawkins, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Suite 1700, Wells Fargo Capitol Center, 150 Fayetteville Street, Raleigh, NC 27601

Jo Anne Sanford, Sanford Law Office, PLLC, Post Office Box 28085, Raleigh, North Carolina 27611-8085

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

M. Gray Styers, Jr., and Elizabeth Sims Hedrick, Fox Rothschild LLP, 434 Fayetteville Street, Suite 2800, Raleigh, North Carolina 27601-2943

For Bald Head Island Ferry Transportation, LLC and SharpVue Capital, LLC:

David P. Ferrell, Nexsen Pruet PLLC, 4141 Parklake Avenue, Suite 200, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Lucy E. Edmondson, Esq., Chief Counsel, Gina C. Holt, William E. H. Creech, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4300

For Bald Head Island Club:

Daniel C. Higgins, Burns Day & Presnell, P.A., P.O. Box 10867, Raleigh, North Carolina 27605

For Bald Head Association:

Edward S. Finley Jr., 2024 White Oak Road, Raleigh, North Carolina 27608

BY THE COMMISSION: On July 14, 2022, Bald Head Island Transportation, Inc. (BHIT) and Bald Head Island Ferry Transportation, LLC (BHIFT), a wholly-owned subsidiary of Pelican Legacy Holdings, LLC (Holdings), managed by SharpVue Capital, LLC (SharpVue), filed an application pursuant to N.C.G.S. § 62-111(a) for approval:

1. To transfer BHIT's common carrier certificate to BHIFT in order to operate the passenger ferry transportation services to and from Bald Head Island and the tram services on the island; and

2. For SharpVue to pledge assets and borrow or issue debt, pursuant to N.C.G.S. § 62-160 and § 62-161, as may be necessary to finance the transaction.

On July 14, 2022, applicants filed with the Commission the direct testimony of witness Charles A. Paul, III, and on July 15, 2022, the applicants filed the direct testimony of Shirley A. Mayfield and Lee H. Roberts.

On July 20, 2022, the Bald Head Association (BHA or Association) filed a Petition to Intervene in the proceeding. On July 27, 2022, the Commission issued an order granting the Association's petition.

On July 21, 2022, the Village of Bald Head Island (Village) filed a petition to intervene. On July 27, 2022, the Commission granted the Village's petition.

On August 24, 2022, the Commission issued an Order Scheduling Hearing, Establishing Procedural Deadlines, and Requiring Public Notice. In the Order, the Commission provided discovery guidelines and set the matter for public witness hearing on Tuesday, November 1, 2022, at the Brunswick County Courthouse in Bolivia, North Carolina, and for expert witness hearing to begin on Tuesday, January 17, 2023, in the Commission hearing room in Raleigh, North Carolina.

The intervention and participation of the Public Staff is recognized pursuant to N.C.G.S. § 62-15(d) and Commission Rule R1-19(e).

On September 14, 2022, Robert T. Blau and J. Paul Carey, residents of Bald Head Island, filed a consumer statement. Various other consumer statements were received in Docket No. A-41, Sub 22CS.

On October 18, 2022, the Bald Head Island Club (Club) filed a petition to intervene in the proceeding. On October 21, 2022, the Commission granted the Club's intervention.

On November 1, 2022, the Commission conducted a public witness hearing in the Brunswick County Courthouse, Bolivia, North Carolina.

On November 23, 2022, the Public Staff filed a motion to extend the time for Public Staff and the other intervenors to file direct testimony and the time for applicants to file their rebuttal testimony. On November 28, 2022, the Commission issued an Order granting the Public Staff's motion for extension of time.

On December 14, 2022, the Public Staff filed the direct joint testimony and exhibits of witnesses Sonja R. Johnson, Krishna K. Rajeev, and John R. Hinton. The Bald Head Association filed the direct testimony and exhibits of witness Robert Drumheller, and the Village filed the direct testimony and exhibit of witness Scott T. Gardner.

On December 21, 2022, the Commission issued an Order Holding Proceeding in Abeyance pending the final decision in Docket No. A-41, Sub 21, a related proceeding initiated by the Village seeking a determination of the regulatory status of certain assets used in relation to the common carrier service. The Order continued the expert witness hearing, to be rescheduled by further order of the Commission.

On December 30, 2022, the Commission issued an Order Ruling on Complaint and Request for Determination of Public Utility Status in Docket No. A-41, Sub 21 (Sub 21 Order). In this Order, the Commission determined that the barge and parking operations owned and operated by BHIT's parent, Bald Head Island Limited, LLC (BHIL), were subject to the Commission's jurisdiction and regulatory authority and that BHIL would be prohibited from selling, assigning, pledging, or transfer the parking and barge operations without prior Commission approval.

On January 20, 2023, the Commission issued an Order Rescheduling Hearing and Establishing Additional Procedures which, among other things, required the filing of an amended application and testimony to reflect the Commission's holding in the Sub 21 Order and set the expert witness hearing to begin on Tuesday, March 7, 2023.

In compliance with the Commission's January 20, 2023 Order, on January 24, 2023, BHIT, BHIFT, and BHIL (collectively, Applicants) filed an amended application pursuant to N.C.G.S. § 62-111(a) (Amended Application). In the Amended Application, in addition to seeking approval of the transfer of the ferry/tram operations and approval to pledge assets and borrow or issue debt, the Applicants sought approval ("to the extent the Commission has jurisdiction and authority to regulate them as may be determined on appeal") to transfer the parking and barge operations to SharpVue and its affiliates. On January 24 2023, the Applicants also filed the amended direct testimony of witnesses Paul, Mayfield, and Roberts.

On January 30, 2023, BHIL, BHIT, and SharpVue filed a Notice of Appeal and Exceptions seeking appellate review of the Commission's Sub 21 Order.

On February 3, 2023, citing the Applicants' appeal of the Sub 21 Order, the Village moved to hold the proceeding in abeyance and requested an expedited ruling on the motion. On February 6, 2023, the Commission issued an Order requiring responses to the motion, and on February 8, 2023, BHIT and BHIL, SharpVue, and the Public Staff each filed a response or a supplemental response to the motion. On February 9, 2023, the Village filed a reply regarding the motion, and on February 13, 2023, the Commission issued an order denying the motion.

On February 20, 2023, the Public Staff filed amended and supplemental joint testimony of witnesses Sonja Johnson, Krishna Rajeev, and John Hinton, which included matters deemed confidential. On the same day, the Village filed the direct testimony and exhibits of witnesses J. Lee Lloyd, Dr. Julius A. Wright, and Kevin W. O'Donnell, which included matters deemed confidential, and the supplemental direct testimony of witness Gardner.

On February 27th and 28th, 2023, Applicants filed the joint rebuttal testimony and exhibits of witnesses Paul and Roberts, which included matters deemed confidential, the rebuttal testimony of witness Bion Stewart, and the rebuttal testimony and exhibit of witness John D. Taylor.

On March 1, 2023, the Public Staff filed a motion to substitute witness Michelle Boswell for witness Johnson and to allow witness Boswell to adopt witness Johnson's previously-filed testimony. On March 3, 2023, the Commission issued an order granting this motion.

On March 1, 2023, BHA filed a motion to withdraw the testimony and exhibits of witness Drumheller. On March 3, 2023, the Commission issued an order granting this motion.

On March 2, 2023, the Village filed a motion to substitute witness Julie G. Perry for witness Kevin W. O'Donnell and for witness Perry to adopt witness O'Donnell's previously filed testimony. On March 3, 2023, the Commission granted this motion.

On March 6, 2023 the Village filed notice of amendment to the testimony of witness Perry.

This matter came on for expert witness hearing before the Commission on March 7, 2023, as scheduled.

On May 22, 2023, the parties submitted post-hearing briefs and/or proposed orders.

Based upon consideration of the pleadings, testimony, and exhibits received into evidence at the hearings, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

I. Jurisdiction and Procedure

1. BHIT is a North Carolina public utility and is subject to the jurisdiction of the Commission. Under color of its certificate, BHIT is engaged in the business of transporting passengers and their personal effects by ferry between the Deep Point terminal on the mainland and Bald Head Island and by tram from the Bald Head Island terminal to and from their destinations on the Island.

2. BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. BHIL is owned by Mitchell Island Investments, Inc., which is owned through a management company by the Estate of George P. Mitchell.

3. Among other assets, BHIL owns and operates parking facilities at the Deep Point Marina terminal for the use of ferry passengers (the "parking facilities"). BHIL also owns a tugboat and barge (collectively, the "barge") used to transport commercial and household materials, goods, and supplies, as well as contractors, vendors, and other personnel together with their commercial vehicles, to and from the Island.

4. Both the parking and barge operations are subject to the Commission's jurisdiction and regulatory authority. *See* Order Ruling on Complaint and Request for Determination of Public Utility Status, Docket No. A-41, Sub 21 (Dec. 30, 2022) (Sub 21 Order). Under the Sub 21 Order, the parking and barge operations are deemed permitted under BHIT's common carrier certificate, and BHIL is prohibited from selling, assigning, pledging, or transfer the parking and barge operations without prior Commission approval.

5. SharpVue is a North Carolina based private equity firm with experience in real estate and infrastructure investment.

6. SharpVue has no record of owning or operating regulated public utilities.

7. SharpVue has established a number of corporate entities, which are all newly-formed special purpose entities specifically intended for this transaction.

8. BHIFT, Pelican Legacy Holdings, LLC (Holdings), and SVC Pelican Partners, LLC are all affiliates of and managed by SharpVue.

9. SharpVue itself will not be an investor in the proposed transaction.

10. The Village of Bald Head Island is a municipal corporation with all the powers, duties and rights conferred by its charter and the laws of the State of

North Carolina. The Village is an intervenor in its governmental capacity, as a significant and regular user of the transportation services, and on behalf of the residents, property owners, businesses, and visitors who rely on the continued availability of the transportation services to the Island on reasonable terms and conditions.

11. The Club is a member-owned club serving the Island.

12. BHA is an association of homeowners and property owners on the Island.

13. The Applicants are lawfully and properly before this Commission pursuant to N.C.G.S. § 62-111(a) with respect to the relief sought in the Application.

14. The Application, testimony, exhibits, affidavits of publication, and public notices submitted by the Applicants are in compliance with the procedural requirements of the North Carolina General Statutes and the Rules and Regulations of the Commission.

II. The Island and Transportation System

15. In the Sub 21 Order, the Commission has previously taken note of basic facts relating to the Island and the transportation system, which are also pertinent here.

16. Bald Head Island (BHI or Island) is a unique natural resource of the state due to the confluence of several attributes: its relative accessibility by 20-minute ferry ride from the mainland, favorable climate as the southernmost location in the state, pristine beaches, protected maritime forest and native wildlife, relaxed and automobile free island environment, historic attractions, sustainability and research programs at the Bald Head Island Conservancy, and outdoor recreational activities.

17. The Island is open to the public, and hundreds of thousands of persons travel to the Island each year.

18. The Island is not yet fully developed, so the demand for transportation services is expected to grow over time.

19. The only means of public access to the Island is via the ferry and the barge. The ferry is used to transport persons, their baggage, and small personal items to the Island.

20. The parking facilities at Deep Point provide the only means of public parking access to the Deep Point Terminal. There is no existing alternative or reasonably substitutable parking facility or service available to the public

21. The barge is used to transport everything else to and from the Island—including household items too large to bring by hand on the ferry, food, retail merchandise, construction materials and supplies, tradesmen vehicles, and equipment.

22. The ferry and barge operations are the only means of general public access to and from the Island and has been operated by the Island's developer in furtherance of its development of the Island.

III. Proposed Transaction

23. Applicants seek the Commission's approval of the transfer of the common carrier certificate permitting the operation of the Bald Head Island transportation system from BHIT and BHIL to BHIFT. The Applicants also seek approve of the pledge of regulated assets in support of the transaction.

24. Holdings is SharpVue's investment vehicle for the transaction and will own, through its subsidiaries BHIFT, Pelican Real Property, LLC, and Pelican IP, LLC, all regulated and non-regulated assets acquired in the transaction.

25. The SharpVue management team intends to own and/or directly control over 50% of the investments in Holdings, will be Managers for all affiliated entities (along with Chad Paul for Holdings and thus BHIFT), and be the decision makers, along with Mr. Paul, for all assets and operations owned and controlled by Holdings, including the regulated assets owned and operated by BHIFT.

26. The manner in which SharpVue will exercise ownership and control over Holdings, BHIFT, and their respective affiliates has not been demonstrated through corporate organizational documents accepted into evidence.

IV. SharpVue's Financing

27. In contrast to private equity investments using a larger pool of capital, SharpVue has put together a small group of dedicated investors specific to this investment. Under this approach, the only funds available to the enterprise are those initially invested and third party debt.

28. The aggregate stated purchase price of the transaction, involving a mixture of regulated and unrated assets, is **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**.

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

V. SharpVue's Financial Incentives

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

VI. SharpVue's Statements to Investors

36. **[BEGIN AEO CONFIDENTIAL]** [redacted]

[redacted]

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

VII. ROFR Litigation

40. On August 21, 1999, BHIL, BHIT, and the Village entered into a Right of First Refusal (ROFR) Agreement pursuant to which BHIL and BHIT granted to the Village a ROFR to purchase the transportation assets should it receive a third party bona fide offer to purchase those assets.

41. The parties dispute the enforceability of this ROFR and whether, assuming its enforceability, BHIL and BHIT have properly afforded the Village of its rights under the ROFR Agreement.

42. On January 19, 2023, BHIL and BHIT brought action against the Village in Brunswick County Superior Court seeking a determination of the parties' respective rights and obligation under the ROFR Agreement. This matter remains pending before the Superior Court, the court having issued an Order Denying Motion for Judgment on the Pleadings on May 11, 2023.

43. Should the Village prevail in this litigation, it will have the opportunity to purchase the transportation assets. Based on the current status of that litigation, and the possibility of an appeal from the trial court's determination, it seems likely that a final determination in that proceeding is many months away.

VIII. Sub 21 Order Appeal

44. BHIL, BHIT, and SharpVue have appealed the Commission's Sub 21 Order. *See generally* Notice of Appeal and Exceptions, Docket No. A-41, Sub 21 (Jan. 27, 2023). This matter is pending before the N.C. Court of Appeals.

45. The parking and barge assets that SharpVue seeks authority to acquire are the same assets as to which the appellants are challenging the Commission's authority in their appeal.

46. Given the overlap in these proceedings, 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 N.C.G.S. § 62-111, while not knowing whether those assets will still be subject to its regulatory authority post-appeal.

IX. Transportation System Financial Performance

47. The Village has presented evidence that BHIL is earning a 26.5% return on investment on the combined transportation system. BHIL has not rebutted this evidence.

48. A 26.5% return-on-investment is significantly above that which the Commission has typically permitted in recent general rate cases and is indicative of a rate structure that is over-compensatory.

49. The evidence tends to show that BHIL's earnings are driven by revenues from its parking and barge operation which, the Commission has determined, are subject to the Commission's regulatory authority.

50. Although the Commission has not yet established the extent to which it intends to regulate the parking and barge operations, the Commission has determined that those operations are subject its authority. This determination is consistent with the Commission's imputation of revenues from parking in BHIT's most recent rate case. At the time it entered into the purchase agreement to acquire the transportation assets, SharpVue was on notice of the Commission's determination in the 2010 rate cases as well as the pendency of the Village's request in Docket No. A-41, Sub 21 for a determination of the regulatory status of parking and barge prior to executing the agreement to purchase the transportation assets.

X. Valuation of Assets

51. SharpVue is proposing to purchase a mixture of regulated and unregulated assets in the same transaction and the purchase agreement includes no stated agreed-upon value for the transportation assets. The mixture of these assets creates significant issues of valuation, particularly under the facts of this proceeding where portions of the regulated assets have not previously been subject to a formal rate base determination by the Commission.

52. Under these facts, SharpVue has the incentive to allocate the purchase price as between assets for the purpose of influencing and maximizing the potential for earning a regulated return. This incentive creates challenges for the Commission in this proceeding as it seeks to protect ratepayers from adverse impacts from the proposed transaction.

53. **[BEGIN AEO CONFIDENTIAL]** S [redacted] **[END AEO CONFIDENTIAL]**

55. The proposed valuation greatly exceeds the property's tax valuation.

56. SharpVue's purchase price is nearly $10 million more than Bald Head Island Transportation Authority's proposed purchase price—a price the Local Government Commission rejected for being too high.

XI. Lack of Widespread Public Support

57. The Applicants have presented no evidence of widespread public support of the proposed transaction.

58. The Village, the governmental representative of the public, opposes the transaction. At the public hearing, various members of the public spoke in opposition to the transaction. Several members of the public have submitted letters opposing the transaction.

59. The Village has presented evidence indicating that a substantial majority of the public do not support the transfer.

XII. Applicable Transfer Standard

60. The proposed transaction is subject to Commission approval under the standard set forth in N.C.G.S. § 62-111(a), and the three-factor test established by the Commission in prior merger and transfer proceedings. Under this test, the Commission must consider whether (1) the transaction will 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.

61. The Applicants bear the burden of proof.

XIII. Post-Closing Operations and Commitments

62. SharpVue intends to "step into the shoes" of BHIL and BHIT as regards operation of the utility assets.

63. SharpVue has stated that it will seek to keep BHIT's management in their current roles and duties.

64. SharpVue has committed to not seeking a rate case for one year following closing of the transfer, except that it would be permitted to increase parking and barge rates by the overall rate of inflation based on the CPI-U.

65. SharpVue has committed to, for one period of six years post-closing or the next rate case filed by BHIFT, whichever is earlier, not increasing the aggregate rates for the parking and barge more than the overall rate of inflation, as measured by CPI-U, regardless of the outcome of the Sub 21 Order appeal.

66. SharpVue has committed to maintaining the availability of parking consistent with existing number of overall spaces regardless of the outcome of the Sub 21 Order.

67. SharpVue states that, upon consummation of the transaction, BHIFT will assume responsibility for all rights and obligations of BHIT that flow from the Commission's order approving a settlement of the 2010 Rate Case for the ferry and tram services in Docket No. A-41, Sub 7.

68. SharpVue has committed to assess operations during its first year of ownership and to evaluate other steps and prudent investments it can make to improve operations.

69. SharpVue has not committed to making any capital improvements or investments to BHIFT or the ferry system.

70. SharpVue has not committed to owning the regulated assets for any particular length of time.

XIV. Benefits

71. The transaction offers no tangible and quantifiable public benefits to ratepayers.

72. The ferry system is not a distressed utility. It is profitable, financially self-sustaining, and operationally sound.

73. BHIL has presented evidence through testimony of its CEO that it wishes to exit the utility business as part of a plan to divest itself of its investments

and operations on the Island. However, the Applicants have not presented witness testimony from the Mitchell family or the Mitchell Estate as regards the Mitchells' capabilities and intentions.

74. BHIL is a solvent going concern with sufficient resources and capabilities to continue operation of the utility.

75. There is no evidence that BHIT is a "distressed utility".

76. The mere existence of a willing buyer and a motivated seller is not a sufficient demonstration of public interest.

77. SharpVue has not committed to making improvements to the transportation system.

78. SharpVue has not offered to reduce rates, provide ratepayer credits, or provide any other tangible or quantifiable benefit to ratepayers.

79. Resolving longstanding questions concerning the ownership of the utility is in the public interest and would likely lead to improvements in employee morale which is a non-quantifiable benefit. However, this benefit is mitigated and offset in this case by the facts of this proposed transaction, which include buyer's status as a private equity company, buyer's lack of commitment to long-term ownership of the utility assets, and lack of widespread public support for the transaction. In other words, it is precisely the uncertainty about the stability of future operations which has caused public anxiety and concern about the proposed transaction, concerns with the Applicants have been either unwilling or unable to address. Additionally, improving employee morale is not a sufficient quantifiable and tangible benefit to satisfy the statutory transfer standard.

80. SharpVue's other purported "benefits" would only maintain the status quo. But keeping things as they are, when the current owner is willing and able to do the same, and the public has expressed specific concerns about service quality, is not a benefit to ratepayers.

XV. Mitigation of Potential Costs and Risks

81. The Settlement Stipulation does not address current overearning and would magnify the issue by (a) permitting increases in parking and barge rates, and (b) permitting BHIFT to distribution 100% of net earnings to its affiliates and management. Collectively, these provisions would have the effect of exacerbating the harm to ratepayers from overearning.

82. The Sub 21 Order freezes current parking and barge rates at existing levels pending a future rate case. The Settlement Stipulation conflicts with the Sub 21 Order and constitutes impermissible single-issue ratemaking.

83. A significant disputed issue in this proceeding is SharpVue's claim for recovery of acquisition premium from ratepayers. In the original Application, SharpVue pledged not to seek recovery of acquisition premium, but in its Amended Application and in its amended direct and rebuttal testimony SharpVue reversed its position and has presented various arguments for full recovery of its acquisition costs from ratepayers.

84. The proposed transfer is premised on SharpVue's expectation that it will be able to recover the full amount of its acquisition payment from ratepayers.

85. The Settlement Stipulation does not protect parking and barge ratepayers from claims for recovery of acquisition premium. As SharpVue proposes to allocate the majority of the purchase price to parking and barge, ratepayers are at risk of paying a significant acquisition premium under the Settlement Stipulation.

86. Relatedly, the Settlement Stipulation does not resolve the issue of how the utility assets being acquired will be treated and valued for rate base purposes.

87. The Settlement Stipulation does not protect ratepayers from the risks associated with SharpVue's plan to separate ownership of utility assets into separate non-utility affiliates and to lease those assets to the utility. This plan is particularly risky for ratepayers given the Applicants' ongoing appeal of the Sub 21 Order and the likelihood that the unresolved issue of the recovery of acquisition premium will arise in the context of the proposed lease arrangements.

88. The Settlement Stipulation virtually ensures future disputes, whether in the context of proposed lease arrangements or rates, which are grounded in the unresolved issues relating to the valuation for regulatory purposes of the assets being acquired, recovery of acquisition premium, and rate base.

89. The Settlement Stipulation does not protect ratepayers from ownership risks related to the disposition of the Sub 21 Order appeal.

90. The proposed Regulatory Conditions in the Settlement Stipulation are insufficient to eliminate or mitigate potential costs and risks of the transaction to the fullest extent reasonably possible.

91. The Applicants have not met their burden of establishing that the proposed transaction will result in sufficient benefits to outweigh known and potential costs and risks.

XVI. Findings Relevant to Public Convenience and Necessity

92. The proposed transfer, as described and conditioned by the Amended Application, the testimony of the witnesses, and the proposed

Regulatory Conditions, is not justified by the public convenience and necessity, does not serve the public interest, and should be denied.

XVII. Findings Relevant to Request for Approval of Pledge of Assets

93. SharpVue's Application seeks approval for SharpVue and/or one of its affiliates to pledge and borrow/issue debt secured by regulated transportation assets as may be necessary to finance the proposed transaction, under N.C.G.S. §§ 62-160 and -161.

94. 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.

95. SharpVue is seeking to acquire in the transaction under review a mixture of regulated and unregulated assets. Additionally, in its appeal of the Sub 21 Order, SharpVue is challenging the Commission's recognition of the parking and barge assets as subject to the Commission's regulatory authority. The evidence presented by SharpVue is inconclusive as regards the specific assets which are being pledged and the specific debt which those assets will be securing.

96. If the Commission approves SharpVue's request to pledge assets at this time, and if Applicant's appeal of the Sub 21 Order is successful, the end result could be that the regulated ferry assets are used as collateral to secure debt related to the then-unregulated parking operation and barge.

I. Jurisdiction and Procedure

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1–14

The evidence supporting these findings of fact is contained in the Application and Amended Application, the testimony of the Applicants' witnesses Paul and Roberts, as well as the entire record before the Commission. These findings and conclusions are jurisdictional or generally informational and are not contested by any party.

The parties do not dispute that BHIT is a North Carolina public utility subject to the Commission's jurisdiction engaged in the business of transporting passengers and their personal effects by ferry between the Deep Point terminal on the mainland and Bald Head Island and by tram from the Bald Head Island terminal to and from their destinations on the Island. *See* Order Granting Common Carrier Authority, Docket No. A-41, Sub 0 (Jan. 6, 1995); Amended Application, ¶ 3 (Jan. 4, 2023). *See also* Tr. vol. 2, 34.

BHIL is owned by Mitchell Island Investments, Inc., which is part of and managed by the Estate of George P. Mitchell. Tr. vol. 2, 58; *see also* Amended Application ¶ 8.

As BHIT/BHIL witness Paul testified, BHIL owns and operates the parking facilities at the Deep Point Marina terminal, as well as the tugboat and barge, that the parking facilities serve the ferry passengers, and that the barge transports commercial and household materials, goods, supplies, and contractors, vendors, and other personnel to and from the Island. Tr. vol. 2, 37; *see also* Amended Application, ¶ 4; Sub 21 Order ¶ 26. There is no dispute that BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. *See* Sub 21 Order ¶ 3.

The Commission's Sub 21 Order established that both the parking and barge operations are subject to the Commission's jurisdiction and regulatory authority. The Sub 21 Order deemed the parking and barge operations are permitted under BHIT's common carrier certificate, and BHIL is prohibited from selling, assigning, pledging, or transferring the parking and barge operations without prior Commission approval. *See generally* Sub 21 Order.

The parties do not dispute that SharpVue is a North Carolina based private equity firm. As SharpVue witness Roberts testified, SharpVue focuses on North Carolina-based investments. Tr. vol. 3, 10-11. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** *See, e.g.*, Village Roberts Direct Cross Exhibit 4 Confidential at 30.

Documents produced by Applicants demonstrate that SharpVue Capital, LLC **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** *See* Village Roberts Direct Cross Exhibit 2 Confidential.

The parties do not dispute that the Club is a member-owned club serving the Island. *See* Bald Head Island Club Petition to Intervene (Oct. 18, 2022), ¶ 8. Nor do they dispute that BHA is an association of homeowners and property owners on the Island. *See* Bald Head Island Association Petition to Intervene (Jul. 02, 2022), ¶ 1.

Finally, there is no dispute that the Application, testimony, exhibits, affidavits of publication, and public notices submitted by the Applicants are in compliance with the procedural requirements of the North Carolina General Statutes and the Rules and Regulations of the Commission.

II. The Island and Transportation System

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 15-22

The evidence supporting these findings and conclusions is contained in the Commission's Sub 21 Order, the testimony of Village witnesses Wright and Gardner, and the record before the Commission. These findings relate to general factual matters which are the subject of a prior Commission ruling or otherwise are not disputed by the parties.

As this Commission has already determined, Bald Head Island is a unique natural resource of the state due to the confluence of several attributes: its relative accessibility by 20-minute ferry ride from the mainland, favorable climate as the southernmost location in the state, pristine beaches, protected maritime forest and native wildlife, relaxed and automobile free island environment, historic attractions, sustainability and research programs at the Bald Head Island Conservancy, and outdoor recreational activities. Sub 21 Order ¶ 8. The Island is open to the public, and hundreds of thousands of persons travel to the Island each year. Sub 21 Order ¶ 9. The Island is not yet fully developed, so the demand for transportation services is expected to grow over time. Sub 21 Order ¶ 10.

As this Commission has further determined, the only means of public access to the Island is via the ferry and the barge. The ferry is used to transport persons, their baggage, and small personal items to the Island. Sub 21 Order ¶ 11. The ferry operation is the only means of general public access to and from the Island and has been operated by the Island's developer in furtherance of its development of the Island. Sub 21 Order ¶ 13.

As such, and as Village witness Wright testified, the ferry system "is the lifeblood of Bald Head Island," which is "completely dependent—in every way—on this transportation system (including the ferry, barge, and parking) for public access." Tr. vol. 6 at 19-20. Likewise, as Village witness Gardner testified, "[e]ach service is dependent on the other: i.e., without parking there would be no ferry, and without the barge's services, there would be no need for the ferry to transport the public to the Island." Tr. vol. 4, 78.

As this Commission has determined, the parking facilities at Deep Point provide the only means of public parking access to the Deep Point Terminal. There is no existing alternative or reasonably substitutable parking facility or service available to the public. *See* Sub 21 Order ¶¶ 13-17.

Finally, this Commission has determined that the barge operation is used to transport to and from the Island essentially all: food and beverage sold on the Island; restaurant and Club supplies; commercial goods and materials sold and used on the Island; construction materials and equipment used in all construction

and repair work on the Island; large household goods (e.g., appliances and furniture); housekeeping, administrative, and office supplies; fuel; landscape materials; golf carts used on the Island, etc. *See* Sub 21 Order ¶ 26.

III. Proposed Transaction

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 23-26

The evidence supporting these findings and conclusions is contained in Amended Application, the testimony of the Applicants' witnesses Paul, Mayfield, Stewart, and Roberts, the testimony of Village witnesses Wright and Lloyd, and the record before the Commission. These findings relate to general factual matters that are not disputed by the parties.

In the Amended Application, the Applicants seek the Commission's approval of the transfer of the common carrier certificate permitting the operation of the Bald Head Island transportation system from BHIT and BHIL to BHIFT. *See generally* Amended Application. The Applicants also seek approve for the pledge of regulated assets in support of the transaction.

SharpVue witness Roberts and Village witness Wright testified about the structure of the transaction and assets after closing.

[BEGIN AEO CONFIDENTIAL] [redacted] **[END AEO CONFIDENTIAL]** *See* Tr. vol. 3, 132. *See also* Amended Application ¶ 17; Tr. vol. 3, 129 (Roberts Amended Dir.); Tr. vol. 6, 35 (Wright Direct); Tr. vol. 4 (Exhibits), at Village Roberts Direct Cross Exhibits 2 Confidential.

Generally speaking, SharpVue contemplates that BHIFT will own the regulated operations, Pelican Real Property, LLC, will own the real property and other unspecified supplemental assets, Pelican IP, LLC, will own intellectual property. *See* Amended Application at Exhibit B, figure 3. *See also* Tr. vol. 3, 34-35 (Roberts); Tr. vol. 6, 36-37 (Wright); Tr. vol. 4 (Exhibits), at Village Roberts Direct Cross Exhibits 2 Confidential. Only BHIFT is a party to these proceedings; none of SharpVue's other affiliates are before the Commission. *See generally* Amended Application.

[BEGIN AEO CONFIDENTIAL] [redacted]

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

SharpVue maintains that it is not the parent company of BHIFT, Pelican Real Property, LLC, Pelican Logistics, LLC, or Pelican, IP, LLC; rather, they are SharpVue's "affiliates." Tr. vol. 5, 35.

Nonetheless, each of these entities is controlled by SharpVue's management team, Lee Roberts and Doug Vaughn. SharpVue owns and/or directly controls more than 50% of the investments in Holdings. Tr. vol. 9, 38 (Roberts/Paul). Tr. Vol 3, 24 (Roberts). **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Although SharpVue has offered testimony concerning the general manner in which the utility assets will be owned and controlled, SharpVue did not put into evidence the underlying corporate governance documents demonstrating the precise manner in which the relevant entities will be structured and controlled, as Applicants stated that the agreements were not "finalized."[1] Although the Commission held the record open to receive these documents, the Applicants have not submitted late-filed exhibits,[2] and Applicants have failed to provide such documents—either finalized or in draft form. The manner in which SharpVue will exercise ownership and control over Holdings, BHIFT, and their respective affiliates has not been demonstrated through corporate organizational documents accepted into evidence. Accordingly, there is no evidentiary basis upon which the Commission can make findings as to who will control the various SharpVue entities.

Based on the consideration of the foregoing, the Commission concludes that the regulated assets will be held by SharpVue's affiliate, BHIFT. Other aspects of the ferry system related to the regulated assets, including the parking facility real estate itself, will be owned by SharpVue's other affiliates. These affiliates are not parties to this proceeding. Any lease agreement between SharpVue and its affiliates would be subject to this Commission's review and approval. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

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

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

IV. SharpVue's Financing

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 27-31

The evidence supporting these findings and conclusions is contained in Village witness Lloyd, SharpVue witness Roberts, and the record before the Commission.

SharpVue witness Roberts testified about how SharpVue will finance the transaction. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

Rather than drawing from a larger pool of capital, SharpVue has put together a small group of investors specific to this investment. Tr. vol. 3, 14. **[BEGIN AEO CONFIDENTIAL]** [redacted]

[END AEO CONFIDENTIAL]

V. SharpVue's Financial Incentives

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 32-35

The evidence supporting these findings and conclusions is contained in the testimony of Village witness Lloyd, SharpVue witness Roberts, and the record before the Commission.

As SharpVue witness Roberts testified, the transaction is being funded through a third-party loan and a pool of investors. Tr. vol. 3, 6, 68. SharpVue is thus not putting any of its own money into the transaction, despite acquiring an ownership interest in the investment upon closing.

SharpVue is highly incentivized—and obligated—to follow the short-term disposition of assets. **[BEGIN AEO CONFIDENTIAL]** **[END AEO CONFIDENTIAL]** Thus, if presented with the right opportunity, SharpVue must do what will benefit the ratepayers, even if it is at the cost of the consumers.

Village witness Lloyed testified about **[BEGIN AEO CONFIDENTIAL]**

[redacted]

[redacted]

[END AEO CONFIDENTIAL]

Based on the foregoing, the Commission concludes that SharpVue will acquire an ownership interest in the investment, despite putting not money into the transaction itself. SharpVue will earn management and performance fees as part of the investment. The fee structure incentivizes SharpVue to dispose of the ferry system assets quickly.

VI. SharpVue's Statements to Investors

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 36-39

The evidence supporting these findings and conclusions is contained in Village witness Lloyd, SharpVue witness Roberts, and the record before the Commission.

Although SharpVue contends that service will not be disrupted because it intends to retain the existing management, its communications to investors demonstrate **[BEGIN AEO CONFIDENTIAL]** [redacted]

[redacted]

[redacted]

[redacted]

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

Further, notwithstanding any intent by SharpVue to hold the assets for ten years, SharpVue has not committed to do so. *See* Settlement Agreement and Stipulation; Tr. vol. 4 (Exhibits), at Scott Gardner Exhibit 1, SharpVue Responses to the Village's Second Set of Data Requests, Request 2-34 (committing only to "analyz[ing[the business more fully while operating it"). Nor can it, because SharpVue's primary obligation is to its investors, not ratepayers. Tr. vol. 3, 63 (testimony of witness Roberts explaining SharpVue fiduciary obligation to investors).

Based on the foregoing findings and consideration of the entire record, the Commission finds and concludes that **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**

VII. ROFR Litigation

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 40-43

The evidence supporting these findings and conclusions is contained in the record before the Commission.

Separate from this proceeding, the parties are litigating the August 31, 1999 Right of First Refusal (ROFR) between BHIL, BHIT, and the Village, in which BHIL and BHIT granted the Village a ROFR to purchase the transportation assets should BHIT/IL receive a third-party bona fide offer to purchase those assets. *See Bald Head Island Limited, LLC and Bald Head Island Transportation, 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)).

On January 19, 2023, BHIT and Limited filed a Complaint for Declaratory Judgment contesting the Village's ROFR. *Id.* BHIT and Limited argue that the ROFR status must be resolved before any closing of the transportation assets could occur. Specifically, it is alleged that SharpVue's lender is unwilling to finance the transaction without title insurance but has been unable to obtain title insurance because of the Village's ROFR to acquire the transportation assets. *Id.* ¶ 53.

The court denied Defendant's motion for judgment on the pleadings on May 11, 2023, and the matter is now proceeding to discovery. *See* Exhibit 4 to Village's Post-Hearing Brief. Given that the ROFR litigation is just now entering into the discovery phase, the resolution of that litigation is not imminent. If the Village prevails, it will have the opportunity to purchase the transportation system.

Based on the forgoing, the Commission concludes that the ROFR litigation is ongoing and its resolution may affect the rights of the parties in this case as well as the ability of SharpVue to close on the transaction.

VIII. Sub 21 Order Appeal

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 44-46

The evidence supporting these findings and conclusions is contained in the testimony of SharpVue witness Roberts, record before the Commission and the Commission's Sub 21 Order.

On January 27, 2023, BHIL, BHIT, and SharpVue appealed the Commission's Sub 21 Order. *See generally* Notice of Appeal and Exceptions, Docket No. A-41, Sub 21 (Jan. 27, 2023). This matter is pending before the N.C. Court of Appeals.

The parking and barge assets that SharpVue seeks authority to acquire are the same assets as to which the appellants are challenging the Commission's authority in their appeal. *See* Tr. vol. 4, 32.

The transfer is thus complicated by the fact that the regulatory status of the parking facilities are barge is in flux due to Applicants' appeal. The Applicants' ongoing litigation against the Commission also 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] **[END AEO CONFIDENTIAL]**

As for the commitments SharpVue has offered, if SharpVue's appeal is successful, the parking and barge operations would no longer be regulated and SharpVue would be free to sell the parking and barge operations at any time without Commission approval. Further, regardless of the outcome of the appeal, there is no guarantee that any SharpVue commitment regarding parking or barge availability or rates would be binding on any successor, which creates significant risks for users and consumers of the transportation system.

More generally, the Commission observes that SharpVue has conditioned its agreement to all of the Regulatory Conditions set forth in the Settlement Stipulation with the Public Staff on the following:

> The consent and acknowledgment as set forth above does not constitute a general consent to expansion of the Commission's jurisdiction over such entity (entities) beyond that established by Chapter 62 of the North Carolina General Statutes. Further, as long as SharpVue and its affiliates own or operate ferry, tram, parking, barge, and tug operations, SharpVue and the SharpVue Affiliates agree to submit to the Commission's regulation and oversight of those operations as set forth in the Regulatory Conditions herein and the Commission's [Sub 21 Order], to the extent it is upheld on appeal."

Settlement Agreement and Stipulation, Attachment A at 1-2 (May 10, 2023) (emphasis added). Given these reservations, in the event that the Sub 21 Order is overturned, SharpVue would likely argue that any conditions reliant on the Sub 21 Order are no longer enforceable.

Based on the forgoing, the Commission concludes that it is unable to assess whether the merger will result in sufficient benefits to offset potential costs and risks under N.C.G.S. § 62-111, while not knowing whether those assets will still be subject to its regulatory authority post-appeal.

IX. Transportation System Financial Performance

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 48-51

The evidence supporting these findings and conclusions is contained in the testimony of Village witness Perry and the record before the Commission.

Village witness Perry, using the audited financial information provided by Limited in discovery, calculated the return on Limited's rate base using financial data provided by Limited for 2021. Tr. vol. 4, 183 (O'Donnell Dir., as adopted by Perry). **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** Tr. vol. 4, 183. The result is a return on investment of 26.5%. Tr. vol. 4, 190. As Village witness Perry testified, this profit is "significantly above that which would typically be permitted in a rate proceeding . . . ." *Id.*

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

Applicants did not contradict the Village's calculations of Limited's rate base, net operating income, or the return on investment based on analysis of Limited 2021 financial reports. Therefore, the Commission accepts this analysis as true. *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.").

Based on the foregoing, the Commission determines that the ferry system is overearning relative to other regulated assets, and that the parking facility and barge are driving that overearning.

X. Valuation of Assets

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 51-56

The evidence supporting these findings and conclusions is contained in the testimony of Village witnesses Gardner, Wright, and Perry; Applicants witnesses Roberts and Paul; and the record before the Commission.

The Applicants claim that SharpVue has tentatively, for tax purposes, proposed to allocate **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** to the transportation assets. This sort of tax allocation, however, is not binding on the Commission as regards the value of assets for purposes of establishing utility rates. And the unilateral allocation of purchase price among regulated and non-regulated assets by the parties to the transaction raise significant concerns of transparency and fairness to consumers.

The record includes evidence that tends to call the proposed allocation into question.

Village witness Gardner testified that 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. And Village witnesses Gardner and Wright testified that Applicants' valuation exceeds tax values. Tr. vol. 6, 29 (Wright) (citing Exhibits JAW-2, JAW-3, JAW-4, JAW-5, and JAW-6); Tr. vol. 4, 77 (Gardner). *See also* Tr. vol. 9, 24 (Roberts/Paul), at n.2 ("Dr. Wright is correct that . . . these appraised values were higher than the Brunswick County assessed property tax value . . . .").

As for the parking lot specifically, earlier appraisals valued the entire 52.6 acre parcel at $10.5 million. Tr. vol. 9 (Exhibits), at LHR/CAP Rebuttal Exhibit 1. The parking lot, which is 36 acres, is thus presumably worth $7.14 million. A later appraisal valued the parking at $4 million. Tr. vol. 9 (Exhibits), at LHR/CAP Rebuttal Exhibit 4.

[BEGIN AEO CONFIDENTIAL] [redacted]

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

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 it included in rate base below. And if the parking facilities are 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 access their homes or jobs. This incentive creates challenges for the Commission in this proceeding as it seeks to protect ratepayers from adverse impacts from the proposed transaction.

Based on the foregoing, the Commission concludes that SharpVue's proposal allocation of value to the transportation system is not supported by evidence.

XI. Lack of Widespread Support

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 57-59

The evidence supporting these findings and conclusions is contained in Village witness Gardner, BHIT/IL witness Paul, SharpVue witness Roberts, the testimony received at the Commission's public hearing, and the record before the Commission.

Applicants have not presented any evidence of or testimony indicative of widespread public support for the transaction. To the contrary, the evidence indicates substantial public concern with the transaction.

The Village, a major stakeholder in the Island, opposes the transaction. *See generally*, Joint Post-Hearing Brief on Behalf of the Village of Bald Head Island (May 22, 2023).

In addition, Village witness Gardner testified about the results of a survey conducted by BHA regarding the transfer. After a July 27, 2022 public forum conducted by SharpVue and Limited, BHA surveyed the Island's 1,500 property owners. Of the respondents, only 23% 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. Tr. vol. 4, 77 (Gardner) (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. 4,107-08 (Gardner).

Likewise, at the Commission's public hearing in Bolivia, NC on November 1, 2022, various Island citizens expressed their concerns with the transaction.

Mr. Pope, a business owner and large user of the transportation, stated that he had "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." Tr. vol. 1, 44.

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. Tr. vol. 1, 82-92. Mr. Belch testified as regards the primary concern of private equity firms to "maximize income, potentially limit services, and minimize needed reserves." Tr. vol. 1, 76-81.

Mr. Rausch testified of his love of the Island community, 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 with investors could harm the Island the community. Tr. vol. 1, 70-75.

Mr. Hagland testified from the perspective of a full-time resident and 20-year visitor. 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 equities premium returns." Tr. vol. 1, 34-41.

Mr. Brawner testified 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 with the continued regulation of all aspects of the system should SharpVue be the buyer and whether SharpVue had plans and the means to make necessary improvements to service. Tr. vol. 1, 26-34.

While SharpVue did attend the July 2022 public forum on the Island to address questions from the public, the evidence also shows that SharpVue has not made any effort to directly engagement the Village concerning its needs and concerns or with other large users of the transportation system to solicit their views about the needs and concerns of the system's operation. Tr. vol. 4, 80 (Gardner); Tr. vol. 1, 46 (Pope). Nor did Limited follow-up on its commitment made at the public hearing to follow-up with a citizen concern. Tr. vol. 1, 105-106; Tr. vol. 2, 50-52 (Paul).

Based on consideration of the forgoing, the Commission concludes that the evidence indicates a lack of widespread support for the transfer.

XII. Applicable Transfer Standard

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 60-61

The evidence supporting these findings and conclusions is contained in the testimony of the Public Staff, the Application and Amended Application, and the record before the Commission.

All parties agree that the three-prong test under G.S. § 62-111(a) is the correct standard. Applicants cited § 62-111(a) in their Initial and Amended Applications. Application ¶ 22; Amended Application ¶ 23. In their Settlement Agreement and Stipulation, the Applicants and Public Staff recite the § 62-111(a) standard in arguing that the settlement should be approved. Settlement Agreement and Stipulation ¶ II.A. And in the regulatory conditions attached to the Applicants and Public Staff's Settlement Agreement and Stipulation, those parties agree that § 62-111(a) is the correct standard for any future mergers and acquisitions as well. *See* Settlement Agreement and Stipulation at 18. The other parties to this proceeding likewise agree that this is the correct standard. *See* Post-Hearing Brief of the Village of Bald Head Island at 28-36; Tr. vol. 6, 133-34 (Public Staff) ("The 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.").

The Commission agrees that G.S. § 62-111(a) applies. Under G.S. § 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 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.

The term "franchise" is broadly defined under Chapter 62 to include any grant "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. Gen. Stat. § 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 constitutes a "franchise" under G.S. § 62-111(a) which cannot be "sold, assigned, pledged or transferred" without the Commission's prior approval.

In the context of utility mergers, the Commission has articulated and applied a three-part test for determining whether a proposed utility merger is justified by the public convenience and necessity under G.S. § 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.

See Order Approving Merger Subject to Regulatory Conditions and 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 and Code of Conduct*, Docket Nos. E-22, Sub 551 and G-5, Sub 585 (Nov. 19, 2018) (Dominion Energy/SCANA).

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 and other transfers of control. *See, e.g.*, *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).

In limited circumstances, the Commission has applied the standard for transfers of continuously operated motor carriers under G.S. § 62-111(e) to the transfer of seasonally operated, recreationally focused tour boats. *See, e.g.*, 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). Section 62-111(e)'s more liberal standard is narrowly construed to encourage the transfer of "highly specialized" and "highly competitive" motor carriers, and only when the application of the standard will not harm the public. *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 *Utilities Comm. v. Express Lines*, 33 N.C. App. 99, 234 S.E.2d 628 (1977)). It thus

has no bearing here where the Bald Head Island transportation system is both essential to residents and businesses on Bald Head Island, and is a *de facto* monopoly. *See* Sub 21 Order at 8 (describing essential nature and monopoly status of ferry system).

Based on consideration of the foregoing, the Commission concludes that the appropriate standard to apply in this proceeding is the three-prong test that the Commission has previously applied under G.S. § 62-111(a).

XIII. Post-Closing Operations and Commitments

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 62-70

The evidence supporting these findings and conclusions is contained in Village witnesses Gardner, SharpVue witness Roberts, and BHIT/BHIL witness Paul and the record before the Commission.

SharpVue has not committed to make any updates to the ferry system. Instead, Applicants have repeatedly stated that the transaction will simply maintain the status quo. *See, e.g.*, Tr. vol. 2, 22-23, 48.

To that end, SharpVue witness Roberts testified that SharpVue will keep BHIT's management (Chad Paul, Shirley Mayfield, and Bion Stewart) in their current roles and duties. Tr. vol. 3, 13. SharpVue has agreed not to seek a rate case for one year following closing, except that it would increase parking and barge rates by the overall rate of inflation based on CPI-U. *See* Proposed Regulatory Condition No. 28.

SharpVue has committed to maintaining the availability of parking consistent with existing number of overall spaces regardless of the outcome of the Sub 21 Order. *See* Proposed Regulatory Condition No. 5.

SharpVue has agreed to assume responsibility for all rights and obligations of BHIT that flow from the Commission's order approving a settlement of the 2010 Rate Case for the ferry and tram services in Docket No. A-41, Sub 7. Settlement Agreement and Stipulations at II.B.

SharpVue has notably avoided several commitments. SharpVue has not committed to make any capital improvements or investments in BHIFT or the ferry system, instead stating that it will assess operations during its first year of ownership and to evaluate other steps and prudent investments it can make to improve operations. Tr. vol. 3, 16.

Likewise, SharpVue has not committed to owning the regulated assets for any particular length of time. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** Tr. vol. 7 Exhibits (Village Public Staff Cross Exhibit 1); Tr. vol. 3, 79-80.

Based on consideration of the foregoing, the Commission SharpVue has only promised to maintain the status quo, without any commitment to make improvements or hold the assets long term.

XIV. Benefits

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 71-80

The evidence supporting these findings and conclusions is contained in the testimony of the Applicants' witnesses Roberts, Paul, Stewart; the testimony of the Public Staff; the testimony of the Village witnesses Gardner, Wright, Perry; and Lloyd; and the record before the Commission.

A central question to be analyzed by the Commission under N.C.G.S. § 62-111(a) is whether the proposed transfer will benefit ratepayers. The parties dispute whether Applicants have demonstrated a benefit in this proceeding. The Applicants generally argue that ratepayers will benefit from the continued provision of utility service on a status quo basis in circumstances where the seller has indicated that it no longer wishes to provide utility service. The Applicants also point to various commitments made in proposed regulatory conditions, including that SharpVue will not commence a rate case within a one year period after consummation of the transaction and various commitments regarding the continued availability of parking.

The Public Staff generally agrees with the arguments of the Applicants and by entering into the Settlement Stipulation agrees that the stipulations will result in sufficient benefits to ratepayers that the transaction should be approved.

The Village disputes that ratepayers will benefit from the transaction. The Village argues that neither the Applicants nor the Public Staff has demonstrated that ratepayers will receive any tangible, quantifiable benefits if the transaction is approved, citing numerous cases where the Commission as required such concrete benefits. The Village also challenges the Applicants' contention that the preservation of "status quo" is a benefit to ratepayers, citing prior cases where the Commission has required a showing of "distressed" operations where the only claimed benefit was the maintenance of status quo and arguing that no evidence of such distress exists here.

Having reviewed the arguments of the parties and the evidence in the record, the Commission concludes that the Applicants have not met their burden to show that the transaction offers tangible and quantifiable public benefit to ratepayers and that the mere commitment to maintain status quo service, under the facts presented here, does not justify a finding of public benefit.

I. The mere transfer of a utility to a new owner is not a ratepayer benefit.

Regarding the first proffered benefit, Applicants contend that ratepayers will receive a benefit by SharpVue taking over the operations because Limited no longer wants to operate the ferry system. Amended Application, ¶ 39. Specifically, the Applicants point to evidence of BHIL's prior, failed efforts to sell the assets, the fact that the assets are ultimately owned and controlled by the Estate of George Mitchell, and assertions that the current owners will not continue to support the operations of the utility. *See* Tr. Vol. 9, 34 ("With respect to the benefits of the transfer, the Mitchell estate is no longer interested in owning and operating a utility business. An indifferent owner is not in the best interest of utility customers.").

The Commission is sympathetic to seller's desire to exit from the utility business and divest itself of its interests on the Island and accepts BHIL's representations in this regard at face value. Such a transition is a normal part of the development cycle for many real estate developments that have utility components, typically involving water and sewer utilities. However, seller's desire to exit must be balanced against protection of ratepayers. Having built a utility system under the regulatory authority of the Commission, and having induced private parties to invest in the development based, at least in part on the understanding that utility service would remain available, the owner remains subject to the Commission's authority with regards to the utility's operations. Here, where the assets in question are generating significant cash to the owner and where the primary source of those profits are utility assets as to which a formal rate base has not yet been established, the Commission is presented with novel circumstances that create significant risks for ratepayers. The Commission is cognizant of the opportunity, under these unique circumstances, for the transaction to be packaged in a manner that harms ratepayers who will be faced with claims by the new owner for recovery of the premium paid for the assets.

As regards benefits to ratepayers, as discussed below, there is an utter lack of evidence in the record of any tangible, quantifiable benefits. The Commission concludes that, under the facts here, seller's desire to sell and buyer's desire to buy are not a sufficient "benefit" to ratepayers to just approval of the transaction. There is no evidence that Limited is unable to continue operations, that it lacks sufficient resources to do so, or that it is threatening to suspend or diminish operations. Instead, the evidence in the record suggests otherwise on all counts.

First, Limited itself has offered evidence that its existing operations are sufficient, safe, well-maintained, "extremely well-run". *See* Tr. Vol. 3, p. 16; Tr. vol. 8, 102-103, 122-124 (Stewart).[3]

Second, there is no evidence that Limited lacks financial resources to continue operations. **[BEGIN AEO CONFIDENTIAL]** [redacted]

[3] Testimony of Bion Stewart ("Even as we face two aging ferry vessels, supply chain constraints, increased complexity in the maritime environment, and growth in demand for our services with another record breaking year in ridership for 2022, by any measure, BHIT has and continues to provide a high value service to the residents, businesses, employees, and visitors of Bald Head Island. We do everything we can within our control and within our resource availability to improve OTP, maintain vessels and facilities, attract and retain employees, and provide a positive customer experience.).

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

[redacted] [END AEO CONFIDENTIAL]

As regards the intentions of the Mitchell family and/or the Mitchell Estate, no member of the family or Estate appeared in the proceeding to provide evidence of their respective intentions with regard to the transportation system operations. *See generally* Docket No. A-41, Sub 21; Tr. vol. 2, 55. It is fair to presume that if the Mitchells or the Estate had views relevant to these matters, they would have offered evidence of such. Although witness Paul testified about the Mitchell family's desires, he later clarified that he was not authorized to speak for the Mitchells but rather was testifying only as CEO of BHIL. Tr. vol. 2, 55 (Paul). Thus, although Applicants claim that the transfer stands in the way of closing of the Mitchell Estate, and that the Mitchells are unwilling to continue to invest in the system, there is no evidence in the record to support that claim. The only evidence shows that the Mitchells are continuing to support the ongoing operations of the system. Further, other evidence would support the inference that the financial resources of the Estate are, at a minimum, sufficient to support the utility's going forward needs. *See* Tr. vol. 2 (Exhibits) at Village Paul Direct Cross Exhibit 1 (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). Stated another way, contrary to the facts typically presented to the Commission in cases of utility "distress," there is nothing in the record here to suggest that Limited, the Mitchells, or the Mitchell Estate lack the financial resources to provide support for the utility operations.

Under the record before it, the transportation system is not, in any respect, a "distressed" utility. It is profitable, financially self-sustaining, and operationally sound. In fact, SharpVue's primary business plan is centered on funding going forward operations with the profits from existing operations (plus any rate increases the Commission will authorize).

Thus, the only benefit SharpVue offers is a transfer to a new owner. But every transfer involves a buyer who wants to own the utility more than the seller. To find that a buyer's interest is a "benefit" to consumers would effectively eliminate this prong of the analysis. The Commission has rejected the argument that a mere

change in ownership is a benefit to customers in the context of acquisition premium.[5] The same principle applies here.

II. SharpVue Has Not Committed to any Tangible Benefits to Ratepayers.

The Commission further concludes that SharpVue has not committed to any specific ratepayer benefits in the Settlement Stipulations or otherwise.

SharpVue has specifically refused to make any commitments as regards service improvements or capital improvements to the ferry system. *See, e.g.,* Tr. vol. 8, 124-125 (Stewart testifying that SharpVue has no "firm plan" as regards vessel improvement or replacement); Tr. vol. 6, Exhibit JAW-11, at 11 ("capital needs will be assessed post-transaction"; "operating and capital budgets will be assessed post-transaction"; "SharpVue will act to support current baggage handling operations"; "needs of ferry fleet will be assessed post-transaction"), at 15 (identifying no known investments or improvements relating to parking), at 16 ("barge facilities will be operated in a manner substantially similar to that of current ownership").

SharpVue's refusal to commit to any system improvements stands in contrast to the record of known needs. For example, Village witness Gardner testified concerning serious issues relating to on-time performance in peak summer period and related baggage handling issues. He also testified about other issues that have known solutions and could be easily resolved, such as tidal flooding on the Island-side ferry dock which could be addressed by elevating the dock platform. Tr. vol. 4, 131–32. Similarly, witness Gardner testified about the need for covered areas to protect offloaded baggage from the elements. *Id.* at 132-33. SharpVue admits that these improvements would be easy to make, but it will not commit to resolving any issues.[6] Although SharpVue stated that it would implement an e-ticketing system and certain baggage handling improvements, that

[5] *See* Order Approving Transfer and Denying Acquisition Adjustment, Docket No. W-1000, Sub 5 (Jan. 6, 2000) ("W-1000 Sub 5 Order") (explaining that "approval of 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").

[6] Tr. vol. 3, 16 (Roberts) ("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, 218 (Public Staff) ("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.").

system is already being designed and implemented by Limited, and, in any event, SharpVue did not make any specific commitments as regards its implementation.[7]

SharpVue's stipulation commitment to limit parking and barge rate increases to the rate of inflation for six years after closing is not a cognizable ratepayer benefit under the circumstances here. First, SharpVue is already under an obligation in the Sub 21 Order to maintain current rates at existing levels, so SharpVue's proposed commitment conflicts with the prior order of the Commission. Second, SharpVue's commitment does not prevent the company from seeking a rate increase through commencement of a rate case. Additionally, the evidence of record demonstrates that the parking and barge rates current assessed are resulting in substantial overearnings. *See* Tr. vol. 4, 190 (Perry) (explaining that Limited's estimated overall rate of return is 26.5%). Thus, SharpVue's proposal would actual result in significant *increases* (through annual inflation adjustments) in rates which have been demonstrated to already be generating return in excess of that typically permitted by the Commission. This commitment does not result in cognizable "benefits" to ratepayers.

Similarly, SharpVue has committed in its proposed Settlement Stipulation to continue to making parking available at Deep Point. *See* Settlement Agreement at ¶ B. This commitment is a substantial improvement for ratepayers over SharpVue's prior position (which would have permitted SharpVue to "shuttle" passengers from remote parking facilities), but SharpVue is already constrained by the Sub 21 Order in making service impacting changes. SharpVue's proposed commitment to maintain the same level of service that consumers already receive is not a benefit. To the contrary, it only highlights the risk to ratepayers from the transaction given that SharpVue is seeking to "negotiate" by offering to simply maintain the current level of utility service, implicitly threatening that its real plan is to discontinue the current service level.

Through the Settlement Stipulation, SharpVue has also offered to maintain a 90% on-time departure goal for the ferry. Again, this is simply maintaining the status quo; as BHIT/IL witness Stewart testified, the BHIT/IL's ferry handbook already sets a 90% on-time performance goal. Tr. vol. 8, 127. Further, there is no evidence in the record that SharpVue could achieve this goal, *id.* at 110, and SharpVue has offered no plans to address known on-time service deficiencies in peak summer months. In fact, Stewart testified that a 90% on-time-departure standard would be "very difficult to achieve," and he has not achieved an overall 90% on-time standard in an overall year during his tenure. *Id.* at 127.

[7] Tr. vol. 9, 18 (Roberts/Paul) ("Current management has been working on implementing an electronic ticketing and reservation system for the past 24-months."); Tr. vol. 6, 219–20 (Public Staff).

SharpVue has not offered any other benefits, such as reducing rates, providing ratepayer credits or providing any other tangible or quantifiable benefit to ratepayers. Thus, this transfer stands in contrast to other proceedings before this Commission, in which this Commission has required applicants to demonstrate tangible and quantifiable ratepayer benefits to satisfy the statutory transfer standard.[8]

Further, although there may be some benefit to resolving longstanding questions concerning the ownership of the utility, the Commission finds that the transfer to SharpVue would not answer these questions where, as is the case here, the buyer is a private equity company, the buyer will not commit to long-term ownership of the utility assets, and widespread public support for the transaction is lacking. In other words, it is precisely the uncertainty about the stability of future operations which has caused public anxiety and concern about the proposed transaction, concerns with the Applicants have been either unwilling or unable to address. Additionally, improving employee morale is not a sufficient quantifiable and tangible benefit to satisfy the statutory transfer standard.

Based on consideration of the foregoing, the Commission concludes that Applicants have not met their burden of establishing that the proposed transaction will result in sufficient benefits to outweigh known and potential costs and risks.

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

XV. Mitigation of Potential Costs and Risks

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 81-91

The evidence supporting these findings and conclusions is contained in SharpVue witnesses Roberts and Taylor, Village witnesses Gardner, Perry, Lloyd and Wright, and the record before the Commission.

The Commission takes notice that SharpVue has proposed Settlement Stipulations in which it stipulates that direct costs and expenses associated with the transaction will be excluded from the regulated expenses of BHIFT and that ratepayers will be held harmless from such costs. To the extent that rates for the ferry/tram, parking and barge services continue to be established through BHIFT, the Commission accepts this stipulation as mitigating risks associated with the direct costs associated with the transaction.

However, this proposed transaction is unique in many respects and there are other risks to ratepayers arising in connection with the transaction other than those associated with the direct cost and expenses of the transaction itself. These risks include risks associated with existing overearning, acquisition premium, and regulatory risks associated with the appeal of the Sub 21 Order. As to these risks, the Applicants have not met their burden to show that the risks and costs of the transaction have been sufficiently mitigated.

I. Existing System Earnings.

As discussed above, the record evidence shows that, under the rates currently charged, Limited is overearning on the consolidated transportation operations. *See* Findings of Fact Nos. 47-49; Tr. vol. 4, 190 (Perry) (explaining that Limited's estimated overall rate of return is 26.5%). Prolonged instances of overearning create risk of harm to ratepayers, of course, by causing them to pay more for regulated services than would be justified by application of established ratemaking principles. As previously concluded, the Applicants have not rebutted this evidence tending to show that existing operations, on a combined basis, are significantly overearning; accordingly, the Commission accepts the Village's evidentiary showing on this issue.

SharpVue offers no plan to address this overearning by, for example, utilizing excess funds for the benefit of the system or reducing rates. Similarly, the proposed Settlement Stipulation does not address this overearning and, in fact, exacerbates it by permitting SharpVue to increase "aggregate" parking and barge rates by CPI-U every year for a six-year period, on top of existing overearning.

Not only do the proposed regulatory conditions set forth in the Settlement Stipulation do not address existing overearnings, they do not sufficiently control for the harm to ratepayers from this risk. The proposed stipulations restrict SharpVue to distributing 100% of BHIFT's net income, calculated on a two-year rolling basis, to its affiliates and managers. But SharpVue proposes a corporate structure in which BHIFT will receive the operational revenues from each of ferry, parking and barge, but (a) the debt associated with enterprise will be held by Holdings, and (b) the bulk of the value associated with the operations will be held in sister entities. Thus, the 100%-of-net-income restriction will provide little protection to ratepayers since there will be very little depreciation or interest to net against BHIFT's revenues. As a result, nearly all of the excess revenues from the transportation operations will be distributed to SharpVue's affiliates, managers, and investors without benefit to ratepayers. Intervenors have consistently articulated a concern about the potential for a new owner—particularly a private equity company—to "siphon off" excess revenues from the system without ratepayer benefit and the proposed regulatory conditions do not sufficiently address this risk.

Further, as noted, the proposed Settlement Stipulation conflicts with the Sub 21 Order, which requires parking and barge rates to be maintained at "status quo" levels, by allowing SharpVue to impose annual increases in parking and barge rates based on inflation. This proposal would, effectively, institute rate increases outside of a general rate case to address a single issue (i.e., inflation). Thus, in addition to conflicting with the Sub 21 Order, the proposed stipulation violates the "well-established, general ratemaking principle that all items 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." 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.

For these reasons, the Commission concludes that record evidence shows that ratepayers are not sufficiently protected against risks from overearnings.

II. Acquisition Premium.

The potential recovery of acquisition premium from ratepayers as a result of this transaction has been a source of significant dispute in the proceeding. The Applicants argue that they should be permitted to recover the full acquisition price from ratepayers and that, since the parking and barge assets have not previously been subject to the Commission's regulatory authority, they should come into rate base at their acquisition value. The Village argues that the Commission has consistently disallowed the recovery of acquisition premium in mergers and transfer proceedings, that the allowance of such premiums here would significantly

harm ratepayers, and that the assets in question are not "unregulated"—instead they have been deemed subject to the Commission's regulatory authority since, at a minimum, the issuance of the Sub 21 Order in December 2022.

The Commission agrees with the arguments of the Village on acquisition premium. SharpVue's position is unsupported by G.S. § 62-133 and long-standing Commission rate making principles 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 affected ferry rate regulation since 2010 through imputation of parking revenues, and (3) evidence suggests that Limited has more than recovered its original purchase price for the parking facilities through parking rates. The Commission has rarely allowed a purchaser to recoup acquisition premium, and only then in "special circumstances" which do not exist here.[9] The transportation system here is not "distressed" or "operationally nonviable," rather all evidence in this proceeding indicates that the system is profitable, financially self-sustaining, and operationally sound. In fact, SharpVue's primary business plan is centered on funding going forward operations with the profits from existing operations (plus any rate increases the Commission will authorize). *See* discussion *supra.*

SharpVue has made clear its intention to seek recovery of acquisition premium. Several of the Applicants' witnesses testified that the proposed transfer is premised on SharpVue's expectation that it will be able to recover the full purchase price from ratepayers. For example, witness Taylor testified that if SharpVue is not allowed to recover acquisition premium it 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." Tr. vol. 7, 101.[10] Consistent with witness Taylor's testimony, when Applicants filed their initial application, they included a promise not to recover acquisition premium from rate payers. Initial Application ¶ 37. Applicants' Amended Application, filed after

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

[10] *See also id.* 30 ("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."); *id.* 26 ("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.").

the Sub 21 order, withdrew that promise. *Compare* Amended Application ¶ 38 *with* Initial Application ¶ 37.

Indeed, Applicants' Settlement Stipulations impliedly confirm that SharpVue and its affiliates will seek to recover acquisition premium for the parking facilities and barge. Although SharpVue and its affiliates have committed not to "pursue or recover an acquisition adjustment in any future rate case," this promise is limited to the ferry and tram services. *See* Stipulations ¶ 3. The proposed stipulations, therefore, would still allow SharpVue to claim that it should recover acquisition premium for the parking facilities and the barge in a future rate case or other similar proceeding. In fact, the evidence shows that, under SharpVue's draft allocations, no premium is being assigned to the ferry operation.[11] 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. Thus, ratepayers would still be subject to SharpVue's claims for recovery of acquisition premium through utility rates, which is not warranted.

Alternatively, SharpVue has signaled an intention to seek effectively the same result through another means. **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]** Seeking to establish an affiliate lease which is based on the transaction value of the underlying property is an alternative mechanism for extracting the same monies from ratepayers and raises the same concern as regards the recovery of acquisition premium.

For these reasons, the Commission concludes that record evidence shows that ratepayers are not sufficiently protected against risks associated with SharpVue's intention to seek recovery of acquisition premium.

III. Other Risks.

The Settlement Stipulation leaves ratepayers open to additional risks as well. For example, the Settlement Stipulation does not resolve the issue of how the utility assets will be treated and valued for rate base purposes. And the Settlement Stipulation does not protect ratepayers from the risks associated with SharpVue's plan to separate ownership of utility assets into separate non-utility affiliates and to lease those assets to the utility. This plan is particularly risky for ratepayers given the Applicants' ongoing appeal of the Sub 21 Order and the likelihood that

[11] *See* Tr. Vol. 4 (Exhibits) KWO-3, at Exhibit A.

the unresolved issue of the recovery of acquisition premium will arise in the context of the proposed lease arrangements.

A major disputed issue in this case is the appropriate treatment of the barge and parking assets for rate base 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.[12] 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) As discussed immediately above, 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 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.

The Commission agrees with the Village's argument that the parking and barge assets should be included in rate base, if at all, at the lower of net original cost or net book value. This conclusion is mandated by N.C.G.S. § 62-133, which establishes how "just and reasonable" rates are fixed as well as the Commission's long standing implementation of this requirement. None of the Applicants' arguments for a contrary result are meritorious. The fact remains that the Applicants were on notice prior to execution of the purchase agreement that the regulatory status of the parking and barge assets was before the Commission for resolution. Moreover, both parties were equally aware that the Commission, in the 2010 rate case, expressly imputed revenues from parking based on a rate base analysis undertaken by the Public Staff. More fundamentally, SharpVue—should this transaction be approved—would be acquiring all the transportation assets *as regulated assets*. The determination is not new to SharpVue, rather would be acquiring assets know that they have been determined to be regulated assets.

Under these circumstances, the Applicants have shown no justification for deviating from the Commission's well-established rule, required by statute,[13] and in keeping with Supreme Court precedent,[14] that assets be valued based on net

[12] *See, e.g.,* Tr. vol. 7, 94-95 (Taylor).

[13] *See* N.C.G.S. § 62-131 and -133. 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[.]"

[14] *See State ex rel. Utils. Comm'n v. Pub. Staff-N. Carolina Utils. Comm'n*, 323 N.C. 481, 487 n.7, 374 S.E.2d 361, 364 n.7 (1988) (interpreting Section 62-133 to define

original cost or net book value. This determination is further justified by the practical concern that a decision otherwise would encourage utilities to "game" the regulatory process, at ratepayers' expense, but stacking transactions of the same regulated assets for the purpose of ratchetting up rate base.

Similarly, the Applicants' ongoing appeal of the Sub 21 Order puts ratepayers in jeopardy of significant harm. Should the Sub 21 Order be overturned, **[BEGIN AEO CONFIDENTIAL]** [redacted] **[END AEO CONFIDENTIAL]**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 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.

Based on consideration of the foregoing, the Commission concludes that the record evidence, including consideration of the proposed Settlement Stipulations, are insufficient to eliminate or mitigate potential costs and risks of the transaction to the fullest extent reasonably possible. Accordingly, the Applicants have not met their burden of establishing that the proposed transaction will result in sufficient benefits to outweigh known and potential costs and risks.

XVI. Findings Relevant to Public Convenience and Necessity

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 92

The evidence supporting these findings and conclusions is contained in the testimony of Village witnesses Gardner, Wright, Perry, and Lloyd; SharpVue witness Roberts, BHIT/IL witnesses Paul and Stewart; the joint testimony of SharpVue and BHIT/IL witnesses Paul and Roberts; the testimony of the Public Staff, and the record before the Commission.

Because none of the prongs of the N.C.G.S. § 62-111(a) analysis are met, the proposed transfer, as described and conditioned by the Amended Application, the testimony of the witnesses, and the proposed Regulatory Conditions, is not

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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.").

[15] *See* Tr. vol. 6, 20-21 (Wright).

[16] Tr. Vol. 7, 16 (Hinton).

justified by the public convenience and necessity, does not serve the public interest, and should be denied.

The Commission reaches this conclusion based on consideration of the unique facts of this proceeding, and with due consideration of the desire of seller to divest its ownership interest in the utility. In addition to the consideration of the public benefit and ratepayer harm factors underlying the statutory standard, the Commission notes several additional factors which implicate the public interest and which support the Commission's conclusion.

Significantly, the Applicants have not demonstrated widespread community support for the transaction. *See* Tr. vol. 1 (Public Hearing); Tr. vol. 2, 29-30; Tr. vol. 4, 76-77, 92-97, 107-108, 137-138 (Gardner); Tr. vol. 6, 21, 55 (Wright); Tr. vol. 4, 77-78, 110, 130. While this fact is not determinative, the lack of evidence of widespread community support, coupled with the opposition of the Village, is troubling given the integral nature of the transportation system to all aspects of Island activity and the history of a high level of engagement of and interest by the community concerning these matters. Relevant to this consideration is that there is no evidence suggesting engagement by the sellers with the public on the issues which were presented to the Local Government Commission in that body's consideration of an application by the Bald Head Island Transportation Authority for approval of financing for the acquisition by the Authority of the transportation system assets. Many of the same concerns expressed by the public and articulated by members of the Local Government Commission are concerns present in this proceeding—namely, the valuation of the assets and protection of ratepayers from the risk of overvaluation. *See* Tr. vol. 6, 29-31 and Exhibits JAW-2, JAW-3, JAW-4, JAW-5, and JAW-6 (Wright Dir.). Rather than address these issues, the evidence in this proceeding suggests that sellers have simply repacked the same transaction, albeit with a higher purchase price and a new buyer, and are seeking, in essence, a different answer from a different agency of the State. The applicants, of course, are entitled to seek redress from agencies of the State. However, both the Local Government Commission and this Commission are tasked, at a broad level of generality, with protecting the interests of the public and those interests are equally at stake before this body.

Compounding this concern, the Applicants here have withheld important information from the public about their plans and intentions. Much of the hearing in this proceeding was conducted in confidential session where only counsel and consultants for intervenors who had executed confidentiality agreement permitting access to "attorneys eyes only" information were permitted to attend. Critical documents concerning SharpVue's corporate organization, funding, and plans were designed "attorneys eyes only" and were therefore excluded from public view. The plans, in particular, contained information conveyed to SharpVue's investors

about SharpVue's plans for owning and operating the transportation system. This same information was not shared with the public.

The Commission acknowledges that a party is entitled to designate confidential and proprietary information qualifying for protection as such. Indeed, such designations are routine in practice before the Commission. Without making any determination in this order regarding the propriety of the Applicants' confidentiality designations, and accepting for present purposes the designations as appropriate, the tension between the Applicants' public statements to this body concerning their plans and intentions and their statements to prospective investors about their plans and intentions is palpable.

The Commission is charged with making its own assessment of the public interest based on the record evidence before it, and it has done so as discussed in this order.

XVII. Findings Relevant to Request for Approval of Pledge of Assets

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NOS. 93-96

The evidence supporting these findings and conclusions is contained in the Amended Application; the testimony of Village witness Wright; SharpVue witness Roberts; and the record before the Commission.

SharpVue's Amended Application seeks approval for SharpVue and/or one of its affiliates to pledge and borrow/issue debt secured by regulated transportation assets as may be necessary to finance the proposed transaction, under N.C.G.S. §§ 62-160 and -161. Amended Application, ¶¶ 18-19.

This 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 *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), the Commission denied YES AF Utilities EXP, LLC's application to pledge regulated assets used by the utility for the benefit of nonregulated affiliates, stating 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.

Id. at *3.

SharpVue's Application, buttressed by the testimony of SharpVue Witnesses Roberts and Paul, states that SharpVue is seeking to acquire in the transaction under review a mixture of regulated and unregulated assets. *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).

In its appeal of the Sub 21 Order, SharpVue is challenging the Commission's recognition of the parking and barge assets and subject to the Commission's regulatory authority. *See generally* Notice of Appeal and Exceptions, Docket No. A-41, Sub 21 (Jan. 27, 2023).

SharpVue Witness Taylor testified that the majority of the total purchase price is allocated by SharpVue to the parking and barge assets. *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).

The Commission finds that evidence presented by SharpVue is inconclusive as regards the specific assets which are being pledged and the specific debt which those assets will be securing. Neither SharpVue's Amended Application nor SharpVue witnesses made specific representation as regarding the assets which are being pledged or the debt which those assets will be securing. *See, e.g.*, Amended Application, ¶¶ 18-19. Village Witness Wright testified that SharpVue seeks to use regulated assets to support unregulated assets.

For these reasons, the Commission concludes that SharpVue's request to pledge assets is not permissible under N.C.G.S. § 62-161(b).

IT IS, THEREFORE, ORDERED as follows:

1. The proposed transfer as described and conditioned by the Amended Application, the testimony of the witnesses, and the proposed Regulatory Conditions, is not justified by the public convenience and necessity, does not serve the public interest, and is DENIED.

2. [IN THE ALTERNATIVE] The Commission holds this proceeding in abeyance pending final determinations in the ROFR litigation and the appeal of the Sub 21 Order.

This ____ day of _____, 2023.

NORTH CAROLINA UTILITIES COMMISSION

Certificate of Service

I hereby certify that a copy of the foregoing *Proposed Order of the Village of Bald Head Island* has been served this day upon counsel for all parties of record in this proceeding by electronic mail.

This the 22nd day of May, 2023.

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, LLP

/s/ Marcus Trathen